



# 2014 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia

The Asian NGO Network on National Human Rights  
Institutions (ANNI)



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## Foreword

The Asian Forum for Human Rights and Development (FORUM-ASIA), as the Secretariat of the Asian NGO Network on National Human Rights Institutions (ANNI), humbly presents the publication of the 2014 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia. Our sincere appreciation goes to all 31 ANNI member organisations from across 18 countries in Asia for their participation and commitment to ANNI and continued advocacy towards the strengthening and establishment of NHRIs in Asia. Similarly, we would also like to extend our sincere thanks to the National Human Rights Institutions (NHRIs) that have contributed valuable inputs and feedback to the concerned country reports. This year, the ANNI Secretariat is heartened at the level of engagement and interaction between ANNI members and their respective NHRIs in the course of the report-writing process.

ANNI also expresses its thanks and appreciation to the Asia-Pacific Forum (APF) for its continued engagement with ANNI at various levels- most recently at the 7<sup>th</sup> ANNI Regional Consultation in Taiwan where joint advocacy action with national groups towards the establishment of an independent NHRI took place. At the same time, ANNI welcomes the engagement, for the first time, with the Civil Society and Human Rights Network (Afghanistan).

Reports submitted by organisations representing 14 countries consider the developments that took place in respective countries over the course of 2013 and significant events in the first quarter of 2014. As in previous years, the country reports have been researched and structured in accordance with ANNI Reporting Guidelines that were collectively formulated by the ANNI members at its 7<sup>th</sup> Regional Consultation in April 2014. The Report primarily focuses on issues of independence and effectiveness of the NHRIs and their engagement with other stakeholders such as civil society. Moreover, it is supplemented by inclusion of thematic issues such as 1) protection of human rights defenders and shrinking civil society space and 2) the NHRIs' implementation of the References by the Advisory Council of Jurists (ACJ). We believe that this annual report will continue to serve its purposes as an advocacy tool to enhance the effective work and functioning of NHRIs so that they can continue to play their role as public defenders and protectors of human rights on the ground.

FORUM-ASIA would like to acknowledge the contribution of everyone who has dedicated their time and effort to the publication of this Report; namely Aklima Ferdows Lisa, Shahindha Ismail, Karan Aingkar, Astor Chan, Eunji Kang and the research team at Korean House for International Solidarity, Shoko Fukui, Enkhtsetseg Baljinnyam, Waranyakorn Fakthong and Chalida Tajarosuk, Jose Pereira, Khin Ohmar, Alex James, Henri Tiphagne, Bijaya Raj Gautam, Chi-Hsun Tsai, Putri Kanesia and Poengky Indarti, and Hassan Ali Faiz. Our sincere thanks extend to the Country Programme team of FORUM-ASIA who has assisted throughout the process. ANNI would also like to convey its deep gratitude to Balasingham Skanthakumar for his expertise and guidance in editing the Report for a successive year. Finally, we

would like to acknowledge the financial support from the Swedish International Development Cooperation Agency (SIDA) in the publication of this Report.

We hope that this publication will be beneficial for all stakeholders involved in the strengthening and establishment of NHRIs in the region.

A handwritten signature in black ink, reading "Evelyn Balais-Serrano". The signature is fluid and cursive, with the first name "Evelyn" being the most prominent.

**Evelyn Balais-Serrano**

Executive Director

Asian Forum for Human Rights and Development (FORUM-ASIA)

Secretariat of ANNI

## **Regional Overview**

### **ANNI Secretariat<sup>1</sup>**

#### **Occupying a precarious space?**

National Human Rights Institutions (NHRIs) in the region are still comparatively young and gained prominence only from the early 1990s where the Paris Principles established a set of international minimum standards required for the independent and effective functioning of NHRIs. The preeminence of NHRIs was also affirmed at the Vienna World Conference on Human Rights and recognized Paris Principles-compliant NHRIs formally as important and constructive actors in the promotion and protection of human rights.

Since 1993, a growing body of principles and standards has continued to emerge to guide NHRIs in the discharging of their work and functioning. They include principles and standards that inform the NHRI's relationship with other stakeholders from civil society to the judiciary and parliament, and even thematic and issue-specific human rights concerns such as corporate accountability and sexual orientation and gender identity, among others.

While NHRIs are still a relatively new phenomenon, many have performed commendably in the midst of trying circumstances and continue to remain a crucial ally and protector of human rights defenders (HRDs). When performing optimally, effective NHRIs are often seen as 'bridge' both within society, by linking several sectors such as authorities and civil society, and beyond it, by acting as a link with the international human rights system. This is particularly so for NHRIs operating in countries just embarking on nascent democratic transitions or emerging from prolonged conflict.

The establishment of an NHRI seems to suggest that the State is willing to subject itself to public scrutiny and accountability. In reality many NHRIs in the region are confronted with operational and practical impediments in actualizing their mandate and performing their role meaningfully. Instead, there appears to be a recurring trend of attempts by the State to undermine the effective work and functioning of NHRIs for daring to perform its role or for being too critical.

These attacks and reprisals may come in the form of amendments to the NHRIs' enabling law, restriction of their mandate and jurisdiction, imposition of arbitrary restrictions on funding and lack of adequate resources, problematic selection and hiring processes, to harassment and intimidation of NHRI members in connection to their human rights activities, among others. These have severely impeded the functional independence, effectiveness as well as credibility of many NHRIs.

The Afghanistan Independent Human Right Commission (AIHRC) is one such example that has performed commendably amidst a challenging political and security environment where governance and domestic accountability/protection institutions are weak while perpetrators of past violations are held unaccountable as a culture of impunity persists. The AIHRC was beset by a series of setbacks, such as the inability to publish a groundbreaking Conflict Mapping Report due to political compromises and lack of protection afforded to the research team as well as the direct appointment of several members with questionable human rights backgrounds and track records by the President, among others.

Despite these challenges, the institutional growth of the AIHRC has seen its mandate, visibility and out-reach expand significantly in the country and evolved to be an important

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<sup>1</sup> Prepared by Joses Kuan, ANNI Focal Point

and credible institution to its stakeholders, particularly human rights defenders, ordinary citizens and victims of rights violations. With the anticipated withdrawal of much of the international community's support from Afghanistan in 2014, the country will continue to face many serious challenges. The government of Afghanistan must take pains to address critical issues relating to resourcing, selection and mandate and protection (of members) of the AIHRC in order not to undermine the key gains made in human rights in the past 12 years.

In Nepal, the enactment of the National Human Rights Commission (NHRC) Act (2012) included several glaring procedural flaws that, if allowed to remain, significantly will undermine the promotion and protection of human rights in Nepal. Section 10 (5) of the NHRC Act stipulates that victims must lodge complaints within a six months time limit. While it appears sound to impose a 6-month time limit certain limits so that the NHRC Nepal is not confronted with backlog of cases (especially many years after the occurrence), the situation in Nepal necessitates that people often take longer than the prescribed period. Reasons include geographical accessibility, awareness of the mechanism, the culture of impunity that marked the conflict era and remains today, among others.

The effectiveness of the NHRC Nepal is further curtailed by Section 17 (10) of the Act which explicitly gives the Attorney General the power not to implement certain NHRC recommendations, namely, that the government initiates legal action against alleged perpetrators of human rights violations.

While attempts to cripple the NHRC Nepal took place in earnest, vacancies in the membership of the Commission remained unfilled since 15 September 2013. The incoming members in the Election Commission of Nepal and Commission of Investigation of Abuse of Authority (CIAA) were appointed through an Ordinance but the neglect of the NHRC Nepal indicates the government's wariness or aversion to having a rights body with teeth in this transitional justice process. Tellingly, there is also no representation of the NHRC Nepal in the review committee formed by the government to expedite the formation of the Truth and Reconciliation Commission and Commission of Inquiry into Disappearance respectively.

### **NHRIs' own (un)doing?**

As they straddle this "*precarious*" space, expectations and perceptions are bound to differ. As a unique body created by the State but charged with taking state actors to task, States have rarely been willing to subject themselves to any accountability or scrutiny by NHRIs.

Civil society is sometimes also inclined to view NHRIs as entities affiliated to or propped up by the State and lacking in ability, commitment and resources while adopting an overcautious approach to addressing human rights violations. Conversely, NHRIs can also often be wary or guarded about the civil society actors they want to engage or can be aloof about their involvement for perceived political partisanship, tendency to be overly critical and confrontational or have unrealistic demands or misplaced expectations.

In some instances, the relationship between NHRI and civil society is marked by antagonism and/or disengagement. Often, though, the crises in legitimacy and erosion of trust that NHRIs suffer from are not unfounded. NHRIs have been found to adopt problematic positions or acted in ways that contradict their human rights mandate.

A prominent example is the NHRC Korea's (NHRCK) problematic position on the increasing trend of invoking the National Security Law (NSL) to curtail the enjoyment of the right to freedoms of expression and association. The NHRCK had in 2012 backtracked from its earlier position of calling for the abolition of the NSL. Instead, it now called for a reduction in human rights violations in applying NSL. The Korean government has also in recent times

increasingly clamped down on the exercise of peaceful assembly especially by environmental rights defenders and affected communities due to large-scale development projects. Prominent examples include the mass protests against the construction of the naval base in Jeju Island and the building of power transmission towers in Miryang which typically involved the excessive use of force by security personnel and mass arrests of HRDs on spurious charges (obstruction of business, obstruction of justice, trespass).

To its credit, the NHRCK had initiated various investigations and made recommendations concerning police action in handling peaceful demonstrations in various other cases (Jeju Island). However, Most of the NHRCK's actions, particularly in the aforementioned "emblematic" cases, revolve around ensuring that medical attention and necessities are provided. They however do not amount to effective protection and remedies to victims. On the Miryang case, the NHRCK has continually failed to make timely pronouncements or condemn the heavy-handed approach employed by the authorities and law enforcement personnel.

Similarly, the NHRC Thailand has come under harsh criticism for its performance as a credible defender and ally of HRDs, most recently for its recently-published report on the 2010 crackdown (released three years later) which seemed to absolve the administration and military and downplay human rights violations perpetrated during the brutal crackdown. The inquiry itself suffered from mistrust, and lack of cooperation from participants in the hearings and interviews.

The Myanmar National Human Rights Commission (MNHRC), proudly feted as the one of the many showpieces of the Burmese government's reformist credentials and supported by international community, will be re-constituted in 2015 following the passage of the enabling law earlier this year. However, there are already legitimate and strident concerns that the MNHRC could be simply a window-dressing measure as democratic rollbacks and regression on reforms are increasingly apparent.

It should however also be acknowledged that the MNHRC has made improvements in its engagement with its constituencies. For example, inputs were sought for the draft legislation through the national broadsheets. Several amendments, albeit slight, were also made in response to the feedback received. Other positive changes include expanding the selection committee of the MNHRC beyond the exclusive reach of the Executive and also to empower the Commission to demand a response from relevant government departments or agencies in the course of its investigations.

However, the MNHRC should take heed and address the teething problems or risk losing its relevance altogether. The MNHRC's founding law prescribes that it only engages with registered civil society organizations, which remains a notoriously arduous task under the remit of the Ministry of Home Affairs. Another salient example is the MNHRC's troubling position on the Rohingya people in Burma. A fact-finding report undertaken by the MNHRC not only contained questionable findings which found no evidence of massacre (despite widespread evidence to the contrary) but also highlighted the MNHRC's discriminatory attitude by labeling them as "*Bengalis*"- a derogatory term used by the authorities who regard them as illegal immigrants from neighboring Bangladesh.

Issues relating to land rights, which former Special Rapporteur on the situation of human rights in Burma Mr. Tomas Quintana has forecasted to be "one of the primary challenges for the Government to deal with over the years to come", remain especially bleak as the proliferation of special economic zones and the extractive industries often occurs at the expense of livelihoods and homes of affected communities who are often not consulted or party to such plans. Villagers and environmental defenders are then arrested under the

problematic Peaceful Assembly Law for protesting (often in conjunction with trumped up charges under the Penal Code).

What the above examples convey is that it is precisely in systematic and widespread incidents of human rights violations that NHRIs are expected to display integrity, moral courage and competence in the exercise of sound judgement and discharge of their duties as well as exhibit sufficient independence from executive influence to warrant any public credibility. It is also in situations like these that NHRIs should work in tandem with defenders to assess the human rights situation on the ground and ensure accountability for human rights violations, hence becoming an essential actor in the fight against impunity. Making timely interventions, ensuring quality of responses and the development of a systematic follow-up plan to collectively address larger systemic issues in the country and that can lead to institutional change in the country and advocate for a safe and enabling environment for HRDs.

For the most part, NHRIs do already have an existing and fairly healthy working relationship with civil society on the ground. These come in the form of formal engagement mechanisms such as Memorandums of Understanding (MOUs) for joint partnership and activities such as conducting workshops, organizing roundtable discussions to bring relevant stakeholders together on a certain pressing human rights issue (NHRC Bangladesh and the garment industry), to having institutionalized mechanisms such as NHRI-CSO working groups on thematic issues (NHRC Thailand on Lese Majeste, Komnas HAM on religious minorities). It is also heartening to know that many NHRIs in Asia have dedicated focal points/desk for HRDs and even civil society core groups/networks that they consult with (NHRC India, HRC Maldives).

Recent reports in 2013 and 2014 by the former Special Rapporteur on the Situation of Human Rights Defenders, Mdm. Margaret Sekaggya, further highlighted the critical role that NHRIs today can play in advocating for a safe and enabling environment for HRDs and the legitimate exercise of rights. They include measures and actions that go beyond mere compliance with Paris Principles, such as ensuring its protection programmes and HRD focal desks are accessible to HRDs, its complaints handling mechanisms are transparent, efficacious and undergirded by a long-term and systematic follow-up plan and even monitoring the legal and administrative framework that regulates the work of HRDs.

### **Allies and Adversaries in the National Protection System**

Since its establishment in 2001, the government has mandated the NHRC Mongolia to issue Annual State of Human Rights reports (in addition to regular/annual activity reports) that are debated in Parliament. The Annual State of Human Rights Report is particularly significant as the exercise of framing national issues subsequently leads to deliberation, policy and action endorsed by the highest levels of government. This is done through the passing of Resolutions by the Standing Committee on Legal Affairs of the *State Great Khural* (Parliament) which formalizes in law a requirement of the government to implement the recommendations by the NHRC Mongolia through a plan of action. In addition, ex-officio members from a broad spectrum of civil society representatives and sectors serve in the NHRC Mongolia to ensure that pressing, emergent or under-reported issues are kept on the national agenda and informs their plans/activities.

In particular, Parliament can play an important role in terms of securing the independence of NHRIs by clearly lay down in the founding law a transparent selection and appointment process with the involvement of civil society. Attempts to undermine the independence of NHRIs through Executive over-reach were evident in the appointments process as in the case of HRC Sri Lanka (18<sup>th</sup> Amendment), the AIHRC (direct Presidential appointment) and the NHRC Thailand (2007 Constitution), among others. It is worth noting that the selection of Komnas HAM commissioners is a rigorous process that involves a battery of administrative,

psychological and medical tests and includes the participation of a broad spectrum of stakeholders in civil society from the media to the academe across different platforms such as public hearings and open debates.

In Indonesia, despite having conducted inquiries and released its pro-justicia investigation reports on past incidents of gross human rights violations (such as the 1965 massacre), the Attorney General has refused to accept Komnas HAM's case on grounds that administrative requirements were not fully met or there was insufficient evidence to commence criminal proceedings. Similarly, in Nepal, despite a seminal ruling by the Supreme Court which declared the provisions 10(5) and 17(10) null and void, the government has not complied and clearly highlights a scant regard for the rule of law in the country. The AIHRC completed a potentially formative and groundbreaking Conflict Mapping Report in 2012 as part of a national plan to develop a mechanism and strategy for transitional justice, including mapping of past abuses and establishing a set of judicial and non-judicial measures implemented to redress the legacy of massive human rights abuse. It also involved a consultation carried out by the AIHRC in 2004 based on in-depth interviews and focus groups, addressing issues of justice and accountability for past abuses. To date, the Afghan government has blocked its publication and release. Instead, the Afghan parliament passed the National Reconciliation, General Amnesty, and National Stability Law that grants immunity and pardons former warlords who were involved in human rights violations and abuses.

The above snapshots highlight the challenges and complexities involved in ensuring a robust and comprehensive national protection system. In order for NHRIs to operate meaningfully and remain relevant, it has to foster synergies and harness stronger collaboration with various stakeholders, particularly from civil society, parliament and the judiciary, in order to create a conducive environment for them to adequately fulfill their mandate, combat impunity while ensuring State accountability and scrutiny.

### **Need to reinvigorate campaigns to establish an NHRI**

In countries where NHRIs do not yet exist, a common and recurring theme that emerged from the experiences of Taiwan, Hong Kong and Japan is the reluctance and aversion of existing watchdog and oversight bodies to cede control of its powers. Often, these agencies question the wisdom and necessity of another institution allegedly duplicating its work. This is seen in the case of Taiwan and Japan, where the Control Yuan and the Civil Liberties Bureau respectively tend to make similar red-herring arguments around their mandate and powers.

The incumbent government in Japan has aborted the plans made by the previous administration (who campaigned on a human rights platform that included proposals to establish an NHRI and had eventually even drafted the founding law). Furthermore, the government adopted a Cabinet resolution in June 2013 that declared the Concluding Observations of international treaty bodies that Japan is party to are not legally binding and therefore do not require compliance or implementation. This clearly signals the dismissive attitude and scant regard Japan has for its obligations and duties under international law.

In Taiwan, the efforts and energy of civil society in advocating for an independent and effective NHRI built on the momentum generated following the passage of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) into domestic law in 2009. A landmark review was then conducted by ten international human rights experts last year to assess the government's compliance with the international human rights norms and obligations it had undertaken. One of the key recommendations was for the establishment of an independent NHRI in compliance with the *Paris Principles* as a priority objective.

Given the momentum and impetus, it was thus opportune that ANNI members from around Asia and the Asia Pacific Forum (APF) were present in Taipei to lend their solidarity and support for this significant endeavor. An ANNI delegation also met with the Vice President, who is the Convenor of the Human Rights Advisory Committee under the President's office. It was encouraging that this national endeavor appeared to have the support at the highest levels of government and with the involvement of civil society. The Committee's proposal (recently presented to the President in July 2014) is similar to the version that civil society actors had drafted and will be debated in Parliament in the coming months.

The Taiwan example is particularly exciting largely owing to the sizeable gains and persistent efforts of civil society despite its isolation from the international human rights regime due to its political status. Civil society has maneuvered smartly and leveraged on the various available political opportunities to reiterate calls and reinforce the case for the establishment of an independent NHRI (such as in various other treaty body reporting processes and reviews).

Increasingly confronted with an array of critical human rights issues and violations ranging from violent crackdowns against peaceful demonstrators to forced evictions and the death penalty, it is imperative for the Taiwan government to create a robust national system committed to the promotion and protection of human rights. The establishment of an independent and effective NHRI is a timely and necessary next step.

# BURMA: ALL THE PRESIDENT'S MEN

## Burma Partnership and Equality Myanmar<sup>1</sup>

### 1. Introduction

On 28 March, 2014, the Myanmar National Human Rights Commission enabling law was passed, finally institutionalising its mandate that will begin in 2015. The human rights situation in Burma certainly needs any institution possible: with continuing abuses by the Burma Army, violations related to business investment rampant, particularly land confiscation, curtailment of freedom of expression and association, and perhaps most pressing, the continuing rise of anti-Muslim rhetoric, persecution, and violence.

Since the two major bouts of violence in Arakan State, western Burma in 2012, of which the Rohingya have been overwhelmingly the victims, the situation in Arakan State, western Burma is deteriorating. With around 135,000 mostly Rohingya, living in squalid conditions in Internally Displaced Persons (IDPs) camps, the government took the deplorable decision to effectively kick out the humanitarian agency Medicines Sans Frontières (MSF). This is related to their corroboration of facts regarding a massacre at Duu Char Yar Tan village which will be outlined later in this report, but also in the context of anti-NGO bias in the area, with many Arakanese Buddhists perceiving biased treatment from humanitarian agencies in favour of the Rohingya.

Other humanitarian agencies, including UN agencies, were forced to leave Arakan State due to well-planned mob violence, fuelled by the perception of pro-Rohingya bias in aid distribution. While these NGOs and UN agencies are gradually making their way back to Arakan State, although not MSF, the effect of the absence of aid has hit the Rohingya population the hardest, with people starving due to lack of food, and dying due to lack of adequate medical attention that was previously provided.

The violence aimed at NGOs was closely linked to the 2014 Census, the first of its kind in Burma for over thirty years, where a campaign led by extremist monks and Arakanese nationalists to deny the option of Rohingya to identify themselves as anything other than 'Bengali' was successful, with the government making a last minute decision to deny the option to acknowledge the existence of Rohingya, thus painting them as illegal immigrants. This hate campaign is carried out with impunity led by the extremist monk, Wirathu, to whom President Thein Sein is close. It is not only carried out with impunity, but is hand in hand with persecution policies of the government, as documented by human rights organisation Fortify Rights in their report about official state policies of persecution against Rohingya.<sup>2</sup>

President Thein Sein also supports a package of four proposed bills, one of which is the Law on Religious Conversions that places restrictions on marriage between religions. Thus, a Muslim man who wants to marry a Buddhist woman has to change religion, while the parents of a Buddhist woman also have to give

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<sup>2</sup> Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar, Fortify Rights, 2014, [http://www.fortifyrights.org/downloads/Policies\\_of\\_Persecution\\_Feb\\_25\\_Fortify\\_Rights.pdf](http://www.fortifyrights.org/downloads/Policies_of_Persecution_Feb_25_Fortify_Rights.pdf)

permission for such a marriage. Such a law violates the rights of women to have free choice over their marital partner while further discriminating against Muslims.

Human rights abuses are ongoing related to conflict, especially in Kachin and northern Shan States. Arbitrary arrest and detention, rape and sexual assault, torture and extrajudicial killing are all systematic policies of the Burma Army, which remains a completely unreformed institution that is guaranteed impunity in the 2008 Constitution. Despite ceasefire negotiations, the Burma Army continues to launch offensives and commit abuses. In ceasefire areas, such as Karen State, land acquisition by unscrupulous businesses, often in conjunction with the Burma Army or its proxy forces, are taking advantage of the lull in fighting to grab land for quick profit while the Burma Army itself is reinforcing and strengthening its presence.

Despite the release of some political prisoners more are being arrested, especially under Article 18 of the Peaceful Assembly Law. Repressive legislation is also still on the books while the media are increasingly being muzzled.<sup>3</sup> Instances for arrests of journalists and criminal charges based on political motivation include: five journalists sentenced to ten years in prison with hard labour from *Unity Journal* for reporting on a chemical weapons factory; of *Democratic Voice of Burma* journalist, Zaw Pe for trying to investigate corruption; Ma Khine from *Eleven Media* spent time in prison under trespass and defamation charges while a *Mizzima* journalist was charged for leading a demonstration against the increased repression of the media. This is a human rights issue that has taken a major step backwards under Thein Sein's government.

Other trends include continuing human rights abuses related to business, particularly land confiscation. Mega projects such as Special Economic Zones (SEZs) of which foreign investors are involved such as Thilawa SEZ (Japanese involvement), Kyaukphyu SEZ (Chinese involvement) and Dawei SEZ (Thai involvement) are displacing thousands with inadequate compensation, livelihood support and little attempts for genuine consultation. Displaced villagers are often coerced into signing agreements and accepting compensation while the concept of free, prior and informed consent is systematically ignored, by domestic and international companies, or the Burmese government itself.

With huge potential investment in Burma's manufacturing sector, especially the garment industry in industrial zones, it is vital that the rights of workers are protected yet there is a continuing pattern of harassment and intimidation of labour activists and unionists. Legislation enacted in 2012 does not adequately protect workers who make attempts to improve their dismally low wages, health and safety conditions in factories and long working hours.

Other major economic development projects that are infringing on people's economic and social rights, particularly in ethnic areas, are large mining and hydropower projects such as the Leptadaung Copper Mine in Sagaing Region and the Tasang Dam in Shan State are displacing local communities without adequate reparation and causing significant negative environmental effects.

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<sup>3</sup> Burma: Repression Marks Press Freedom Day, Human Rights Watch, 2014, <http://www.hrw.org/news/2014/05/03/burma-repression-marks-press-freedom-day>

In this environment, the Myanmar National Human Rights Commission has been ineffective. In the two areas of most concern, in Arakan State and Kachin State, the MNHRC has done almost nothing. The Chairman explicitly stated that they cannot investigate abuses in active conflict zones, thus ruling out Kachin State and the ongoing atrocities there, while in Arakan State, despite credible evidence in the hands of the UN and corroborated by Medicins Sans Frontieres, claims to have found no evidence of the massacre at Du Char Yar Tan village, in which over 40 Rohingya were killed with police involvement. Furthermore, the MNHRC continues to use the term ‘Bengali’ to describe Rohingya, thus explicitly revealing their discriminatory attitude to them while exacerbating the victimisation process.

## 2. Independence

Establishment of NHRI	
Established by Law/Constitution/Presidential Decree	<i>Myanmar National Human Rights Commission Law, 2014</i>
Mandate	<ul style="list-style-type: none"> <li>a) To promote and protect the fundamental rights of citizens enshrined in the constitution of the Republic of the Union of Myanmar effectively</li> <li>b) To create a society where human rights are respected and protected in recognition of the Universal Declaration of Human Rights adopted by the United Nations</li> <li>c) To effectively promote and protect the human rights contained in the international conventions, decisions, regional agreements and declarations accepted by Myanmar</li> <li>d) To engage, coordinate, and cooperate with the international organisations, regional organisations, national statutory institutions, civil society and registered non-governmental organisations working in the field of human rights</li> </ul>
Selection and appointment	
Is the selection process formalised in a clear, transparent and participatory process in relevant legislation, regulations or binding	It is up to the selection board to come up with procedures for short-listing candidates, yet the enabling law itself should set out the process/procedure for selection, with consultations with civil society. Thus currently, the assessments for candidates are not based on pre-determined, objective and publicly available criteria that promotes the appointment of merit-based candidates.

administrative guidelines?	
<p>Is the selection process under an independent and credible body which involves open and fair consultation with NGOs and</p>	<p>Candidates for membership of the MNHRC are selected by a selection board, from which the President will choose final appointments. This selection board currently comprises of ten members, five of which are from the government or government affiliated. Only two are from civil society and those people must be from a registered NGO. This is problematic. Firstly, there are too many government representatives on the selection board, it must be reduced to increase independence. Furthermore, many civil society organisations are not registered, and this stipulation thus excludes large swathes of civil society, particularly smaller, community groups, and overtly political and human rights activists.</p>

civil society?	
Is the assessment of applicants based on pre-determined, objective and publicly available criteria?	The enabling law outlines the criteria for the assessment of applicants, including experience in a plethora of issues including, domestic and international human rights, good governance, public education, cultural issues, economics and employment, and civil society. They must be over 35 years of age, a citizen of Burma, and recognized as a person of good character.
How diverse and representative is the decision making body? Is pluralism considered in the context of gender, ethnicity or minority status?	Article 7(c) does give consideration to pluralism in the context of gender, ethnicity, or minority status but it isn't specific, and should therefore indicate a proportional number of women and ethnic and religious minorities.
Terms of office	
Term of appointment for members of the NHRI	Five years
Next turn-over of members	After the 2015 election

The current enabling law has only recently been passed, and as such it is too early to assess how this has been practically applied. The current Commission members were not selected based on this law and new members will be selected after the 2015 general election. Within the enabling law itself, however, there are issues related to independence and therefore effectiveness.

Financial independence is a problem. Currently the MNHRC receives funding from the government as oppose to Parliament. The allowances, entitlements and honorariums of MNHRC members are also at the discretion of the President rather than under the general MNHRC budget. Thus the funding of the institution as well as the benefits for individual members are under too much control of the executive, potentially limiting their independence.

As for dismissal, the enabling law does not offer guarantees that prevent arbitrary dismissal which is crucial to effectiveness and independence. It does not specify who has the authority to dismiss a member of the MNHRC. Furthermore, the grounds under which a member can be dismissed are too broad. A member can be dismissed if that person "is deliberately engaged in actions to defeat the objectives of the

Commission.” Thus, the potential of arbitrary dismissal is high and the criterion for dismissal on this ground are vague.

As regards selection of staff members of the MNHRC, while considerations of pluralism are included for members, these are not included for staffers; while there are no provisions to ensure an open and transparent recruitment procedure that would safeguard against nepotism.

The current Commissioners include members who have less than illustrious pasts when it comes to human rights issues in Burma. The current Chairperson, Win Mra is the former ambassador to the United Nations in New York between 1994 and 2001. His tenure was marked by consistent denial of human rights violations in Burma, despite a wealth of evidence to the contrary during a particularly repressive time in Burma’s history.

Furthermore, and this is especially salient to the current human rights situation in Arakan State, he denied that the term Rohingya can be used to describe an ethnic group of Burma. The Vice-Chair, Kyaw Tint Swe also served as the ambassador to the UN in New York, between 2001 and 2010 and would also consistently deny the obvious human rights violations that were taking place in Burma, claiming that the country was a victim of a “systematic disinformation campaign.”<sup>4</sup>

### **3. Effectiveness**

The MNHRC, in times when an independent, principled investigation into human rights abuses is required, has been proven to be ineffective and has actually contributed to the culture of impunity and hate in certain parts of Burma.

#### **Case Study 1: Duu Chee Yar Tan Massacre**

One of the most pressing human rights issues in Burma today is the anti-Rohingya violence and persecution by authorities. As Tomas Quintana, Special Rapporteur on the situation of human rights on Myanmar stated in his final statement to the UN Human Rights Council in March 2014, “tackling the impunity and systematic discrimination in Rakhine (Arakan) State represents a particular challenge which, if left unaddressed, could jeopardise the entire reform process.” One case study of significance is that of an alleged massacre at Duu Chee Yar Tan village in Arakan State in January 2014, committed by an Arakanese mob, and local police. The following is a summary based on an account put together by the Burmese Rohingya Organisation UK:

*Duu Chee Yar Tan is a collection of seven small villages in northern Arakan State, a remote area. Three of these villages are home to mostly Arakanese and four to Rohingya. On the 9<sup>th</sup> of January, eight Rohingya men passing through the area were summoned to see the town administrator. Four days later, the dead bodies of eight Rohingya men were found and this information began to spread throughout the villages causing confusion and anger. In the middle of that night, a group of police officers went to one of the Rohingya villagers, allegedly to prevent the future spread of the news of eight dead Rohingya men,*

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<sup>4</sup>Alternative Asean Network on Burma(ALTSEAN-Burma), available at: <http://www.altsean.org/Research/Regime%20Watch/Judicial/Human%20Rights%20Commission.php>

*raping and killing a woman. After local villagers heard about these events, protests and altercations occurred, including gunshots. A police officer who went missing is thought to have been shot at this time. The police returned with more officers as well as a mob of around 30-40 Arakanese and the raping, beating and killing began, carried out by both police and Arakanese villagers. Most of the villagers then fled the scene.*<sup>5</sup>

The UN High Commissioner for Human Rights, Navi Pillay, stated that the UN had received “credible information” that “at least 40 Rohingya Muslim men, women and children were killed in Duu Chee Yar Tan village by police and local Rakhine (Arakan)”.<sup>6</sup> This information was corroborated by MSF who claimed they had treated 22 Rohingya at that time, in that area, due to violence-inflicted injuries. Calls for an international investigation were not heeded, but the MNHRC did conduct an investigation.

Yet after their three day investigation, in a statement released on February 14, the MNHRC claimed that such an incident did not take place and recommended more security measures. According to the Burmese Rohingya Organisation UK, however, before Arakan State Government officials visited the area on the 22<sup>nd</sup> of January, villagers in the area were warned by police and security services of arrest if they told of seeing killings or dead bodies. If this is true, the same fear applies to the investigation conducted by the MNHRC a week later.

A worrying aspect of the MNHRC statement is the reference to Rohingya as ‘Bengali’ (Arakan state borders Bangladesh, formerly East Bengal). For many Arakanese Buddhists, and indeed, many people throughout Burma, they perceive the term Rohingya as an artificially created identity by illegal immigrants from Bangladesh to gain more status within Burma. This is a highly discriminatory term that furthers the idea that they are not from Burma and violates the human rights principle of self-identification. It is obvious from this investigation that the MNHRC is not impartial. The language used reflects a discriminatory attitude and one that does not respect international human rights standards, including the Universal Declaration of Human Rights. The MNHRC’s investigation was used as a counter effort to placate the calls from the international community for an independent and international investigation.

Furthermore, as a result of MSF’s statements that they had treated 22 Rohingya, the government did not renew their terms of reference in Arakan State, effectively banning them from delivering lifesaving treatment to vulnerable communities, most of whom are Rohingya. Members of the press were also blamed for stirring tensions by the government and reporters trying to access the area were denied, and briefly detained.<sup>7</sup> The MNHRC’s investigation, whose findings contradict those from the UN and statements from MSF serve to de-legitimise the Commission in the eyes of the international community. An independent NHRI should not be used as a tool to cover human rights atrocities committed by a state institution, in this case, the police force.

## **Case Study 2: Sexual Violence in Armed Conflict Zones**

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<sup>5</sup>Du Chee Yar Tan Massacre Timeline, Burma Rohingya Organisation UK, available at: <http://brouk.org.uk/?p=85>

<sup>6</sup>Pillay Calls for Killings in Northern Rakhine State to be Investigated, UN Office of the High Commissioner for Human Rights, January, 2014, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14194&LangID=E>

<sup>7</sup>Rise in Bigotry Fuels Massacre in Myanmar, Jane Perlez, The New York Times, 1, March, 2014, <http://www.nytimes.com/2014/03/02/world/asia/rise-in-bigotry-fuels-massacre-inside-myanmar.html>

One of the other major human rights issues facing Burma today is the abhorrent behaviour of the Burma Army that continues to act with impunity. While ceasefires have been signed with most major armed groups, and peace talks continue, the Burma Army itself continues its offensive against the Kachin Independence Organisation in northern Burma. Over 130,000 people have been displaced in the past three years and the rights groups have documented a plethora of human rights violations committed mainly by the Burma Army.

One particular issue is that of sexual violence. The Women's League of Burma, an umbrella alliance comprising of 13 women's organizations from Burma released a report in January 2014 titled, "Same Impunity, Same Patterns."<sup>8</sup> The report presents how over 100 women have been raped by the Burma Army since reforms began in 2010. Many of these cases occurred in Kachin State, which has experienced the majority of the fighting and the most activity by the Burma Army. In Shan State too, where there is a ceasefire but the Burma Army continues to manoeuvre and launch offensives, thirty cases of sexual violence were recorded. The report states that forty-eight of the documented cases involved gang rape by Burma Army soldiers, and twenty eight of the victims died. Some girls were as young as eight years old. Given the difficulties of recording these cases, both due to fear of repercussions as well as social stigma, WLB believe that these numbers are just the tip of the iceberg.

The incidence of sexual violence and rape by the Burma Army is systematic and deliberate. Thus, according to WLB, "sexual violence is used as a tool by the Burmese military to demoralise and destroy ethnic communities. Army officers are not only passively complicit in these sexual crimes but often perpetrators themselves." Yet these horrific abuses are committed with impunity. Under the 2008 Constitution, a courts-martial system was established which, under its mandate, according to the Burma Lawyers Council, "members of the military never have to appear before civilian courts, regardless of their crime."<sup>9</sup> While courts-martial systems are common in other countries, the military justice system in Burma is practically non-existent. While in Indonesia, for example, decisions made in the military courts can be appealed at the civilian Supreme Court, but the highest power in the military justice system in Burma is the Commander-in-Chief of the Armed Forces, Senior General Min Aung Hlaing, who can overturn any decision made.<sup>10</sup>

Thus it becomes all the more important for the Myanmar National Human Rights Commission to conduct an independent and effective investigation into abusive policies that are not accountable under the current legal framework. Yet the MNHRC has done very little to address sexual violence and rape, committed by the Burma Army, nor the judicial and legal framework that places the Burma Army above the law. When WLB released their report in January, an invitation was sent to the MNRHC to attend the event but there was no response. Similarly, when the Kachin Women's Association – Thailand (KWAT), a member organisation of WLB, have tried to engage the MNHRC on this issue, and sent reports, there has been no response.

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<sup>8</sup> *Same Impunity, Same Patterns*, Women's League of Burma, January, 2014, [http://womenofburma.org/wp-content/uploads/2014/01/SameImpunitySamePattern\\_English-final.pdf](http://womenofburma.org/wp-content/uploads/2014/01/SameImpunitySamePattern_English-final.pdf)

<sup>9</sup> *Revealing Burma's System of Impunity*, Burma Lawyer's Council, 9 September 2011, <http://www.burmapartnership.org/wp-content/uploads/2011/09/Revealing-Burmas-System-of-Impunity-BLC-Briefer.pdf>

<sup>10</sup> *Myanmar: Civil-military Relations and Constitutional Reform*, Melissa Crouch, East Asia Forum, 21 June 2013, <http://www.eastasiaforum.org/2013/06/21/myanmar-civil-military-relations-and-constitutional-reform/>

This is illustrated by the case of Sumlut Roi Ja, which is emblematic of the lack of consideration given by the MNHRC towards sexual violence in conflict areas. Sumlut Roi Ja is a Kachin woman who was abducted by the Burma Army in late 2011. Witnesses saw her being sexually assaulted at a Burma Army base yet her family found no redress in the court system. KWAT thus filed this case with the MNHRC but the only response was a letter of reply that stated that they had forwarded the case on to the Office of the Union Government. In 2012, KWAT met with the MNHRC and offered to work together. MNHRC member Saw Khin agreed but after the follow-up letter sent by KWAT, there was no response from MNHRC.

It is clear that the MNHRC will not investigate or become involved in the affairs of the Burma Army despite evidence that its actions constitute war crimes, such as using rape as a weapon of war. The Burma Army is the most powerful institution in Burma, and despite the various levels of reform that have taken place in other spheres, the military is completely unreformed. It is debatable if the executive has any power over the military's actions, as evidenced by the two times that President Thein Sein ordered the halt to offensives in Kachin State and the subsequent indifference to such orders. Whether the MNHRC is committed to investigating cases of sexual assault and rape may be beside the point. The real issue is that the military is still in control in Burma, and the fear of the army is still very real. The MNHRC is not independent of the government, but even so the government does not necessarily have control over the army, and as such, this leaves the MNHRC in a position of impotence, regardless of whether the government has too much control over the MNHRC or not.

#### **4. Engagement with National Stakeholders**

There has been a more inclusive approach this past year by the MNHRC to include civil society input and to act more transparently, although this is starting from a very low baseline. One positive development has been the establishment of the website, both in Burmese and English languages. Notices in the state-run, 'New Light of Myanmar' and 'The Mirror' newspapers have also appeared, giving information on how to lodge a complaint. Yet for many people, this is not an effective method of communication. There is deficit of trust regarding state-run newspapers, and many people in rural areas simply do not read these publications.

More needs to be done to ensure that people know how to make a complaint anonymously. An example is the case of Brang Shawng, whose 14 year old daughter was shot by the Burma Army when they attacked a village in Hpakant Township, Kachin State in September 2012. He did file a complaint to the MNHRC in order to seek truth and justice for his dead daughter, but he also sent a copy of the complaint to the Burma Army itself. Subsequently he was charged by the Burma Army for making false accusations. If the complaints process of the MNHRC had been clear to him, as well as its operating procedures, he may have been spared the injustice of appearing in court as the accused against the Burma Army.

Perhaps the most significant effort to engage with civil society was the publication of the draft enabling law in 'The Mirror' newspaper in July, 2013. Along with this publication was an invitation for comments and recommendations, which civil society duly submitted. This was a real chance for lawmakers to

incorporate input from the 43 civil society organisations that signed a six page document that outlined the kind of changes the enabling law needed to make it more independent and effective.

Yet, the final law adopted in March 2014 was in fact very similar to the original draft. Very few changes had been incorporated. One change was that there is now to be two members of civil society on the selection board; whereas there was only provision for one in the draft law. These civil society members, however, still have to come from civil society organisations that are registered under the Ministry of Home Affairs, a notoriously difficult task. Another positive change based on the recommendations was that if a complaint concerns a government department or organisation, the findings found by the MNHRC and sent to that department or organisation necessitate a response within thirty days. Yet the key problems with the draft enabling law remain, and thus renders the invitation for civil society input largely redundant. Furthermore, despite the invitation to send comments, there was no actual consultation meeting between the MNRHC and members of civil society regarding the draft enabling law.

The enabling law does give the MNHRC the mandate to consult with civil society but this needs improvement, and recommendations given to the MNHRC state that such consultation should be “regular and inclusive.”

Regarding the actual practice of engagement with civil society, disregarding the invitation for input on the enabling law, the results are mixed. There has been more of an attempt to travel and reach out to civil society organisations in the country. Members have made trips to Mandalay Region, Sagaing Region, Tenasserim Region, Mon State, and Karen State in the past year to talk with civil society about the Commission and conduct human rights trainings as well as taking part in discussions at various events such as International Human Rights Day on 10 December, 2013. Yet there has not been a systematic and regular relationship with civil society. In Burma, which has many remote and underdeveloped areas, these visits need to increase. Currently the MNHRC office is in Yangon, and for many people it is simply too far and too expensive to reach.

The draft enabling law states that the MNHRC cannot investigate cases with which there is already a court case pending or if a case has been ruled upon already by a court. Yet these should be complementary proceedings, and the enabling law should allow concurrent investigations.

The enabling law does outline the MNRHC role vis-à-vis Parliament in that their annual report is to be presented to the legislative body that summarises the current human rights situation and to outline the main activities carried and make recommendations.

The MNHRC is to review both existing and proposed legislation to monitor its adherence to international human rights law that Burma is a state party; as well as to make recommendations for additional legislation and proposals to parliament to further promote and protect human rights.

However, two major flaws exist. There is no oversight on the bodies that actually make the regulations that enforce laws enacted by parliament. In Burma the current trend is that these regulations are designed and carried out by various government ministries, with whom the MNHRC does not have any institutional relationship.

The second flaw is that both for the selection and dismissal of Commission members from their positions, the President can do so merely after consulting with both the speakers of the lower and upper houses of parliament. So this means the law is based on individuals rather than on the institution, the parliament, itself.

The MNHRC has been engaging with other NHRIs as well as entering into a capacity building program with the Raoul Wallenberg Institute that is based in Sweden. In 2013 three members of the Bangladesh National Human Rights Commission visited the MNHRC; while an eight member delegation took a tour to Europe, visiting Denmark, Germany, and France to learn from NHRI experiences in those countries. In partnership with the Raoul Wallenberg institute, assistance was given on human rights training programmes in the fields of business and human rights, on the roles and functions of NHRIs, on the International Covenant on Economic, Social, and Cultural Rights, the International Covenant on Civil and Political Rights, as well as assistance in developing the MNHRC website which was launched in 2013. A MNHRC delegation also attended the first technical working group meeting of the South-East-Asia NHRI Forum in Bali in 2014. The willingness to learn from, and cooperate with, other NHRIs as well as engaging in capacity building exercises with a renowned international human rights institute is a positive development that hopefully will continue.

## **5. ACJ References and Protection of Human Rights Defenders**

There is little evidence that the MNHRC uses the Asia Pacific Forum (APF) Advisory Council of Jurists (ACJ) references in its work, although the MNHRC did acknowledge the suggestion to use such references in the future. These authoritative interpretations of universal human rights standards and their application by NHRIs in the exercise of their mandates would be of great assistance to the MNHRC, given the human rights issues facing Burma.

For instance, the ACJ reference on corporate accountability outlines the international framework that the actions of companies are accountable, highlighting legal and non-legal avenues as well as barriers and problems in this field. It also proposes ways that national human right institutions can work on this issue including: monitoring human rights violations related to investment, reviewing legislation to ensure it complies with international best practices, building capacity of human rights defenders to monitor abuses, to advocate that governments introduce legislation that complies with international standards, to educate both governments and companies on their obligations and responsibilities and to handle business-related complaints.

In the context of the rampant land confiscation throughout Burma, there is ample opportunity to use this particular ACJ reference. Reviewing the legal framework on land tenure is an urgent and hugely significant task that could have positive impacts on livelihoods, the environment, the peace process and equitable development. The ACJ reference provides both the expertise that the MNHRC can use in its work and practical guidelines to implement meaningful actions that can address land tenure.

As for the MNHRC's work on protection of human rights defenders this has been almost non-existent. Human rights defenders (HRDs) in Burma continue to be arrested, especially those involved in land

confiscation cases, but the MNHRC remains silent on such cases. Furthermore, there has been no capacity building workshops for HRDs on their rights as defined in the UN Declaration on Human Rights Defenders conducted by the MNHRC.

## **6. Conclusion and Recommendations**

To date, the MNHRC has still not successfully investigated and taken effective action on any case submitted to it. Sitt Myaing, secretary of the MNHRC, stated in January that they haven't received many complaints from war-torn areas. However, when the MNHRC chairman publicly announces that the institution won't investigate complaints in active conflict areas, is this really a surprise? Despite the widespread and deeply serious violations taking place in conflict-affected areas, the reality that the MNHRC won't investigate them is a significant flaw in its claim to take human rights seriously. Furthermore, the situation in Arakan State is deteriorating and rather than even a statement that denounces human rights abuses, as various other human rights organisations have done, the MNHRC has made itself complicit in the persecution of the Rohingya by acting as a tool to cover up atrocities committed by the police force and reinforcing perceptions that Rohingya are illegal immigrants.

The above analysis of the enabling law is based on a law that has still to come into effect, and so only time will tell the practical application of the provisions in the law. One of the biggest flaws is the lack of independence that the selection committee has. Too many of its members are either government or government-affiliated while the provision of civil society involvement excludes large parts of Burma's civil society due to the stipulation that they must be registered. Furthermore, the MNHRC is financially dependent on the president's office.

For the MNHRC to be seen to be making substantive progress it needs to effectively tackle one of the myriad deteriorating trends in the human rights situation in Burma. This would send a message that does have a significant degree of independence and has the political will to investigate human rights abuses.

### **Recommendations**

#### **To the Burma Government, Parliament, and Military:**

- To allow MNHRC unrestricted access to active conflict and ceasefire areas with guarantees of protection.
- To amend the enabling law to ensure that:
  - The selection committee consists of more civil society representatives, including those from unregistered civil society organisations;
  - To specify that at least a third of its members are women and from religious and ethnic minorities;
  - An independent mechanism is established for dismissal procedures to ensure that retaliation for investigation into sensitive issues is avoided;
  - To allow the MNHRC to investigate cases that are under court proceedings;
  - Funding for the MNHRC comes from Parliament as opposed to the government as it is now;
  - Salaries and expenses of members and staff are allocated through parliament as oppose to the president's office, as it is now.

**To the MNHRC:**

- To regularly and systematically engage with civil society organisations, both registered and non-registered, including human rights groups, ethnic groups and women's groups;
- To speak out publicly on cases of arrest and intimidation of human rights defenders;
- To study and use Advisory Council of Jurists references in its work;
- To refrain from perpetuating the racism and violence in Arakan State by using discriminatory language.

# INDONESIA: LACKING EFFECTIVENESS

## KontraS and Imparsial<sup>1</sup>

### 1. General Overview

During 2013 – 2014, especially before the legislative and Presidential elections, much violence and many cases of human rights violations continue to happen. *KontraS* recorded 81 violations with political motive during Election Campaign 2014: such as arson (44 cases); violence (24 cases); intimidation (8 cases); shooting (5 cases); kidnapping (2 cases); and clashes between supporters of the parties (10 cases).<sup>2</sup> The resulting impact is 7 people killed and 48 people wounded. In addition to the physical harm, there are also psychological and material losses.

The violations that occurred also specifically related to fundamental rights: such as torture practiced by the state security officers, violations of other human rights, and violations of freedom of expression. In a report on the situation of torture in Indonesia between 2013 and 2014<sup>3</sup>, we documented 108 cases which occurred in Indonesia: 80 cases occurred in Police Institutions, 10 cases occurred in Military Institutions; and 18 cases occurred in Detention Centers.

Related to the cases of gross human right violations in the past, Prabowo Subianto, who was allegedly involved in kidnapping and enforced disappearances of activists in 1997 and 1998 is running as Presidential Candidate in the 2014 election. Although the National Human Rights Institution (*NHRI / Komnas HAM*) has released the *pro-justitia* [‘on behalf of justice’ i.e. independent submission to assist the court] investigation report, the attorney-general didn’t proceed with further investigation of the case so it cannot be brought to the human rights court.

However, the General Elections Commission (*Komisi Pemilihan Umum / KPU*) certified Prabowo as Presidential candidate even though he had a disreputable background related to the human rights violations in the past. Kivlan Zen, [former Army Strategic Reserves Command Leader] and also a member of Prabowo Subianto’s campaign team during his interview with journalists on 28 April 2014 suddenly made a statement that he knows who executed the 13 activists<sup>4</sup> who went missing in 1998, and where their bodies are buried. Following this disclosure, *Komnas HAM* announced it will summon Maj. Gen. [Ret.] Kivlan Zen regarding the information he claims to possess on the enforced disappearances.<sup>5</sup> Previously, a scanned copy of an official letter signed by members of the Indonesian Armed Forces (ABRI) Officers Ethics Council (DKP) revealed that Prabowo, then the Army’s Special Forces (Kopassus) commander, was removed from his position due to alleged involvement in the kidnapping and enforced disappearances of the activists.

<sup>1</sup> Contact Person: Putri Kanesia <kontras\_98@kontras.org>

<sup>2</sup> “Election without Human Rights Protection”, Monitoring report of Human Rights Violations toward Election 2014, <http://kontras.org/data/Laporan%20Pemantauan%20Pelanggaran%20Hak%20Asasi%20Manusia%20da%20Kekerasan%20menjelang%20Pemilu%202014.pdf>, 17 May 2014

<sup>3</sup> Torture: Rates Rising, Actors Expanding, Report about Situation of Torture in Indonesia 2013 – 2014, *KontraS*, [http://kontras.org/data/Final%20Penyiksaan\\_OK.pdf](http://kontras.org/data/Final%20Penyiksaan_OK.pdf), 26 June 2014

<sup>4</sup> This is the case of kidnapping of several youth activists and students who intended to uphold justice and democracy in the New Order Regime in 1997 and 1998. There were 23 victims being kidnapped: nine victims were returned, and one victim found dead, but there are still 13 victims missing until now. They are Sonny, Yani Afri, Ismail, Abdun Nasser, Dedi Hamdun, Noval Alkatiri, Wiji Thukul, Suyat, Herman Hendrawan, Bimo Petrus Anugerah, Uocok Munandar Siahaan, Yadin Muhidin and Hendra Hambali

<sup>5</sup> The Central Jakarta District Court had agreed to allow the Komnas HAM to subpoena Kivlan Zein because the former Army Strategic Reserves Command leader did not meet three previous Komnas HAM summons.

Unfortunately, even with these facts and evidence, the NHRI did not take any preventive efforts when Prabowo Subianto was declared to be one of the Presidential candidates. On May 2014,<sup>6</sup> the representative of victims of past human rights violations, *Gerakan Melawan Lupa*, (Refuse to Forget Movement) had meet with NHRI to urge them to find 13 activists who were missing in 1997/1998 and to publish the name of suspect who responsibility of kidnapping and enforced disappearance case based on NHRI inquiry report. The victims also urged the General Elections Commission (*Komisi Pemilihan Umum / KPU*) to not allow the President and Vice-Presidential Candidates who had a “bad track record” for past human rights violation to contest in the Presidential Election.

To respond the victims, the Commissioners of NHRI stated that the victims’ representations would be raised through the NHRI Plenary Council. But in fact, the Chairman of the NHRI Hafid Abbas, spoke differently subsequently. He said that the NHRI cannot name the suspects in public because it is not the responsibility and authority of the NHRI.

In addition, the delay in revision of penal code (*Kitab Undang-Undang Hukum Pidana / KUHP*) made the Ministry of Foreign Affairs initiate a different strategy, by drafting individual laws, such as the Anti-Torture Law, accepting that the legal vacuum on the prohibition of torture and the punishment of torture, had become the main trigger of the increasing and rampant practices of torture. Drafting a separate law is one of the recommendations from UN Bodies, such as the UPR (Universal Periodic Review), Human Rights Committee, and the many reports from UN Special Rapporteurs that must be followed by the Indonesian government as Indonesia’s commitment to preventing and punishing every form of torture and other inhuman and degrading acts. The draft law now is still under discussion with the Ministry of Law and Human Rights and NGOs.

## 2. Independence

<b>Establishment of NHRI</b>	
Established by Law/Constitution/Presidential Decree	Law No. 39 Year 1999 concerning Human Rights
Mandate	Article 76 and 89 The National Commission on Human Rights has functions to study, research, disseminate, monitor and mediate human rights issues
<b>Selection and appointment</b>	
Is the selection process formalized in a clear, transparent and participatory process in relevant legislation, regulations or binding administrative guidelines?	The selection process is conducted by National Commission on Human Rights Selection Committee. The Selection Committee members background are NHRI Advisors, Government officials, Journalists, Academics, etc  There are several criteria for selection, such as administration test, medical test, psychology test, and fit and proper test of all candidates in House of Representative [DPR RI].

<sup>6</sup> See KontraS Press Release “Refuse to Forget Movement, NHRI and Attorney General must find the 13 Activists by summoning Prabowo Subianto and Kivlan Zein”, [http://kontras.org/index.php?hal=siaran\\_pers&id=1875](http://kontras.org/index.php?hal=siaran_pers&id=1875), May 7, 2014

	<p>During the recent selection process, some problems occurred. The few number of applicants to become NHRI members,<sup>7</sup> made the committee extend the deadline for registration of candidates.<sup>8</sup></p> <p>Another problem happened when the committee had finished the selection process and submitted names of 60 candidates to the parliament on July 11, 2012. Commission III of the House of Representatives did not immediately proceed to conduct fit and proper test of the candidates so the selection process was delayed for more than three months. In the same time, the term of the NHRI Commissioners (2007– 2012) ended on August 31, 2012, so the President had to issue a Decree on 29 August 2012 for extending the term of NHRI until the House of Representatives had reviewed the candidates.</p> <p>After conducting the selection process, the Commission III finally announced the 13 members of National Human Rights Commission on 22 October 2012.</p>
<p>Is the selection process under an independent and credible body which involves open and fair consultation with NGOs and civil society?</p>	<p>The selection committee has accommodated input from the NGOs and civil society regarding the criteria of commissioners through the qualification of individual competence and their acceptance of the universality of human rights. In addition, the Selection Committee also conducted public debate or an open forum for all candidates which was attended by victims of human rights violations, journalists, and civil society representatives.</p>
<p>Is the assessment of applicants based on pre-</p>	<p>In every level of selection, the Selection</p>

<sup>7</sup> The Committee of NHRI Selection initially stated that the deadline of registration of candidates of NHRI will end on January 31, 2012. However, as only 51 people registered, the registration was extended until 100 applications were received. NHRI Commissioner Saharudin Daming reasoned that the lack of government support and the small budget of the NHRI explained the low level of interest of people to apply to become NHRI members, "Less Support, The Selection Process of NHRI had few applicants", <http://www.gatra.com/hukum-1/7673-kurang-dukungan-pendaftar-komnas-ham-sepi-peminat.html>, 24 January 2012

<sup>8</sup> On the administrative selection process, YLBHI [Indonesian Legal Aid Foundation], ELSAM [Institute of Policy Research and Advocacy] and KontraS [the Commission for the Disappearance and Victims of Violence] claim that the lack of interest from nationally recognized personalities to apply for the NHRI positions means that most of those who did apply were those trying to pursue a career through the NHRI or those who want to make the NHRI a place for part-time work after retirement, "National Human Rights Commission at the Crossroads", Evaluation of Role of National Human Rights Commission 2012 – 2013, page 64-65, Imparsial, 2014

determined, objective and publicly available criteria?	Committee only announces the name of candidates who pass the selection to the public, but do not explain the reason for their decisions.
How diverse and representative is the decision making body? Is pluralism considered in the context of gender, ethnicity or minority status?	The candidates of NHRI are coming from academic background, lawyers, Activists, Journalists, Civil Servants etc
Term of office	2012 – 2017
Term of appointment for members of the NHRI	Every 5 years
Next turn-over of members	2017

The existence of NHRI in Indonesia was originally based upon Presidential Decree Number 50 of 1993, and subsequently strengthened by Law Number 39 of 1999. This latter law is specifically concerned with human rights and especially the national human rights institution. Some sections in this law explicitly state that NHRI is an independent institution which has the authority of other state institutions and with the mandate to conduct research, counseling, monitoring and mediation of human rights issues.

After the enactment of the Human Rights Law, the legal position of NHRI is stronger than when it was set by-up Presidential Decree. The status of NHRI was further improved after the government enacted Law Number 26 of 2000 establishing the Human Rights Court, to which NHRI is appointed as an investigator of Gross Human Rights Violations [pro-justitia investigator]. Law Number 40 of 2008 regarding the Elimination of Racial and Ethnic Discrimination was added to the functions of NHRI in order to control the occurrence of racial and ethnic discrimination. The functions and authority from this law recently set up by NHRI in 2010 based on government regulation No 56 of 2010 regarding the Mechanism on monitoring of the Elimination of Racial and Ethnic Discrimination.

Therefore the legal position of the NHRI is stronger than before. But as documented by Imparsial,<sup>9</sup> since the NHRI was established issues of representation, independence and integrity are of serious public concern. The NHRI is not perceived as independent institution because the selection process for the Commissioners or members is dominated by political interests. Most candidates do not have sufficient knowledge and expertise of Human Rights.

In the context of the huge expectations of society and victims or their relatives, the NHRI has not delivered the anticipated achievements in promoting, protecting and enforcing human rights. On the contrary, NHRI seems to be powerless, especially in relation to its core function of complaints-handling.

Functionally, the work of NHRI is divided into four sub-commissions, such as assessment and research, education and training, investigation and mediation. The work of NHRI in carrying out all functions is stuck in routine operations and actions without effecting the changes to improvement of human rights enforcement in Indonesia.

However, the NHRI has recorded progress in certain aspects. For example, in relation to the high number of cases of human rights violations based on economic, social and cultural (ESC) rights; the

<sup>9</sup> “National Human Rights Commission at the Crossroads”, *op.cit.*

NHRI together with NGOs is currently pushing for all ESC cases to be investigated using the human rights mechanism created through Law Number 26 of 2000, that is the Human Rights Court. In addition, NHRI also conducted research study including a focus group discussion with NGOs on ESC rights violations: such as the increasingly violence against indigenous people, and the problem of community [tribal] leaders who give permission to companies for land-grabbing, over the heads of affected community members.

Since February 2014, National Human Rights Institution (NHRI) has been established a Special Desk on Freedom of Religion and Belief (Desk KBB). Imdadun Rahmat, Commissioner of NHRI, said that NHRI created some Special Desks which are based on specific issues. He has been chosen to be a Special Rapporteur on Freedom of Religion and Belief who will lead Desk KBB in taking cases or giving responses regarding freedom of religion issues. The establishment of the desk gave hope to the victims of religious violence that the NHRI can take forward cases, such as violations against Ahmadiyahs’ and Shias’ [Muslim minorities in Indonesia] through NHRI *pro justitia* investigation team. Unfortunately, until now, the desk has not been proactive in taking initiatives on further investigation of those cases in the Plenary Council<sup>10</sup> of the NHRI.

### 3. Effectiveness

Related to the effectiveness of its work, NHRI is still facing several obstacles in carrying out its functions. The main problem is about the powers of the NHRI to summon the alleged perpetrators of violations. In addition, NHRI recommendations have no binding force, so its recommendation can be ignored at will.

The constraints of authority above convey the poor ability of this institution in the handling of cases. Many cases of human rights violations receive less than satisfactory responses from NHRI; even when most of these complaints are of a serious nature: such as agrarian conflicts, attacks on minority groups, the armed conflict in Papua, and Cebongan case.<sup>11</sup> Without strong legal powers, it will be difficult for NHRI to take effective action on human rights violations.

Further, the effectiveness of the NHRI is called into doubt by the views of the Commissioners themselves on human rights, which indicate their lack of understanding of these concepts. Some of these statements and responses of NHRI members are presented below.

Year	Name of Commissioners	Cases / Issue	Statements
February 22, 2013	Natalius Pigai	Papua	Natalius stated that Armed Forces personnel stationed in Papua who were shot “had it coming” as their activities there were only to sleep and hang out and that such incidents in a conflict

<sup>10</sup> According to Article 79 (1) Law No. 39 of 1999, the Plenary Council is holder of the highest authority in the National Commission on Human Rights

<sup>11</sup> The Cebongan prison was attacked by Special Forces (*Kopassus*) personnel and some detainees killed. The investigation report which was carried out by the NHRI was not published and there is no further information about the NHRI recommendations on the Cebongan case.

			situation could not be categorized as human rights violations <sup>12</sup>
July 2, 2013	Meneger Nasution	LGBT [Lesbian, Gay, Bisexual, Transgender]	Meneger claims that LGBT rights is not human rights. He stated that same-sex marriage is a behavioral deviation and violates religious beliefs <sup>13</sup>
August, 11 2014	Haffid Abbas	Election / Hendropriyono <sup>14</sup>	Hafid Abbas stated that the appointment of Hendropriyono to be advisor of Jokowi transition team will hasten the resolution of human rights violations from inside the new regime <sup>15</sup>

Some of the weaknesses in the handling of human rights violations by NHRI are discussed below:

### Gross human rights violation cases in the past

NHRI as specified in section 18 (1) of Law Number 26 of 2000 regarding the Human Rights Court, has a mandate to inquire into gross human rights violations such as occurred in Trisakti, Semanggi I 1998 and Semanggi II 1999, May Tragedy 1998, Wasior 2001 and Wamena 2003 Papua, Enforced Disappearances 1997-1998, Talangsari Lampung 1989, the genocide of 1965-1966, and the 'Mysterious Shootings' between 1982-1985. Those cases are still dragging in the Attorney General's office, without any further investigation.

Based on its mandate of Law Number 26 of 2000, NHRI must be pro-active to encourage further investigation by the Attorney-General because Komnas HAM has a legal obligation to complete the inquiry process, if the Attorney-General considers the reports are incomplete.

In January 2013, NHRI established a special team to encourage the follow-up of human rights violation cases in the past. The team consists of four Commissioners of NHRI who are specifically handling these issues. Unfortunately, the internal conflict<sup>16</sup> within the NHRI has contributed to the lack of focus on follow up to the cases. The NHRI is unable to communicate directly with the Attorney-General to find solutions for the different interpretations of both institutions in concluding the investigation reports which are currently considered by the state prosecutor to be incomplete.

<sup>12</sup> See "NHRI: the Shooting case in Papua occurred because the Army not aware", <http://nasional.kompas.com/read/2013/02/22/16582931/Komnas.HAM.Penembakan.di.Papua.akibat.TNI.Tak.Siaga>

<sup>13</sup> See "NHRI Commissioner: Same-sex marriage is deviation of behavior", <http://www.republika.co.id/berita/nasional/umum/13/07/02/mpawdk-komisisioner-komnas-ham-pernikahan-sejenis-penyimpangan-perilaku>

<sup>14</sup> Hendropriyono is a former of Chief of State Intelligence Body [Badan Intelijen Negara / BIN] who was allegedly involved in the murder of human rights activist Munir Said Thalib in 2004. As an Army Commander, Hendropriyono was also responsible for a 1989 attack on villages in Lampung province that killed nearly 30 people and left dozens disappeared. This case is also known as the 'Talangsari Case'.

<sup>15</sup> See "Shocking statement NHRI about Hendropriyono", <http://www.gresnews.com/berita/politik/190118-tanggapan-mengejutkan-komnas-ham-soal-hendropriyono-jadi-tim-penasihat-rumah-transisi/>

<sup>16</sup> See: 2013 ANNI Report On The Performance And Establishment Of National Human Rights Institutions In Asia, p 28

On April 4, 2013, the victims of past human rights violations lodged a complaint regarding the NHRI to the Ombudsman. The victims claim that there is maladministration<sup>17</sup> within Komnas HAM as there is undue delay in complaints-handling. On April 8, 2013,<sup>18</sup> KontraS (The Commission for the Disappearance and Victims of Violence) also complained about the NHRI to the Ombudsman, because of the cases of human rights violations reported by KontraS to the NHRI only a small number have been followed-up. KontraS believes that the internal conflict within the NHRI has made the Commissioners lose focus on their work.

### **Access to reparations**

The Standard Operational Procedure (SOP) of Provision of Psychosocial and Medical Assistance by the Witness and Victims Protection Agency (*Lembaga Perlindungan Saksi dan Korban / LPSK*), provides that the NHRI has an important role in determining the status of victims of Human Rights Violations that are currently applying for Psychosocial and Medical Assistance through LPSK. The obligation of NHRI is to issue a certificate or recommendation letter to the victims who apply for assistance, as described in the Formal Requirement Application in SOP of LPSK.<sup>19</sup>

The letter to be provided by the NHRI is very important for the victims to receive access to compensation or the psychosocial and medical benefits to which they are entitled. However, the problem is that sometimes the process in granting recommendation letters to the victims takes such a long time that the victims cannot receive the compensation or Psychosocial and Medical Assistance in a timely manner.

### **Bureaucracy of National Human Rights Institution (NHRI)**

Regarding the Standard Operating Procedure in handling the human rights violation cases, the NHRI must follow an internal process which is very complex beginning with the initial report from the victims and NGOs, through to the stage of investigation into their complaints. For example, in the case of the “*pangonan*”<sup>20</sup> land in Bogor village, Indramayu, when there is an urgent situation in that area, the NHRI cannot make quick responses in the handling of the case, because of the long procedures that needs to be followed according to the NHRI bureaucracy.

Meanwhile, the letter of response from NHRI follows a queue system where earlier complaints receive prior attention, regardless of the urgency or priority that should be given to serious violations or imminent violations even where timely action can prevent or reduce the violation. The impact of this bureaucratic approach of NHRI is that there is slow progress on cases, and no relief to the victims of human rights violations.

## **4. Engagement with other stakeholders**

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<sup>17</sup> Law No 37 of 2008 regarding Ombudsman Republik Indonesia stated that Maladministration is behavior or illegal actions, beyond authority, including omission or neglect of legal duty in the public service performed by state organizations

<sup>18</sup> Letter No. 164/SK-Kontras/IV/2013

<sup>19</sup> The Standard Operational Procedure (SOP) on Medical and Psychosocial No 4 of 2009 required that the application must be supported by a “Statement Letter from Komnas HAM that show the applicant is the victims or family of the victim of gross human rights violations”

<sup>20</sup> *Pangonan* land is allocated for the grazing of cattle belonging to villagers

The monitoring of performance of NHRI conducted by *Imparsial*, indicates that among the reasons for NHRI's poor handling of cases of human rights violations is the lack of cooperation and minimum political support to NHRI from other institutions.

#### **a. Relation between Komnas HAM and Government**

Since the issue of various discriminatory regulations such as the Joint Decree of Three Ministers [Minister of Religious Affairs, Minister of Internal Affairs, and Attorney General] banning any religious activities of the Ahmadiyah sect; the regulation on the construction of houses of worship etc., become a trigger to the increasing number of discriminatory local regulations promulgated by Local Governments in various parts of the country.

The NHRI as independent institution which has mandates and functions to conduct research<sup>21</sup> should be able to take initiative to disseminate the understanding of human rights, especially the rights of minority groups to the head of local government and regional officials. It is important to prevent the issuance of discriminatory regulations by the local government in various areas in Indonesia.

#### **b. Relation between NHRI and Law Enforcement Body**

The National Human Rights Commission and the Attorney-General up to now have not reached an agreement on the concept of gross violation of human rights as identified in Article 9 Law No. 26 of 2000 regarding the establishment of an Ad-Hoc Human Rights Court. This problem results in reports submitted by the National Human Rights Commission to the Attorney-General for further investigation being returned by the Attorney-General for reason of "incomplete evidence".

#### **c. Relation between NHRI and Parliament**

The failure to ratify the International Convention for the Protection of All Persons from Enforced Disappearance (ICPED) in national law, even though discussed in the parliament, proves the lack of seriousness from both the parliament and National Human Rights Commission to make the ratification of the ICPED as a priority human rights issue. The NHRI has failed to encourage the parliament to consider the report of *pro justitia* investigation for enforced disappearance case of the 13 activists by the National Human Rights Commission as a signal of how important the ratification of this Convention would be in tackling this serious human rights violation.

### **5. Conclusion and Recommendation**

The establishment of the National Human Rights Institution (NHRI) in Indonesia was expected to be the answer to the various cases of human rights violations in Indonesia. Moreover, the NHRI in this period has a legal basis that is relatively more powerful than when it was first formed.

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<sup>21</sup> Article 89 [1] Law No. 39 Year 1999 regarding Human Rights mention that to carry out the functions of the National Commission on Human Rights with realize aims as referred to in Article 76, the National Commission on Human Rights has the authority to a) study and examine international human rights instruments with the aim of providing recommendations concerning their possible accession and ratification, b) study and examine legislation in order to provide recommendations concerning drawing up, amending and revoking of legislation concerning human rights, c) publish study and examination reports, d) carry out literature studies, field studies, and comparative studies with other countries, e) discuss issues related to protecting, upholding and promoting human rights, and f) conduct cooperative research and examination into human rights with organizations, institutions or other parties, at regional, national and international levels

However, the performance of the NHRI is not experiencing improvement in comparison to previous years. The NHRI also did not make the effort to improve their effectiveness, especially in dealing with human rights violation cases in Indonesia, including the gross human rights violation cases in the past.

The work of NHRI also tends to get stuck in routine annually programmed work which is not responsive to new or unexpected violations. Further, NHRI recommendations lack legal effect. In future, NHRI must improve its ability in dealing with human rights violation cases in Indonesia in strategic ways.

Recommendations for improvement of the performance of NHRI include:

1. To improve the regulatory framework of existence and role of Komnas HAM, such as Law Number 39 of 1999 regarding human rights and Law Number 26 of 2000 regarding the human rights court. In addition, as an institution, NHRI regulations must be set by separate law / regulation. Such a new regulation is expected to encourage NHRI to be more independent and stronger, in particularly for human rights violation cases.
2. To improve the mechanism and selection process for candidates of NHRI. The improvement in this sector can be achieved by the clear requirement that the candidates must have qualifications required for the NHRI, such as commitment, experience and adequate human rights understanding. In addition, the selection process must be transparent and include the participation of civil society.
3. To improve the internal operational system in NHRI, so the coordination between Sub-Commissions is more integrated, and the cases can be handled more quickly and effectively.
4. Government and Parliament have to increase the budget of the NHRI. It is necessary due to many human rights violation cases handled by the NHRI every year. The limited budget of NHRI limits the institution from optimum performance
5. To encourage the strengthening of NHRI in the regions, in terms of capacity and budget. It is important since most of human rights violation cases occurred in the regions and must be followed-up in those regions too. By maximizing the role of NHRI regional offices, it is anticipated that human rights violation cases at regional-level will be handled quickly.
6. Improve the capacity of human rights standards and understanding, at the level of staff as well as the Commissioners. It is very important since not all staff and commissioners have a background in human rights work.

# THAILAND: PROTECTING THE STATE OR THE PEOPLE?

## People's Empowerment Foundation<sup>1</sup>

### 1. General Overview

The overall human rights situation of Thailand was largely influenced by the political conflict between the People's Democracy Reform Committee (PDRC) led by Mr. Suthep Thaugsuban, former Secretary General of Democrat Party and the former government led by Yingluck Shinawatra.

The PDRC pushed for the resignation of Yingluck and the dissolution of the House of Representatives. The conflict was sparked by the amendment of the 2007 Constitution proposed by the Pheu Thai Party as it was part of their election campaign. The 2007 Constitution was viewed as undemocratic because it was drafted by the people selected by the coup-makers in 2006. Later, the Constitutional Court ruled against the Constitution Amendment. However, it ruled that the parliament could amend the Constitution on a piecemeal basis by amending separate articles.

The Pheu Thai Party started with the amendment of Articles 111-118 proposing that the Senate should be elected, which started a huge debate in the parliament. Also, the passing of an Amnesty bill that wipes away all charges relating to political violence since 2004 at around 4am was heavily criticized by the public. The opposition party criticized that the president of the parliament did not respect the intervention made by the opposition MPs. PDRC was then formed and started to call people out to gather on the streets. The PDRC's ultimate goal was to eradicate the Thaksin Shinawatra regime meaning the banning of the Shinawatra clan from Thai politics.

The political crisis created polarization among the people; with the narrow definition of being "red" (associated with the pro-Thaksin camp) and "yellow" (associated with the old ruling class). This deep-rooted cause of the conflict has also been hindering the possibility for reconciliation in Thai society.

However, the assembling of the two groups in public space had come to an end once the military declared martial law on 20 May, 2014 and formally took power by declaring a coup d'état on 22 May, 2014.

Under military rule, people cannot enjoy their full rights as certain rights such as their political and socio-economic rights are limited. People were not even able to exercise their right to vote in the general election.

Moreover, the political crisis also affected the continuity of the peace process in the southern border provinces. The date for the next peace talk has never been discussed again. Moreover, more violence could be observed in the south, as there has been no concrete action taken by the central government on the grievances of the Muslim minority.

### 2 Independence

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<b>Establishment of NHRI</b>	
Established by Law/Constitution/Presidential Decree	2007 Constitution of Kingdom of Thailand, Articles 256-257 <sup>2</sup>
Mandate	<p>The National Human Rights Commission consists of a president and six other members appointed by the King with the advice of the Senate</p> <p>The Commission has the powers and duties as follows:</p> <ol style="list-style-type: none"> <li>1. to examine and report the commission or omission of acts which violate human rights or which do not comply with obligations under international treaties to which Thailand is a party, and propose appropriate remedial measures to the person or agency committing or omitting such acts to be acted upon. In the case where it appears that no action has been taken as proposed, the NHRCT shall report the non-compliance to the National Assembly;</li> <li>2. to submit to the Constitutional Court any complaints received and an assessment of the provisions of the law that affect human rights and are inconsistent with the provisions of the Constitution;</li> <li>3. to propose to the Administrative Court any complaints received and an assessment of any regulations, orders, or other actions that affect human rights and are inconsistent with the provisions of the Constitution;</li> <li>4. to file lawsuit with the court of justice on behalf of the injured when requested and deemed appropriate to solve problems of public human rights violation as specified by law;</li> <li>5. to suggest policy and recommendation to revise laws, regulations to the national Assembly and the Council of Ministers to promote and protect human rights;</li> <li>6. to promote education, research and dissemination of information on human rights;</li> <li>7. to promote cooperation and coordination among government agencies, private organizations, and other organizations in the field of human rights;</li> <li>8. to prepare an annual report for the appraisal of situations in the sphere of human rights in the country and submit it to the National Assembly;</li> <li>9. other powers and duties as provided by the law.</li> </ol> <p>The National Human Rights Commission has the power to demand relevant documents or evidence from any person or summon any person to give statements of fact and has other power for the purpose of performing its duties as provided by law.</p>

<sup>2</sup> The complete text of the 2007 Constitution can be found at [www.constituteproject.org/constitution/Thailand\\_2007.pdf](http://www.constituteproject.org/constitution/Thailand_2007.pdf)

<b>Selection and appointment</b>	
Is the selection process formalized in a clear, transparent and participatory process in relevant legislation, regulations or binding administrative guidelines?	The selection process is formally stated in the Constitution that “ <i>The selection of the Selective Committee shall be made in accordance with the provisions of Section 243</i> ”. However, the selection of the commissioners still lacks transparency due to the secretive nature of the process.
Is the selection process under an independent and credible body which involves open and fair consultation with NGOs and civil society?	<p>The selection process is controlled by state-appointed senior judges and politicians and lacks civil society’s participation and public disclosure of the nomination and selection criterion.</p> <p>The Constitution stated that “The selection of the National Human Rights Commission shall be made in accordance with the provisions of Section 206 and Section 207 mutatis mutandis. The selection committee shall consist of seven members under provision 243, namely the President of the Supreme Court of Justice, the President of Constitutional Court, the President of the Supreme Administrative Court, the President of the House of Representatives, and the Opposition Leader in the House of Representatives, one person elected at the general meeting of Justice, and a person elected at a general meeting of the Supreme Administrative Court.</p> <p>Within thirty days from the date when selection and election has to be made and submit a namelist of those selected with their consent to the President of the Senate. The decision of the selection process is made by an open ballot and must have a vote of no less than two-third of the total number of the existing Committee members. If there are some vacancies in the Committee or if there are members but these cannot perform duties, if there are fewer than one half, the members available shall constitute the Selection Committee.</p> <p>After that the names of the 7 candidates were then passed to the Senate for approval through secret ballot. The President of the Senate submits the names of the seven commissioners to the King for approval. From this selection process, it is obvious that the civil society is excluded from the entire process.</p>
Is the assessment of applicants based on pre-determined, objective and publicly available criteria?	The assessment of applicants is a confidential process run by the selection committee under sections 206 and 207. The lack of necessary qualifications in human rights protection and promotion of the commissioners who have been appointed, is a result of the lack of human rights expertise of the selection committee itself.
How diverse and representative	Out of 7 commissioners, 2 are women. One of them is Prof. Dr.

is the decision making body? Is pluralism considered in the context of gender, ethnicity or minority status?	Amara Pongsapich, who is the chairperson of the HNRC. The professional background of the commissioners is quite diverse. They come from the field of academia, business, police and medical profession. More than half of them are government officers. There is no representative from the civil society or persons from vulnerable groups. Moreover, very few commissioners have proven human rights expertise. <sup>3</sup> In terms of decision making process, the voting method is used. If the issue receives equal vote (3:3), the chairperson will make final decision. This means if the chairperson is unable or unwilling to make a decision, that issue will be remain in a pending status. Moreover, any documents coming out on behalf of the commissioners will have to reach the consensus among the commissioners first.
<b>Terms of office</b>	
Term of appointment for members of the NHRI	The term lasts 6 years and is not renewable.
Next turn-over of members	24 June 2015

### Brief profile/background of NHRI members

Out of the 7 commissioners, 4 are retired government officers and 2 are medical doctors. Despite being blacklisted by the first set of commissioners, Mr. Parinya Sirisarakarn, the other commissioner who is the only businessman in the Commission, was viewed as having required qualifications by the selective committee in being a human rights commissioner. Former police officer, Pol. Gen. Wanchai Srinuannat is one of the retired government officers in the Commission. Having a police officer in the Commission could obstruct the victims from filing complaints with the commission as most of the time the victim come to NHRCT because of the failure in receiving protection or justice from the police officers.

One of the 2 woman commissioners is Ms. Visa Benjamano, who formerly worked for Ministry of Social Development and Human Security on the issue of women and children. However, there has been no concrete outcome on the protection of women and children from the NHRCT on this thematic issue. A lot of statements come out from NHRCT on the political situation also show the bias and the lack of a human rights standpoint of the commissioners, even though the chairperson Prof. Dr. Amra Pongsapich has a strong background in human rights.<sup>4</sup> This caused a lot of criticism by the public on the protection mandate of the NHRCT.

Regarding the selection process, it is considered the key element in determining the independent status of the NHRCT. However, there was norepresentative from the civil society in the selection committee.The committee was only composed of state officials and politicians. It is obvious that when the people who have

<sup>3</sup> The profile of the commissioners can be found at <http://www.nhrc.or.th/en/Commissioners.php>

<sup>4</sup> The report on the 2010 crackdown launched in 2013 triggered the movement on the partiality of the NHRCT due to the implication of the report on the rightful use of military force of the government under Mr. Abhisit Vejjajiva against the protesters. Information regarding the movement can be found at <http://www.bangkokpost.com/news/investigation/365167/nhrc-under-fire-for-being-partial-to-impartiality> and [http://www.khaosod.co.th/en/view\\_newsonline.php?newsid=TVRNM05qVTJPRFF4Tke9PQ=&subcatid=](http://www.khaosod.co.th/en/view_newsonline.php?newsid=TVRNM05qVTJPRFF4Tke9PQ=&subcatid=)

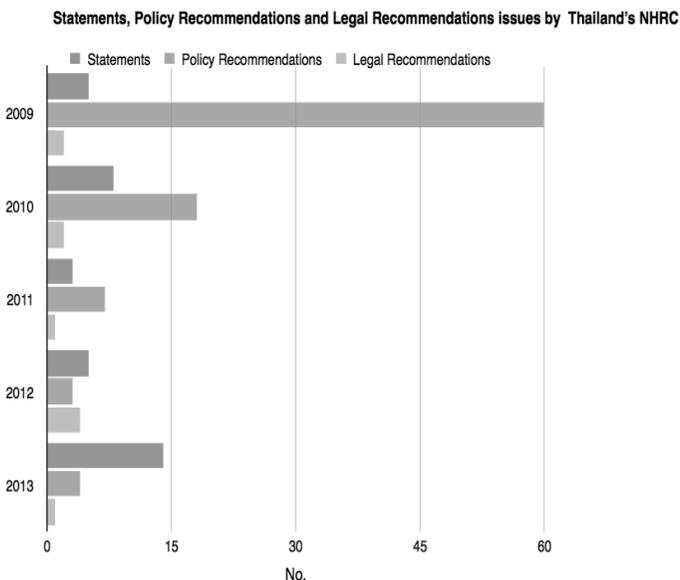
the authority to select the commissioners are not independent, it is impossible to come up with independent commissioners. The commissioners should be the persons who prioritize the protection of the rights of the people, and not the protection of the state. The selection process requires those who have human rights expertise and a firm understanding of human rights violation and the value of human dignity.

### Staffing and recruitment

The open call for staff recruitment of the NHRCT was announced publicly. The applicants must pass a written test and oral interview. Government officers who wish to transfer themselves to the NHRCT can also do so. The sub-committees are recruited by each commissioner. The renewal of the term of the sub-committees is done annually. However, in practice, the chairperson usually approves the renewal of the old set of sub-committees. Sub-committees are mostly composed of both government officers and representatives from civil society. There has been no standard setting on the recruitment of the sub-committees. The role of the sub-committees is to submit information or research paper to the commissioners for them to make decision on the issues. The NHRCT has no involvement of politicians in the sub-committees although some commissioners may have close relations with certain political parties.

If the NHRCT is to perform as an independent, transparent and accountable body under the system of checks and balances, apart from receiving financial support, the NHRCT should be free from other means of control from the government. Its staff should also be recruited based on their human rights knowledge and their understanding of human rights principles. However, in reality, staff transferred from other government agencies often have limited expertise in human rights issues and often prioritize the interests of the state over that of the people.

### 3. Effectiveness



### Statements About Political Protests in 2010 Compared to 2013

2010: Red Shirts Protestors against Prime Minister Abhisit Vejjajiva	2013: Anti-Government protestors against Prime Minister Yingluck Shinawatra
“Statement Condemning the Use of Violence in the Protest” (14May 2010)	“Statement Expressing Concern about the Protest” (26 December 2013)
“Statement Condemning the Use of the Red Cross and Urging the Respect for the Red Cross, Medical Facilities, Medical Operation and the Right of Patients” (30 April 2014). The NHRC Claimed that protestors blocked accesses to the hospital and disturbed normal medical operation of hospitals, while trying to recover their fellows’ bodies. The fact that protesters had been killed during the protest dispersal has not mentioned.	“Statement Expressing Concern about the Protest” (22 December 2013)
“Statement: An Agreement to Respect Rights and Freedom of Assembly” (16 March 2010)	“Statement Demanding that Violence Must be Stopped” (2 December 2013) for the Ramkamhaeng incidents where five counter protestors (Red Shirts) and bystanders were killed, injured and humiliated in the incident.
“NHRC Urges Every Party to Respect the Freedom of Assembly” (11 March 2010)	“Statement Expressing Concern about the Protest” (28 November 2013)
	“Statement on the Case of Violation of the Freedom of Assembly from the Enforcement of the Security Law and the Legislative Process of the Amnesty Bill” (8 August 2013)

#### Assessment of the NI’s effectiveness

It can be seen from the diagram and the table that mainly, there are three types of documents come out from the NHRCT. The documents are statements, policy recommendations and legal recommendations. It seems that the Commission’s proactiveness depends on the political climate. Few actions were taken by the NHRCT during a time where there was no political movement.

The legal recommendations and policy recommendations are the outputs from the investigation of cases of human rights violation received through complaints. However, the legal and policy recommendations sometimes lack proper analysis of the situation and focus only on the changing of the wording in the law.

Since NHRCT is titled only as an advisory body, a lot of the recommendations from the Commission are often ignored by the government and concerned agencies.<sup>5</sup> This shows that no mechanism has been set up by the NHRCT to monitor the implementation of the recommendations proposed by the NHRCT.

The NHRCT's sub-committees have tried to present their cases to the public and government agencies involved but very few can make changes at the policy level since the NHRCT is only a consultative body and does not have the authority to order punishment. Even though the NHRCT reports to the parliament, the role of the parliament in supporting the work of the NHRCT is unknown and likely non-existent.

Part of the ineffectiveness of the NHRCT is the non-independence of the NHRCT. As mentioned earlier that the NHRCT is not acting as an independent body as a result of its undemocratic selection process. Therefore, the commissioners are protecting the interest of the state rather than benefit of the people. This claim was proven by the fact that so far after the military coup, the NHRCT has never issued any statements concerning the arbitrary detention of activists, politicians, media, and academicians including students who have different political opinion.

The non-governmental Asian Human Rights Commission (AHRC) (2014)<sup>6</sup> stated that “during the first two months of rule by the junta, there have been severe restrictions placed on freedom of expression and political freedom, ongoing formal and informal summons to report to the junta, extensive use of arbitrary detention, the activation of military courts to process dissidents, and the creation of a general climate of fear detrimental to human rights and the rule of law.” Moreover, the NHRCT has also been silent on the fact that the media's freedom and the rights to access information of the people in the country are strictly limited.<sup>7</sup>

All in all, the NHRCT has produced very minimal output despite the budget<sup>8</sup> of around 200 million Baht allocated to the Commission each year. It is disappointing that the budget has not contributed to fulfill the mandate of the NHRCT on the promotion and protection of human rights of the people in the country.

Despite the international concern,<sup>9</sup> there is no concrete action taken by the NHRCT in the cases of many victims of human rights violation happened in the country to both citizen and non-citizens. Human rights defenders continue to struggle on their own despite the protection mandate that the NHRCT upholds.

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<sup>5</sup> The recommendations on the case of the undocumented Myanmar migrant worker, Charlie Deeyu who was chained to the hospital bed while receiving treatment back in 2011, were sent to the police but received no response in return. For more information on the case please refer to <http://www.humanrights.asia/news/forwarded-news/AHRC-FST-007-2011>.

<sup>6</sup> Asian Human Rights Commission (AHRC), 22 July 2014, *Arbitrary detention of student activist and human rights defender by junta*. Retrieved from <http://reliefweb.int/report/thailand/arbitrary-detention-student-activist-and-human-rights-defender-junta>

<sup>7</sup> (2014, June 26). NCPO sets up five panels to watch media. *Bangkok Post*. Retrieved from <http://www.bangkokpost.com/news/politics/417407/ncpo-sets-up-five-panels-to-watch-media>

<sup>8</sup> Please refer to [www.library.coj.go.th/managelaw/data/16-55-38.PDF](http://www.library.coj.go.th/managelaw/data/16-55-38.PDF) for Annual Expenditure Budget Act, BE 2556 (2013) (in Thai) and [www.mua.go.th/~budget/doc/act-budget57.pdf](http://www.mua.go.th/~budget/doc/act-budget57.pdf) for Annual Expenditure Budget Act, BE 2557 (2014) (available in Thai only)

<sup>9</sup> Case 1: Mr. Andy Hall is a British human rights defender working on migrant and labor rights and previously worked for Mahidol University as Associate Researcher and Foreign Expert in the Institute for Population and Social Research. He was reportedly the principal Thailand-based researcher contributing to a publication, which reportedly investigated the production process of fruit juices on sale in Finland. The report revealed the working condition and the human rights violations done to the workers inside the Natural Fruit Company in Thailand. Later, criminal charges of broadcasting false statement have been brought against Mr. Hall by the Natural Fruit Company in Thailand. For more details on the case, please refer to the statement of the UN special rapporteurs at [https://spdb.ohchr.org/hrdb/24th/public\\_-AL\\_Thailand\\_26.04.13\\_%284.2013%29.pdf](https://spdb.ohchr.org/hrdb/24th/public_-AL_Thailand_26.04.13_%284.2013%29.pdf)

Case 2: Mr. Nick Nostitz is a freelance German journalist working in Thailand. He was assaulted by the People's Democracy Reform Committee (PDRC) protesters because he was believed by the PDRC to be affiliated with the pro-government United Front for Democracy against Dictatorship (UDD) or the “Red Shirts”. There was footage of a former Democrat Party member of parliament,

#### 4. Engagement with other stakeholders

NHRCT has established their relationship with CSOs through its sub-committees, of which some CSOs are part. However, the engagement of the NHRCT with civil society has proved to be rather weak since the CSOs do not have trust in the protection mandate of the NHRI.

Moreover, there is not enough outreach on the promotion of human rights knowledge to the people at the very base of society. Thai people living in a critical conflict area like the southern border provinces still have limited knowledge on human rights and on how to engage with the Commission.

As a member of the ICC, SEA-NF and sub-regional group of the APF, the NHRCT should cooperate with other national human rights institutions or national human rights bodies (in countries where NHRI is not yet established) in the region, especially those in ASEAN countries to more effectively work on human rights violation cases which involve cooperation across borders. The NHRCT should also cooperate with the regional human rights bodies such as ASEAN Intergovernmental Commission on Human Rights (AICHR) for cases of transnational human rights violation which requires a regional cooperation in dealing with the problem. However, since the establishment of AICHR, civil society has never observed a concrete cooperation or constructive engagement between the two bodies.

The NHRCT also participates in the Universal Periodic Review Process and other UN mechanisms. However, from our observation, the NHRCT tends to act in these mechanisms as the representative of the

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Chumpol Junsai, announcing to thousands of protesters in front of the Bangkok Metropolitan Police headquarters that Nostitz was affiliated with the UDD and urged them to chase him out. As a result, he was assaulted by the protesters and his picture and profile were widely shared on social media which raises concerns for his safety. More details on the case of Nostitz and other media during the protest can be found at <http://www.hrw.org/news/2013/11/26/thailand-opposition-groups-attacking-journalists>. Later Nostitz submitted his complaint to the NHRCT on 14 May 2014. However, Nostitz claimed that there had been no progress on his case both from the police and the NHRCT despite the fact that the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression had expressed its concern on the issue; the statement can be found at [https://spdb.ohchr.org/hrdb/24th/public\\_-\\_UA\\_Thailand\\_10.12.13\\_\(7.2013\).pdf](https://spdb.ohchr.org/hrdb/24th/public_-_UA_Thailand_10.12.13_(7.2013).pdf)). The matter has been affecting his daily life as he and his family have been constantly threatened by the PDRC supporters. More detail on the progress of the case can be found at [http://www.khaosod.co.th/view\\_news.php?newsid=TUROd01ERXINREEwTURnMU53PT0%3D](http://www.khaosod.co.th/view_news.php?newsid=TUROd01ERXINREEwTURnMU53PT0%3D) (available in Thai only).

Case 3: Ms. Kritsuda Khunasen is an activist associated with the United Front for Democracy against Dictatorship (UDD). She was arbitrarily detained by the military officers. She has made an allegation that received ill-treatment and there was a use of torture during her detention in the military camp. She was detained since 27 May 2014 and was released after 29 days later. However, it was only until 20 June 2014 that the military admitted that she was being detained without disclosing her whereabouts. Khunasen gave an interview claiming that she was forced to sign a document stating her permission to be detained for more than 7 days because of her safety because under the martial law imposed after the military coup on 22 May 2014, the military is authorized to hold people in administrative detention for no longer than seven days. So far there is still no investigation on the case despite the concerns expressed by the United Nations High Commissioner for Human Rights (<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14918&LangID=E>) For more information on the case, please refer to <http://www.icj.org/thailand-allegations-of-torture-against-activist-kritsuda-khunasen-require-immediate-investigation/>

Case 4: Mr. Porlajee Rakchongcharoen: In September 2011, Karen villagers from Ban Pong Luek filed a complaint against the officers from Kaeng Krachan National Park for illegal burning and damaging their houses and barns. This case has been continued in the Administrative court against the chief of Kang Krachan National Park. In mid-April 2014, News reported that Mr. Porlajee Rakchongcharoen also known as Billy, a prominent Karen leader who preparing for the lawsuit villagers filed against the Department of National Parks, Wildlife and Plant Conservation in Administration Court as their properties were set ablaze by officers of Kaeng Krachan National Park in 2011, disappeared after leaving his home on April 17. He was taken and detained by National Park officers for possessing illegal wild honey. It has been a month he has not been seen since then and such lack of progress on investigating the case and affects the wellbeing of his family and other villagers. However, later the court dismissed the case due to insufficient evidence despite the concern on the case expressed by the United Nations High Commissioner for Human Rights. The article about this case can be found at <http://www.bangkokpost.com/print/407851/>

state, rather than playing a role as the independent human rights body which protects the rights of the victims of human rights violation.

In terms of their engagement with regional human rights body such as the ASEAN Intergovernmental Commission on Human Rights (AICHR), there is no concrete cooperation between the NHRCT and the AICHR despite the fact that the national human right institutions are vital machinery in improving the situation of human rights in the region. There has been no joint statement of the national human rights institutions existing in ASEAN on any human rights issues that occurred in the region.

Regarding the engagement with the media, since the NHRCT is seen as being a part of the government and has never taken any strong actions, it seems to not receive much attention from the media.

In terms of engagement with other state bodies, there is no record that the parliament has a discussion session on the activity report (2010-2013) of the NHRCT, although the NHRCT must obtain approval from the parliament regarding its budget. There is no focal committee on the NHRCT in the parliament and NHRCT was excluded throughout the legislative process whether it be drafting or reform. NHRCT engages with the judicial system in a way that it can file lawsuits on behalf of the victims to the administrative court, constitutional court and criminal court. The courts will issue subpoenas if the case requires investigation.

## **5. Thematic Issues (Implementation of the ACJ's References)**

Often times, the work of the NHRCT are not shared or can be accessed publicly and its annual reports are not published regularly. Thus, according to the available information we can obtain on the implementation on the following thematic issues, we found that one of the thematic issues of the ACJ's references that NHRCT seems to implement quite well is on the issue of corporate accountability.

There is a good example of how the NHRCT can deal with the issue. This is the case of two Thai sugar companies operating in Kho Kong sugar cane plantation in Cambodia. The commercial operation caused forced eviction and human rights violation to the local people who have long been living in the area. The sugar industry has been one of the worst offenders in Cambodia's land grabbing epidemic.<sup>10</sup> The NHRCT promised to take action in the matter since the perpetrator holds Thai citizenship and the corporation's actions went against many international human rights conventions. The NHRCT claimed that it had a mandate in obtaining information from both the local people in Cambodia and the Thai companies.<sup>11</sup> The NHRCT did an investigation to obtain information in the affected area and will be able to launch its fact-finding report this October (2014), although it admitted having no authority in taking any legal action. However its report will be of benefit to the litigation of this case.<sup>12</sup>

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<sup>10</sup> For more information on the case, please refer to the report "Bittersweet Harvest: A Human Rights Impact Assessment of the European Union's Everything But Arms Initiative in Cambodia" published by Equitable Cambodia and Inclusive Development International, available online at [http://www.inclusivedevelopment.net/wp-content/uploads/2013/10/Bittersweet\\_Harvest\\_web-version.pdf](http://www.inclusivedevelopment.net/wp-content/uploads/2013/10/Bittersweet_Harvest_web-version.pdf)

<sup>11</sup> (2013, 12 November). Bittersweet: Sugar Industry and the Eviction in Cambodia. *Prachatai*. Retrieved from <http://www.prachatai.com/journal/2013/11/49749> (available in Thai only)

<sup>12</sup> Ponniah, K. (2014, 14 August). Sugar Giant in Spotlight for Abuse. *The Phom Penh Post*. Retrieved from <http://www.phnompenhpost.com/national/sugar-giant-spotlight-abuse>



officers to file complaints on their cases. Moreover, the chairperson of the sub-committee on women and children does not investigate the cases of human rights violation of women and children in the conflict area of the 3 southern border provinces because of the sensitivity of the situation in the area. This prevents the women and children in that area from having access to the justice system.

6. It is a regulation set by the NHRCT that only the victim can file a complaint on their behalf. This obstructs human rights organizations to assist the victim in filing complaints. This creates problem since a lot of marginalized people such as the Muslim Melayu (Malays) in the 3 southern border provinces have to spend around 3,000 to 10,000 Baht in hiring a lawyer to file a complaint.
7. At present, many male and female human rights defenders are being threatened, killed or forced to disappear without any assistance from any government agencies. The NHRCT itself, despite having a direct responsibility in providing protection to the people, does not have any policy in protecting the human rights defenders or seriously implement any guidelines in protecting their rights.

## **Recommendations**

1. Amendment should be made to the Thai Constitution articles 206-207 on the selection process and article 243 on the selection committee. CSOs should be allowed to sit in the selection committee in order to obtain independent commissioners.
2. Sub-committees and staff of the NHRCT should be recruited or evaluated every 2 years to ensure their efficiency.
3. The Committee on Law, Justice and Human Rights of the Parliament should act as a focal point in receiving the report from the NHRCT. The agenda regarding the work of the NHRCT should be for consideration not just for acknowledgment as has been practiced since the NHRCT requires support from Parliament in realizing its recommendations.
4. NHRCT should provide more trainings on human rights for its staff at all level.
5. NHRCT should organize trainings on human rights for all stakeholders involved including different government agencies such as immigration and military officers. It should organize education forums for the public to promote the right understanding on human rights and the work of the NHRCT so that people are more aware of their rights and able to seek assistance from the NHRCT when needed.
6. Due to the fact that the NHRCT has been unable to protect the right of the people in the country especially under the martial law imposed after the military coup, it should be high time for the International Coordinating Committee of National Human Rights Institutions (ICC) to reconsider the level of accreditation given to the NHRCT.

# TIMOR-LESTE: LAW AND PRACTICE NEED FURTHER STRENGTHENING

## Judicial System Monitoring Programme (JSMP)<sup>1</sup>

### 1. General Overview

Timor-Leste is a newly independent and democratic country in the 21<sup>st</sup> century. Its democracy is still in the process of development and consolidation. The principles of human rights and guarantees constitute over a quarter of the provisions of the Constitution.<sup>2</sup>

There have been free and fair national elections taking place. The second national election took place in 2012, where ex-general Taur Matan Ruak was elected as the head of State and the ex-resistance leader Kay Rala Xanana Gusmão became the Prime Minister, forming the 5<sup>th</sup> Constitutional Government. The government has taken some effort to build and strengthen all of the state institutions, including particularly the defence and security forces as part of its constitutional obligations.

Nominally, the national defence and security forces reported to civilian authorities but the authorities failed to maintain effective control over them. The defence and security forces have committed lots of human rights abuses for years during their establishment.<sup>3</sup>

The main human rights problems included police use of excessive force during arrest, abuse of authority, arbitrary arrest and detention, and an inefficient and understaffed judiciary system that deprived citizens of an expeditious and fair trial.<sup>4</sup>

As the Timor-Leste security force called *Polisia Nasionál Timor-Leste* (PNTL) has been involved in human rights abuses, the government in 2014 initiated a draft law on criminal investigation bodies, which defines and attributes competence to another body called Criminal Investigation Police (CIP).<sup>5</sup> This police body is independent from the PNTL structure. One of the legal competences of CIP is to investigate violations committed by authorities,

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<sup>2</sup> See Art. 20 to Art. 60 of the Constitution, [http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution\\_RDTL\\_ENG.pdf](http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution_RDTL_ENG.pdf)

<sup>3</sup> See Timor-Leste 2013 Human Rights Report, Country Reports on Human Rights Practices for 2013, United States Department of State, Bureau of Democracy, Human Rights and Labor, <http://www.state.gov/j/drl/rls/hrrpt/2013/eap/220237.htm>

<sup>4</sup> See Timor-Leste 2013 Human Rights Report, Country Reports on Human Rights Practices for 2013, United States Department of State, Bureau of Democracy, Human Rights and Labor, <http://www.state.gov/j/drl/rls/hrrpt/2013/eap/220237.htm>

<sup>5</sup> Proposal Law No. 11/III (2<sup>nd</sup>) on Organization of Criminal Investigation

including members and officials from the defence and security forces. This draft law is now in the hands of the National Parliament.

Other human rights problems included poor prison conditions, warrantless search and arrest, uneven access to civil and criminal justice, corruption, gender-based violence, violence against children including sexual assault, and trafficking in persons.<sup>6</sup>

The parliamentarians, NGOs, and the Office of the Ombudsman for Human Rights and Justice received complaints about the use of excessive force by security forces. Most complaints involved maltreatment, use of excessive force during incident response or arrest, threats made at gunpoint, and arbitrary arrest and detention.

The government took steps to prosecute members and officials of the security services who used excessive force or inappropriately treated detainees, but public perceptions of impunity persisted.

In June 2013, the Dili District Court sentenced a member of the PNTL to 16 years' imprisonment on charges related to the 2012 killing of a young man, allegedly without provocation, while responding to election-related unrest in Hera, near the capital.<sup>7</sup>

The Timor-Leste National Human Rights Institution, the Ombudsman of Human Rights and Justice (PDHJ) has received complaints and undergone investigations on human rights abuses committed by defence and security forces.

In 2014, in a joint operation called "Halibur" (or Gathering), the PNTL and the F-FDTL (military force) again committed human rights violations. In March 2014, the National Parliament approved Resolution No. 4/2014 to give the authority to the PNTL to disband all illegal organisations in the territory.<sup>8</sup> The basis of the resolution is the repudiation of attempts to instability and threats to the rule of law. Subsequently the government, based on the Decree-Law No. 2/2007<sup>9</sup> on special operations of criminal prevention, authorised the PNTL and F-FDTL to establish the *Halibur* joint operation to pursue the members of the organisations who refused to cooperate.

In April 2014, during the joint operation, the PNTL and F-FDTL arbitrarily detained innocent people and forced

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<sup>6</sup> Timor-Leste 2013 Human Rights Report, Country Reports on Human Rights Practices for 2013, United States Department of State, Bureau of Democracy, Human Rights and Labor, <http://www.state.gov/j/drl/rls/hrrpt/2013/eap/220237.htm>

<sup>7</sup> Timor-Leste 2013 Human Rights Report, Country Reports on Human Rights Practices for 2013, United States Department of State, Bureau of Democracy, Human Rights and Labor, <http://www.state.gov/j/drl/rls/hrrpt/2013/eap/220237.htm> & <http://www.easttimorlawandjusticebulletin.com/2014/03/usgov-timor-leste-country-reports-on.html>

<sup>8</sup> See <http://jornal.gov.tl/?q=node/1085>

<sup>9</sup> See <http://jornal.gov.tl/?q=node/1358>

them to dig for weapons and ammunitions, taken them to mountains and forests and forced and threatened them to expose the members of those organisations in hiding in the jungle. The women and children were more vulnerable to human rights violations during the operation. On 14 April 2014 in Selegua, Laga of Baucau District, the PNTL forced Mrs. Jacinta Gusmão and her son to dig a hole underneath her bed to find weapons and grenades but in fact, no concealed arms and ammunition were to be found.<sup>10</sup>

## 2. Independence

<b>Establishment of NHRI</b>	
Established by Law/Constitution/Presidential Decree	<p>The PDHJ was established based on legal provisions in the Constitution of the Democratic Republic of Timor-Leste (RDTL)<sup>11</sup> and Law No. 7/2004. The Constitution of RDTL only sets out general principles and guidelines in relation to a National Human Rights Institutions (NHRI). Law No. 7/2004 defines all of the specific details, processes and procedures of the PDHJ.</p> <p>In 2011, the Government established Decree Law No. 25/2011 on the organic framework and status of the PDHJ which establishes the rules necessary for the PDHJ to achieve its objectives as a specialised institution with technical services in the areas of human rights and good governance.</p>
Mandate	<p>Based on the provision of Article 27.3 of the Constitution; the Ombudsman shall be appointed by the National Parliament through absolute majority votes of its members for a term of office of four years and Article 19.1 of Law No. 7/2004; the Ombudsman for Human Rights and Justice (PDHJ) is elected for a term of four years and may be re-elected only once for the same period.<sup>12</sup> The Deputy Ombudsmen are also appointed by the Ombudsman for the same term and may be reappointed only once for an equal period.</p>
<b>Selection and appointment</b>	
	The selection process is defined in Law No. 7/2004, Article 12.1-5

<sup>10</sup> Celestino Gusmão Pereira, Researcher from La'o Hamutuk (LH), <http://www.laohamutuk.org/>

<sup>11</sup> See Art. 27 of the Constitution; [http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution\\_RDTL\\_ENG.pdf](http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution_RDTL_ENG.pdf)

<sup>12</sup> See Art. 19.1 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<p>Clear, transparent and participatory process in relevant legislation, regulations or binding administrative guidelines</p>	<p>and Article 16.1-6. The Ombudsman is appointed by the National Parliament with an absolute majority of votes.<sup>13</sup> The National Parliament publicly announces the candidacy of the Ombudsman for a period of one month.<sup>14</sup> The National Parliament will vote on all candidates; for one to be elected to the position of Ombudsman in a plenary session.<sup>15</sup> Then the Ombudsman him/herself will appoint two or more Deputy Ombudsmen.<sup>16</sup></p>
<p>Independent and credible body which involves open and fair consultation with NGOs and Civil Society</p>	<p>The body that is responsible for the selection process is the National Parliament based on the provision of Law No. 7/2004. The election for the new Ombudsman will be done after two months, counting from the date of the vacancy.<sup>17</sup></p>
<p>Is the assessment of applicants based on pre-determined, objective and publicly available criteria?</p>	<p>There are several criteria for the candidate for Ombudsman based on the provision of the Law No. 7/2004, Article 13.1-2 as follows:</p> <ol style="list-style-type: none"> <li>1. The Candidate for the Ombudsman of Human Rights and Justice shall have: <ul style="list-style-type: none"> <li>a) experience and qualifications to investigate and report on human rights violations, corruption, political influence and mismanagement; b) proven integrity; c) a solid knowledge of the principles of human rights, good governance and public administration.</li> </ul> </li> <li>2. The candidate for the Ombudsman for Human Rights and Justice should also be recognised for their position/role in the community, as well as their high level of independence and impartiality.</li> </ol>
<p>How diverse and representative is the decision making body? Is the pluralism</p>	<p>Diversity and pluralism is not reflected at the structural level of the Ombudsman and Deputy Ombudsmen. There are no women among</p>

<sup>13</sup> See 12.1 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>14</sup> See 12.3 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>15</sup> See 12.4 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>16</sup> See 16.1 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>17</sup> See 20.2 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

considered in the context of gender, ethnicity or minority status?	the Ombudsman and the two Deputy Ombudsman. At the level of head of office, women represent only 29% of the 24 chairs.
<b>Term of office</b>	
Term of appointment for members of the NHRI	<p>Based on the provision of the Law No. 7/2004, Article 19.1-6 the Ombudsman for Human Rights and Justice (PDHJ) is elected for a term of four years and may be re-elected only once for the same period.<sup>18</sup> The Deputy Ombudsmen are also appointed by the Ombudsman for the same term and may be reappointed only once for an equal period.</p> <p>The Ombudsman for Human Rights and Justice may be removed by two-thirds majority of the members of parliament in office when s/he,<sup>19</sup></p> <ul style="list-style-type: none"> <li>a) accepts or plays a role, function or activities incompatible with its mandate, in accordance with the provisions of Article 17;</li> <li>b) suffers from permanent mental or physical disability that prevents him/her from carrying out his/her functions, attested by a medical board, pursuant to Article 19 paragraph 6;</li> <li>c) is deemed incompetent;</li> <li>d) is convicted by final judgment, a criminal offence punishable by imprisonment of less than one year;</li> <li>e) is practicing acts or omissions inconsistent with the terms of his oath.</li> </ul> <p>One fifth of the active members of the parliament can submit the motion for dismissal of the Ombudsman. After receiving the motion for dismissal, the National Parliament will create a special commission of inquiry to investigate the subject matter of the motion for dismissal. The conclusions of the special commission of inquiry will be notified to the Ombudsman, in advance, and may be appealed before a Plenary session summoned to vote on impeachment. The conclusions of the special commission of inquiry will not be voted without Parliament having evaluated the appeal and heard the Ombudsman.<sup>20</sup></p>

<sup>18</sup> See 19.1 of the Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>19</sup> See 21.1 (a) to (e) of the Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>20</sup> See 21.2 to 5 of the Law No. 7/2004, <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

Next turn-over of members	The Ombudsman and his two deputies have been re-elected for a period of 4 years. Their terms ended in March 2014.
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## **Appointment or Selection process & Composition**

### Brief profile/background of members in the NHRI

The Ombudsman for Human Rights and Justice (PDHJ) has three (3) members: one Ombudsman and two Deputy Ombudsmen.<sup>21</sup>

#### Ombudsman

Dr. Sebastião Dias Ximenes took his Bachelor in Constitutional Law degree at the University of Brawijaya, East of Java, Indonesia in 1985. He took his Masters in Administrative Law degree at the University of Airlangga, East Surabaya, Indonesia in 2001. In May 2005, the National Parliament elected him as the Ombudsman for Human Rights and Justice (PDHJ) for a period of 4 years, starting from May 2005 until March 2009. The National Parliament extended his mandate for one year before re-election in April 2010 for the second term of 4 years which ended in March 2014. His mandate was extended again for several months pending the selection of a new candidate. Based on the provision of the Law No. 7/2004, Article 19.1 the Ombudsman can only be re-elected once and for the same term of 4 years.

Mr. Sebastião before assuming his role as Ombudsman, in 2002 to 2003 served as private practitioner, Consultant and Lecturer at the Faculty of Law of the Dili University (UNDIL) and in 2003 to 2004 served as Jurist and Rector of Dili University (UNDIL). In 1974, during Portuguese occupation he served in the public sector and continued as public administrator during the 24 years of Indonesian occupation until 1999.<sup>22</sup>

#### Deputy Ombudsman for the Area of Good Governance

Dr. Rui Pereira dos Santos took his Bachelor in Law degree at the Christian University of Satya Wacana, Salatiga, in Java, Indonesia in 1996. He worked as a lawyer for 3 years in the non-governmental human rights HAK Association, from 1997 to 2000. He was a Judge at Dili District Court from 2000 to 2005. He later served as Alternative Commissioner for the Commission of Truth and Friendship (CTF) from 2005 to 2008. He has also lectured at the University of Peace (UNPAZ), Dili, Timor-Leste. He was adviser to the Ministry of Economic Development between 2008 and 2010. In April 2010 the Ombudsman nominated him as the Deputy Ombudsman responsible for the Area of Good Governance for a period of 4 years, from 2010 to 2014.

<sup>21</sup> See PDHJ website, <http://pdhj.net/about/meet-the-ombudsman-and-deputies/>

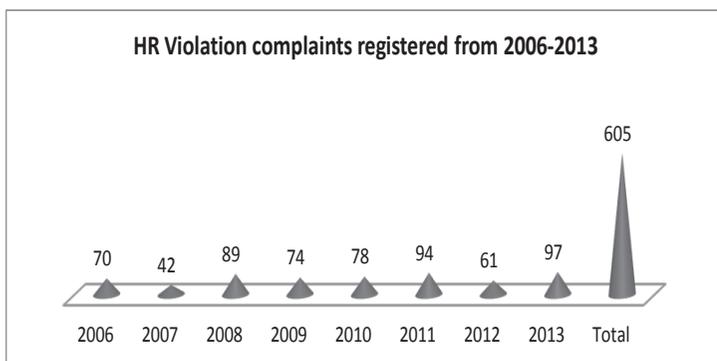
<sup>22</sup> See PDHJ website, <http://pdhj.net/about/meet-the-ombudsman-and-deputies/>

## Deputy Ombudsman for the Area of Human Rights

Dr. Silveiro Pinto Baptista took his Bachelor in Law degree at the University of Indonesia (UI), Jakarta, Indonesia. He worked as a human rights defender and Vice Director of the non-governmental HAK Association from 1998 to 2005. In 2005, the Ombudsman nominated him as Deputy Ombudsman responsible for the Area of Human Rights for a period of 4 years, from 2005 to 2009. The National Parliament extended his term in office together with that of the Ombudsman. In April 2010, he was re-appointed as the Deputy Ombudsman for period of 4 years, from 2010 to 2014.<sup>23</sup>

### **Public confidence and real perception of independence of the PDHJ**

Since the establishment of the PDHJ, there have been an increasing number of complaints registered at the office of the PDHJ. This statistic can prove the confidence of the public in the role and independence of the institution. One year later after its establishment, in 2006, the PDHJ received 250 complaints; out of which 70 cases were human rights violations. The graph below shows the number of human rights related cases registered every year between 2006 and 2013.<sup>24</sup>



### **Procedure for the filling of vacancies or appointment process**

The procedure for the filling of vacancies when the term of office of the Ombudsman expires is provided by Law No. 7/2004.<sup>25</sup> The National Parliament publicly solicits the candidacy for the Ombudsman of Human

<sup>23</sup> See website PDHJ; <http://pdhj.net/about/meet-the-ombudsman-and-deputies/>

<sup>24</sup> See the annual reports of the PDHJ from 2006-2013; <http://pdhj.net/media-publications/annual-reports-budgets/>

<sup>25</sup> See Art. 12.3 & 4 of the Law No. 7/2004;

Rights and Justice (PDHJ) within a period of one month counting from the date of the promulgation of this law or within one month counting from the date of the vacancy of the office.<sup>26</sup>

The vacancy or candidacy is opened to the public, so anyone can nominate his or herself and any organization or group can propose someone from their organization or group within the period of one month. There is no limitation on the number of candidates.

The National Parliament will in a plenary session review all candidates, voting on each one of them.<sup>27</sup> So it means that the candidate who gets the majority of votes will be designated as Ombudsman; and then the Ombudsman will nominate his/her deputies, which are two or more.<sup>28</sup> The deputies are nominated for a period of 4 years and can be re-nominated for one more period.<sup>29</sup> The mandate of deputies will expire as the mandate of the Ombudsman expires.<sup>30</sup> So the process is open, participatory, transparent and prompt.

In the case of vacuum of power or position different from the term of office or in the case of suspension of the Ombudsman of the Human Rights and Justice (PDHJ), in term of Article 22, the National Parliament will nominate as soon as possible and in a period of time to be determined, one of the Deputies as the Interim Ombudsman of the PDHJ.<sup>31</sup> The National Parliament will elect, in any circumstance, the new Ombudsman of the PDHJ within a period of two months counting from the date of the vacancy.<sup>32</sup>

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<http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>26</sup> See Art. 12.3 of Law No. 7/2004;

<http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>27</sup> See Art. 12.4 of Law No. 7/2004;

<http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>28</sup> See Art. 16.1 of Law No. 7/2004;

<http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>29</sup> See Art. 16.3 of Law No. 7/2004

<http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>30</sup> See Art. 16.4 of Law No. 7/2004

<http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>31</sup> See Art. 20.1 of Law No. 7/2004

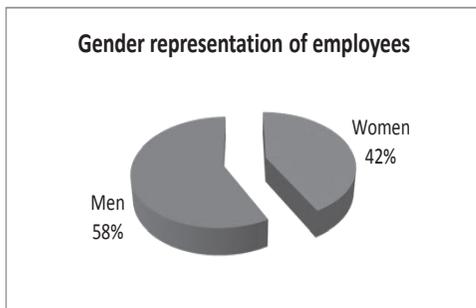
<http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>32</sup> See Art. 20.2 of Law No. 7/2004

<http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

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## Composition



The composition of the PDHJ is also specified in Law No. 7/2004, Article 9, which states that the Office of Ombudsman consists of the Ombudsman for Human Rights and Justice, the Deputy Ombudsmen, a Head of Office, Officers of Ombudsman and other employees as are necessary to provide the Ombudsman with the necessary technical and administrative support.

Total personnel in 2013 were 86 persons, and the number of vacancies was 13. In 2014, total personnel were 90 persons out of approved personnel of 103 persons. There are yet 13 persons to be recruited.<sup>33</sup>

The pluralistic representation, particularly gender balanced representation is only seen in the level of officers and employees. Women constitute 38 persons from the total of 90 persons or 42% of the total number of employees in 2014.

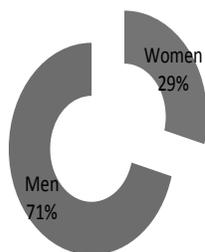
There are a number of women holding positions as the heads of the office divisions and departments. There is a woman who holds the position of National Director out of the four National Directors. One woman holds the position as District Director out of four District Directors; and five women hold the positions as Head of Department out of 16 Departments. This statistic shows that women hold 7 chairs from the total of 24 Head of Office Chairs, that is, almost 30 percent as of 2013/14.<sup>34</sup>

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<sup>33</sup> See report of PDHJ 2013, <http://pdhj.net/media-publications/annual-reports-budgets/>

<sup>34</sup> See report of PDHJ 2013, <http://pdhj.net/media-publications/annual-reports-budgets/>

### Gender Representation as the Head of Office



The pluralistic representation is not seen at the level of Ombudsman and Deputy Ombudsmen. None of the three are women. The Ombudsman and the Deputy Ombudsman for the area of good governance have had the same background as lawyers and academics. The two Deputy Ombudsmen have worked with the same human rights non-governmental organisation (NGO). The plurality of civil society working on human rights issues is unrepresented in the composition of the Ombudsman.

### Implementation of law

The provision of the Law No. 7/2004 clearly defines the procedure in the filling of vacancies, but in practice there have been delays. The first occasion was in 2009 where the filling of vacancies only started in 2010. The second occasion is this year (2014). There should have been announcement of the vacancy in March 2014 for the candidacy of the new Ombudsman. So the intervention of the National Parliament in the process of filling the vacancy is not effective and efficient. The National Parliament just started the vacancy announcement on 1 June 2014 for the candidacy of the new Ombudsman.<sup>35</sup>

The delay in the presentation of the PDHJ Annual Report to the National Parliament on 30 June every year based on the provision of Article 46.1 also puts in question the implementation of the law.

### Terms and conditions of office

The term of office of the Ombudsman is clearly defined in the provision of the Law No. 7/2004, Article 19 on the tenure. The provision states that the Ombudsman for Human Rights and Justice is elected for a term of four

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<sup>35</sup> See Timor-Leste Daily Journal Timor Post, dated 9 July 2014, p. 16; and Jornal Nacional Diário, dated 9 July 2014, p. 13

years and may be re-elected only once, and for the same period.<sup>36</sup>

The Ombudsman for Human Rights and Justice has been established for around nine years and there has been institutional progress during these years. Most of the challenges were lack of qualified human resources, as well as the budget to put in practice all of its programmes and services. Still, its existence for almost a decade should be adequate for the independence of its members and to ensure the continuity of its programs and services.

### Dismissal Process

Law No. 7/2004, Article 21.1-5 defines in detail the dismissal process for the Ombudsman of the PDHJ. The Ombudsman of the PDHJ can be dismissed by the majority (two-thirds) of the members of the parliament.<sup>37</sup> There are several grounds for the dismissal of the Ombudsman. The National Parliament can dismiss the Ombudsman if s/he:

- a) accepts or holds a position, role or activity that is incompatible with her/his mandate based on the provision of the Art. 17 on the incompatibilities due to the function;<sup>38</sup>
- b) suffers from permanent mental or physical disability that prevents him/her from carrying out his/her functions, attested by a medical board under no. 2 of the Article 19;<sup>39</sup>
- c) is deemed incompetent;<sup>40</sup>
- d) is convicted by final judgment for an offence punishable with imprisonment for not less than one year;<sup>41</sup>
- e) is committing acts or omissions inconsistent with the terms of his oath.<sup>42</sup>

To begin the dismissal process, the members of parliament should submit a motion to the National Parliament. The motion for dismissal of the Ombudsman for Human Rights and Justice must be supported by one-fifth of the parliamentarians.<sup>43</sup> Then the National Parliament will create a special commission of inquiry to consider and

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<sup>36</sup> See Art. 19.1 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>37</sup> See Art. 21.1 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>38</sup> See Art. 21.1 (a) of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>39</sup> See Art. 21.1 (b) of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>40</sup> See Art. 21.1 (c) of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>41</sup> See Art. 21.1 (d) of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>42</sup> See Art. 21.1 (e) of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>43</sup> See Art. 21.2 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

investigate the subject matter of the motion for dismissal.<sup>44</sup> The conclusions of the special commission of inquiry then shall be notified to the Ombudsman for Human Rights and Justice, with due notice, with right of appeal to the special Plenary session of the National Parliament.<sup>45</sup> The conclusions of the special commission of inquiry will not be voted without having heard the Ombudsman for Human Rights and Justice.<sup>46</sup>

### **Guarantee of privileges and functional immunities**

The Ombudsman for Human Rights and Justice has several privileges and functional immunities that are to be found in Law No. 7/2004, Article 18.

This provision states that the Ombudsman for Human Rights and Justice and the Deputy Ombudsman shall enjoy the rights, honours, precedence, category, salary and privileges of the Attorney General's Office and Deputy Prosecutor respectively.<sup>47</sup> The Ombudsman for Human Rights and Justice and the Deputy Ombudsmen shall not be liable (under civil or criminal law) for acts done or omitted or any reports or opinions given in good faith in the exercise of their functions.<sup>48</sup>

The Ombudsman and Deputy Ombudsmen have the same privileges and immunities as other state organs. These are important for them to freely exercise their functions in protection and promotion of human rights.

The National Parliament can revoke immunity in the case of offences committed in the course of the exercise of the Ombudsman's functions.<sup>49</sup> Before the National Parliament can do so, the Ombudsman for Human Rights and Justice is obliged to respond to the allegations of clear and serious violations under the law.<sup>50</sup> If the Ombudsman for Human Rights and Justice is found to have committed such offences outside the course of its duties, the National Parliament will refer that information to the Attorney General's Office for investigation and prosecution.<sup>51</sup>

The Ombudsman for Human Rights and Justice is also protected against censorship or any other kind of interference regarding their correspondence, material, and information sent, provided, obtained or compiled

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<sup>44</sup> See Art. 21.3 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>45</sup> See Art. 21.4 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>46</sup> See Art. 21.5 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>47</sup> See Art. 18.1 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>48</sup> Art. 18.2 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>49</sup> See Art. 18.4 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>50</sup> See Art. 18.3 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>51</sup> See Art. 18.5 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

(Art. 18.6). The facilities, archives, files, documents, communications, property, fund and assets of the Ombudsman for Human Rights and Justice are also protected or shall be inviolable, and no search, seizure, requisition, confiscation or any other form of interference.<sup>52</sup>

### **Staffing and recruitment**

Law No. 7/2004, Article 10 gives all competences to the Ombudsman for Human Rights and Justice relating to staffing and recruitment; in accordance with the Civil Service Act and other applicable provisions.

In the appointment and employment process, besides the qualifications, the issue of pluralism is considered such as the balance between men and women, between ethnic groups and religious representation.<sup>53</sup> This principle of pluralism should be also at the level of Ombudsman and Deputy Ombudsmen. Unfortunately, there is only one person to be elected as Ombudsman based on the nature or characteristic and legal provision for the Ombudsman.

So it is impossible to have pluralism in the level of Ombudsman, it can only happen at the level of the Deputy Ombudsman. However, hierarchically and instinctively, the Deputy Ombudsmen will submit to the decision of the Ombudsman because they are nominated by the Ombudsman and do not have any legitimacy compared with the Ombudsman. There are no checks and balances in the decision making process.

Employees of the Office of the Ombudsman shall act always in accordance with the law, have a duty of loyalty and are subjected to the direction of the Ombudsman for Human Rights and Justice.<sup>54</sup> This provision of the Law No. 7/2004 helps the PDHJ to avoid the influences of other state institutions and to be more independent and impartial in exercising their functions. The provision of Article 10.3 and Article 10.5 reinforce this provision by stating that all functions performed in the Ombudsman are incompatible with paid activities in a company or private body, as well as any activity in Public Administration under the Civil Service Act.<sup>55</sup> The personnel of the Ombudsman does not receive instructions from any other authority, unless it has been delegated the authorisation to do so by the Ombudsman for Human Rights and Justice.<sup>56</sup>

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<sup>52</sup> See Art. 19.7 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>53</sup> Art. 10.2 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>54</sup> See Art. 10.4 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>55</sup> See Art. 10.3 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>56</sup> See Art. 10.5 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

Based on the provisions on staffing and recruitment, there are no representatives from any ruling party or coalition or government or any secondment from government, to any of the positions in the PDHJ. This is one of the measures that minimise conflict of interest or inappropriate influence in decision making process.

### 3. Effectiveness

The PDHJ Annual Report 2013 unfortunately did not describe any specific cases and recommendations on the investigation results as described in the previous reports. In the section of human rights, the reports only described in general the number of complaints registered, the complaints under the mandate of the PDHJ and outside the mandate, cases considered as human rights violations, cases to be investigated and cases with final reports of the investigations.

In 2013, the Department of Human Rights Investigation of the PDHJ registered a total of 97 complaints. The Commission of Complaint Management (CCM) after the preliminary investigation decided the number of cases to be investigated which were 57 cases and the rest 40 cases were outside the mandate of the PDHJ. The results of the investigations have shown that the Timor-Leste National Police (PNTL) alone committed 28 cases, PNTL with the F-FDTL (military force) committed 2 cases, and PNTL with the local authority committed 6 cases. So the PNTL committed more than 50% of human rights violations in 2013.

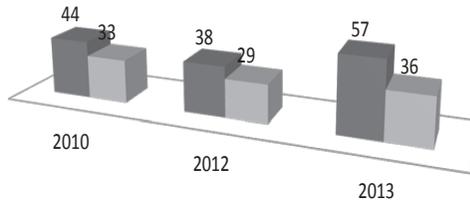
The PNTL every year commits lots of human rights violations of the same nature or type. The PDHJ, in almost all of its reports cites the trainings provided to PNTL on law enforcement and protection and promotion of human rights. The PDHJ also in each of its reports provides detailed and targeted recommendations to the Secretary of State of Security and the Head or Commanders of the PNTL. The question then arises as to why the PNTL therefore every year commits the same high number and types of human rights violations? This situation calls into question the effectiveness of the work of the PDHJ.

The National Police Force (PNTL) is the only state institution that commits most of the human rights violations during these years as shown at the graph below:<sup>57</sup>

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<sup>57</sup> See annual reports of the PDHJ of 2010 to 2013; <http://pdhj.net/media-publications/annual-reports-budgets/>

### Frequency of Human rights violations committed by PNTL



	2010	2012	2013
Allegation of HR violations	44	38	57
HRV committed by PNTL alone & with others	33	29	36

The PNTL committed around 60 percent to 76 percent of human rights violations of the total number of cases registered. Besides the PDHJ, the UN mission in Timor-Leste (UNMIT) also provided lots of capacity building, professional trainings and education on human rights to the PNTL during several years of its mandate. So it's necessary to find out what the roots of the problems and what are the solutions to be considered and taken to solve the problem.

In all of the reports of the PDHJ there was no information on the results of the follow-up of the recommendations taken and recommended to relevant and responsible institutions whether these institutions have taken any concrete actions to implement the recommendations or not. There was no information on how many recommendations have been followed and how many were not.<sup>58</sup>

Based on the provision of the Law No. 7/2004, Article 40 on recommendations, the PDHJ within 60 days should be informed about the measures taken to comply by the institutions to which the recommendations are directed. When those institutions within 60 days do not inform about the measures taken to comply with the recommendation, the PDHJ should report it to the National Parliament in its annual report or in any specific report depending on the cases or situations.<sup>59</sup>

The PDHJ has all of its legal procedures and power to force those state institutions or organs that commit human rights violations to implement its recommendations, but it does not do so.<sup>60</sup> At the end, the recommendations

<sup>58</sup> See annual reports of the PDHJ, <http://pdhj.net/media-publications/annual-reports-budgets>

<sup>59</sup> See Art. 40.4 & Art. 46.5 of Law No. 7/2004, <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>60</sup> See Art. 23 to Art. 28 of Law No. 7/2004, <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

made every year bring no change to human rights violations committed by state institutions, particularly the PNTL.

## **Quality and timeliness of actions or interventions by NHRI**

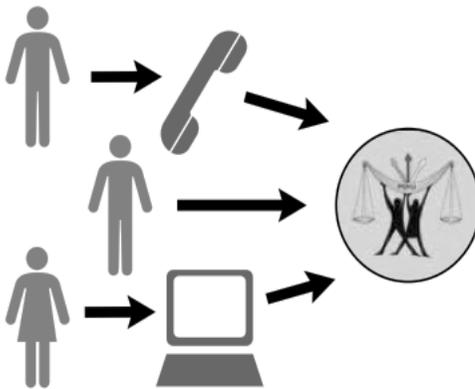
### Complaints handling process

In 2014, the PDHJ with the support of the United Nations Development Programme (UNDP) developed a new website with lots of useful information. The information included the methods of making complaint, online complaint, complaint handling, reporting on complaint, case map, and access to justice for vulnerable groups.

### Methods of making complaint

The PDHJ has several methods that public can use to make their complaints. These methods are the online complaint, phone call, mobile service, direct visit to central office in Dili and regional offices in Baucau, Maliana, Same and Oecusse and another method that is available in all 13 districts is designated boxes located at the office of the District Administration.<sup>61</sup>

### **Illustration of method of making complaint<sup>62</sup>**



### Online complaint

There are two ways to make online complaint. The complainant can either use the online complaint form to make the complaint or simply make complaint via e-mail that is available also on the website.<sup>63</sup>

<sup>61</sup> See the website of the PDHJ, <http://pdhj.net/case-handling/make-a-complaint-online/>

<sup>62</sup> See <http://pdhj.net/case-handling/make-a-complaint-online/>

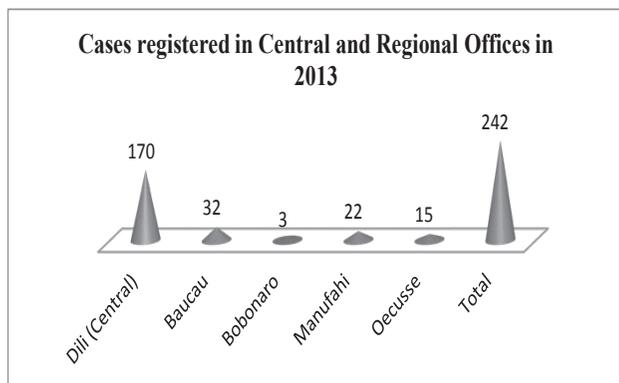
This method seems to be not very effective as there presently there are only a small number of people with access to the internet and the knowledge of how to use it. In future, this method can be useful as more people enjoy access to the internet and use it to make their complaints.

### Phone call

Unfortunately, the 2013 annual report of the PDHJ is not detail as the 2012 annual report. In the 2012 annual report there was complete information on the number of complaints registered through the established mechanism or methods, so that the general public knows how effective those methods are. In 2012 annual report, the number of complaint made through phone call was one and it's in the same number in the 2013 annual report<sup>64</sup>.

### Making complaint directly to the offices of the PDHJ

The PDHJ has established its offices in Dili and in the centre of four regions; Baucau, Maliana (Bobonaro), Same (Manufahi) and Oecusse.



These offices will directly receive and handle the complaints. In the 2013 annual report, the PDHJ described in detail about the number of complaints registered in each of the office.<sup>65</sup>

### Complaint mobile service

The total of complaints registered through mobile service in 2012 annual report was 1 and it increased to 9 in 2013 annual report. In 2013, the PDHJ conducted mobile service in 7 districts, 23 sub-districts, 24 villages (Suku).<sup>66</sup>

The mobile service method could be more effective if the PDHJ conducts this activity in the sub-district level rather than village level. In the sub-district level, the activity can cover all of the villages of each sub-district

<sup>63</sup> See the website of the PDHJ, p. 95, <http://pdhj.net/case-handling/make-a-complaint-online/>

<sup>64</sup> See the 2013 report on Human Rights on pp. 93-94, <http://pdhj.net/media-publications/annual-reports-budgets/>

<sup>65</sup> See the 2013 report on Human Rights on pp. 48-50, <http://pdhj.net/media-publications/annual-reports-budgets/>

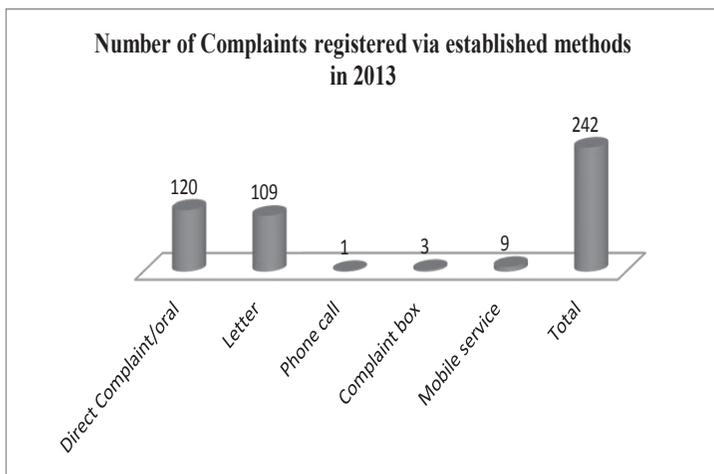
<sup>66</sup> See the 2013 Annual Report, pp. 97-98, <http://pdhj.net/media-publications/annual-reports-budgets/>

through inviting the village leaders and some of the members the village structures or representatives from the communities to participate. The representatives of each village can present their concerns or any complaints regarding any violations committed by any State authorities or institutions. Through this way, the PDHJ could have conducted mobile service to 163 villages of the 23 sub-districts, around 37% from the total of 442 villages.<sup>67</sup> The number of the complaints could be more than 9.

### Complaint boxes

The PDHJ has established complaints handling through providing complaint boxes localised at the office of the District Administration in 13 districts to receive complaint.<sup>68</sup> Even though the PDHJ has established complaint boxes in all 13 districts but the number of complaints was only 3 for a whole year.<sup>69</sup> Based on the data of the PDHJ, 109 complaints or 45% of the complaints were in letters and why the complainants did not use the complaint boxes to submit their complaints? There are probably several reasons that can be taken into account. The first reason could be limited information to public on the complaint boxes and the second reason could be the public have lack of the feeling confidence and security to this method. It would be good for the PDHJ to evaluate this method to know the reason why public do not use it effectively.

The graph below clearly show how effective was each of the established and used methods of the PDHJ in 2013.



### Complaint handling process

<sup>67</sup> See list of district, sub-district and villages of Timor-Leste in Wikipedia,

[http://pt.wikipedia.org/wiki/Anexo:Lista\\_de\\_sucos\\_de\\_Timor-Leste#Distrito\\_Oecusse](http://pt.wikipedia.org/wiki/Anexo:Lista_de_sucos_de_Timor-Leste#Distrito_Oecusse)

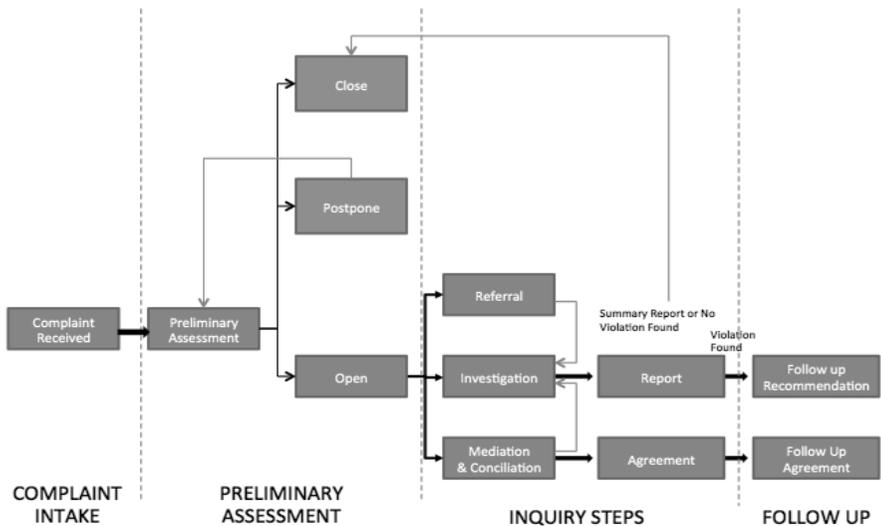
<sup>68</sup> See the website of the PDHJ, <http://pdhj.net/case-handling/make-a-complaint-online/>

<sup>69</sup> See the 2013 Annual Report, p. 94, <http://pdhj.net/media-publications/annual-reports-budgets/>

The PDHJ has described in its website about the complaint handling process. The process is as follows:<sup>70</sup>

- Complaint received by the Ombudsmen
- Preliminary assessment
- Case is either dismissed, opened for full investigation or postponed
- Open cases then go into a process involving mediation/conciliation, investigation and/or referral
- Mediation/Conciliation can lead to a negotiated agreement and follow-up to that agreement or it can break down and result in the need for an investigation
- Investigations lead to a report and then follow-up to the report findings and recommendations for public authorities involved
- Cases are closed when all actions and follow-up are completed.

The organogram of the complaints handling procedure is presented below:



The provision of the Law No. 7/2004, Article 45 on the final report of the investigation has clearly defined the procedure of publishing the final report of the investigation. The provision cites that the PDHJ transmits to the complainant and the person or entity called into question after the conclusion of any investigation, a draft report

<sup>70</sup> See the website of the PDHJ on complaints handling, <http://pdhj.net/case-handling/complaints-process/>

containing the results of its investigation and its assessment, conclusions and recommendations before publication.<sup>71</sup> The litigants submit comments within 15 days from the date of receipt of the draft report.<sup>72</sup> And then, the PDHJ can publish the results of the investigation and opinions, conclusions and recommendations.<sup>73</sup>

The PDHJ should not keep in secret the results of the final report on the investigations, opinions, conclusions and specific recommendations based on specific cases of human rights violations; only the individual right to privacy can be protected.<sup>74</sup>

### **Complaint investigation**

The provision of the Article 28 of the Law No. 7/2004 has clearly defined all of the competences of the PDHJ in complaint investigation. The law empowers the PDHJ with these following competences to:

- a) receive complaints;
- b) investigate and inquire about matters within its competence;
- c) Allow or disallow the complaints submitted to it under paragraph 3 of Article 37;
- d) Summon or call any person to appear before himself or another location that is deemed most appropriate, if it considers that it may have relevant information for a investigation started or start;
- e) enter any premises, sites, equipment, documents, goods or information and inspect them and interrogate any person in any way related to the complaint;
- f) visit and inspect the conditions of any place of detention, treatment or care and conduct confidential interviews with detainees;
- g) forward complaints to the competent court or other mechanism of action;
- h) request permission from the National Parliament to appear before a court, administrative tribunal or commission of inquiry;
- i) mediate or reconcile the complainant and the agency or entity subject of the complaint, when they agree to undergo such a process;
- j) recommend solutions to complaints submitted to it, including proposing remedies and reparations;
- k) advise and give opinions, proposals and recommendations to improve compliance human rights and good governance by the entities within its area of jurisdiction;
- l) report to the National Parliament the findings of its investigations and its recommendations.

The PDHJ, besides the legal powers that it has in complaints investigation, also has limitation those powers. Article 29 of the Law No. 7/2004 defines the limitations as follows

The PDHJ may not:

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<sup>71</sup> See Art. 45.1 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>72</sup> Art. 45.2 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>73</sup> See Art. 45.3 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>74</sup> See Art. 31.2 of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

- a) make decisions that violate human rights or fundamental freedoms;
- b) ignore, revoke or modify decisions of the bodies or entities jeopardized nor compensate the injured;
- c) investigate the exercise of judicial functions or challenge decisions of the courts;
- d) investigate the exercise of legislative functions, except through the means of review of constitutionality under Articles 150 and 151 of the Constitution.;
- e) investigate matters that are pending before a court.

According to its annual reports, the PDHJ has conducted investigations on complaints registered which were under its mandate. There have been recommendations made and directed to institutions responsible for violations committed. The PDHJ also referred the cases considered under the mandate of the Public Prosecutor for further investigations and accusation to court as it has limitation to do intervention in judicial process.<sup>75</sup> The PDHJ has only legal power to recommend or propose remedies and reparations to victims of human rights violations.<sup>76</sup>

There has been a department established within the PDHJ with the task to follow-up on recommendations to ensure compliance. However, in the annual report of the PDHJ there is no information on this department, nor the results of its work. Unfortunately, in the reports, there was no information on the recommendations that had been complied and which institutions had taken the measures to comply with the recommendations. Nor was there information on the recommendations that had been rejected and which institutions rejected compliance.<sup>77</sup>

In the reports also, there was no information on the total number of pending and under investigation cases. The statistics have shown that there has been an overflowing of complaints and the number of complaints concluded investigations with final report is very low compared to the number of pending complaints or under investigation.

The following graph aims to show the rough estimation of number of human rights violations registered, concluded investigation and pending or under investigation. This estimation did not include the statistic from the year of 2005, 2006 and 2011 because there was no information available. The graph shows that in the 6 years analysed, the PDHJ only concluded investigations in 44 cases of human rights violations from a total of 344. This is not including investigations completed on the pending cases of the previous years.<sup>78</sup>

These statistics reveal that the PDHJ has found difficulty to focus on the new cases registered in the reporting year, because there have been lots of pending cases from the previous years. The PDHJ should have included all of the information on these issues in its reports with all of its limitations and obstacles. The inadequacies of the complaints handling process of the PDHJ might come from limitations of the professional and qualified human resources in the department of investigation. These limitations might be caused by budgetary constraints, leading to lack of investment in human resources. Or, this shortcoming could be due to difficulties in the investigative process, such as establishing the true facts, the evidentiary burden etc. The PDHJ did not disclose or put this information in its annual

<sup>75</sup> See the 2013 Annual Report, pp. 48-50, <http://pdhj.net/media-publications/annual-reports-budgets/>

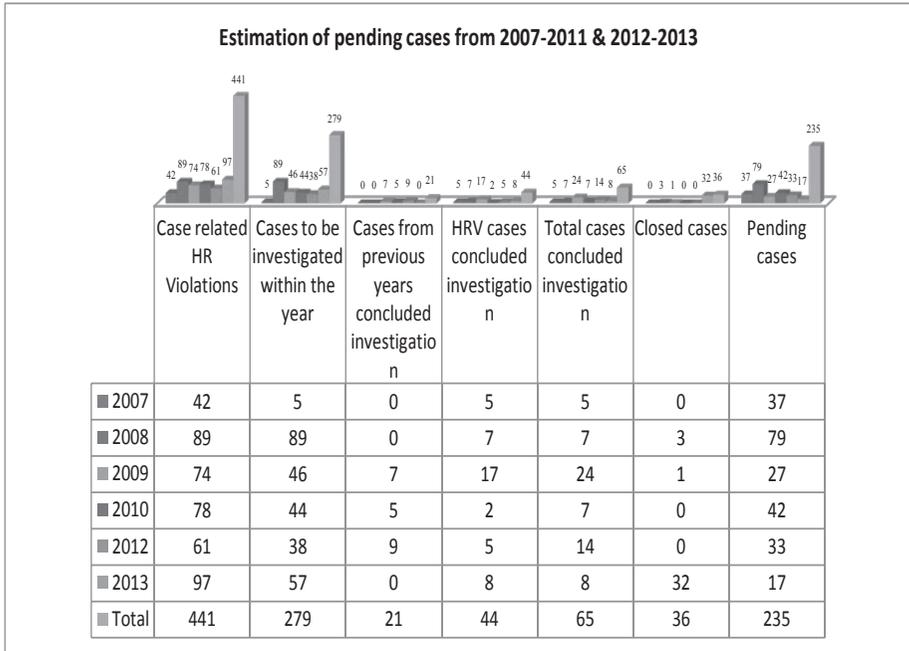
<sup>76</sup> See Art. 28 (j) of Law No. 7/2004, <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>77</sup> See the 2013 Annual Report, pp. 48-50, <http://pdhj.net/media-publications/annual-reports-budgets/>

<sup>78</sup> See the Annual Reports from 2007-2013, <http://pdhj.net/media-publications/annual-reports-budgets/>

report so that public can have access to it.

The graph below shows the total estimation of the pending cases from the 2007-2011 & 2012-2013.



#### 4. Engagement with other stakeholders

According to the reports of the PDHJ, there is cooperation established between civil society and the PDHJ, and at the national and local level. The cooperation at the national level is mostly through coordination of activities with the non-governmental organisations that work on human rights and justice issues.

In 2013, the PDHJ cooperated with the Association of *Chega Ba Ita* (ACbit) or ‘Enough To Us’, and Asia Justice and Right (AJAR), to organise a national dialogue among representatives of women from the 13 districts in Dili. The topic of the dialogue was on “how to assure the rights of all of women in Timor-Leste, particularly the vulnerable women”. The PDHJ together with the NGOs organise this dialogue annually to celebrate International Women’s Day on every 8th of March.<sup>79</sup>

<sup>79</sup> See the 2013 Annual Report of the PDHJ, p. 112, <http://pdhj.net/media-publications/annual-reports-budgets>

The PDHJ in 2013, besides cooperating with the NGOs, local authorities, and district police, also continued its cooperation with some Ministries of the government. The cooperation was in the area of capacity building or training, particularly on good governance and human rights protection and promotion. The PDHJ also continued to establish good cooperation with the Public Prosecutor, the Commission of Anti-Corruption, PNTL, and other relevant institutions.<sup>80</sup>

The PDHJ also cooperated with local authorities and local police in term of education and sharing information on human rights issues. The PDHJ has established a department for education and human rights promotion. The PDHJ besides provided trainings to PNTL, it also provided trainings to community leaders on human rights.

## **Parliament**

The PDHJ is obliged by law to submit its annual report on 30 June every year.<sup>81</sup> There is a plenary session in the National Parliament for the presentation of the report and discussion on the report itself.

There should be deep discussion on the recommendations of the PDHJ, particularly on the compliance of the recommendations. The PDHJ could have made use of this mechanism to make its recommendations more effective in bringing changes to the institutions that often commit human rights violations.

For example, the PNTL since the beginning has committed lots of human rights violations and the PDHJ has made a number of recommendations, but the number of human rights violations committed remains the same. The PDHJ unfortunately did not include in its report the institutions that have taken measures to comply with the recommendations. What are the measures that have been taken and what are the changes happening in those institutions. Are those measures effective or not, and what are the institutions that refused to take measures. If there is any institution rejecting compliance with the recommendations, the PDHJ should inform or communicate it to the National Parliament through its annual report or a specific report.<sup>82</sup>

In its reports, there has been no information on the cooperation between the National Parliament and the PDHJ to discuss and ensure that the recommendations were properly considered and implemented by the relevant institutions or authorities.

The PDHJ is also obliged to send a financial report to the National Parliament on the execution of the budget approved by the National Parliament.<sup>83</sup> In every fiscal year, the PDHJ also presents its budget proposal to the National Parliament for the parliament to discuss and approve it.

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<sup>80</sup> See the 2013 Annual Report of the PDHJ, pp. 112 & 113, <http://pdhj.net/media-publications/annual-reports-budgets>

<sup>81</sup> See Art. 46.1 of Law No. 7/2004, <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>82</sup> Art. 47.4 of Law No. 7/2004, <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>83</sup> Art. 11.6 of Law No. 7/2004, <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

In term of the participation of the PDHJ in the legislative process, in previous years, the PDHJ did not disclose information on this in its annual report. In 2013, there was a very important draft law on Land Law prepared by the Government. This new draft law gives too much power to state and big companies to take lands from people which at the end will bring lots of human rights violations. There was no information on the involvement of the PDHJ written in the report about its participation to the process of drafting that law to ensure the protection of human rights.

## Judiciary

The provision of the Law No. 7/2004 has clearly defined the scope and limitations of the competence of the PDHJ in the execution of its mandate. The PDHJ can only investigate and inquire about matters within its competence.<sup>84</sup> The complaints that are outside its mandate will be forwarded to other competent agencies to do the investigation and inquiries.<sup>85</sup>

The law also restricts the presence of the PDHJ before a court, administrative tribunal or commission of inquires through requesting permission from the National Parliament.<sup>86</sup> So the PDHJ can only appear before a court or a commission of inquires if the National Parliament agrees to do so.

The competence of the PDHJ is limited by law to not investigate the exercise of judicial functions or challenge decisions of the courts<sup>87</sup> or investigate matters that are pending before a court.<sup>88</sup> The PDHJ can only give advice and opinions, proposals and recommendations aimed at improving respect for human rights and good governance by the entities within its area of jurisdiction.<sup>89</sup> In terms of mediation and reconciliation, the PDHJ can mediate or reconcile the complainant and the organ or entity subject of the complaint, when they agree to undergo such a process.<sup>90</sup> And the PDHJ can recommend solutions to complaints submitted to it and under its mandate, such as proposing remedies and reparations.<sup>91</sup> The PDHJ cannot go further in the cases under the mandate of the court, and even the statement made in the course of an investigation conducted by the PDHJ or any proceedings pending before this investigation will not consider admissible as evidence in court,

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<sup>84</sup> See Art. 28 (b) of Law No. 7/2004, <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>85</sup> See Art. 28 (g) of Law No. 7/2004, <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>86</sup> See Art. 28 (h) of Law No. 7/2004, <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>87</sup> See Art. 29 (c) of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>88</sup> See Art. 29 (e) of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>89</sup> See Art. 28 (i) of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>90</sup> See Art. 28 (j) of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>91</sup> See Art. 28 (j) of Law No. 7/2004; <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

investigation or other procedure cannot be used against the person who uttered it.<sup>92</sup>

The only entity that has direct link with court on the legal issue is the Public Prosecutor. So all the issues related to judicial investigation and prosecution, the PDHJ will be forwarded to the Public Prosecutor to do investigation and accusation to court. The PDHJ forwards the complaints under jurisdiction of the Public Prosecutor after the preliminary evaluation of the complaints and also after the final investigations, only for the cases that are needed to be taken to court for the judicial prosecution.

### **International Human Rights Mechanism**

Timor-Leste joined the United Nations in 2002 and since then ratified seven of the nine core human rights treaties. The PDHJ is responsible for making presentations before members of the treaty bodies and the UPR process and contributes regularly to regional and international human rights forum. In July 2009, the PDHJ presented a report to the CEDAW Committee in New York on the issue of discrimination against women in Timor-Leste.<sup>93</sup>

During the UPR process in 2011, the PDHJ worked with civil society organisations to develop a joint report, intervened directly in the UPR session and devised and implemented an advocacy campaign with diplomatic representations in Geneva.

In 2012, the PDHJ spearheaded a new procedure at the Human Rights Council by making statements via video. This cost effective intervention measure could be an accessible mechanism for the PDHJ to utilise to advocate for sexual orientation or gender identity rights, including killings, torture, rape, criminal sanctions, and other forms of violence and discrimination. In 2013, the PDHJ submitted a request for a delay to the second UPR session in 2013.

Besides the international mechanisms, the PDHJ also uses regional mechanisms such as the Network of the National Commissions on Human Rights and Ombudsmen of Justice (NNCHROJ) of the CPLP (the Community of the Portuguese Speaking Countries) and the South East Asian National Human Rights Institutions Forum (SEANF).

In 2013, the PDHJ acted as the president of the SEANF and hosted a Technical Working Group meeting and also SEANF annual meeting in Timor-Leste to discuss the issues of human rights in South East Asia. In 2013, the PDHJ together with other members of the CPLP signed a joint declaration in Lisbon on the constitution of the Network of the National Human Right Commissions, Ombudsmen of Justice and other human rights institution in CPLP. The objective of this network is to protect and promote human rights in the CPLP.

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<sup>92</sup> See Art. 39 of Law No. 7/2004, <http://www.asiapacificforum.net/members/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf/view> and the Portuguese version is here: <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>93</sup> See the PDHJ-CEDAW report here: <http://pdhj.net/wp-content/uploads/2013/11/PDHJ-CEDAW-report-25-July-2009.pdf>

## 5. Thematic Issues

### 5.1 Protection of HRDs/WHRDs and shrinking Civil Society Space

The Constitution has reviewed and defined all of the fundamental principles and rights such as the freedom of expression,<sup>94</sup> association and peaceful assembly.<sup>95</sup> The State is obliged to create conditions to protect and promote these fundamental rights.

The State has produced policies and laws to assure the implementation of these Constitutional obligations. The State to guarantee the freedom of association has produced the law on the Nonprofit Corporations; the Decree Law No. 5/2005<sup>96</sup> to regulate the Civil Society Organisations and the law on Political Party; the Law No. 3/2004<sup>97</sup> to regulate the political parties. The State has produced the law on Freedom of Assembly and Manifestation; the Law No. 1/2006<sup>98</sup> and the law on Strike; the Law No. 5/2012<sup>99</sup> to guarantee the freedom of assembly, manifestation and expression.

As a member of the United Nations, Timor-Leste is bound and obliged to respect and put in practice the UN Guiding Principles on Business and Human Rights<sup>100</sup> and also the seven core human rights conventions ratified.<sup>101</sup> As a member of the international community, Timor-Leste is also bound and obliged to implement the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.<sup>102</sup>

The Law No. 7/2004<sup>103</sup> has given the PDHJ the power to oversight and to make recommendations on any violations of human rights committed by any State institution on the implementation of these legal frameworks on the protection and promotion of human rights.<sup>104</sup> As a member of the Asia Pacific Forum (APF), the PDHJ is obliged to implement the recommendations of the Advisory Council of Jurists (ACJ)<sup>105</sup>.

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<sup>94</sup> See Art. 40 & Art. 41 of the Constitution on the Freedom of Speech and Information and the Freedom of Press and Mass Media, [http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution\\_RDTL\\_ENG.pdf](http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution_RDTL_ENG.pdf)

<sup>95</sup> See Art. 42 & Art. 43 of the Constitution on the Freedom of Assembly and Manifestation and the Freedom of Association, [http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution\\_RDTL\\_ENG.pdf](http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution_RDTL_ENG.pdf)

<sup>96</sup> See <http://jornal.gov.tl/?mod=artigo&id=892>

<sup>97</sup> See <http://jornal.gov.tl/?mod=artigo&id=120>

<sup>98</sup> See <http://jornal.gov.tl/?mod=artigo&id=167>

<sup>99</sup> See <http://jornal.gov.tl/?mod=artigo&id=3924>

<sup>100</sup> See [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

<sup>101</sup> See [http://en.wikipedia.org/wiki/Human\\_rights\\_in\\_East\\_Timor](http://en.wikipedia.org/wiki/Human_rights_in_East_Timor)

<sup>102</sup> See [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm)

<sup>103</sup> See <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>104</sup> See Art. 24 of the Law No. 7/2004 on the Oversight and Recommendation, <http://jornal.gov.tl/?mod=artigo&id=124>

<sup>105</sup> See <http://www.asiapacificforum.net/support/issues/acj/references>

The PDHJ has been trying to fulfil some of its constitutional and legal obligations through establishing complaint mechanisms as described previously,<sup>106</sup> appointing focal points in the districts and conducting trainings, seminars and visits to prisons.

The trainings that the PDHJ conducted were to PNTL, public employers, community leaders and students.<sup>107</sup> There were no programs, protection mechanisms and trainings undertaken to respond to the needs of the human rights defenders mentioned in the reports.

The PDHJ conducted twice monthly regular visit to prisons, including emergency visits. One of the objectives of the visit is to prevent and monitor human rights violations in the prisons. Second objective is to how the prisoners get access to lawyers or public defenders' services.<sup>108</sup> Even though the PDHJ has been conducting regular visits to prisons, but there are still prisoners who do not have any information on their cases and its process because many of them have never meet their Defenders or Lawyers. And those who are waiting for pre-trial detention which is according to Timor-Leste Penal Procedure Code<sup>109</sup> could wait up-to three years in detention centres for the final decision of the court do not have the right to access to various trainings provided by the State.<sup>110</sup> It's considered as a kind of human rights violations and discrimination practiced by the State. The PDHJ could have taken any action regarding this issue to address and prevent the violations to happen again in future.

## 5.2 Implementation of Advisory Council of Jurist (ACJ) References

There are nine issues that the ACJ has provided reports and references that the NHRIs can use for their advocacy on the protection and promotion of human rights. These issues are the sexual orientation and gender identity, corporate accountability, right to environment, right to education, torture, terrorism and the rule of law, trafficking, death penalty and child pornography.<sup>111</sup>

There have been provisions in the Timor-Leste Constitution on the sexual orientation and gender equality,<sup>112</sup>

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<sup>106</sup> See <http://pdhj.net/case-handling/>

<sup>107</sup> See the 2013 Annual Report of the PDHJ; P4 to P12;  
<http://pdhj.net/media-publications/annual-reports-budgets>  
<http://pdhj.net/education-promotion/>

<sup>108</sup> See the 2013 Annual Report of the PDHJ; P47 & P48;  
<http://pdhj.net/media-publications/annual-reports-budgets>

<sup>109</sup> See Art. 195 (c) of the Penal Procedure Code; P68 for the Portuguese version & P65 for the Tetun version.

<sup>110</sup> See the summary of the human rights report of the HAK Association of the month of August to October 2013; P7  
[http://www.haktl.org/wp-content/uploads/2014/05/human\\_rights\\_reeport\\_10\\_dez\\_2013.pdf](http://www.haktl.org/wp-content/uploads/2014/05/human_rights_reeport_10_dez_2013.pdf)

<sup>111</sup> See <http://www.asiapacificforum.net/support/issues/acj/references>

<sup>112</sup> See Art. 17 of the Constitution; P16 in the electronic version & P17 in the printed version;  
[http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution\\_RDTL\\_ENG.pdf](http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution_RDTL_ENG.pdf)

child pornography (child protection),<sup>113</sup> education and culture (right to education),<sup>114</sup> environment (right to environment),<sup>115</sup> right to life (death penalty),<sup>116</sup> right to personal freedom, security and integrity (torture),<sup>117</sup> etc.

In 2009, the National Parliament (PN) produced the Penal Code which included provisions on terrorism,<sup>118</sup> trafficking,<sup>119</sup> child pornography,<sup>120</sup> and torture.<sup>121</sup> In 2010, the PN produced Law No. 7/2010 on domestic violence with the objective to promote gender equality in term of access to justice.<sup>122</sup> Then, in 2011 the PN produced Law No. 17/2011 on Prevention and Combating of Money Laundering<sup>123</sup> and the Financing of Terrorism. The government in 2011 produced Decree Law No. 5/2011 on Environment Licensing<sup>124</sup> and in 2012 produced Decree Law No. 26/2012 on Environment,<sup>125</sup> then the PN produced Law No. 3/2012 on legislative authorisation on the environmental matter to approve the Basic Law of Environment with the objective to protect the environment and assure the right of people to a clean and healthy environment.<sup>126</sup>

The signing and ratification of the seven core human rights conventions by Timor-Leste is just to reinforce and complete the existing national legal frameworks. The State is nationally and internationally bound and obliged these legal frameworks to do all necessary means to address all of the issues related to the protection and promotion of human rights, particularly the issues constituted in the references of the ACJ.

The PDHJ is constitutionally and legally mandated and given the competences to promote human rights and protect and prevent citizen's human rights against the violations by the State. All of these legal frameworks are the powerful means that the PDHJ can use, including the ACJ References to assure the State to fully protect and promote human rights.

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<sup>113</sup> See Art. 18 of the Constitution, p. 6 in the electronic version & p. 17 in the printed version, [http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution\\_RDTL\\_ENG.pdf](http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution_RDTL_ENG.pdf)

<sup>114</sup> See Art. 59 of the Constitution, pp. 27 & 28 in the electronic version & p. 28 in the printed version, [http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution\\_RDTL\\_ENG.pdf](http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution_RDTL_ENG.pdf)

<sup>115</sup> See Art. 61 of the Constitution; p. 28 in the electronic version & pp. 28 & 29 in the printed version, [http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution\\_RDTL\\_ENG.pdf](http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution_RDTL_ENG.pdf)

<sup>116</sup> See Art. 29 of the Constitution, p. 19 in the electronic version & p. 20 in the printed version, [http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution\\_RDTL\\_ENG.pdf](http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution_RDTL_ENG.pdf)

<sup>117</sup> See Art. 30 of the Constitution, pp. 19 & 20 in the electronic version & p. 20 in the printed version, [http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution\\_RDTL\\_ENG.pdf](http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution_RDTL_ENG.pdf)

<sup>118</sup> See Art. 132 of the Penal Code, [http://cac.tl/wp-content/uploads/2011/11/Penal-Code\\_RDTL.pdf](http://cac.tl/wp-content/uploads/2011/11/Penal-Code_RDTL.pdf)

<sup>119</sup> See Art. 163 & 165 of the Penal Code, [http://cac.tl/wp-content/uploads/2011/11/Penal-Code\\_RDTL.pdf](http://cac.tl/wp-content/uploads/2011/11/Penal-Code_RDTL.pdf)

<sup>120</sup> See Art. 176 of the Penal Code, [http://cac.tl/wp-content/uploads/2011/11/Penal-Code\\_RDTL.pdf](http://cac.tl/wp-content/uploads/2011/11/Penal-Code_RDTL.pdf)

<sup>121</sup> See Art. 167 of the Penal Code, [http://cac.tl/wp-content/uploads/2011/11/Penal-Code\\_RDTL.pdf](http://cac.tl/wp-content/uploads/2011/11/Penal-Code_RDTL.pdf)

<sup>122</sup> See <http://www.jornal.gov.tl/lawsTL/RDTL-Law/RDTL-Laws/Law%207-2010.pdf>

<sup>123</sup> See <http://www.jornal.gov.tl/lawsTL/RDTL-Law/RDTL-Laws/Law%2017-2011%20.pdf>

<sup>124</sup> See <http://www.laohamutuk.org/Agri/EnvLaw/DL5-2011En.pdf>

<sup>125</sup> See <http://www.laohamutuk.org/Agri/EnvLaw/2012/DL26EnvBasicLaw4Jul2012en.pdf>

<sup>126</sup> See <http://www.laohamutuk.org/Agri/EnvLaw/2012/DL26EnvBasicLaw4Jul2012en.pdf>

In term of the fulfilment of the ACJ References by the PDHJ, unfortunately there was no any specific information written in the 2013 report<sup>127</sup> and the PDHJ also did not fully cooperate to provide information on the issue through the questionnaire sent by the ANNI secretariat in preparation for this report.

## **6. Conclusion and Recommendations**

The human rights situation in Timor-Leste in 2013 until 2014 remains good even though there have been human rights violations continuously committed by PNTL and F-FDTL and other state institutions.

The PDHJ has actively monitored the issues of human rights violations. There has been increasing number of human rights violations registered in 2013 and as well as increase in the number of pending cases. The limitations of qualified human resources in the area of investigation is a serious issue for consideration, as well as the budgetary constraints

The PDHJ has established a standard complaint mechanism and complaint handling procedure. There is already a online complaint in the new website of the PDHJ and other information on making a complaint. There has been lots of information on the role of the PDHJ, the international Treaty-bodies and others in several languages: Tetum, Portuguese and English. Most of the reports of the PDHJ are on its website.

The PDHJ has been trying to fulfil its legal obligations, but there are still areas for further improvement. The PDHJ did not submit and present its report to the National Parliament on time as previewed in the provision of the Law No. 7/2014. In the 2013 report, the PDHJ did not describe in detail the cases of human rights violations investigations with specific opinions and recommendations.

There was no information written on the results of the follow-up of the recommendations. The PDHJ did not inform in its report whether the state organs or institutions which the recommendations directed to have taken any measures to comply with the recommendations. If those state organs or institutions rejected taking such measures, what were the next actions taken by the PDHJ to force the compliance with the recommendations?

There is no information on the pending cases from the previous years until 2013, what happened to them. How many cases are still under investigation and how many have been closed, etc.

The issue of the pluralistic representation is also to be considered in this report. At the level of decision making body or at the level of the Ombudsman and Deputy Ombudsmen there seem to be no pluralistic representation. There will

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<sup>127</sup> See the annual reports on the website of the PDHJ, <http://pdhj.net/media-publications/annual-reports-budgets>

be no pluralism in the decision making process. The Deputy Ombudsmen are nominated by the Ombudsman, so there is loyalty to the Ombudsman.

The process for the new election for the new Ombudsman was again delayed. The end of the mandate of the Ombudsman and the two Deputy Ombudsmen was in March 2014. The National Parliament should have elected the new Ombudsman for the next period of four years, immediately after the end of the previous term, but hadn't as at time of writing.

#### **Recommendations to the Government:**

- a) to the Minister and the Secretary of State for Security and Defence
  - To consider and take concrete measures to comply the recommendations taken by the PDHJ regarding the human rights violations committed by the members of the PNTL and F-FDTL;
  - To further consider the continuation of capacity building to the officers and members of the PNTL and F-FDTL on law enforcement and human rights protection and promotion;
  - To further consider the continuation of capacity building to the members of the PNTL and F-FDTL on the standard of professionalism in dealing with the problems in communities.
  - To further consider the importance of selection process for the new members of the PNTL and F-FDTL to have good, professional and responsible members in future.
  
- b) to the Ministry of Education
  - To consider and take concrete measures to comply with the recommendations taken by the PDHJ regarding the human rights violations committed by the teachers in schools;
  - To consider the importance of training school teachers on human rights protection and promotion;

#### **Recommendations to the National Parliament:**

- To consider, discuss and question the work of the PDHJ as described in its annual reports;
- To have effective oversight the PDHJ in term of execution of its functions and compliance with the law;
- To consider and allocate enough budget to PDHJ to facilitate its work;
- To consider and discuss the structure of the PDHJ, considering the lack of pluralistic representation at the level of the Ombudsman and Deputy Ombudsmen, particularly in the Deputy Ombudsmen.

#### **Recommendations to the PDHJ:**

- To consider and fully comply with Paris Principles and to adopt and comply with the recommendations of the ACJ;
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- To consider and focus on the capacity building of its staff in the area of investigation;
- To prepare and submit its annual report on time as prescribed by law;
- To include in its report the human rights violations cases with final reports and recommendations;
- To include in its report the results of the follow-up to the recommendations made to the relevant institutions, particularly the PNTL in the term of the implementation of the recommendations of the PDHJ;
- To consider and recommend to the National Parliament to discuss the structural model of the PDHJ, considering the pluralistic representation in the level of the Ombudsman and Deputy Ombudsmen;
- To consider and create mechanisms for the protection of human rights defenders;

# AFGHANISTAN: UNFULFILLED PROMISES, UNDERMINED COMMITMENTS

## The Civil Society and Human Rights Network (CSHRN)<sup>1</sup>

### 1. General Overview

Afghanistan has had several distinct human rights achievements in the past twelve years but with the ongoing security, economic and political transition – which will have impact on human rights – the hard-won gains are more fragile than ever. If these achievements are not consolidated, it is feared that they may roll back as the overall human rights situation is deteriorating on several fronts.

There was continued declining respect for human rights throughout 2013. Civilian casualties was on the rise; there was an upturn in women's rights violations; cases of wide-spread torture surfaced; the efficacy of the AIHRC<sup>2</sup> was undermined; and impunity for abusers was the norm for the pro-government forces and insurgents.

There was a 23 percent rise in the civilian casualties during the first six months of 2013 compared to the same period in 2012. Although, most (74 percent) were caused by insurgents, the pro-government forces were also blamed for 9 percent of the total casualties.

There were several setbacks in women rights over the past year. A drop-off in quota representation of women in the new electoral law; 24.7 percent increase in violence against women in 2013 compared to its previous year; and the content of the EVAW<sup>3</sup> law was termed un-Islamic by a group of conservative parliamentarians during a parliamentary debate.

There were 326 cases of torture in the detention facilities run by the Afghan security apparatus indicating wide-spread inhuman treatment of conflict-related detainees.

Some of the major cases of human rights violations or setbacks in human rights during 2013 are discussed below in detail:

**Protection of Civilians in Armed Conflict:** The current conflict causes thousands of civilian deaths each year. Civilian casualty and collateral damage to homes and property of Afghans have created an environment of distrust between ordinary people and Afghan government and have also severely damaged international troop legitimacy in the eyes of Afghan people. The civilian death rising in recent years has led to mounting tension between the Afghan government and its international allies.

The civilian casualties have been on the rise in recent years. In the Mid-Year Report released in July 2013, the United Nations Assistance Mission in Afghanistan (UNAMA), documented 3,852 civilian casualties marking a 23 percent rise in civilian casualties compared to the first six months of 2012.<sup>4</sup> According to UNAMA, of overall casualties in the mid-year report, 74 percent were attributed to insurgents, 9 percent to pro-government forces and 12 percent to ground battles causing casualties.<sup>5</sup>

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<sup>1</sup> Prepared by Hassan Ali Faiz, Senior Researcher of CSHRN (Civil Society and Human Rights Network)

<sup>2</sup> Afghanistan Independent Human Rights Commission

<sup>3</sup> Elimination of Violence against Women

<sup>4</sup> UNAMA's Mid-Year Report 2013 "Protection of Civilians in Armed Conflict"

<sup>5</sup> Ibid.

**Torture and Arbitrary Detention:** There is a widespread allegations of torture and inhuman treatment of detainees by the Afghan National Security Forces (ANSF). According to UNAMA report released in January 2013, there is sufficiently reliable and credible information on occurrence of torture in detention facilities of ANSF. Of 635 pre-trial detainees and convicted prisoners UNAMA interviewed, 326 were subjected to torture.<sup>6</sup> (UNAMA interviewed 635 detainees and convicted prisoners between October 2011-2012, in 89 facilities in 30 provinces). UNAMA has found sufficiently reliable and credible evidence of systematic use of torture by the Afghan National Police and the Afghan National Border Police in Kandahar province.

There are allegations of torture by the Afghan Local Police too. Of 12 detainees interviewed by UNAMA, 10 were subjected to torture or ill-treatment.<sup>7</sup> The Afghan Local Police are mandated to conduct security missions in villages. To carry out their missions successfully they are permitted to hold suspects temporarily. They lack legal authority of police to arrest or detain suspects.

Security forces are legally allowed to detain a suspect for 72 hours only, after which they have to transfer him/her to a detention center run by Central Prisons Directorate under the Ministry of Interior. According to UNAMA's findings in many cases the average time a suspect remains under custody of law enforcement authorities far exceeds 72 hours legal time limit. For example in the Department 40 of National Directorate of Security, detainees were held for an average of 55 days.<sup>8</sup> This indicates widespread of arbitrary detention.

**Gender Equality and Violence against Women and Girls:** For the past twelve years since the collapse of Taliban regime in 2001, women made significant gains in terms of gender equality. Now, as the international presence in Afghanistan is winding down, the post-Taliban hard-won gains are more precarious and could be compromised and traded away in pursuit of political settlement with insurgents.

The drop-off in quota representation of women in the new electoral law,<sup>9</sup> remains amidst other troubling issues about gender equality in Afghanistan. The new law eliminates quotas that set aside 25 percent of the seats in the country's provincial and district councils for women. Gender quotas as an important policy tool were among the most-vaunted aspects of the post-Taliban regime. The under-representation of women in political participation is further undermined with a trade-off on weak governance, inequality and insecurity.

Violence against women hit record levels, becoming more frequent and increasingly brutal in 2013. The AIHRC has registered 4154 cases of violent crimes; 24.7percent increase in violence against women in 2013 compared to its previous year. The violent crimes included among others, cutting lips and nose, gang rape, public rape, killing, maiming, beating with cables, pouring boiling water, cutting body parts with knife etc. The report covers a period of six months (Mar-Aug 2013).<sup>10</sup>

The disaggregated data in the AIHRC's six-month report, suggest 1249 cases of physical violence, 262 cases of sexual violence, 243 cases of honor-killing, 164 cases of child and forced marriage and 5 cases of *Baad* (customary dispute resolution and punishment).<sup>11</sup>

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<sup>6</sup> UNAMA Report released in January 2013, "Treatment of Conflict-Related Detainees in Afghan Custody"

<sup>7</sup> *Ibid.*, p. 10

<sup>8</sup> *Ibid.*, p. 16

<sup>9</sup> Article 30, Election Law

<sup>10</sup> <http://www.aihrc.org.af/media/files/Research%20Reports/Voilence%20Against%20Women-%20first%20half-%20year%201392-%20English.pdf>

<sup>11</sup> *Ibid.*, p. 11

**The Law on Elimination of Violence Against Women:** In 2009 the Afghan president signed the Law on the Elimination of Violence Against Women (EVAW). The law which is considered a landmark legislation imposes tough penalties for 22 acts of violence against women including among others, physical and sexual violence, honor-killing, child and forced marriage and *Baad*.

The efforts to implement the law have fallen far short. By all accounts, implementation of the law has remained too sketchy. According to the UNAMA report '*A Way to Go*', acts of violence against women have increased by 28 percent since the EVAW was enacted while only 2 percent of the reported incidents have been adjudicated on the basis of the new law.<sup>12</sup>

In May 2013 the law was debated in the Afghan Parliament, where conservative opponents of the law argued that its provisions have violated the country's religious and cultural values. The debate was brought to end after only 15 minutes. Soon after the controversial debate, politically motivated protesters in several cities of the country called for the repeal of the law.

Despite all efforts made to alleviate the pains and hardships of women, violence against women remain part of the day-to-day experience of most Afghan women, and the violators escape largely unpunished.

**The National Action Plan for Women of Afghanistan (NAPWA)<sup>13</sup>:** The NAPWA which provides a policy framework to relevant government institutions to guide their work for improving women's rights, the implementation process of the Plan remains too sketchy with little commitments met. Equality on paper has not led to equality on the ground and women's rights rhetoric fails to translate into action. Domestic violence and extreme forms of discrimination remain part of the day-to-day experience of most Afghan women.

**Discrimination on the basis of Gender, Religion and Ethnicity:** The Afghan new Constitution prohibits discrimination, and, stipulates that all Afghans are equal. However, societal discriminations against women, ethnic and religious minorities prevail across the country. There are reports of discrimination based on race, ethnicity, religion, and gender.

Women are among most discriminated segment of Afghan society. Afghan women live in conditions in which they are deprived of their most basic human rights for reason of their gender alone.

An absolute majority of Afghans are Muslims but there are other religious minorities like Hindus, Sikhs and Christians. The Afghan Constitution guarantees freedom of religion and equal opportunity for all citizens without discrimination of any kind. Recently, the Afghan Parliament refused the allocation of even a single seat for Hindus and Sikhs in the lower house of parliament. The move caused outcry among civil society and rights groups. Rights activists believe the reason for refusing to allocate a single seat to Hindus and Sikhs in the lower house of parliament is due to their religious beliefs. Hindu and Sikh children are also discriminated against in schools.

In May 2013 around 70 Hazara ethnic minority university students went on hunger strike for six days, protesting against discrimination on the basis of ethnicity in Kabul University.

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<sup>12</sup> [http://www.ohchr.org/Documents/Countries/AF/UNAMA\\_Nov2011.pdf](http://www.ohchr.org/Documents/Countries/AF/UNAMA_Nov2011.pdf)

<sup>10</sup> <http://www.baag.org.uk/sites/www.baag.org.uk/files/resources/attachments/APPRO%20Implementation%20of%20the%20NAPWA%20Assessment%20Mar2014.pdf>

**Returning Refugees and Internally Displaced Persons:** Continued conflict and natural disaster have resulted in significant displacement internally. There are around 536000 displaced individuals in the country, according to the UNHCR.<sup>14</sup>

Conflict-related violence and insecurity continued to cause high levels of internal displacement in Afghanistan. The Internally Displaced Persons (IDPs) Taskforce recorded 124,354 civilians displaced due to the armed conflict in Afghanistan in 2013.<sup>15</sup>

This represents a 25 percent increase over 2012. As at 31 December 2013, the total number of IDPs in Afghanistan was 631,286 individuals, more than half of whom have been displaced in the past three years.<sup>16</sup>

Most IDPs and Returnees are deprived of their most basic needs and rights. Their rights to education, health, food, water and shelter are not fulfilled. Every winter, tens of their children die due to illnesses caused by cold weather. There are often disputes among local residents and IDPs. They are often under constant threat of forced eviction.

In many cases, the returning refugees often find it hard to return to their places of birth. Most of these refugees have lived in their host community for a long period of time, and, their children have grown up in different living contexts.

**Freedom of Speech and Press:** Freedom of expression is believed to be one of the biggest achievements of the President Karzai's political era. Media enjoys freedom to some extent albeit journalists still face violence, intimidations and threats. Despite government pledges to protect media freedom and journalist, the Afghanistan Journalists Center (AFJC) has registered 84 cases of violence against media and journalists during 2013 stated in its latest report. Of 84 cases registered, 38 are attributed to government authorities and law enforcement agencies.<sup>17</sup> The violence against journalists and media include murder, injuries, beating and closure of media outlets.<sup>18</sup>

In June 2013, Mr. Abdul Satar Khawasi a lower house MP from Parwan, declared *jihad* against some media outlets accusing them for transgressing and breaching rules of Islam and Afghan culture.

The Mass Media Law remains poorly implemented and the authorities in the Ministry of Information and Culture constantly seek more control over media.

**Legislative Reforms:** It is uncertain to what extent human rights norms inform Afghanistan's domestic laws and how the judiciary perceives its own role in complying with state obligations. The government of Afghanistan has not yet formally initiated a process to harmonize its domestic laws with international human rights treaties to which it is a party.

The government does not consider the human rights conventions it has already ratified as legally binding instruments and therefore has not incorporated their provisions into the domestic legal system to make them applicable. Legislative provisions contradictory to human rights conventions still remain in force. Article 398 of penal code still exempts perpetrators of honor-killings from punishment and even the

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<sup>14</sup> UNHCR Submission to UPR review of Afghanistan 2013

<sup>15</sup> The IDP Taskforce is co-chaired by the UN High Commissioner for Refugees (UNHCR) and the Ministry of Refugees and Repatriation (MoRR).

<sup>16</sup> UNHCR Brief, "Conflict Induced Internal Displacement Trends 2013"

<sup>17</sup> <http://afjc.af/english/index.php/af-media-news/central-provinces/kabul/444-annual-report-84-cases-of-violence-against-media-freedom-recorded-in-afghanistan.html>

<sup>18</sup> Ibid

EVAW Law has not criminalized honor-killings. There are inconsistencies between civil law, Sharia and customary laws in relation to legal minimum age of marriage.

**Action Plan on Peace, Justice and Reconciliation:** The Afghan government accepted to implement the Action Plan on Peace, Justice and Reconciliation adopted in 2005. The plan which aimed to address the past human rights violations expired in 2009 and was never renewed. The plan was further undermined when the Afghan parliament passed the National Reconciliation, General Amnesty, and National Stability Law. The law provides immunity and pardons former warlords who were involved in human rights violations, war crimes and crimes against humanity.

All above indicate a waning determination on the part of the government of Afghanistan to respect, protect and fulfill human rights.

**2. Independence**

Establishment of NHRI	
Established by Law/Constitution/Presidential Decree	The Constitution of Afghanistan, 2004
Mandate/Objective	<ul style="list-style-type: none"> <li>a) Monitoring the situation of human rights in the country;</li> <li>b) Promoting and protecting human rights;</li> <li>c) Monitoring the situation of and people’s access to their fundamental rights and freedoms;</li> <li>d) Investigating and verifying cases of human rights violations; and</li> <li>e) Taking measures for the improvement and promotion of the human rights situation in the country.</li> </ul>
Selection and appointment	
<p>Is the selection process formalized in a clear, transparent and participatory process in relevant legislation, regulations or binding administrative guidelines?</p> <p>Is the selection process under an independent and credible body which involves open and fair consultation with NGOs and civil society?</p>	<p>On paper, the membership selection is done through consultative process that takes into account the perspectives of civil society. A list of names are nominated by civil society after a series of consultations. The President considers individual nominee on the basis of merit and the principles of pluralism in the process of selection of members of the AIHRC. The President then appoints the members of the AIHRC.</p> <p>There are nine Commissioners in the AIHRC appointed by the President for service terms of five years. To ensure the independence of the AIHRC, the President has no authority to remove the Commissioners once they are appointed.</p> <p>However, on 15 June 2013, after 19 months of overdue appointments the president appointed five new commissioners (most of whom displayed poor human rights records). The President appointed these new commissioners without consultation with civil society.</p>
Is the assessment of applicants based on pre-determined, objective and publicly available criteria?	<p>Under Article 11 of the law on <i>Structure, Duties and Mandate of the Afghanistan Independent Human Rights Commission</i>, members of the Commission should have the following qualifications:</p> <ul style="list-style-type: none"> <li>1) Afghan Citizenship;</li> <li>2) Twenty five years of age;</li> </ul>

	<ol style="list-style-type: none"> <li>3) Not being deprived of political and civil rights by a competent court;</li> <li>4) Higher educational background in law, human rights law Islamic Jurisprudence or</li> <li>5) an academic background in other fields of study with practical experiences in the field of human rights;</li> <li>6) Not being accused of national treason or crimes against humanity;</li> <li>7) Shall have a good reputation, be independent, hold popular trust and a commitment to human rights;</li> <li>8) Shall not be a member of any political party during their term of office at the Commission.</li> </ol>
How diverse and representative is the decision making body? Is pluralism considered in the context of gender, ethnicity or minority status?	Practically the composition of the AIHRC members is diverse. However there is no mention of diversity and pluralism in terms of gender, ethnicity and minority in any legislative documents related to the AIHRC. The President has so far appointed commissioners who reflect ethnic and gender diversity.
<b>Terms of office</b>	
Term of appointment for members of the NHRI	Five years
Next turn-over of members	2018

The Afghanistan Independent Human Rights Commission (AIHRC) is a national human rights institution established under Article 58 of the Afghan Constitution. The AIHRC fulfils its constitutional mandate to protect and promote the cause of human rights throughout the country.

The AIHRC has a law enacted by the presidential decree called the “Law on Structure, Duties and Mandate of the Afghanistan Independent Human Rights Commission”. The law is yet to be approved by the Afghan parliament.

Article 2 of the AIHRC law stipulates "The AIHRC has been established, as an independent body, within the framework of the State of the Islamic Republic of Afghanistan and it shall function independently"<sup>19</sup>.

The Commission secured ‘A’ status accreditation from the peer review process of the International Coordinating Committee of NHRIs (ICC) in November 2008.

**Membership and Selection:** Members of the AIHRC are appointed by the President of Afghanistan. On paper the members selection is done through a consultative process which takes into account the perspectives of civil society. President considers the merits of individual nominees, their respective competencies, and the principles of pluralism in the process of selection of members of the AIHRC.

There are nine Commissioners in the AIHRC appointed by the President for service terms of five years. To ensure the independence of the AIHRC, the President has no authority to remove the Commissioners once they are appointed.

Article 11 of the AIHRC law requires that commissioners have a good reputation, demonstrate independence, enjoy popular trust and have a commitment to human rights.

<sup>19</sup> AIHRC Law adopted by the Afghan Cabinet Ministers on 1 May 2005 and enacted by presidential decree on 12 May 2005 in the form of Decree No. 16 of 2005 of the President of the Republic of Afghanistan.

However, in December 2011, President Karzai announced the removal of three of the nine commissioners of the AIHRC. On 15 June 2013 after 19 months of overdue appointments the period of uncertainty came to an end with appointment of five new commissioners, most of whom have a poor human rights record. One of the five commissioners was a member of the former Taliban regime who ended up in the AIHRC after he was released from the US-controlled detention facility in Bagram. Another was a former member of the *Jamiat-e Islami* party; a *Jihadi* political organization accused of gross human rights violations during the civil war of the 1990s.

The Paris Principles set out standards for national human rights institutions to function independently and effectively. The Principles require broad consultation, transparency and extensive involvement of civil society active in the area of human rights. The President ignored Paris Principles by appointing new commissioners without consultation with civil society.

The newly appointed Commissioners did create problems in the beginning which affected the performance and credibility of the AIHRC. The new appointees tried to create cliques within the AIHRC while also openly criticizing the work of their own institution. One even went as far as to call for the resignation of the previously appointed Commissioners. The unilateral and non-consultative appointment process clearly created divisions and disrupted the daily operations of the AIHRC.

**Monitoring Power of the AIHRC to monitor detention centers:** The AIHRC has the legal power to initiate investigation into any allegation of human rights violation of citizens. The Commission has the right to full cooperation of all state institutions and authorities, which, in practice does not happen quite often. For instance, the AIHRC has free access to detention centers and can visit any place where human rights are potentially violated, without any prior notice. In practice, sometimes the detention centers personnel do not allow the AIHRC monitoring team to monitor the detention centers without prior notice or the monitoring team is not allowed to take photographic evidence.<sup>20</sup>

**The ‘Conflict Mapping in Afghanistan since 1978’ report:** The AIHRC’s conflict mapping report, documents gross human rights violations committed in Afghanistan since 1978. This report of around 1000 pages thoroughly details the severe human rights abuses committed during the different phases of the Afghan civil wars over the past three decades. It took years to prepare the report with huge human and financial investment. The report remains unpublished so far.

Some believe that the reason behind not publicizing the report is that the AIHRC has not received a positive signal from the government of Afghanistan. However, the AIHRC officials argue that, firstly, truth-seeking and documentation was one of the four key actions<sup>21</sup> of the Action Plan<sup>22</sup> the AIHRC had the responsibility to implement. The AIHRC completed its job and submitted its report to the government. Secondly, for implementing a transitional justice strategy successfully, all four actions should have been implemented. Thirdly, the release of the report at this juncture may pose serious risk to the AIHRC staff members, victims and witnesses. Fourthly, the release of the report should support an outcome for transitional justice which seems improbable in the present political and security context.

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<sup>20</sup> US State Department, 2013 Country Human Rights Report: Afghanistan

<sup>21</sup> Four key actions of the Peace, Reconciliation and Justice in Afghanistan Action Plan of the Government of the Islamic Republic of Afghanistan: 1) acknowledgement of the suffering of the Afghan people; 2) ensuring credible and accountable state institutions and purging human rights violators and criminals from the state institutions; 3) truth-seeking and documentation; 4) promotion of reconciliation and improvement of national unity.

<sup>22</sup> [http://www.aihrc.org.af/media/files/Reports/Thematic%20reports/Action\\_Pln\\_Gov\\_Af.pdf](http://www.aihrc.org.af/media/files/Reports/Thematic%20reports/Action_Pln_Gov_Af.pdf)

It is explicitly stated under Article 25 of the law on *Structure, Duties and Mandate of the Afghanistan Independent Human Rights Commission* that, “The Commission shall not be coerced to disclose evidence, documents or testimonies that it has in its possession”.

Whatever the reason, the victims are impatiently waiting for the launch of the report. While no one might be prosecuted on the basis of the information provided in the report even if it is published – given the powerful presence of warlords in the current government – nevertheless naming the perpetrators as violators might alleviate some of the pain of the victims. Victims of the past human rights violations are disappointed with the AIHRC in its unnecessary delay in making the report public.

**Financial dependency of the AIHRC:** The AIHRC’s budget is entirely funded by donors. Despite being its Constitutional obligation, the government of Afghanistan has failed to provide financial support to the AIHRC ever since its establishment. The AIHRC has been constantly seeking for budget allocation but their demand had lingered for years. Approximately 99% of the AIHRC’s budget is sourced from external donors.

Only during 2012 and 2013 the Afghan government provided 0.5 million and 1 million US Dollars respectively to the AIHRC, while the annual budget of the AIHRC is over 10 million US Dollars. The overall 1.5 million US Dollars government commitment over a period of two years was only allocated to operational activities of the AIHRC. The programmatic activities of the AIHRC was not covered under that budgeted amount.

The dependency on donor contributions undermines the future stability of the AIHRC.

### 3. Effectiveness

**The mandate of the AIHRC:** The AIHRC is a constitutional body mandated to protect and promote rights and freedoms enshrined in Afghanistan’s Constitution, international declarations and international human rights conventions and protocols to which Afghanistan is a party.

Article 5 of the Law<sup>23</sup> establishes five objectives for the AIHRC:

(1) Monitoring the situation of human rights in the country; (2) Promoting and protecting human rights; (3) Monitoring the situation of and people’s access to their fundamental human rights and freedoms; (4) Investigating and verifying cases of human rights violations; and (5) Taking measures for the improvement and promotion of human rights in the country.

**Areas of engagement:** The areas of activity of the AIHRC include monitoring and investigation, human rights education, women’s rights, children rights, transitional justice, and the rights of people with disabilities. The AIHRC has other support units such as Research and Policy, Media and Publication, Resource Center, Reporting, Administration, Finance, Logistics and IT units.

To ensure a country-wide presence, the AIHRC has eight regional and six provincial offices with more than 600 staff members.

**The AIHRC reports and recommendations:** The AIHRC issues regular annual, periodic and research reports on different human rights topics. The AIHRC also issues shadow reports to the Treaty Body and UPR mechanisms. The AIHRC reports mainly include recommendations for action to the government of Afghanistan to ensure the realization of human rights.

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<sup>23</sup> The Law on Structure, Duties and Mandate of the Afghanistan Independent Human Rights Commission

Mainly the reports are kept on the shelves after they are launched, without even being read. Almost no government institution takes the reports seriously. Recommendations made in the reports are rarely implemented.

There is no proper mechanism within the AIHRC to follow up the status of the implementation of the recommendations it has made so far. In occasional attempts the AIHRC has tried to draw the attention of the government institutions to its recommendations.

The government has been unresponsive to all recommendations including the recommendations it has received through the UN human rights monitoring mechanism such as the UPR and Treaty Body. The weak governance is mainly blamed for the poor performance of the government.

**Transparency:** Probably the AIHRC is the most transparent and clean institution in the country. While Afghanistan is the most corrupt country after Somalia and North Korea according to Transparency International,<sup>24</sup> the AIHRC can be a model for other state institutions in the country.

The AIHRC has developed transparent administrative and financial management systems which enable it to effectively utilize its resources. The AIHRC regularly undergoes external performance and financial audits and adopts advices and recommendations it receives from audit companies to enhance its overall effectiveness.

**Reactions to human rights violations:** The AIHRC constantly reacts and take stance against incidents of grave human rights violations through issuing public statements and press releases; and conducts debates and press conferences. Sometimes it issues up to four or even more, press releases in one day condemning the incidents.

**Professionalism:** The AIHRC is increasingly becoming a professional human rights body, and with greater focus in human rights issues. The AIHRC has pioneered a results-based human rights strategic plan in Afghanistan which it has just updated on the basis of experience gained.

However, there is still room for the AIHRC to improve. For instance the AIHRC has a more generic approach to human rights issues rather than an indicator based approach. Baselines have not yet been set so far for major human rights issues. The minimum standard for enjoyment of human rights is missing. The methodology for human rights education is not updated.

Given the experience of the AIHRC and the most difficult circumstances in which it operates, it should be recognized as a unique institution doing a commendable job. The AIHRC staff members are committed, steadfast and professional compared to all other state institutions.

**Complaint handling mechanism:** The AIHRC has an extensive field presence across the country which enables it to effectively monitor and assess the overall human rights situation. The AIHRC investigates cases of human rights violations, documents them and supports victims in seeking remedies. The AIHRC has probably the best database for storing data on human rights violations.

However, the overall mechanism has its own faults and flaws. According to para 2 of Article 23 of the law on 'Structure, Duties and Mandate of the Afghanistan Independent Human Rights Commission', *"The Commission shall assess and analyze the complaints, collect information and evidence as required, and shall cooperate with the concerned authorities in finding remedial solutions for these cases. If it is*

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<sup>24</sup> <http://www.transparency.org/country#AFG>

*required, the Commission, in accordance with the paragraph 9 of Article 21 of this Law, may refer the case to the relevant judicial and non-judicial authorities”.*<sup>25</sup>

Normally, the AIHRC, after registering and investigating a case refers it to the Attorney General’s office or court for prosecution or redress. This process has three main points of concern.

1) The law enforcement agencies including the judiciary are the most corrupt institutions in Afghanistan according to a Transparency International report.<sup>26</sup>

2) Sometimes, complaints are registered quicker when filed in person, rather than through the other referral channels, which is to the disadvantage of complainants for whom there is trouble and expense in direct access to the AIHRC office.

3) The capacity in understanding human rights violations is very low in both the Attorney-General’s office and the judiciary. Most prosecutors and judges don’t understand human rights violations very well. The lack of formal education specifically among judges and the low understanding of human rights among prosecutors and the judges have hampered the consistent delivery of justice. Given that the prosecutor’s office and the judiciary sometimes view the AIHRC as their rival rather than complementing institution they believe the AIHRC to unnecessarily interfere into their business and give itself the authority to oversee them. This hostile attitude is especially to be found in the judiciary, which interprets the AIHRC’s mandate as an attack on judicial independence.

**Relationship with civil society:** The AIHRC has improved its relationship with civil society organizations. Now, the AIHRC is more positive and supportive to the work of civil society organizations. The AIHRC continuously collaborate and interact closely with civil society on improving the volatile human rights situation. The AIHRC undertakes joint projects with CSOs and also supports training initiatives in order to strengthen the capacity of CSOs to protect and promote human rights.

**The relationship of the AIHRC with other state institutions:** Article 6 of the AIHRC law<sup>27</sup> stipulates that *“Judicial and prosecutorial organs, ministries, governmental organizations, civil society groups, Non-Governmental organizations and all citizens are obliged to cooperate with the Commission in achieving the objectives set up by this law”.*

But, state institutions mainly do not feel “obliged” to cooperate with the AIHRC. Obligations at policy level are rarely materialized on the ground. However, it is not only with the AIHRC, the relationship among other state institutions is also very vague. Very few institution may respond to the calls of the AIHRC. The influence of the AIHRC over other state institutions is mainly attributed to the role and charisma of the Chairperson of the AIHRC and not the AIHRC itself as a Constitutional entity.

However, the AIHRC’s enhanced engagement with government authorities, media, and other public and private offices provides grounds for interaction and collaboration. The increased number of young, educated and motivated people within the state bureaucracy widens the perspective of positive engagement with government and ensures better protection and promotion of human rights throughout the country.

**Police Ombudsman:** The AIHRC with the support of EUPOL (EU Police mission in Afghanistan) has created the Office of the Police Ombudsman in the Ministry of Interior as an oversight mechanism to

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<sup>25</sup> The Law on Structure, Duties and Mandate of the Afghanistan Independent Human Rights Commission

<sup>26</sup> <http://www.tolnews.com/en/afghanistan/11176-report-shows-judiciary-is-most-corrupt-institution-in-afghanistan->

<sup>27</sup> *Ibid.*, p. 5

investigate human rights violations by the police authorities and monitor the work of the police. The initiative aims to prevent human rights violation by police and raise acceptance of the police among Afghan citizens.

### **Accountability**

To fulfill its constitutional mandates and promote the cause of human rights, the AIHRC monitors, protects and promotes human rights throughout the country. It addresses both the rights-holders and the duty-bearers. The country-wide presence of the AIHRC enables it to constantly monitor and assess the human rights situation across the country. The AIHRC submits regular annual reports to the Afghan Parliament and public. The AIHRC always feels accountable to the people of Afghanistan and relevant state institutions authorized by law to receive reports from the AIHRC.

## **4. Conclusion**

For the past twelve years since the collapse of Taliban regime in 2001, the international community has been involved in improving the human rights situation aside their other engagements. The mere presence of the international community pushed the government of Afghanistan to heightened scrutiny in terms of its compliance with human rights commitments.

Now, as international engagement with Afghanistan is steadily winding down, the government's reluctance and ability to deliver on its obligations to respect, protect and fulfill human rights calls into question the political will of the government of Afghanistan.

For many rights activists the prospects for human rights beyond 2014 are bleak especially if the international community goes for the 'Zero Option' [the total withdrawal of foreign military forces]. Opponents of human rights may step forward to roll back the achievements made since the collapse of Taliban regime.

The weak rule of law, weak governance, high level of corruption, insecurity and recurring impunity for abusers have contributed to the denial of the rights of Afghan citizens. The continued deteriorating security situation has severely hampered the enjoyment of human rights by Afghans. The weak enforcement of legislation to protect the human rights of Afghan citizen is undermined by a weak judiciary and indifferent law enforcement agencies.

By all accounts, the future of human rights situation in Afghanistan seems grim.

### **Recommendations:**

#### **To the Government of Afghanistan:**

Protect women's rights:

- Ensure that the Supreme Court and the Attorney-General's Office and their subordinate courts and prosecution offices consistently apply the EVAW Law;
- Ensure that police register all complaints of violence against women and girls, and that all allegations of violence are promptly, impartially and effectively investigated and that perpetrators are brought to justice;
- Strengthen the capacity of the Ministry of Women Affairs to expedite implementation of the NAPWA;

- Raise public awareness of the CEDAW Convention, in particular among judicial officers, judges, lawyers and prosecutors;

Support the independence of the Afghanistan Independent Human Rights Commission:

- Provide financial support to the Afghanistan Independent Human Rights Commission so that it discharges its mandate effectively;
- Respect the independence of the AIHRC and the rule-book set out in the 'Paris Principles' and the ICC-SCA General Observations when appointing new commissioners;

Put an end to impunity:

- Repeal the National Reconciliation, General Amnesty, and National Stability Law;

Protect civilians in the conflict:

- Investigate in a transparent and timely manner all cases of civilian casualties attributed to Afghan National Security Forces, and ensure that perpetrators are brought to justice;
- Provide appropriate means of redress to civilian casualties;

Torture and arbitrary detentions:

- Investigate in timely, impartial and effective manner all cases of torture and arbitrary detentions, and prosecute all those responsible for these crimes;

The rights of returnees and IDPs:

- Provide adequate funding for implementation of all policies related to IDPs and returnees and consider durable solutions for them;
- Evaluate the impact of policies on IDPs and Returnees with the scope to propose and apply remedial measures that can address their needs;

Implementation of human rights conventions ratified by GoIRA:

- Initiate a process to incorporate systematically the provisions of all human rights conventions ratified by Afghanistan into domestic legal system to make them applicable;

Freedom of expression and protection of journalists:

- Stop restricting freedom of expression and media and ensure that journalists are not threatened, harassed and intimidated. Those responsible for attacks on journalists must be brought to justice;

End discriminations:

- Develop initiatives to combat gender, religious and racial discrimination. Report on the implementation of the Convention on Elimination of all Forms of Racial Discrimination (CERD);

**To the AIHRC:**

Racial discrimination:

- Conduct a study on ethnic discrimination. Lobby the government to implement and report on the implementation of the Convention on Elimination of all Forms of Racial Discrimination (CERD);

The 'Conflict Mapping in Afghanistan Since 1978' Report:

- Make all arrangements to release the "Conflict Mapping in Afghanistan since 1978" report without any further delay.

Follow-up to the AIHRC recommendations:

- Establish appropriate follow-up mechanisms to recommendations issued by the AIHRC. The annual and thematic reports of the AIHRC must be presented and discussed in Parliament and ensure that adequate follow-up be entrusted to the corresponding parliamentary committees or task-forces to mainstream their recommendations and monitor their implementation.

# BANGLADESH: INSTITUTIONAL COMMITMENT NEEDED

## Ain o Salish Kendra (ASK)<sup>1</sup>

### 1. General Overview

This report is a critical assessment of the performance of National Human Rights Commission (NHRC), Bangladesh in the protection and promotion of human rights, mainly between January to December 2013 as well as during the first half of 2014. This report draws attention to selected issues of concern on independence and effectiveness of the NHRC as an institution; and examines its full compliance with the international standards for national human rights institutions – the ‘Paris Principles’.

This country report is structured and prepared according to the guidelines for the 2014 ANNI Regional report. It is divided into two major parts. Firstly, it looks at the general human rights situation of the country in 2013 and the NHRC’s role in addressing the same. Secondly, it makes an assessment of the NHRC’s independence and effectiveness in the context of its performance in protecting and promoting human rights during the reporting period.

The overall human rights situation in 2013 was alarming amid continuous political violence throughout the year and it has been one of the most challenging years for the country’s economy in recent times. Political violence and the deteriorating law and order situation created panic and a sense of insecurity among people. Enforced disappearances, extrajudicial killings (mentioned as “crossfire” and “encounter”) and deaths in police custody continued along with communal violence, harassment and killing of journalists, gender-based violence and violation of workers’ rights.

Several positive measures for human rights have been taken in 2013 through: (a) legislation enacted in 2013 by Parliament, (b) Court Judgments and Judicial directions.

### Law and Policy Development:

#### (a) Significant Legislation enacted by Parliament

- The Children Act, 2013 (amending the Children Act, 1974 to ensure compliance with the United Nations Convention on the Rights of the Child,
- Rights of Persons with Disabilities and their Protection Act, 2013 (following Bangladesh’s ratification of the UN Convention and Protocol),<sup>2</sup>
- Parents’ Care Act, 2013 (to ensure social security of the senior citizens),
- Torture and Custodial Death (Prevention) Act, 2013,
- Overseas Employment and Migrant Workers Act 2013.

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<sup>2</sup> Daily Star, <http://archive.thedailystar.net/beta2/tag/disabled-peoples-rights-and-protection-act/>

**On the other hand the Parliament has also adopted legislation that could impact negatively on human rights:**

- Anti-Terrorism (Amendment) Act, 2013 empowers the law enforcement agencies to record conversations, videos, photographs, conversations posted on social media such as Facebook, Twitter, Skype, Blogs, Emails and to allow these as evidence in court. This Act is contrary to the right to privacy of correspondence and other communication as well as to fundamental rights in the constitution.<sup>3</sup>
- The Anti-Corruption Act, 2004 has been amended by Parliament to curtail the Anti-Corruption Commission's authority to file cases against public servants.<sup>4</sup>
- Information and Communication Technology (Amendment) Act, 2013 has been heavily criticised because of its provisions limiting freedom of speech and expression.<sup>5</sup>

**(b) Court Judgments and Directions**

- The International Crimes Tribunal, a domestic mechanism created in 2009, issued verdicts against nine persons accused of war crimes in 1971, including life imprisonment for Abdul Quader Mollah, Assistant General Secretary of Jamaat-e-Islami. Following massive reaction culminating in protests triggered by the victory sign showed by Quader Mollah after hearing the verdict, the prosecution filed an appeal in the High Court which sentenced him to death, and he was executed on 12 December 2013.<sup>6</sup>
- The High Court concluded the trials of BDR personnel for the death of 74 persons, including 57 army officers, and other criminal offences during a bloody rebellion in the BDR Headquarters on 25-26 February 2009.
- In the case filed for murder of Biswajit Das,<sup>7</sup> the Court sentenced eight members reportedly of the Awami League student front to death and thirteen persons to lifetime imprisonment on 18 December 2013, an unusual but welcoming example to see that the ruling party affiliated are not spared by the court.<sup>8</sup>
- The Ministry of Home Affairs withdrew two cases (possession of arms and obstructing law enforcement forces) which it had filed in 2011 against an innocent boy Limon, who was shot in his leg by the Rapid Action Battalion (RAB).<sup>9</sup>

**Political Confrontation and Violence**

The violence coincided with (a) the death sentences passed in March 2013 by the International Criminal Tribunal on Abdul Quader Mollah<sup>10</sup> and Delwar Hossain Sayeedi,<sup>11</sup> two leaders of the Jamat-e-Islami for

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<sup>3</sup> *Daily Star*, <http://archive.thedailystar.net/beta2/news/anti-terror-law-draws-flak/>

<sup>4</sup> *Dhaka Tribune*, <http://www.dhakatribune.com/long-form/2013/dec/25/acts-parliament-2013>

<sup>5</sup> [https://spdb.ohchr.org/hrdb/24th/public\\_-\\_AL\\_Bangladesh\\_29.10.13\\_\(11.2013\).pdf](https://spdb.ohchr.org/hrdb/24th/public_-_AL_Bangladesh_29.10.13_(11.2013).pdf)

<sup>6</sup> *Daily Star*, <http://archive.thedailystar.net/beta2/news/koshai-quader-hanged-2/>

<sup>7</sup> The killers used machetes to hack Biswajit, a young tailor to death in front of police, out of mere suspicion that he was a BNP cadre supporting his party's strike call

<sup>8</sup> *Bd News 24.com*, <http://bdnews24.com/bangladesh/2013/12/18/eight-to-die-for-biswajit-murder-13-get-life>

<sup>9</sup> Limon was shot in leg by RAB personnel on 23 March 2011; while he was grazing his cows by a river bank in Sathuria village, Rajpur Upazilla, Jhalakathi district. RAB filed two cases against him, one for possession of arms and the second, for obstructing them in their duties.

<sup>10</sup> On February 5, 2013, the International Crimes Tribunal-2 (ICT-2) sentenced Quader Mollah to life imprisonment. On September 17, 2013, the Supreme Court overruled the judgment and enhanced his sentence to death penalty. Subsequently, on December 8, 2013, ICT-2 had issued a warrant of execution for Quader Mollah after receiving the Supreme Court verdict on December 5, 2013. <http://www.eurasiareview.com/16122013-bangladesh-executing-butcher-mirpur-analysis/>

<sup>11</sup> *Daily New Age*, <http://www.newagebd.com/supliment.php?sid=210&id=1541>

crimes committed against humanity in 1971 and (b) differences over modalities for holding the national election.

In 2013, about 848 clashes took place between different political parties, with law enforcement agencies, as well as between factions within political parties.<sup>12</sup> Newspaper reported a total of 507 persons killed and around 22,407 wounded during political conflicts in 2013.<sup>13</sup>

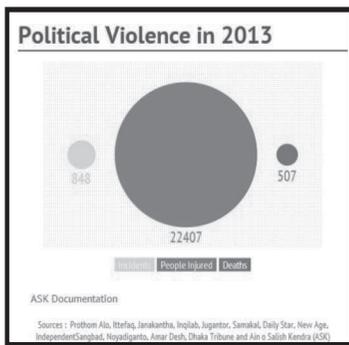
### **Incidence of violence by Jamat-e-Islami**

From 28 February to 21 March 2013, 35 Government offices and 10 vehicles were vandalized and burnt in 25 upazillas of Chittagong, Rangpur, Rajshahi, Khuna and Sylhet Divisions.<sup>14</sup> Following the verdict by the International Crimes Tribunal, Jamat activists were reported to have attacked different areas in an orchestrated manner, resulting<sup>15</sup> death of 37 persons<sup>16</sup> in the capital and 15 other districts;

### **Violence during Hefazat-e-Islam “Siege” Programme**

On 5 May 2013, from noon to midnight friction between law enforcement agencies and Hefazat-e-Islam activists<sup>17</sup> led to 22 deaths including that of a police constable.<sup>18</sup> The next morning (on 6 May 2013), 27 persons were killed in a collision between law enforcers and Hefazat activists at different places in Narayanganj, Hathazari, Chittagong and Bagerhat.<sup>19</sup>

### **Violence by Law enforcement agencies and ruling party cadres**



Threats to human rights were aggravated by the use of unlawful methods of law enforcement agencies such as extrajudicial killings, disappearances, custodial deaths and torture, as well as controls over freedom of expression, mobility and association. On 15 December 2013, Joint Forces (Army, RAB, BGB, and Police) were deployed to curb the violence in Satkhira district. Five persons including two Jamaat activists were reported to be killed by the joint force.<sup>20</sup> On 29 December 2013, lawyers demonstrating in support of the 18 Party Alliance “March for Democracy” programme were attacked by ruling party cadres in the presence of police inside the Supreme Court premises.<sup>21</sup> Several lawyers, including a female lawyer, were assaulted<sup>22</sup> allegedly by the ruling party student cadres in the presence of police.

<sup>12</sup> <http://www.askbd.org/ask/2014/01/11/political-violence-january-31st-december-2013/>

<sup>13</sup> <http://www.askbd.org/ask/2014/01/11/political-violence-january-31st-december-2013/>

<sup>14</sup> Daily Prothom Alo, <http://archive.prothom-alo.com/detail/date/2013-03-22/news/338613>

<sup>15</sup> Daily New Age, <http://www.newagebd.com/supliment.php?sid=210&id=1541>

<sup>16</sup> Daily Prothom Alo, <http://archive.prothom-alo.com/detail/date/2013-03-01/news/333012>

<sup>17</sup> Daily Prothom Alo, <http://archive.prothom-alo.com/detail/date/2013-05-06/news/350124>

Daily Prothom Alo, <http://archive.prothom-alo.com/detail/date/2013-05-06/news/350110>

<sup>18</sup> Daily Prothom Alo, 7 May 2013

<sup>19</sup> Daily Prothom Alo, <http://archive.prothom-alo.com/detail/date/2013-05-07/news/350343>

<sup>20</sup> Daily Star, [http://www.thedailystar.net/print\\_post/raids-in-satkhira-jamaat-dens-kill-5-2737](http://www.thedailystar.net/print_post/raids-in-satkhira-jamaat-dens-kill-5-2737)

Daily Samakal, [http://www.esamakal.net/?archiev=yes&arch\\_date=17-12-2013](http://www.esamakal.net/?archiev=yes&arch_date=17-12-2013)

<sup>21</sup> <http://www.bdchronicle.com/detail/news/32/3344>,

Daily New Age, [http://newagebd.com/detail.php?date=2013-12-30&nid=78621#\\_UzptoXYQ\\_IU](http://newagebd.com/detail.php?date=2013-12-30&nid=78621#_UzptoXYQ_IU)

<http://www.bangladeshchronicle.net/index.php/2013/12/6-hurt-as-cops-al-men-attack-pro-oppn-sc-lawyers/>

<sup>22</sup> Dhaka Tribune, <http://www.dhakatribune.com/law-amp-rights/2014/jan/03/opposition-lawyers-protest-attack>

## **Violence on Minorities**

Several incidents of violence on minorities had taken place during the reporting period. It has been reported by the media that 278 houses and 208 business establishments of Hindu community were vandalised, burnt and 495 incidents of destruction of idols, temples took place in 2013.

## **Extra Judicial Killings, Torture and Custodial Deaths**

Incidents of torture and death in police custody also continued in 2013. Seventy-two persons were victims of extra judicial death by law enforcement agencies in 2013.<sup>23</sup> Among them 24 were killed in “cross fire” by RAB, 17 by police, 1 by BGB, 1 person was reported to have died after torture by RAB and Police, and 26 persons were tortured in police custody.<sup>24</sup>

## **Enforced Disappearance**

According to the national dailies (in 2013), about 53 persons disappeared. Five dead bodies were recovered, three were handed over to police, two were detained, and the rest of them remained missing.<sup>25</sup>

## **Border killings and Torture**

The media has reported 335 incidents of border killings and torture by the Indian Border Security Force (BSF) at the India-Bangladesh border in 2013.<sup>26</sup> Reports indicated that 26 persons died, 84 were tortured, and 175 were abducted from the border.

## **Freedom of Information and Expression**

The state authority has tried to suppress dissent through arrest of Bloggers, Human Rights Defenders, bans on public assemblies or closing of media outlets. Opposition parties were refused permission to hold meetings several times in 2013.

## **Harassment of Journalists**

In 2013, three journalists were reported to have been murdered and 339 Journalists were tortured by different groups. Among them 43 Journalists were allegedly tortured by law enforcement agencies, 33 received death threats, 26 faced cases in Court, two were harassed by Government officials, 56 by terrorists, 141 by members of different political parties, 24 by Hefazat e Islam, and 14 became victims of other forms of persecution.<sup>27</sup>

## **Workers’ Safety**

The greatest disaster of 2013 was the death of 1,135 garment workers and injury to over 2,000 workers on 24 April due to the collapse of Rana Plaza at Savar, which housed five garment factories along with many other incidents. In this context, the risky and unsafe working environment of the workers has been criticised nationally and internationally. Cases of criminal negligence were filed against the owner of Rana Plaza, Sohail Rana and five factory owners.<sup>28</sup> They were arrested and their cases are pending.

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<sup>23</sup> <http://greenwatchbd.com/504-violence-deaths-72-extrajudicial-killings-53-disappearances-in-2013/>

<sup>24</sup> <http://www.askbd.org/ask/2014/01/11/death-law-enforcement-agency-2013/>

<sup>25</sup> ASK documentation based on newspaper reports in 2013.

<sup>26</sup> Daily Star, <http://www.thedailystar.net/rights-situation-was-alarming-in-2013-4883>

<sup>27</sup> <http://www.askbd.org/ask/2014/01/11/journalist-harassment-2013/>

<sup>28</sup> Dhaka Tribune, <http://www.dhakatribune.com/bangladesh/2013/apr/29/11-cases-filed-labour-court-against-5-apparel-factory-owners>

## **Migrant Workers**

The media reported that recruitment and employment agencies had used forged passports for migrant workers. Their discovery resulted in the Malaysian Security Forces detaining 387 Bangladeshi migrant workers<sup>29</sup> in one day of 2013. Detention of migrant workers after expiry of penalty period, cases of harassment and torture overseas were also reported.

## **Violence against women**

Frequent cases of rape, acid burn, domestic torture, stalking and fatwa instigated violence were reported in 2013. The media reported that 812 women were raped or gang raped in 2013.<sup>30</sup> Amongst these, 87 women were killed after rape and 14 allegedly committed suicides. Notwithstanding court directions and government action, stalking and sexual harassment continued to be reported in workplace and educational institutions in 2013. Despite the High Court's directions that extra judicial penalties imposed by fatwa were unconstitutional and illegal, physical penalties were pronounced by fatwa upon 21 women in 2013. Seven of them were physically and mentally tortured, three were forced to leave their villages, and three committed suicide after torture. In 2013, 44 women became victims of acid violence, and out of these only 16 cases were filed. Out of 703 women victims of domestic violence including dowry, only 361 filed cases. Employers were reported to have committed violence on 78 domestic workers, but only 24 cases were filed.<sup>31</sup>

## **Rights of indigenous people**

There was no progress in implementing the Chittagong Hills Tracts Accord and the CHT Land Commission remained dysfunctional. More than a hundred houses of the indigenous people were set on fire and vandalised in Taidong, Rangamati on 3 August 2013. About 162 indigenous families who became homeless had to take shelter in the forest and in no man's land between the India-Bangladesh borders.

## **General Human Rights Situation in 2014**

The general human rights situation in first half of 2014 was worsening due to widespread violence centring on the 5 January 2014 parliamentary polls, and particularly attacks against the most vulnerable populations, including women and children as well as religious and ethnic minorities.

The opposition parties had been very active in street protests against the 5 January 2014 parliamentary election. In most instances such moves have turned into violence. Violent protest by the opposition parties and excessive use of force by the law enforcement agencies were rampant. The violent protests have led to indiscriminately setting fire to vehicles resulting in the burn to death of the passengers, looting and burning of houses of religious minorities and brutal killing of the members of law enforcement agencies on many occasions.

15 people have been killed in 'gun fights' with law enforcement agencies between 1 January and 27 January 2014. It has been reported that, those people died in gunfights with law enforcement agencies were largely the activists of Jamaat-Shibir and involved in political killing, particularly the communal

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<sup>29</sup> Bd news24.com, <http://bdnews24.com/bangladesh/2013/09/04/malaysia-softens-on-foreign-workers>

<sup>30</sup> ASK documentation based on newspaper reports in 2013.

<sup>31</sup> ASK documentation based on newspaper reports in 2013.

attacks. There were several recent attacks on the homes shops, livelihoods of religious minorities at Natore, Joypurhat, Satkhira, Gaibandha, Chittagong, Dinajpur districts and also on temples, churches at Thakugaon, Netrokona, Sherpur, Mymensingh districts. Notably, on 5 January 2014 there were also attacks on houses, businesses and temples at Jessore, Dinajpur, Lalmonirhat, Luxmipur districts. According to ASK Documentation, 628 houses, 192 business institutions, 63 temple-idols were destroyed, 106 people were injured and 2 people died out of fear in attacks during January 2014. It has been also documented that 20 houses, 22 temples-idols were vandalised and 7 people were injured during the period of 1-26 February 2013.

Abduction and killings took an increasing toll in the first quarter of 2014. According to ASK documentation, based on different sources and media reports, 54 people have allegedly abducted by the law-enforcing agencies all over the country in January to April 2014. Among them only 8 people have returned, 15 dead-bodies were found and the rest are still missing. Seven people including the City Corporation Councillor and a Lawyer were abducted and killed, allegedly by the Rapid Action Battalion (RAB) at Narayanganj on 27 April 2014. The recurrence of abduction incidents strongly proved the deteriorating law and order situation of the country and it has pushed citizens into extreme fear and unprecedented insecurity.<sup>32</sup> 85 incidents of Border Violence occurred between January and May 2014.

### **NHRC's role in addressing the human rights situation:**

It is noteworthy that the National Human Rights Commission of Bangladesh has for the first time in 2013 investigated the death of a person in "crossfire". While the police claimed that a gunfight occurred while the person died in crossfire, the NHRC fact-finding concluded that no gunfight had actually happened.<sup>33</sup> A three-member fact-finding team led by a Director of the Commission conducted the fact-finding after the media reported that 41-year-old Rajab Ali alias Kala Rajab had been killed in a "gunfight" between his accomplices and police in the early hours of 16 February 2014 in Jessore district. It has been reported in the media that the NHRC fact finding team faced resistance from the police department during its probe. The Chairman of the Commission submitted the probe report to State Minister of Home Affairs. The NHRC Chairperson commented in the media: "Our conclusion in this particular case of Rajab Ali is that the incident of his killing was not a gunfight. The shooting by police was not in self-defence".<sup>34</sup>

The NHRC was vocal against the allegation of enforced disappearance and extrajudicial killings, communal attacks<sup>35</sup> in 2013 as well as in the first half of 2014. The Chairperson and the members of the Commission have made solidarity visits to places of gross human rights violations including Ramu, Bashkhali,<sup>36</sup> Sundorganj etc.

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<sup>32</sup> It has been reported by different media that the family members of victims of abduction, kidnap and murder incidents are receiving various types of threat and suffering from lack of security.

<sup>33</sup> Daily Star, <http://www.thedailystar.net/its-not-crossfire-14301>

<sup>34</sup> ibid

<sup>35</sup> [http://www.nhrc.org.bd/PDF/Press%20Release\\_on%20current%20situation.pdf](http://www.nhrc.org.bd/PDF/Press%20Release_on%20current%20situation.pdf).

[http://www.nhrc.org.bd/PDF/Press%20Release\\_%20NHRC%20Statement%20on%20the%20Attack%20of%20Hindu%20Community.pdf](http://www.nhrc.org.bd/PDF/Press%20Release_%20NHRC%20Statement%20on%20the%20Attack%20of%20Hindu%20Community.pdf).

[http://www.nhrc.org.bd/PDF/Press%20Release\\_%20NHRC%20Statement%20on%20%20Post%20Election%20Violence%20on%20Hindu%20Community.pdf](http://www.nhrc.org.bd/PDF/Press%20Release_%20NHRC%20Statement%20on%20%20Post%20Election%20Violence%20on%20Hindu%20Community.pdf)

<sup>36</sup> [http://www.nhrc.org.bd/PDF/Report\\_NHRC\\_Banskhali\\_Visit.pdf](http://www.nhrc.org.bd/PDF/Report_NHRC_Banskhali_Visit.pdf)

In the wake of an alarming rise in abductions and secret killings, on 5 May 2014 at a roundtable the NHRC chairperson stated that it would seek intervention of the higher court if the government fails to stop abductions, murder and forced disappearances.<sup>37</sup> To stop extrajudicial killings and ‘enforced disappearances’ the NHRC has placed two positive recommendations to the government; to stop drives by law enforcers in plainclothes and to keep at least two persons to witness under what circumstances the raid and arrests are being made. The Commission also requested the Ministry of Home Affairs to form a three-member committee within 24 hours with a retired judge as its head to investigate the seven-murder incident in Narayanganj.<sup>38</sup> However, these recommendations have not been implemented by the government. It perhaps shows that along with statement in media and sending letters to the authority, the NHRC needs to undertake long term strategic intervention to bring effective changes in the policy of the state.

The NHRC is mandated for both human rights promotion and protection. However, while responding to the human rights issues, the NHRC has largely depended on promotional activities like organising trainings, seminars. Although the Chairperson of the NHRC has expressed his concern on almost all the major human rights violations, it has not been supported with adequate and effective action from the institution.

In 2013, bloggers and social media users were particularly targeted both by the state and non state actors. Use of social media was a prime issue for discussion. It is noteworthy that the NHRC also picked up this issue. The NHRC organised two-day long training programme titled “Social Media and Human Rights Advocacy in Bangladesh” where 20 human rights defenders from different organisations participated.<sup>39</sup> However, it should be noted that, NHRC did not include bloggers in this training while the bloggers were particularly the victim of harassment by state and non state actors in relation with their expression in social media. The NHRC was also not seen proactive to protect Bloggers and HRDs when they were facing judicial harassment in 2013.

Likewise, jointly with Relief International, the NHRC organised a national conference titled “Role of Human Rights Defenders: Protection and promotion of Human Rights” on 28 September 2013 in Dhaka.<sup>40</sup> The NHRC has also published a handbook to provide a practical resource for HRDs. Speaking at the event, the NHRC Chairperson asked the government to enact a law for the protection of human rights defenders. However, that has not been systematically persuaded through drafting and initiating the law making process which is within the ambit of the NHRC mandate.<sup>41</sup>

The Commission is mandated for examining draft bills and proposals for new legislation to verify their conformity with international human rights standards and to make recommendations for amendment to the appropriate authority. The NHRC has done substantive work to culminate and provide input on the amendment of the Children Act and Rights of Persons with Disabilities and their Protection Act, 2013. However, to our frustration, the NHRC has not criticised the Anti-Terrorism (Amendment) Act, 2013 or the Information and Communication Technology (Amendment) Act, 2013.

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<sup>37</sup> <http://www.thedailystar.net/nhrc-to-move-court-if-abductions-killings-not-stopped-22817>

<sup>38</sup> <http://www.thedailystar.net/form-body-to-probe-narayanganj-murders-nhrc-23107>

<sup>39</sup> <http://archive.thedailystar.net/beta2/news/nhrc-trying-to-gain-public-confidence/>

<sup>40</sup> Dhaka Tribune, <http://www.dhakatribune.com/bangladesh/2013/sep/29/human-rights-defenders-not-enemies-state-conference>

<sup>41</sup> Sec 12 (m) of NHRC Act 2009

It seems that conducting national inquiries is one of the priorities for the NHRC. The Commissioners and the staff members of the NHRC took part in training on National Inquiries from 31 March 2014 to 3 April 2014.<sup>42</sup> The four-day training was jointly organised by the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI), Sweden; the Asia Pacific Forum of National Human Rights Institutions (APF) in collaboration with the UNDP capacity development project. The objective of this training was to build the capacity of the NHRC to conduct national inquiry into systemic patterns of human rights violations.

## 2. Independence

As provided in the Paris Principles, to be truly independent, a national human rights institution should be: (1) established by a distinct law or legislation; (2) financially solvent, and able to act independently with respect to budget and expenditures; (3) autonomous of any State agency or entity in carrying out its administrative functions.

<b>Establishment of NHRI</b>	
Established by Law	The National Human Rights Commission Act, 2009 (NHRC Act 2009)
Mandate	The key mandates can be summed up as follows: <sup>43</sup> (a) to inquire, suo-moto or on a petition presented to it by a person affected or any person on his behalf, into complaint of violation of human rights or abetment thereof, by a person, state or government agency or institution or organization or into any allegation of violation of human rights or abetment thereof or negligence in resisting violation of human rights by a public servant; (b) To inspect any jail or any other places where persons are detained or lodged and to make recommendation to the government thereon for the development of those places and conditions; (d) To review the safeguards of human rights provided by the Constitution or any other law for the time being in force and to make recommendation to the government for their effective implementation; (e) To review the factors, including acts of terrorism that inhibit the safeguards of human rights and to make recommendations to the Government for their appropriate remedial measures; (f) To research or study treaties and other

<sup>42</sup> <http://www.nhrc.org.bd/PDF/Workshop%20on%20National%20Inquiries.pdf>

<sup>43</sup> [http://www.nhrc.org.bd/About\\_NHRC.html](http://www.nhrc.org.bd/About_NHRC.html)

	<p>international instruments on human rights and to make recommendation to the government for their effective implementation</p> <p>(g) To examine the draft bills and proposals for new legislation for verifying their conformity with international human rights standards and to make recommendations for amendment to the appropriate authority for ensuring their uniformity with the international human rights instruments;</p> <p>(h) To give advice to the Government for ratifying or signing the international human rights instruments and to ensure their implementation;</p> <p>(i) To research into the field of human rights and to take part in their execution in educational and professional institutions;</p> <p>(j) To publicise human rights literacy among various sections of society and to promote awareness of the safeguards available for the protection of those through publications and other available means;</p> <p>(k) To encourage and coordinate the efforts of Non-Governmental Organisations and institutions working in the field of human rights;</p> <p>(l) To enquire and investigate into complaint related to the violation or probability of violation of human rights and resolve the issue through mediation and conciliation.</p> <p>(m) To advise and assist the Government by providing necessary legal and administrative directions for protection and promotion of human rights.</p> <p>(n) To make recommendation to the Government so that the measures taken through the laws of the land in force and administrative programs are of international standard ensuring human rights;</p> <p>(o) To assist and advice the organisations or institutions working in the field of human rights and generally the civil society for effective application of human rights;</p> <p>(p) To raise public awareness through research, seminar, symposium, workshop and relevant activities and to publish and disseminate the outcomes.</p> <p>(q) To provide training to the members of the Law enforcing agencies regarding protection of human</p>
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	rights; (r) To provide legal assistance to the aggrieved person or any other person on behalf of the aggrieved person to lodge a complaint before the Commission;
<b>Selection and Appointment</b>	
Is the selection process formalised in a clear, transparent and participatory process in relevant legislation, regulations or binding administrative guidelines?	The founding Act <sup>44</sup> states that the Honourable President, upon recommendation of an impartial Selection Committee, will appoint the Chairman and Members of the National Human Rights Commission. According to Section 7(1) of the NHRC Act 2009, 'To make recommendation on the appointment of the Chairman and Members, a selection Committee shall consist of seven members and it will be headed by the Speaker of the Parliament.
Is the selection process under an independent and credible body which involves open and fair consultation with NGOs and civil society?	Headed by the Speaker of the National Parliament, the selection committee includes the Minister for Home Affairs, Minister for Law, Justice and Parliamentary Affairs, Chairman of the Law Commission, Cabinet Secretary, one Member of Parliament from the treasury bench and one Member of Parliament from the opposition bench as members of the Committee. So it appears from the composition that the selection committee could be dominated by the executive.  The enabling law does not guarantee that the Civil Society should be consulted in the selection process. The selection committee also did not adopt any guideline to conduct the selection process.
Is the assessment of applicants based on pre-determined, objective and publicly available criteria?	As per Section 6(2) of the National Human Rights Commission Act, 2009: 'The Chairman and the Members of the Commission shall be appointed from amongst the persons who have remarkable contribution in the field of legal or judicial activities, human rights, education, social service or human development.'

<sup>44</sup> [http://www.nhrc.org.bd/PDF/NHRC%20Act%202009\\_1\\_.pdf](http://www.nhrc.org.bd/PDF/NHRC%20Act%202009_1_.pdf)

	The selection committee neither makes any open call nor publicises the names for consideration. Thus people know about the selection only after the Chairperson and the Members are appointed.
How diverse and representative is the decision making body? Is pluralism considered in the context of gender, ethnicity or minority status?	Section 11(4) of the NHRC Act states: For taking decision in the meeting of the Commission each Member shall have one vote and in case of equality of votes, the person presiding over the meeting shall have a second or casting vote. According to Sec 5 (3) of the NHRC Act: ‘Among the members at least one shall be women and one shall be from the ethnic group’ (sic).
<b>Terms of office</b>	
Term of appointment for members of the NHRI	As per Section 6(3) states that the Chairman and Members of the Commission shall hold office for a term of three years from the date of joining office; provided that a person shall not be appointed for more than two terms as a Chairman or Member of the Commission.
Next turn-over of members	In 2016
Dismissal process	According to Section 8 of the enabling Act: The Chairman or any Member of the Commission shall not be removed from the office except in like manner and on the like grounds as a Judge of the Supreme Court. The President may remove the Chairman or any other Member from his/her office, if he/she is declared insolvent by any competent court; or of unsound mind; or convicted of any offence involving moral turpitude or in case of Chairman and Full Time Member engages in any post extraneous to his/her own duties during the term of office for remuneration

The present Chairman and members of the NHRC were appointed on 22 June 2010 for the first term and the same members were re-appointed on 23 June 2013 for another term except one, who already served as a member in two terms. There was no initiative from the selection Committee for any open dialogue or public call or consultation with the Civil Society on the selection and re-appointment of the members of the Commission.

A strong and Paris Principles compliant legislation could give the NHRC, Bangladesh the independence and autonomy which was required for a national human rights institution that meets normative principles of internationally recognised human rights. Lack of such legislation constrains its efficiency and limiting the fulfilment of its mandate and functions. Some provisions of the founding Act were identified to be in contravention to the Paris Principles; for instance, section 18 could be interpreted as narrowing the scope and mandate of the NHRC by limiting its ability to investigate alleged human rights violations perpetrated

by disciplined forces, known to be principally responsible for human rights abuses and violations in Bangladesh. The existing procedure provided is apparently only to seek reports from the Government. We think this as a major impediment to the full functioning of the NHRC and a disabling restriction that in the long-run will affect its credibility and independence.

On 21 October 2013, the Commission organised a National Consultation on the National Human Rights Commission Act, 2009 with the support of the UNDP Capacity Development Project. According to NHRC, the objective of the consultation was to review the compliance of the NHRC Act establishing the NHRC with the Paris Principles relating to the Status of National Institutions and examine the challenges faced by the NHRC in carrying out its mandate. NHRC Chair said that the NHRC had both failures and limitations but it was their responsibility to advocate for the amendment of the Founding Act; bringing it in compliance with the Paris Principles so that the NHRC can effectively carry out its mandate. The NHRC has sent its proposal for the amendment of the enabling Act to the relevant ministry. However, the NHRC should undertake a holistic advocacy strategy to bring the necessary changes in the Act. NHRC should build a strong ally with the Civil Society and envisage a common strategy for this.

The Secretary, Directors and the Deputy Directors have been seconded from the public service since the NHRC's inception.<sup>45</sup> Deputation or secondment may have been desirable in the commission's early, establishment phase, when it needed experienced senior staff to lead its building, but the high levels of positions held on deputation are complicated in the long term and could lead to serious functioning deficits. This practice has also been seen as contrary to the standards adopted by the ICC and its SCA which provide that no senior officials of the institution should be on secondment.<sup>46</sup> The secondment of public officials, who are holding senior management positions in the Commission, was seen by many Commission members and staff as affecting the NHRC's development and, in time, as possibly compromising its independence.

The Commission is managing only one office in the capital and in a rented building which is not in a well accessible location. It has no permanent presence elsewhere in the country. It has only two working component: complaints and inquiry, and administration and finance. There is no component and no specialist staff for research and monitoring or for human rights education and promotion. The existing 28 persons' workforce that had been approved for NHRC in 2010 has not increased till today. Amongst the allotted 28, only four Assistant Directors are the staff members directly involved in fulfilling the mandate of the NHRC. Others are the support staff (e.g. computer operator, drivers, telephone operator, personal assistant etc).<sup>47</sup> The NHRC is hopeful of receiving the approval for additional 20 positions in 2015.

## **Financial Independence**

The NHRC's annual budget is around 30 million taka (about USD 385,000).<sup>48</sup> The NHRC Act 2009 reads: "the Government shall allocate specific amount of money for the Commission in each fiscal year; and it shall not be necessary for the Commission to take prior approval from the Government to spend

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<sup>45</sup> NHRC Act 2009, s 23(4).

<sup>46</sup> ICC General Observation 2.5. The General Observation also provides that the total number of seconded staff should not exceed 25 per cent of the workforce of the NHRI. This is not an issue for the NHRC where only four of the 26 staff are seconded.

<sup>47</sup> NHRC Annual Report 2012, p. 6.

<sup>48</sup> The NHRC has sought a budget of 32 million taka for 2014 but the Ministry of Law is proposing to cut it to 25.4 million taka.

such allocated money for the approved and specified purpose” (Sec 25).<sup>49</sup> In terms of resourcing, the founding Act ensured the independence of the NHRC in using its resources, but the Act limits the commission in getting bilateral funding from the donors.

The Paris Principles clearly articulate requirements for independence in the budget and infrastructure of NHRIs, which if pursued would increase the NHRC’s financial independence. The NHRC Act does not ensure an adequate budget and financial independence for the Commission, which are considered imperative for the enhancement of the institution’s operations.<sup>50</sup>

The provisions of the Act that address financial issues are seen as falling short of the requirement set by the Paris Principles and limiting the NHRC’s ability to exercise autonomy over its budget. At present, the NHRC receives a discretionary budget from the Ministry of Law and it is not a specific item in the national budget approved by the Parliament. It is not subject to parliamentary scrutiny or approval and the NHRC does not have an opportunity of advocating publicly for the budget it considers necessary for its work. This limits its ability to control its budget and restricts its financial autonomy.

### 3. Effectiveness

The National Human Rights Commission still has “B” status accreditation with the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC). It has responsibilities for the promotion and protection of human rights in Bangladesh and most of its functions and powers expected of an NHRI are in compliance with the Paris Principles.<sup>51</sup> However, the enabling law has several limitations and deficiencies that have prevented the NHRC achieving full “A” status accreditation, including:

- inadequate definition of ‘human rights’;
- deficiencies in the procedure for selection of members;
- limitations on full financial independence.<sup>52</sup>
- exclusion of the ability to investigate allegations of human rights violations; committed by the “disciplined forces”, that is, the military and police;

There is concern among different stakeholders about the functioning of the NHRC as an institution, rather than individual personalities. To address this concern, the Commission has recently adopted a Standard Operating Procedure (SOP) which is yet to be implemented.

The NHRC has established nine thematic committees. Each Commissioner, except the Chairman, has been appointed in three to five of these committees, as chair, co-chair or member. However, it appears that, except for the Child Rights Committee, the other thematic committees are not very active,

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<sup>49</sup> The National Human Rights Commission Act of 2009 (Founding Act), [http://www.nhrc.org.bd/PDF/NHRC%20Act%202009\\_1\\_.pdf](http://www.nhrc.org.bd/PDF/NHRC%20Act%202009_1_.pdf)

<sup>50</sup> NHRC Act s 25.

<sup>51</sup> Principles relating to the status and functioning of national institutions for the promotion and protection of human rights in Commission on Human Rights Resolution 1992/54 and General Assembly Resolution 48/134.

<sup>52</sup> See Richard Carver *Review of the compliance of the NHRC Act with the Paris Principles* 2013 and SCA report on the Bangladesh NHRC, 23-27 May 2011.

notwithstanding plans to activate some of them soon. In the absence of personal or institutional work plans for the NHRC, up to now there has been no system to place any formal responsibility on any Commissioner to undertake any activity through these committees or otherwise.

The Commission with the cooperation of Relief International<sup>53</sup> organised eight roundtables under the title “Respect Human Rights” with the participation of human rights activists, community and religious leaders, educationalists and youths, representatives of local government, law enforcement agencies. The roundtables covered the districts Mymensing, Dinajpur, Sirajgonj, Kustia, Rajshahi, Jessore, Noakhali and total 270 participants including 43 women took part in these roundtable discussions. NHRC stated that main objectives of these roundtables were to develop the overall human rights situation and human rights culture of Bangladesh, to promote the National Human Rights Commission by generating extensive publicity across the country and reach even the most marginalised populations. The NHRC is perceived as weak in accomplishing these objectives; as well in making the outcomes of these roundtable discussions more visible.

The Commission took noticeable measure in 2014 for nationalisation and continuation of 228 private schools at Chittagong Hill Tracts (CHT)<sup>54</sup> which were financed under CHTVF project lead by UNDP as the project duration is up to December 2014. This is a constructive approach taken by the Commission towards child education in hilly and remote areas of the country.

## **NHRC’s response and action on pressing Human Rights situation**

### **Case 1: Violence against Minorities**

In 2013, Hindu communities in many towns and villages were subjected to violence and many had to leave their homes. Most of the violence happened in February and March of 2013 were perpetrated by Jamaat-e-Islami cadres following the ICT’s verdict sentencing Jamaat leaders for the crimes against humanity committed in 1971. After October 2013 violence against minorities was instigated during the opposition party’s demonstration demanding the general elections under a Caretaker Government. In some cases, members of the ruling party were also involved in such violence to gain political or material gain such as land or property. Law enforcement agencies failed to take adequate steps to protect the religious minorities, even though there were early warnings of communal violence.

### **Action taken by the NHRC:**

- The NHRC organised a discussion on the Role of Citizens to Protect Human Rights on 20 March 2013 at Deputy Commissioner’s Conference Room in Gaibandha following the attack on the Hindu community at Gaibandha on 28 February 2013.
- On 2 November 2013, NHRC team visited the Hindu community of Banogram at Sathia Upazilla of Pabna district. The objective of the visit was to investigate the facts, assess the severity of the attacks and the damage caused, and to inquire about the local administration’s role in protecting

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<sup>53</sup> Relief International is a humanitarian non-profit agency that provides emergency relief, rehabilitation, development assistance, and program services to vulnerable communities worldwide.

<sup>54</sup> <http://www.nhrc.org.bd/PDF/NHRC%20Letter%20regarding%20CHT%20school.pdf>

the rights of this minority community. The Commission has prepared fact finding report and has sent a letter to the Secretary of Ministry of Home Affairs highlighting its observation on 14 November 2013.

- NHRC issued several press statements on its visits and attacks at several places;
- NHRC team visited to Thakurgaon district on 16 January 2014 as communal attack took place there;

**Outcome of NHRC's intervention:** The solidarity visits and statements have of course helped to boost the confidence of the victims and survivors. However, it is not evident that the NHRC recommendations have been taken seriously by the government and it has rightly acted upon.

**Comment:** The NHRC should differentiate its role from the role of a non-governmental human rights organisation and thus should focus on making the government authorities accountable to implement its recommendations.

## **Case 2: Arrest of a human rights defender on the allegation of violating the Information and Communication Technology Act, 2006**

'Odhikar', a human rights organisation, has come under the limelight, both nationally and internationally, after it published a report giving a very specific number of casualties in the actions taken by the law enforcement officials during their operation on 5 May 2013 and in the early morning of 6 May 2013.<sup>55</sup> Following its publication, the Secretary of Odhikar, Adilur Rahman Khan, was arrested on 10 August 2013. The Metropolitan Magistrate placed him on a five-day remand after Detective Branch (DB) of police produced him before it with a 10-day remand prayer on 11 August. However, the High Court stayed the remand order on 13 August 2014. He was finally released on bail and the High Court later put stay order on the functioning of the Cyber Crime Tribunal which was conducting his trial. The way Adilur Rahman Khan was arrested and been treated during the judicial process was protested and condemned by many national and international human rights organisations including ASK.<sup>56</sup>

**Action taken by the NHRC:** Although NHRC Chairperson has expressed his concern speaking to the media after the arrest of Adilur Rahman Khan, NHRC has not issued any written statement in this regard.

**Outcome of NHRC's intervention:** NHRC Chairperson's concern published in the media was welcomed.

**Comment:** The NHRC could take this case to set an example to demonstrate its role as the 'Defender of Human Rights Defenders'. They could use this case for standard setting on state responsibility to protect Human Rights Defenders.

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<sup>55</sup> Assembly of Hefazat-e- Islam Bangladesh and Human Rights Violations , <http://odhikar.org/?p=5714>

<sup>56</sup> *Dhaka Tribune*,

<https://www.dhakatribune.com/law-amp-rights/2013/aug/12/adil%E2%80%99s-arrest-remand-condemned>

*Daily Star*, <http://archive.thedailystar.net/beta2/news/rights-organisations-us-condemn-adilurs-arrest/>

*New Age*, <http://www.newagebd.com/supliment.php?sid=268&id=1898>

### **Case 3: Rana Plaza disaster and death of 1,135 garment workers**

On 24 April 2013, Rana Plaza, an eight-storied commercial building collapsed in Savar, Dhaka. The search for the dead ended on 13 May with the death toll of 1,129. Approximately 2,515 injured people were rescued from the building alive. It is considered to be the deadliest garment-factory accident in history, as well as the deadliest accidental structural failure in modern human history.

**Action taken by the NHRC:** NHRC Chairperson visited the place, after his return from abroad after couple of days. He expressed his concern to the media and to victim families. The NHRC convened a multi-stakeholder consultation<sup>57</sup> with 35 representatives from key stakeholder groups including the Government of Bangladesh (Ministry of Labour and Employment), UNDP, the Private Sector, and Media, Civil Society, Industrial Labour experts and Analysts on 15 June 2013.

The NHRC also hosted a roundtable discussion<sup>58</sup> on “Creating Better Environment for Garments Workers and Improving Working Conditions in the Readymade Garment Sector: Reforming the Labour law” with the civil society. According to NHRC, the Commission was trying to team up with the garment industry body (BGMEA), the Bangladeshi federation of Chambers of Industry (FBCCI) and civil society groups to set up safety monitoring committees in each textile factory.

**Outcome of NHRC’s intervention:** No measurable outcome has been observed from NHRC intervention.

**Comment:** Not limiting itself to express concern, the NHRC could undertake a number of interventions to ensure rehabilitation, compensation and to avoid recurrence of such incidents.

## **4. Engagement with National stakeholders**

### **Civil society**

According to the NHRC, it considers partnership with national stakeholders very significant to raise human rights awareness in the country and also developed specific as well as comprehensive strategy in the area of partnership building.

NHRC claimed that it already developed partnership with local NGOs to raise the awareness of the citizens as well as launch a broad-based campaign about human rights related issues across the country, and reached around 39,950 community people through interactive cultural programme i.e. Pot Song, Gamvira and Drama for disseminating messages on NHRC, Human Rights, Child Rights, Birth Registration, Domestic Labour, Violence against women, migrant workers and social discrimination issues in 20 districts of Bangladesh in 2013.

## **5. Thematic Focus**

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<sup>57</sup> At Lakeshore Hotel, Dhaka

<sup>58</sup> On 4 July 2013 at BRAC INN

The ANNI Report 2014 focuses on two thematic issues, namely 1) The Protection of HRDs/WHRDs and Shrinking Civil Society Space and 2) The Implementation of the APF Advisory Council of Jurists (ACJ) References by NHRIs.

### **NHRC's role in protecting HRDs/WHRDs and the shrinking space for civil society and the Implementation of the APF Advisory Council of Jurists (ACJ) References:**

As part of assessing role of the NHRC in protecting HRDs/WHRDs as well as the shrinking space for civil society and the implementation of the ACJ references, a questionnaire was prepared and shared with NHRC, Bangladesh. We welcome that the NHRC has provided their response, although that was very brief and did not show the impact of the actions taken by the NHRC.

On the question of using ACJ references, the NHRC mentioned that it has conducted round table discussions with NGOs working for sexual minority population, in collaboration with the Law Commission, NHRC has developed the first ever draft law on anti-discrimination, which covers legal protection of SOGI issues.

NHRC has also mentioned that in order to ensure better access to education for the common people and to include Human Rights based Approach (HRBA) into the curricula, it has started reviewing junior level text books. Moreover, it started a program for the boys and girls in schools to make them aware about human rights in broad and child rights in particular. The NHRC has reviewed the draft Human Trafficking Act and placed its recommendation, which has been incorporated in the final Act.

It is noteworthy that the NHRC has been talking about SOGI rights and working for the incorporation of Human Rights in the education curricula. However, it is noticeable that the NHRC has not adopted any special mechanism to provide protection to Human Rights Defenders including of establishing a focal point or protection desk.

On the question of challenges in using ACJ references, NHRC has mentioned that it has not yet been equipped with adequate manpower and branch offices as well as with enough logistics. However, we realize that detail understanding of the ACJ references and not having clear strategic direction to implement those are also important in this regard.

## **6. Recommendations**

### **To the Government of Bangladesh (GoB):**

- The Government should adopt speedy steps to remove the limitations and loopholes in the founding/ enabling legislation including the provision on fact-finding on allegations against the security forces;
- It should insert the provision of an open dialogue or public call or consultation with civil society in selection and appointment of members in the National Human Rights Commission;

- The Government should make sincere efforts and take concrete measures to make the Commission institutionally, functionally, financially independent and also as a dignified national institution as well as an internationally acclaimed institution;
- The Government should comply with the NHRC's recommendations and act upon them immediately with foremost preference and sincerity;
- It should enable NHRC in making complaints-handling process more effective;

#### **To the National Human Rights Commission (NHRC):**

- The Commission should restructure the annual statement of the responsibilities and tasks of each Commission member, based on the needs of the NHRC and the level of availability of the individual member.
- To maximise the participation of all members in the work of the NHRC the Commission should meet at least once a month for at least half a day to plan NHRC activities, receive reports on implementation of strategic and annual work plans, develop and approve policy on major issues, and ensure accountability.
- Each NHRC committee should also meet at least once a month, with the initial priority being the development and adoption of a work plan for the committee.
- The NHRC should effectively pursue concerned authorities to repeal the current rule on deputation or secondment of staff to the position of Secretary and to other senior management positions. It should draft terms of reference for those positions as the basis for external advertising and competitive selection to fill the positions at that time and thereafter. It should draft terms of reference for those positions as the basis for external advertising and competitive selection to fill the positions at that time and thereafter.
- The NHRC should adopt and implement a development program for the NHRC as a whole and for each commissioner and permanent staff member to ensure that the NHRC has personnel – commissioners and staff – with the range of skills and expertise it requires.
- The NHRC should initiate consultative process to review the 2010-2015 Strategic Plan and adopt a new strategic plan to ensure that it reflects the NHRC's own policies and priorities, that it continues to be relevant, appropriate and implementable, and that the Commission is committed to its full implementation.
- The NHRC should ensure its financial independence, transparency and accountability through:
  - \* Direct funding from the Parliament with its own budget line and with budgetary authority to spend
  - \* Full financial transparency by publication of its budget and expenditure statements

- \* Full financial audit annually and the audit should be publicly released.
- The NHRC should develop a strategy and plan for outreach to all divisions of Bangladesh, including setting priorities for the opening of offices in divisional headquarters.

# MALDIVES: BETWEEN A ROCK AND A HARD PLACE

## Maldivian Democracy Network<sup>1</sup>

### 1. Introduction

Although some forward-thinking legislation was adopted,<sup>2</sup> the year 2013 has seen the Maldives markedly low on the human rights spectrum. Some regressive legislation was adopted<sup>3</sup> while several incidents of human rights abuses had taken place within the year. Some of these incidents involved extremely violent attacks on individuals including child sexual abuse, attacks on journalists, law enforcement personnel and on political activists. An obvious case is the rape of a 15 year old girl and the subsequent sentencing of the victim to flogging on charges of fornication.<sup>4</sup> A significant rise in child rape has been noted.<sup>5,6,7,8,9</sup> These incidents were closely linked to the disregard for the right of the child by the judicial system in the country where children are unlawfully charged and sentenced while perpetrators are acquitted.<sup>10,11</sup> The difficulty in addressing these violations were widely contributed by the loopholes in the justice system<sup>12</sup> and the rising attitude of fundamentalism in the country.<sup>13,14</sup> The attempted murder of Raajje TV journalist “Asward” Ibrahim<sup>15</sup> was followed later on by the arson attack on the TV station itself.<sup>16</sup>

The political crisis in the Maldives extended into the year under review as well. A continued trend of politically motivated arrests and police brutality<sup>17</sup> was noted. While the criminal charges against former president Mohamed Nasheed was advanced for arraignment to take place before the presidential elections,<sup>18,19,20</sup> the elections itself was hampered by interventions from the judiciary and the police.<sup>21,22,23,24</sup>

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<sup>2</sup> Anti-Torture Act, Human Trafficking and People Smuggling Act, Political Parties Act.

<sup>3</sup> The Public Assembly Act has been cited by civil society and the Human Rights Commission of Maldives to curtail more fundamental rights.

<sup>4</sup> <http://minivannews.com/society/under-age-rape-victim-convicted-of-fornication-sentenced-to-100-lashes-53712>

<sup>5</sup> <http://minivannews.com/news-in-brief/17-year-old-girl-gang-raped-in-male-84055>

<sup>6</sup> <http://minivannews.com/society/police-searching-for-24-year-old-man-in-connection-with-gang-rape-of-16-year-old-girl-58776>

<sup>7</sup> <http://minivannews.com/society/fourteen-year-old-girl-latest-victim-in-surge-of-rape-crimes-62270>

<sup>8</sup> <http://minivannews.com/society/four-arrested-on-charges-of-rape-and-filming-a-minor-61946>

<sup>9</sup> <http://minivannews.com/society/maldives-facing-widespread-child-prostitution-sexual-abuse-clinical-psychologist-59956>

<sup>10</sup> <http://minivannews.com/society/criminal-court-acquits-six-men-charged-with-gang-rape-of-14-year-old-girl-60080>

<sup>11</sup> <http://minivannews.com/politics/juvenile-court-sentences-17-year-old-boy-to-four-months-in-prison-for-kissing-girl-66493>

<sup>12</sup> <http://minivannews.com/society/hrcm-claims-mandate-pushed-to-limit-over-15-year-olds-flogging-sentence-63134>

<sup>13</sup> <http://minivannews.com/society/flogging-of-15-year-old-%E2%80%9Ctip-of-the-iceberg%E2%80%9D-of-maldives-treatment-of-sex-offences-amnestys-south-asia-director-56991>

<sup>14</sup> <http://minivannews.com/society/rising-religious-fundamentalism-conservative-thinking-impacting-women-department-of-national-planning-60859>

<sup>15</sup> Case study 2 below.

<sup>16</sup> <http://minivannews.com/politics/raajje-tv-destroyed-in-arson-attack-67833>

<sup>17</sup> <http://minivannews.com/politics/police-arrest-12-during-large-mdp-protest-on-charges-of-police-assault-obstruction-67795>

<sup>18</sup> <http://minivannews.com/news-in-brief/nasheeds-trial-hearing-scheduled-for-april-4-54667>

<sup>19</sup> <http://minivannews.com/politics/nasheeds-legal-team-files-high-court-case-to-defer-trial-until-after-elections-55072>

<sup>20</sup> <http://minivannews.com/politics/difficult-to-consider-elections-credible-unless-nasheed-is-allowed-to-contest-european-union-54653>

<sup>21</sup> <http://minivannews.com/politics/supreme-court-annuls-first-round-of-presidential-elections-67952>

<sup>22</sup> <http://minivannews.com/politics/%E2%80%9Csupreme-court-is-subverting-the-democratic-process%E2%80%9D-un-high-commissioner-for-human-rights-70326>

<sup>23</sup> <http://www.idu.org/news.aspx?id=2340>

Local lawyers who criticised the Supreme Court were questioned and suspended<sup>2526</sup> while local NGOs were attacked for their criticism of the judiciary.<sup>2728</sup> A significant rise in murders, gang violence and also reported cases of gender based violence have prevailed in the year under review. The Human Rights Commission of Maldives stated that it noted an increase in torture in detention in 2013.<sup>29</sup> The US State Department in their 2013 Human Rights Report described corruption, religious freedom and the judiciary to be the biggest human rights problems in the Maldives.<sup>303132</sup>

The Human Rights Commission of Maldives faced a challenging year in 2013, one of the biggest being the threats to the dismissal of members through political motivation. The Commission was summoned to the parliamentary special committee on independent commissions several times, where the environment shifted quickly from one of gathering information to one of interrogation. Political parties react to the commission's actions and inactions publicly, and at times severely. These reactions portray some amount of political bias while at the same time it addresses violations of human rights. Some are followed by hints of some kind of steps to be taken against the members of the commission.

## 2. Independence

<b>Establishment of NHRI</b>	
Established by Law/Constitution/Presidential Decree	The Human Rights Commission Act (6/2006) <a href="http://www.hrcm.org.mv/publications/otherdocuments/HRCMActEnglishTranslation.pdf">http://www.hrcm.org.mv/publications/otherdocuments/HRCMActEnglishTranslation.pdf</a>
Mandate	Working towards the protection and maintenance of human rights in the Maldives as described in Islamic Shari'a and the Constitution of Maldives. <sup>33</sup>
<b>Selection and appointment</b>	
Is the selection process formalised in a clear, transparent and participatory process in relevant legislation, regulations or binding administrative guidelines?	The selection process is prescribed in clear and transparent terms in the Human Rights Commission Act and the process is highly participatory. <sup>34</sup>
Is the selection process	The selection process does not involve the participation of NGOs and civil

<sup>24</sup> <http://www.reuters.com/article/2013/10/19/us-maldives-election-idUSBRE99I01020131019>

<sup>25</sup> <http://minivannews.com/politics/supreme-court-questions-mdp-lawyer-hisaan-hussain-over-alleged-contempt-of-court-72316>

<sup>26</sup> <http://minivannews.com/politics/supreme-court-suspends-prominent-lawyer-pending-investigation-for-contempt-75883>

<sup>27</sup> <http://minivannews.com/politics/transparency-international-gravelly-concerned-about-safety-of-maldives-staff-volunteers-67909>

<sup>28</sup> <http://minivannews.com/politics/tourism-employees-association-and-transparency-maldives-under-investigation-67372>

<sup>29</sup> <http://minivannews.com/politics/torture-in-detention-increasing-says-human-rights-commission-79982>

<sup>30</sup> <http://minivannews.com/politics/corruption-religious-freedom-and-judiciary-biggest-human-rights-problems-in-maldives-say-us-report-78705>

<sup>31</sup> <http://www.state.gov/j/drl/rls/hrrpt/2013/sca/220399.htm>

<sup>32</sup> <http://minivannews.com/politics/pro-sharia-march-held-in-male-ngo-claims-maldives-not-ready-for-full-implementation-56564>

<sup>33</sup> Section 2, Human Rights Commission Act.

<sup>34</sup> Section 5, Human Rights Commission Act.

under an independent and credible body which involves open and fair consultation with NGOs and civil society?	society at all. It is conducted primarily by the parliament with the discretion of the short-listing of names to the President of the Republic.
Is the assessment of applicants based on pre-determined, objective and publicly available criteria?	No. The publicly available information is basic criteria for eligibility for membership. Information on the process of evaluation is not disclosed by the parliament.
How diverse and representative is the decision making body? Is pluralism considered in the context of gender, ethnicity or minority status?	The final decision is made by the members of the parliament. It is not necessarily diverse or representative in terms of representation of the regions of the country, and is considered more politically aligned. Gender sensitivity is particularly low within the parliament. The present Human Rights Commission faced many delays in appointing the Chair and Vice Chair because the names of two women were proposed to the parliament by the president, and the parliament refused to appoint women to the two positions <sup>35</sup> by failing the Vice Chair nominee.
<b>Terms of office</b>	
Term of appointment for members of the NHRI	5 years, up to 2 consecutive terms <sup>36</sup>
Next turn-over of members	2015

The members of the NHRI are not particularly outspoken on issues relating to human rights. The present composition of the Human Rights Commission of the Maldives consists of five members, covering expertise from the education sector, foreign relations, Islamic studies, cultural studies and psycho-social education.<sup>37</sup> It is noteworthy that the present commission is the second elected NHRI under the HRCM Act in the country, and the institution has not had a member specialised in human rights education or human rights law. The importance of instilling firmly the principles of fundamental rights is particularly obvious when Commissioner Ahmed Abdul Kareem (nominated for the commission as a representative of Islamic background) stated in a consultation on the Domestic Violence Prevention Bill that Islam allows for husbands to beat their wives.<sup>38</sup>

<sup>35</sup> <http://minivannews.com/news-in-brief/parliament-approves-hrcm-president-fails-vp-nominee-11875>

<sup>36</sup> Section 7, Human Rights Commission Act.

<sup>37</sup> <http://www.hrcm.org.mv/aboutus/Commissioners.aspx>

<sup>38</sup> 2011, Bandos Island, Workshop to review the Domestic Violence Bill.

The NHRI in general is highly active in setting goals and achieving a number of them, and addresses many issues related to fundamental rights that may not be raised publicly, such as assessments on the housing situation, but appears wary in addressing emergent issues and critical incidents that have led to public outcries.

There has not been a baseline study conducted on the public perception of the Human Rights Commission of the Maldives. However the Commission is largely criticised on social media, mostly for inaction on critical events.

The process for filling vacancies of membership is stated in clear and transparent terms within the Human Rights Commission Act.<sup>39</sup> However, the situation of a mid-term vacancy has not arisen to date.

The Human Rights Commission, as is the case of all other independent institutions, face political consequences in appointment of members and also in selecting Chairs and Vice-Chairs due to the highly polarised political representation in the parliament. The president of the republic is not mandated with a time period for when nominations for membership is to be sent to the parliament, which leads to delays at times. The parliament is also not mandated with a timeframe in which to complete the selection process, and political squabbles within the parliament often lead to unwarranted delays in appointment of members to the commission.

### **Terms and conditions of office (guarantees of tenure)**

The term of 5 years is appropriate in promoting independence of membership. The term of the HRCM falls around the middle of the presidential and parliamentary terms, which ensures that there is an overlap in the membership of the NHRI into the presidential and parliamentary terms.

The dismissal process of members of the commission depends on criteria prescribed in the HRCM Act which must be followed by a two-third majority of parliament.<sup>40</sup> It cannot be regarded as a highly objective process due to the overriding importance given to political will rather than competence within the parliament. There has never been a motion for dismissal of a member of the HRCM before, and the process has not been tested so far. The protection of tenure can be questioned as the sole mediator to the parliament on dismissal of members is the president of the republic,<sup>41</sup> and any member of parliament is free to initiate a no-confidence vote of any member of independent institutions. Although there is a process where the vote has to be sanctioned by the relevant parliamentary special committee (in the case of HRCM that is the Independent Institutions Oversight Committee) before being asked for a vote on the floor, there is a fair possibility of politically motivated dismissals of members of the Commission.

National law clearly prescribes protection of legal liability of members for actions and decisions undertaken in good faith in their capacity,<sup>42</sup> stating that no civil or criminal charges shall be undertaken upon a member of the Commission for carrying out a duty in good faith. It further adds that no action shall be taken against

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<sup>39</sup> Section 11 and 12, Human Rights Commission Act.

<sup>40</sup> Section 15, Human Rights Commission Act.

<sup>41</sup> Section 15, Human Rights Commission Act.

<sup>42</sup> Section 27, Human Rights Commission Act.

the Commission or a member of the commission for statements and reports published, providing that there is no misinformation in such a publication.

### **Staffing and recruitment**

The NI has complete authority over determining its staffing profile and recruitment. Article 29 (b) of the HRCM Act provides for it. Neither the governing body nor the staff has any government or political representative. The NI's legislation ensures discretion over hiring staff to the governing body, and the criterion for membership states impartiality of the members.<sup>43</sup> However the legislation is silent on the characteristics of employees in terms of political affiliations. The NI's legislation ensures prevention of conflict of interest or inappropriate influence of decisions. The HRCM Act states that members must not involve to any extent in matters concerning self-interest, personal involvement, financial or any other personal gain. It further prescribes that although a member of the NI may not have been aware of a situation of conflict of interest, the member must inform the Chair of the Commission upon realising it, and must then refrain from inquiring into the matter or influencing the outcome of the decision.<sup>44</sup>

### **3. Effectiveness**

The Human Rights Commission of the Maldives can be measured for its effectiveness in many aspects. Although there has not been a specific methodology designed for this task, MDN has, for the purpose of this report, chosen to select three case studies from the year under review. These case studies present some of the worst cases of human rights abuse in the country where several fundamental rights have been violated in a single incident or incidents surrounding a specific case. Actions taken by the NI, the HRCM Act and implementation of ACJ references by NIs will be used as a benchmark to measure effectiveness of the NHRI in these instances.

The policies of the Commission are set in very broad terms and applies to all potential human rights issues in the country. The legislation allows a very broad mandate of the Commission too. It is noteworthy, however, that the judiciary of the Maldives has shown a tendency to use their *suo-moto* powers to initiate reviews over sections of / or legislation and to amend or remove them. The judiciary has also threatened to displace the role of the HRCM on some of the work that the Commission has carried out through interventions.<sup>45</sup>

#### Case Study 1: Judicial Punishment of a 15 year old girl-child rape victim

On 26 February 2013 the Juvenile Court of Maldives sentenced a 15 year old girl, a victim of rape, to 100 lashes and eight months of house arrest for charges of fornication. While the same girl had given birth to a baby in 2012, which was discovered buried at the home of the girl's family, the father of the girl was later charged for child sexual abuse and premeditated murder, along with her mother who was charged for concealing a crime and failure to report the sexual abuse. The sentence was, however, overturned by the High Court, which was also shortly after a global outcry against the sentencing, with a petition of over a million signatures.<sup>46</sup> It is questionable how the Prosecutor General's office decided to press charges of fornication to a minor who was so publicly claiming that she was raped. The Prosecutor General's office had said that the investigation into the previous case of childbirth had unearthed a separate incident of fornication. There was an attempt by the Prosecutor General's Office to delay the hearing at the Juvenile Court, informing that a

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<sup>43</sup> Section 6, Human Rights Commission Act.

<sup>44</sup> Section 28, Human Rights Commission Act.

<sup>45</sup> <http://minivannews.com/politics/human-rights-commission-receives-juvenile-court-summons-79406>

<sup>46</sup> <http://minivannews.com/politics/maldives-high-court-overturns-flogging-sentence-for-15-year-old-charged-with-fornication-63028>

man was being tried at the Criminal Court at the same time, for charges of sexual abuse of the same 15 year old girl.<sup>47</sup> The Juvenile Court, however proceeded with the trial. It is also noteworthy that allegations of miscommunications between the investigators, prosecutors and the then Deputy Prosecutor General led to the charges being filed on the rape victim. The Juvenile Court sentenced the girl on grounds that she confessed to consensual sexual intercourse. However, human rights groups, NGOs and international criticism heavily highlighted the fact that the girl was a minor, and thus should not be subject to consent. The second issue highlighted in the case is the court's sentence for flogging, which had rendered a woman unconscious a few months before the case in question. Human rights groups in the Maldives and the region, in addition to international pressure, has been calling on the authorities to refrain from using capital punishment and other sentences that are considered inhumane.

The Human Rights Commission of the Maldives launched an investigation into the case based on the allegation that the child had been subjected to sexual abuse by her family. The report of the investigation was submitted to the appellate court following an appeal by the Ministry of Gender and Human Rights.<sup>48</sup> The HRCM urged the High Court to treat the child as a victim of abuse rather than an offender, and was subsequently granted *amicus curiae* on the case in the High Court. HRCM later issued a confidential report on the case, consisting of recommendations to relevant authorities.

It is noteworthy that the said report of the investigation which was issued confidentially by the HRCM resulted in the Juvenile Court taking action against the NI. All the members of the NI were summoned to the Juvenile Court on a number of occasions, alleging that the NI was in contempt of court, referring to some criticism towards the Juvenile Court in the case of the child rape.<sup>49</sup>

#### Case Study 2: Attempted murder of Raajje TV Journalist 'Asward' Ibrahim

The head of news for Raajje TV, Ibrahim 'Asward' Waheed was attacked on the street with iron rods on the early morning of 23 February 2013.<sup>50</sup> The beating left Waheed in a coma and in intensive care for weeks, and he has lost vision in one eye since his recovery. Waheed has been a popular journalist, publishing highly controversial stories of political and judicial corruption. The news-station Raajje TV was targeted later in the year with arson, which destroyed most of the equipment and studios that the station used. The Press Freedom Index by Reporters Without Borders (RSF)'s for 2013 stated that Maldives had dropped to 103, a fall of 30 places from the previous year.

The Maldives Police Service reported in April 2013 that investigation of two suspects had been sent to the Prosecutor-General's Office in the case of the attack on Waheed.<sup>51</sup>

The HRCM issued a press statement condemning the attack on the journalist, and responded to queries from MDN saying that the NI is also monitoring the police investigation into the case.

The NI's legislation prescribes as responsibilities and also grants *suo moto* powers to investigate matters of human rights violations that are reported to the NI and those that are not reported but of which the NI learns.<sup>52</sup>

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<sup>47</sup> <http://minivannews.com/society/trial-against-minor-for-%E2%80%9Cconsensual-sexual-relations%E2%80%9D-to-continue-this-week-51821>

<sup>48</sup> <http://minivannews.com/politics/high-court-appeal-of-15-year-old-rape-victims-sentence-begins-57159>

<sup>49</sup> <http://minivannews.com/politics/hrcm-members-summoned-to-juvenile-court-again-over-confidential-report-81575>,

<http://minivannews.com/politics/hrcm-attends-juvenile-court-after-summons-agrees-to-cooperate-with-enquiry-80091>

<sup>50</sup> <http://minivannews.com/politics/raajje-tv-journalist-in-critical-condition-after-attack-53455>

<sup>51</sup> [http://www.haveeru.com.mv/ibrahim\\_waheed\\_asward/48517](http://www.haveeru.com.mv/ibrahim_waheed_asward/48517)

<sup>52</sup> Sections 20, 21 and 22 of the Human Rights Commission Act.

### Case Study 3: Rising Religious Fundamentalism and its Impact on Girls and Women

Several academics and authors have been writing of the recent rise in Islamic fundamentalism in the Maldives.<sup>53</sup> Among the worst affected are the girls and women in the country. The radicalisation has led to families refusing to immunise babies and enforcing girls to quit school in the name of home schooling. A number of child marriages<sup>54</sup> have taken place outside the legal system, where radical groups insist that Islam does not require more than the father's consent and two witnesses to marry a girl. As such, girls as young as nine years have been married off to adults, and at least one has been given away as a concubine<sup>55</sup>. The punishment under Islamic Shari'a that women have had to undergo for unlawful sexual intercourse, flogging, still prevails in the country<sup>56</sup> and some women have fallen unconscious from the pain of it. The incidences of female circumcision began to rise in early 2012<sup>57</sup> and filtered into 2013 without much voice against it.

Overall, although not much effort could be made by groups within the country for fear of persecution, the fear of the rise in fundamentalism in the Maldives and its effects on women and girls was recognised globally.<sup>58,59</sup> The Minister of Islamic Affairs acknowledged extremism in the Maldives around mid-2012 too,<sup>60</sup> although no action was taken on the issue. The previous Religious Unity Regulation which was later developed into the Religious Unity Act,<sup>61</sup> which allows for specific Islamic scholars to hold public seminars and educate the public on Islam. Most of these scholars have been trained at the Islamic University of Madinah (in Saudi Arabia), which is known for its fundamentalist interpretations of Islam.

The HRCM is aware of the issues highlighted in relation to the rise in fundamentalism in the country, and their monitoring visits have also discovered that some traditional leaders have issued *fatwas* saying that it is un-Islamic to register marriages at the courts. The Commission has embarked on a promising program where it establishes 'Human Rights Clubs', which is an essential part of awareness for children growing up in this society. The Commission also conducts 'Human Rights Clinics' in the atolls, which is also an awareness building exercise aimed at the rural communities.

The Constitution prescribes that there shall be no discrimination between men and women in the Maldives.<sup>62</sup> The law number 9/91 (Child Rights Protection Law) states the government must provide or facilitate immunisation and education to all children,<sup>63</sup> and also that the parents of a child must provide children with education and take necessary precautions to ensure the health and wellbeing of the child, and also that parents must protect the child from anyone who may misbehave with the child or cause harm or violate the child's dignity and report to relevant authorities of such an act immediately.<sup>64</sup> Violating or failure to abide by instructions in a law is prosecutable under the section 88-a (disobedience to order) of the Penal Code. The law number 4/2000 (Family Law) prescribes that a marriage need to be permitted by the Registrar of Marriages,<sup>65</sup> and that it must take place in front of a judge.<sup>66</sup> It also states that the age permitted for marriage

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<sup>53</sup> <http://www.isn.ethz.ch/Digital-Library/Articles/Detail/?id=168645>

<sup>54</sup> <http://minivannews.com/society/police-investigating-reports-of-illegal-under-age-marriage-108>

<sup>55</sup> <http://minivannews.com/politics/azima-shukoor-commends-police-for-finding-concubine-4979>

<sup>56</sup> <http://minivannews.com/politics/the-culture-of-flogging-in-the-maldives-a-systematic-abuse-of-human-rights-55092>

<sup>57</sup> <http://www.smh.com.au/world/female-circumcision-fear-as-fundamentalists-roll-back-womens-rights-20120124-1qflv.html>

<sup>58</sup> <http://www.awid.org/Library/The-Perils-of-Rising-Religious-Fundamentalism-in-the-Maldives>

<sup>59</sup> <http://www.miadhu.com/2012/11/local-news/maldives-warns-on-rising-fundamentalism/>

<sup>60</sup> <http://minivannews.com/politics/nasheed-government-failed-to-combat-extremism-islamic-minister-sheikh-shaheem-39714>

<sup>61</sup> The Religious Unity Act stipulates criteria for those licensed as "Islamic Scholars". The content of sermons and religious dialogue is controlled by this Act.

<sup>62</sup> Article 17, Constitution of Maldives

<sup>63</sup> Section 3, 5, Child Rights Protection Law

<sup>64</sup> Sections 15, 15, Child Rights Protection Law

<sup>65</sup> Section 14, Family Law

<sup>66</sup> Section 3, Family Law

(if not otherwise permitted by the Registrar of Marriages) as eighteen years,<sup>67</sup> that a marriage can only take place with the consent of both man and woman to be wedded in addition to the *walee/wali* (or male guardian)<sup>68</sup> and that without registration a marriage shall be unlawful.<sup>69</sup> The Family Law further states as offenses cases of not registering marriages and violating any part of the law.<sup>70</sup> Furthermore, the law number 6/94 (Religious Unity Act) states that it is an offense to spread religious views that create controversies,<sup>71</sup> and prescribes harsh penalties for violating the law.<sup>72</sup>

There is no information available of whether the HRCM has investigated offenses described in the Child Rights Protection Law, Family Law or the Religious Unity Act.

#### Case Study 4: The Presidential Elections of 2013

The first round of the Presidential Elections following the controversial transfer of power in February 2012 was held on 7<sup>th</sup> September 2013. Former President and the opposition leader Mohamed Nasheed garnered 45% of the votes among all four candidates and went on to a run-off with President Yameen Abdul Qayyoom who acquired 25%. The run-off election was announced by the Elections Commission to be held on the 29<sup>th</sup> September 2014. The Supreme Court ordered a postponement of the run-offs and subsequently made a ruling which annulled the first round of elections<sup>73</sup> and a second date announced for the 19<sup>th</sup> October 2013. The Supreme Court further included in the ruling an “Elections Guidelines”, which was declared impractical and un-implementable by the Elections Commission (EC).<sup>74</sup>

However, the Elections Commission announced that all preparations for the polling was ready for the date. The EC faced numerous obstacles in the run up to the polling day, including refusal by some candidates to sign the voters lists, which was a mandatory requirement by the Supreme Court’s Election Guidelines. Since the said guidelines also mandated the EC, upon criminal liability, to hold the elections by the 19<sup>th</sup> October 2013, the EC declared that the polling would continue as planned. The Maldives Police Service stopped elections shortly before polling was scheduled to begin on 19<sup>th</sup> October 2014.<sup>75</sup> The election was later held on the 9<sup>th</sup> November 2014 and a run-off agreed by all candidates planned for the following day as the Constitution prescribed the swearing in of the President on the 11<sup>th</sup> November. Opposition candidate Nasheed garnered 46% of the votes and President Yameen won 29% of the votes in the polling of the new first round. However, following the first round of elections President Yameen disagreed with holding the run-offs on the following day which resulted in the second rounds being held on the 16<sup>th</sup> of November, passing the date mandated by the Constitution for the appointment of a President.

Several appeals and statements were made by the civil society<sup>76</sup> in relation to the gross violations of the right to vote and elect a leader by the people of the Maldives in addition to statements of appeals made by the international community<sup>77</sup> throughout the delays in holding the presidential elections.

The HRCM made public appeals to all parties concerned, calling for timely polling.<sup>78</sup> The Commission also looked into the obstruction of polling by the Maldives Police Service,<sup>79</sup> and condemned the act, calling it

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<sup>67</sup> Section 4, Family Law

<sup>68</sup> Section 9, Family Law

<sup>69</sup> Section 19, Family Law

<sup>70</sup> Sections 62, 70, Family Law

<sup>71</sup> Section 4, Religious Unity Act

<sup>72</sup> Section 6, Religious Unity Act

<sup>73</sup> <http://minivannews.com/politics/supreme-court-annuls-first-round-of-presidential-elections-67952>

<sup>74</sup> <http://www.haveeru.com.mv/news/51839>

<sup>75</sup> <http://www.haveeru.com.mv/news/51841>

<sup>76</sup> <http://www.haveeru.com.mv/news/51418>, <http://minivannews.com/politics/%E2%80%9Csupreme-court-is-subverting-the-democratic-process%E2%80%9D-un-high-commissioner-for-human-rights-70326>

<sup>77</sup> <http://minivannews.com/politics/ec-dismissals-court-decision-condemned-by-international-community-ec-praised-79528>

illegal.<sup>80</sup> It is unclear whether any further investigations were conducted by the Commission to identify perpetrators of these violations of a fundamental right of the people of the Maldives. It is unclear whether any further action was taken against anyone by the HRCM subsequent to the obstruction to the right to vote.

On the quality and timeliness of actions/interventions by the NHRI:

The complaints handling procedures such as information on how to lodge a complaint, the complaint form, status of a complaint and statistical information on cases concluded and those ongoing are available on the website of the Commission. It is noteworthy however, that the links to some of the mentioned information leads to pages in English, which many of those needing it may not fully understand. The Internet is not widely accessible in outer atolls, and the Commission provides this information in the ‘Human Rights Clinics’ conducted in outer islands as part of the public awareness program.

There have been no known cases of complainants or witnesses having faced retaliation with regard to cases investigated by the Commission. The Commission has legal entitlement, and has used this entitlement to refer its findings to a court of law and to seek reparation for victims of human rights violations in accessing justice and factual information (detailed in the section under engagement with the judiciary).

Complainants and victims face confusion with regard to the type of human rights violation that the HRCM can investigate. The Commission informed the parliament in 2012<sup>81</sup> that it cannot investigate criminal offenses, whereas the Commission shortly after launched the investigation into the unlawful arrest of a judge which was allegedly carried out by presidential orders.<sup>82</sup> MDN also highlights that most human rights violations are criminal offenses under national legislation.

#### **4. Engagement with other stakeholders**

##### **Civil Society**

The Human Rights Commission of Maldives has their main office in the capital city of Male. The Commission does not have branches in the atolls, and daily communication has to be made electronically. The HRCM launched a Network of NGOs<sup>83</sup> which states provision of assistance as a primary mandate. The Network presently comprises of 57 organisations, and although the network has not met in the past year, a primary mode of communication within the network is through e-mail. The HRCM provided technical support to one CBO and conducted one training on legal awareness to 18 participants over the past year. The organisations in the network also participate in the ‘Human Rights Clinics’ that the Commission conducts.

The network is used for consultations in the work of the HRCM such as gathering information for the Commission’s work on reporting to treaty obligations, assessing the national human rights situation, conducting awareness programs and advocacy activities and marking human rights days. The Commission encourages the organisations to align their work with the work of the Commission and to participate in regional and international meetings on human rights. This network is also encouraged by the Commission to work as a pressure group to resolve human rights issues, and meets on alternate years with the HRCM and

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<sup>78</sup> <http://minivannews.com/politics/united-states-hrcm-multiple-ngos-back-elections-commission-urge-presidential-polling-to-take-place-saturday-68929>

<sup>79</sup> <http://www.sun.mv/english/17007>

<sup>80</sup> <http://minivannews.com/politics/police-stopped-election-illegally-in-violation-of-constitution-human-rights-commission-69591>

<sup>81</sup> Meeting with Special Parliamentary Committee on Independent Institutions Oversight, February 2012.

<sup>82</sup> <http://minivannews.com/politics/hrcm-to-conclude-investigation-into-the-arrest-of-judge-abdulla-mohamed-before-april-33286>

<sup>83</sup> [http://hrcm.org.mv/NGO\\_Network.aspx](http://hrcm.org.mv/NGO_Network.aspx)

the government for this purpose. Although some civil society organisations may be engaged in different activities of the Commission, it is unclear whether a mechanism of reaching vulnerable groups through civil society exists at the Commission.

A regular, constructive and systematic working relationship is not seen to be maintained by the Commission with civil society stakeholders. Although such a relationship will enhance the effective fulfilment of their mandate, the Commission may be limited in resources to coordinate such an effort. The Commission does invite some civil society organisations for human rights related trainings such as those on preparation for the UPR and basic human rights mechanisms. There is no information of the Commission requesting data or information from civil society. The HRCM does not involve civil society in programming or planning of policies and implementation of their work. The relationship is more on an ad-hoc basis than systematic.

### **Parliament / MPs**

The regular and timely submission of the annual report and annual budget of the HRCM to the Parliament is a statutory obligation of the NI. However, the annual report is not discussed in parliament following submission. The recommendations of the HRCM are not discussed by parliamentarians and, neither the state nor public authorities are held to account for actions or inactions on previous recommendations. The annual budget proposals are reviewed by a special committee at the parliament. This process involves engagement with the Commission. Individual budget proposals for institutions are not discussed on the floor of the parliament although the overall state budget is discussed and any detailed discussion will depend on whether Members of Parliament raise specific issues with individual budgets.

While the Commission is involved by the Parliament in the drafting process of some bills, the HRCM submits regular reviews of legislative projects and the Parliament invites the Commission to attend Special Committee meetings to advocate for amendments to legislation. The primary contact point in the Parliament for the NI is the oversight committee for independent institutions, and most communications between the two institutions are made through this committee except for meetings with the Speaker of the Parliament.

### **Judiciary**

The HRCM is mandated to investigate and find amicable solutions to infringement of human rights, through means of peaceful reconciliation between the victim and the perpetrator. However, if a solution is not met amicably, HRCM can make recommendations to state authorities and/or file case with the Prosecutor General in criminal cases or pursue public interest litigation cases directly with the courts. As such, HRCM was granted third party intervention at the High Court on appeal in the flogging case of the 15 year old and HRCM's report was considered as an *amicus curiae* submission. The Commission has the powers to submit a report to the Chief Justice and the presiding judge in cases of human rights infringements during an ongoing trial.<sup>84</sup> The Commission can also submit information on the infringement of human rights of a person in an ongoing trial,<sup>85</sup> and the Commission has so far submitted 14 such reports. The national legislation provides the HRCM to make efforts for peaceful reconciliation between those involved in cases of human rights violations. The Commission is also entitled to take legal action failing efforts for reconciliation outside of the courts.<sup>86</sup> The Commission practiced this entitlement in 2013 in the case where the Ministry of Gender, Family and Human Rights disregarded the Commission's directive to remove two female minors from the

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<sup>84</sup> Section 21 (g), HRCM Act.

<sup>85</sup> Section 23, HRCM Act.

<sup>86</sup> Section 24 (a, b), HRCM Act.

Maafushi Prison. The Commission sought a court order for the removal and ensured the protection of the young girls.<sup>87</sup>

### International Human Rights Mechanisms

The HRCM employs staff dedicated to research and monitoring, which involves to a high extent the reporting to and monitoring of treaty obligations. The Commission submits timely stakeholder reports to different treaty reviews. The Commission ensures training of relevant staff in this area of work.

The HRCM monitors public protests in order to ensure the right to assembly for every person. The Commission further appealed with the government to refrain from ratifying the present Freedom of Peaceful Assembly Act, which curtails much of the right to assembly. The Commission made communications raising concern with the Minister of Home Affairs, following the threats of deregistration made to local NGOs by the Registrar of NGOs during the Presidential Elections.

### 5. Thematic Issues

Issues:	Objectives:
<p><b>1. Protection of HRDs / WHRDs and Shrinking Civil Society Space</b></p>	<p>Protection of HRDs and WHRDs: The HRCM does not have a special process for the protection of HRDs and WHRDs. The existing complaints mechanism at the Commission is available for everyone living in the Maldives to seek redress. However the HRCM has, at times, made public statements and launched <i>suo-moto</i> investigations into some cases concerning W/HRDs. They have also made prison visits in some cases where W/HRDs have been detained. It is not clear whether there is a special mechanism for the selection of such cases. The HRCM has not used <i>amicus curiae</i> in a case of a W/HRD yet. The existing mechanism does not address emergencies effectively, and it is difficult to reach staff or get access to the Commission outside of official hours. The Commission must bear in mind that W/HRDs are most vulnerable to human rights violations outside of official hours and there is an express need for immediate action in such cases.</p> <p>The HRCM wrote a letter to the President of the Maldives requesting that he not ratify the Freedom of Peaceful Assembly Act.</p> <p>Shrinking Civil Society Space: The HRCM established a network of NGOs a few years ago. However closer analysis of the relationship between the HRCM and the NGOs in the network shows that the HRCM benefits more from this relationship than do the NGOs and CBOs in it. The step towards the establishment of an NGO network is a positive step and can be</p>

<sup>87</sup> Personal communication to MDN from HRCM.

	<p>improved to benefit the organisations represented in it.</p> <p>The HRCM communicated with the Ministry of Home Affairs through a letter following threats by the Registrar of Associations to deregister some NGOs. The letter condemned the threats.</p> <p>Further, the NGO network does not have individual or unregistered pressure groups representation, hence does not cover some important sections of the civil society. It is crucial that the HRCM establish a mechanism, or revise the existing mechanism to accommodate these groups.</p>
<p><b>2. Implementation of ACJ References by NHRIs:<sup>88</sup></b></p>	<p>Assessment of the general usage, compliance with standards as well as implementation of recommendation by NHRIs</p> <p>The HRCM did not respond at time of finalisation of the report with answers to the questionnaire on ACJ references.</p> <p>The response to MDN's questions indicate that the Maldives presently lacks a mechanism to implement the ACJ references. However, the NI assured MDN that the references are streamlined in the Commission's activities. There is no information available on measures taken on any specific ACJ reference.</p>

## 6. Conclusion and Recommendations

This report highlights some of the key incidents or trends in human rights violations in the Maldives over the year 2013. Such a compressed summary of events cannot do justice to the underlying difficulties that the state has faced due to elements such as political instability, corruption, lawlessness and insufficient level of awareness and education among the public as well as public office holders. The main focus of the report being the Human Rights Commission of the Maldives, it must be noted that no single state institution can undertake to rectify the violations of human dignity and fundamental rights that the Maldives has seen over the past year. Although the Human Rights Commission of the Maldives is the primary institution mandated to the promotion and protection of human rights in the country, the efforts of the Commission can only be realised with cooperation and support from the executive, legislative and judicial branches of the state.

The country has experienced an exceptionally harsh year in which the political instability and the rise in violations of fundamental rights has led to deep economic loss and wavered diplomatic relations. MDN commends the HRCM for their efforts in the face of many obstacles, and note that the Commission has been one of the most active independent institutions in the country over the year 2013. One of the hardest challenges that the Commission faces will be the unavailability of sufficient funds to strengthen the capacity

<sup>88</sup> The ACJ References are: Sexual Orientation and Gender Identity, Corporate Accountability, Right to Environment, Right to Education, Torture, Terrorism and the Rule of Law, Trafficking, Death Penalty, Child Pornography (<http://www.asiapacificforum.net/support/issues/acj/references>)

of the Commission and thus improve or increase its operations at a national level. While MDN recognises the economic difficulties that the state is faced with, it is disheartening to see that independent institutions such as the Human Rights Commission of the Maldives have to take the brunt of this burden. Given the state of human rights in the country and the massive challenge of righting several wrongs that have been recommended through mechanisms such as the Universal Periodic Review, it is essential that state funds be used wisely, such as investing in the HRCM, rather than spending it on the wages and benefit schemes of additional political appointments.<sup>89</sup>

While the HRCM is limited in how much it can function as an ideal national mechanism due to insufficient cooperation from the state, MDN notes that the Commission could function more effectively in areas that the Commission currently operate in. For example the Commission has the legal authority and investigative capacity to push cases against the Family Law for prosecution. It would not require extraordinary amounts of finances, as investigating is a daily activity of the Commission.

The efforts to improve public awareness on human rights and relevant legislation has grown significantly over the year, and changes in attitudes, especially in school children is visible. More effort must be made to broaden the work of the Commission to accommodate and welcome victims of all kinds of human rights violations to file complaints at the Commission and seek redress. It is also noteworthy that the HRCM has not established a special mechanism for the protection of HRDs, such as a focal point or desk at the Commission, despite recommendations by MDN and ANNI for the past five years. It is important that the Commission recognise and establish connections with not only human rights organisation but individual human rights defenders.

The Human Rights Commission Act provides broad and strong powers to the Commission in making interventions into violations of human rights such as *suo moto* powers. Legal proceedings have precedent of granting the Commission *amicus curiae*. National legislation also covers a number of fundamental rights as offenses when violated, and prescribes responsibility over the protection of children to their parents and the state. It is of great importance that the Commission use these powers and legal provisions as broadly as possible in order to ensure the protection of human rights in the Maldives.

## Main Findings

It is evident in this review that the Human Rights Commission of the Maldives have been faced with a very challenging year in 2013, and aftermath of irregular transition of power in 2012 which was followed by a year and half of public protests around the country. The year was also the prelude to the presidential elections, which did not contribute peace or harmony to the community. Recent studies state that Maldivians view the parliament and political parties as highly corrupt in the Maldives.<sup>90</sup> A result of this mixture of events has been a rise in reported cases of human rights violations across the country, a major incident when the Supreme Court curbed the right to vote for over 200,000 citizens.

The Commission, although the legislation is very strong and addresses broadly the potential areas, is not fully independent financially. This proves as a major setback in the work of the HRCM. Political pressure and threats by the judiciary has been a critical obstacle for the Commission over the year, which has taken much

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<sup>89</sup> Number of political appointees exceed 100 in the first eight months into the government. These are Cabinet Ministers, Deputy Ministers and State Ministers only, excluding several presidential Secretaries, Under-Secretaries and Coordinators.

<sup>90</sup> Global Corruption Barometer 2013, Transparency International.

of the Commission's time and resources which could otherwise had been spent on constructive efforts for the protection and promotion of human rights in the country.

The Commission in its composition needs the presence of expertise in human rights and international best practices in order to move the Maldives forward in a repressive environment. While the Commission seem to tackle issues related to rising fundamentalism with awareness building, it needs to take more affirmative action such as using existing legislation to eliminate incidents of violations arising from the problem, such as violations of women's and girls' rights. The Commission does not seem to have taken much action against the state when state institutions are perpetrators of human rights violations. Where the norm of the Commission is to make necessary recommendations to the state, the case of the directive to the Ministry of Gender, Family and Human Rights and the subsequent court order to remove two young girls from a prison facility shows that the Commission can effectively address cases of police brutality when the state disregards recommendations, such as when the Commissioner of Police stated publicly that he would not take action against police following recommendations from the Commission of National Inquiry in 2012.

The existing NGO Network established by the HRCM does not seem to be effective in building the capacity of the NGOs to address human rights issues in the country at present. It appears that the network is used by the Commission for assistance with their work rather than as an engagement with civil society to build their capacity. In addition to broadening engagement with organisations working in the area of human rights, the Commission needs to recognise and engage with individual human rights defenders and advocates. The Maldives is too small a community for selective engagement by state institutions in a critical matter such as the protection and promotion of human rights.

The situation of Freedom of Expression and Assembly in the Maldives has not improved for many reasons, mainly political agenda. Although the HRCM has issued strong statements of condemnation and made communications with the government to advocate for improvement of these rights in legislation, affirmative action once again is not seen by the Commission.

The general public does not see the Commission as very effective, and this may be cause for reluctance to report violations or lodge complaints. A reason for this lack of confidence is that the public is not fully aware of the efforts made by the Commission on a number of issues. MDN has gained a much needed insight into the work of the HRCM through research and interviews for this report. A large part of this information, which the public must be made aware of, is not publicly available.

### **Status of previous recommendations**

1. Recommendation made to the legislature in 2013 to better scrutinise the annual report of the HRCM and the Commission's performance has remained unchanged over the past year.
2. Recommendation made to the HRCM to increase actively engaging with individual HRDs and associations need further strengthening.
3. Recommendation made to the HRCM to be more assertive in acknowledging HRDs in their work as HRDs has remained unchanged over the year.
4. The HRCM needs to strengthen its efforts towards the rights of the migrant worker and corporate accountability in this area.

### **Recommendations**

**To the Government:**

1. Take necessary actions to fulfil the requirements of the HRCM through previous recommendations made to the government and thus create an environment where the efforts of the HRCM is visible in change.
2. Ensure fiscal independence of the HRCM and advocate this change to the Parliament.

**To the Legislature:**

1. The Special Parliamentary Committee on Independent Institutions should monitor the performance of the HRCM in relation to international standards such as the ACJ references and recommendations by the UN human rights mechanisms.
2. The annual report of the HRCM should be tabled for discussion during Parliamentary sessions.
3. The Special Parliamentary Committee on Government Accountability should follow up on recommendations made by the HRCM to the government and the judiciary.
4. A mechanism to create fiscal independence for the HRCM should be established.

**To the HRCM:**

1. Establish a special mechanism or focal point dedicated to the protection of Human Rights Defenders and Women Human Rights Defenders.
2. Develop and enhance the engagement with civil society in such a way that it includes individuals and benefits civil society as much as it benefits the work of the HRCM.
3. Take concrete and timely action following gross human rights violations in the country.
4. Ensure that the complaints mechanism is active at all times, and that immediate action is taken in cases where persons face the threat of physical or psychological harm.
5. Train and sensitise employees at the HRCM on human rights and the situation of victims of human rights abuses. Such training and sensitisation must focus at preparing staff to effectively communicate with victims of abuse.
6. Train and sensitise parliamentarians on human rights and the situation of victims of human rights abuses.
7. Increase communication with the public on the work of the Commission and remove bureaucratic barriers within the institution.

# NEPAL: MISSING ITS MEMBERS

## Informal Sector Service Centre<sup>1</sup>

### 1. General Overview

Elections to the second Constituent Assembly were held in a peaceful manner in November 2013 by the government led by Chief Justice Khil Raj Regmi. There were criticisms of “absence of separation of powers” when his government took charge following a consensus between the political parties last year. While his government was lauded for successfully conducted elections by most sides, the Unified Communist Party of Nepal (Maoists) alleged that vote-rigging resulted in their defeat.

The year saw little human rights progress. In January 2014, the Supreme Court rejected by mandamus the Truth and Reconciliation Ordinance adopted by the President calling for the formation of Commission on Truth and Reconciliation and Commission of Inquiry into Disappearance in line with international standards. Even the elected Legislature-Parliament continued with its effort to grant amnesty to perpetrators of grave human rights violations. It passed the Commission on Inquiry of Disappeared Persons and Truth and Reconciliation (CIDPTR) Act on 25 April 2014 which was approved by the President on 11 May 2014. While discussions were held with various stakeholders by the previous Legislature-Parliament in order to bring laws regarding formation of transitional justice mechanism, this time the final text of the TRC Act was made public only after the presidential approval which received flak from the civil society, victims and rights activists. Some provisions of the TRC Act having provision of amnesty even to serious crimes and authority of TRC to grant amnesty without approval of the victim along with other provisions on impunity have been again challenged by the victims’ group in the court.<sup>2</sup> Political parties seemed little interested in ending impunity by addressing grave violations of human rights committed during the decade-long armed conflict.

The National Human Rights Commission remained without Commissioners after their six-year tenure expired on 15 September 2013. Though Commissioners were appointed in other constitutional bodies like the Election Commission of Nepal and Commission of Investigation of Abuse of Authority (CIAA) through an ordinance on removing constitutional difficulties, the government did not use the same provision to appoint new Commissioners to the NHRC. The Commission continued to operate under the powers formally delegated to the Acting Secretary as Secretary Bishal Khanal completed his five-year term at the Commission in February 2013. The government did not heed the Commissioners’ repeated request to appoint new members in the NHRC before their term expired. This demonstrated a lack of interest on the part of the government for the protection and promotion of human rights in the country.

Incidents of violation against women increased this year. Human rights defenders<sup>3</sup> were subjected to physical abuse, intimidation, arrest, and mistreatment. There has been no investigation into the claim of extra-judicial killings in Tarai. NHRC was charged to have remained docile to investigate such claims by

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<sup>1</sup> Bijay Raj Gautam (bijaya@insec.org.np), Executive Director

<sup>2</sup> [http://www.myrepublica.com/portal/index.php?action=news\\_details&news\\_id=76279](http://www.myrepublica.com/portal/index.php?action=news_details&news_id=76279)

<sup>3</sup> Rights of a total of 126 human rights defenders were violated in 2013, among them one lost his life. Nepal Human Rights Yearbook 2014. INSEC. pp. 101-111.

some Tarai-based NGOs and others. However, the NHRC said that security and peace threats in Tarai have always been in its priority. Saying that out of its nine offices nationwide, five were in the Tarai region which look into the violation of rights of the people in that area, the NHRC officials said that teams from central office were also sent to investigate human rights violations in that region.<sup>4</sup>

The Commission involved itself in urging the concerned governmental and non-governmental agencies to stop the activities that violate the human rights of the citizens. It also expressed its concerns over the issues of security, transitional justice, equality, violence prior to elections, etc.

The National Human Rights Commission has retained “A” status in its accreditation with the International Coordination Committee of the National Human Rights Institutions (ICC). The ICC Sub-Committee on Accreditation (SCA) has deferred the Special Review of the National Human Rights Commission of Nepal (NHRCN) to its second session in October 2014 owing to the absence of the Chairperson and Commissioners. The SCA noted that, in accordance with Article 16.3 of the ICC Statute, it will be required to make a final determination regarding the accreditation status of the NHRCN at its next session.<sup>5</sup>

## 2. Independence

<b>Establishment of NHRI</b>	
Established by Law/Constitution/Presidential Decree	<i>Human Rights Commission Act 1997, replaced by National Human Rights Commission Act 2012. The NHRC was upgraded to a constitutional body by the Interim Constitution of Nepal 2007</i>
Mandate	<i>The NHRC has a broad mandate. It is mandated to monitor prisons and implementation status of laws, investigate, conduct investigations, research, review existing state of human rights, receive and review complaints that are lodged at the commission. This mandate of the Commission also provides room for victims to lodge complaints against human rights violations that occurred even during Nepal’s decade-long conflict.</i>
<b>Selection and appointment</b>	
Is the selection process formalised in a clear, transparent and participatory process in relevant legislation, regulations or binding administrative guidelines?	<i>There is no relevant legislation, regulation or administrative guidelines to ensure that selection process is clear, transparent and participatory. Article 131 of the Interim Constitution does not stipulate an open call for application and appointment of members into the Commission.</i>

<sup>4</sup> NHRC response to the draft ANNI report 2014 prepared by INSEC at a meeting held in NHRC on 4 August 2014

<sup>5</sup> <http://nhri.ohchr.org/EN/Contact/NHRIs/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2823%20May%202014%29.pdf>

Is the selection process under an independent and credible body which involves open and fair consultation with NGOs and civil society?	<i>The President appoints the Chairperson and the members of the NHRC on the recommendation of the Constitutional Council. The decision on appointment is taken by the Executive branch of the government leaving space for political influence in the selection process. There is no stipulation for consultations with NGOs and civil society or for the possibility of public nominations.</i>
Is the assessment of applicants based on pre-determined, objective and publicly available criteria?	<i>There is no assessment of applicants based on pre-determined, objective and publicly available criteria. The Constitutional Council recommends the name of the Commissioners to the Parliament. The recommended Commissioners have to undergo parliamentary hearing, where they can be rejected by a two-third vote.</i>
How diverse and representative is the decision making body? Is pluralism considered in the context of gender, ethnicity or minority status?	<i>Article 131 (2) of the Interim Constitution requires that while appointing the chairperson and members of the NHRC, diversity, including, gender diversity, must be maintained.</i>
<b>Terms of office</b>	
Term of appointment for members of the NHRI	<i>6 Year term. Number of terms of the members has not been stipulated in any law or legislation</i>
Next turn-over of members	<i>2019 (assuming appointment had been made in 2013)</i>

The National Human Rights Commission (NHRC) of Nepal was established in 2000 as per the Human Rights Commission Act 1997. The Interim Constitution of Nepal of 2007 upgraded it as a constitutional body making a new Act necessary to meet the new status. Part 15, Article 131 of the Constitution notes that there shall be a National Human Rights Commission in Nepal consisting of one retired Supreme Court justice as the chairperson and four others from amongst persons who have provided outstanding contribution, being actively involved in the field of protection and promotion of human rights or social work.

The term of the Commissioners whose tenure expired on September 2013 was affected by disputes among the Commissioners. The Commissioners of NHRC are appointed by the Constitutional Council. Though there is no relevant legislation or guideline calling for the application and appointment of commissioners, the Constitutional Council called for application to prepare a roster of eligible candidates for the posts.<sup>6</sup> The Constitutional Council recommends to Parliament the names of the Commissioners. NHRC commissioners are appointed for six years. Their condition of services is equal to the judges of the Supreme Court. They are appointed by the head of the state under the recommendation of the Constitutional Council. Their appointment would be confirmed after the parliamentary hearing. There is a high risk of the appointment process being politicised in the current transition phase as the Commission is also part of Truth and Reconciliation Commission and Commission of Inquiry into Disappeared Persons which are yet to be formed. Such practice is perceived to adversely affect the functional independence of

<sup>6</sup> Notice published by Secretariat of Constitutional Council in Gorkhapatra Daily, 5 April 2014, p. 8

NHRC Nepal. The Secretary of the Commission is appointed by the government upon the recommendation of NHRC.

The tenure of the Chief Commissioner and the commissioners came to an end on September 2013. The Council of Ministers chaired by the Supreme Court Justice Khil Raj Regmi which was mandated to hold elections did not make any efforts for appointing commissioners. There was no functioning parliament at that time which could hold a hearing and public consultations for new Commissioners' appointment. However, there have been no efforts to appoint Commissioners despite the new parliament in place following elections. Consequently, there is no presence of members of the NHRC in the recommendation committee formed by the government to expedite the formation of Truth and Reconciliation Commission and Commission of Inquiry into Disappearance.<sup>7</sup> Appointing a commissioner in the committee will provide a space to advocate against amnesties for those involved in crimes under international law. The vacant positions have affected the functioning of the commission as no recommendations have been forwarded to the government for action due to the absence of commissioners. To ensure transparency in nomination and appointment of the NHRC membership and selection, the calling of the open application, public hearings etc. should commence as early as possible.

The chief commissioner or the members can be removed from their offices on the same ground and manner as has been set forth for removal of a Judge of the Supreme Court.<sup>8</sup> According to Article 105 (1), the removal of the chief commissioner or the members should be like the removal of a Judge of the Supreme Court. The constitutional provision for removal of the Supreme Court Judge is that either the Chief Justice submits his/her resignation to the Council of Ministers or a Judge submits his/her resignation to the Chief Justice or he/she attains the age of 65 or the Legislature-Parliament passes a resolution of impeachment or if he/she dies.

Under Article 105 (2), a resolution of impeachment may be presented before the Legislature-Parliament against the Chief Justice or any other Judges on the ground that they are unable to perform their duties for the reasons of incompetence, misbehaviour, failure to discharge the duties of his/her office in good faith, physical or mental condition, and if by a two-thirds majority of the total number of its members existing for the time being passes the resolution, he/she shall *ipso facto* be relieved from his/her office. Clause (3) of same Article says that the Chief Justice or the Judge, against whom impeachment proceedings are being initiated pursuant to clause (2) above, shall not perform the duties of his/her office until the proceedings are final. Section (33) of the NHRC Act which prohibits initiation of suit or legal proceedings against Commissioners for actions and decisions that are undertaken in good faith in their official capacity provides guarantee of functional immunity to the NHRC members.

The NHRC Bill was enacted by the Constituent Assembly in the capacity of the Legislature-Parliament pursuant to Article 83 of the Interim Constitution of Nepal, 2007 in January 2012. Section 10 (5) of the NHRC Act which prevented the victims from lodging complaints by introducing a time limit of six months and Section 17 (10) which explicitly gave the Attorney General the power not to implement certain NHRC recommendations were declared null and void by the Supreme Court on 6 March 2013.

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<sup>7</sup> <http://www.inseconline.org/index.php?type=news&id=14166&lang=en>

<sup>8</sup> Article 131 (4) of the Interim Constitution of Nepal 2007

The Paris Principles require NHRIs to have financial independence as well. The NHRC Act prescribes the approval of the Finance Ministry for budgetary matters.<sup>9</sup> Instead of the department of the executive approving the budget of the NHRC, Parliament should approve the budget following debates on budget proposals to ensure broader support for the actions of the NHRC and its scrutiny. The Human Rights Committee, while adopting the concluding observations<sup>10</sup> on the second periodic report of Nepal expressed concern at the introduction of restrictions to the independent and effective functioning of the NHRC through the adoption of the National Human Rights Act in 2012. While noting the Supreme Court decision of 6 March 2013 which declared various provisions of the Act null and void, the Committee regretted the lack of progress in bringing the Act in line with the Paris Principles.

The NHRC is authorised to recommend changes in Nepalese laws to make them compatible with international human rights standards.<sup>11</sup> It may recommend the government to make new laws or make amendments to the law that are not human rights friendly and also may recommend the government to ratify international human rights laws. It can also provide advice to the government if it seeks its opinion on becoming state party to any international or regional human rights treaty.

### 3. Effectiveness

Complaints-handling remains as the primary activity of the NHRC. The Act in Section 10 requires the complaint of the violation of the human rights or abetment, verbally or in any other manner. Then the Commission may start the preliminary investigation and if the violation of the human rights or its abetment is seen; then the Commission can request the concerned agency to stop such act.<sup>12</sup> Appointment of the investigating officer or team can be done if the preliminary investigation shows there has been violation of human rights or abetment. Such team is required to submit the report to the Commission, and if necessary the Commission shall seek expert service and collect evidence and go through the public hearings.<sup>13</sup> If the complaint is seen to be baseless then the Commission may keep the complaint on hold or dismiss it and it is to be notified within fifteen days.<sup>14</sup>

Complaint handling and Compensation Determination Regulation, 2069 (2013) and Complaint Handling Guidelines, 2013 were adopted by the NHRC Nepal in January 2013.<sup>15</sup> The NHRC believed that adoption of these legal documents would ease the handling of complaints registered at the Commission. These documents are available in print.

In 2013 there were total of 219 cases registered in NHRC regarding the issues of killing, murder, abduction, kidnapping, torture, mistreatment, misbehaviour, illegal imprisonment or illegal custody, threats, judicial administration issues, seizing of property, economic, social and cultural rights violations, etc. In totality, cases relating to Human Rights, women rights, senior citizen rights, child rights, ethnic

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<sup>9</sup> Section 20 (2).

<sup>10</sup> The Human Rights Committee considered the second periodic report submitted by Nepal (CCPR/C/NPL/2) at its 3050th and 3051st meetings (CCPR/C/SR.3050 and CCPR/C/SR.3051), held on 18 and 19 March 2014. At its 3061st meeting (CCPR/C/SR.3061), held on 26 March 2014, it adopted the concluding observations.

<sup>11</sup> Section 6 of the NHRC Act, 2012.

<sup>12</sup> [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/1220248844National+Human+Rights+Commission+Act.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/1220248844National+Human+Rights+Commission+Act.pdf)

<sup>13</sup> Section 11.

<sup>14</sup> Section 12.

<sup>15</sup> Section 13.

<sup>15</sup> NHRC, Human Rights e-newsletter, Volume 9, Issue 1, January, 2013, p. 6 available at

[http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/NHRC%20Newsletter%20Jan%20Issue\\_12Feb\\_2013low.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/NHRC%20Newsletter%20Jan%20Issue_12Feb_2013low.pdf)

discrimination, political parties, their front organisations, strikes by ethnic groups, rally and demonstrations, protest programmes were monitored 165 times by NHRC and a total of 1346 registered cases were investigated. Final verdict has been given to 504 complaints registered, in which, legal action/bearing for losses/indemnity/ departmental action or interim relief and other recommendation were given to 102 cases, policy related recommendation 5, notify 376 and of termination related 21. Similarly, 307 trainings and seminar has been conducted. Altogether, 13 reports have been published relating to Human Rights directives, national report on the situation of Nepali children and condition of human trafficking in Nepal. One press conference and 45 press reports and press notes has been published and conducted.<sup>16</sup>

A total of 219 complaints were received by NHRC during the period July 2012-July 2013. 29 complaints related to extra-judicial killing, 19 of killing by Maoists, 2 of death in explosion, 12 of torture, five of disappearance, three of abduction, four of arbitrary detention, two of administration of justice, six of internal displacement, four of economic, social and cultural rights violation and one each of related to right to property, right to education, child rights and rights of persons with disabilities.<sup>17</sup>

Over the issues related to killing, explosion, disappearance, displacement, torture, detainees' rights, child rights and the rights of persons with disabilities, NHRC decided to suspend, end and keep on hold 396 complaints. Recommendation has been made on 99 complaints after investigation. The NHRC has also received complaints from LGBTI communities and migrant workers. It provided suggestions to state party reports and supplementary reports.<sup>18</sup>

NHRC also carried out promotional activities for the development of human rights culture. Interaction, workshops and discussion programs were organised among political parties, civil society, journalists, human rights activists, teachers, students and professional organisations over the issues of human rights.

In the fiscal year 2069/70 (July 2012-July 2013), the Commission registered 219 complaints of human rights violation at various departments.<sup>19</sup> The following chart displays the status of complaints received by the NHRC and recommendations made by it:

Fiscal Year	Complaints Received	Total Recommendations (including backlog cases)	Interim Recommendations or other proceeding	Decisions		
				Recommendation	Hold, Finality, Dismissal	Total (including backlog cases)
2012-2013	219	99	8	91	396	487

Complaints were received in various regional and sub-regional branch offices of NHRC. Monitoring visits were conducted by the commission on the issues of death of an inmate in Sindhuli prison, Strike, Custodial death of a detainee in Tanahun and Siraha districts, inhuman treatment and killing of women on

<sup>16</sup> Bhattarai, Bed Prasad. Nepal Human Rights Yearbook 2014. INSEC. pp. 449-450

<sup>17</sup> Thirteen Years of NHRC Recommendations on Complaints and Status of Implementation (2000-2013), p. 2

<sup>18</sup> Ibid., p. 3

<sup>19</sup> Thirteen Years of NHRC Recommendations on Complaints and Status of Implementation (2000-2013), p. 3

charge of practicing witchcraft, detention centre, women rights, rights of the people with disabilities, health rights etc.

394 investigations were made by the Commission which were mostly related to the incidents of the 10 years long conflict.<sup>20</sup>

The Office of the Special Rapporteur on Trafficking of women and children (OSRT) was established in 2002 at the Commission. It submitted its first report on 2002 and now OSRT has recently published its national report on the Trafficking in Persons especially women and children.<sup>21</sup>

The Commission has also recommended the government to ratify the Convention on the Rights of the Migrant Workers and their families (CRMW) and to enter into MoU prior to sending any further work force to migrants receiving countries. The NHRC Commissioners concluded the observation and monitoring on the rights of migrant workers during their visit to South Korea and Malaysia. During the visit-cum-monitoring, the team NHRC-N carried out basic research on how the migrant workers are being treated in the destination countries. Following this, the NHRC-N met and discussed with the counterpart NHRIs in South Korea and Malaysia to raise issues and challenges faced by Nepalese migrant workers in their respective countries.<sup>22</sup>

The Commission in the year 2013 expressed concern over the security of media persons and human rights defenders, obstruction caused to the judicial proceedings into the murder of a journalist, caste-based discrimination and untouchability, consumer rights, attack on dalit community, condition of mentally challenged persons, inhuman treatment meted out to a dalit woman, etc. The Commission provided comments on the TRC-related Ordinance 2013 as per the section 6 of the NHRC Act 2012 which provides that the NHRC shall provide advice to the Nepal Government for making laws whatsoever concerning human rights. The Commission observed in its comment that there are no clear provisions that debar amnesty to the persons involved in the serious violation of human rights and crime against humanity. It noted that such transitional justice mechanism is inclined more towards blanket amnesty rather than justice delivery to the victims.<sup>23</sup>

Commissioner Chairperson Justice Kedar Nath Upadhyay summoned the Inspector General of Nepal Police Kuber Singh Rana to the Commission to inquire about the media report published in connection with the latter's alleged instruction to subordinate police offices to not proceed with any war-time crimes. In the meeting, Upadhyay stressed that Truth and Reconciliation Commission (TRC) cannot be an alternative for the regular criminal justice system.<sup>24</sup>

NHRC Nepal expressed serious concerns regarding violent clashes before the election to the second Constituent Assembly. It urged to the government, political parties and all the stakeholders to create an environment that ensures the Constituent Assembly election to take place in a free and fair manner. Issuing a joint press statement NHRC and UNICEF expressed concerns over potential misuse,

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<sup>20</sup> Ibid.

<sup>21</sup> Trafficking in Persons especially women and children, National Report 2011, Prepared by OSRT on December 2012, NHRC Nepal available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/National%20Report%20on%20Trafficking%20in%20Persons%20%20Especially%20%20on%20women%20and%20Children%20in%20Nepal%20-%202012.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/National%20Report%20on%20Trafficking%20in%20Persons%20%20Especially%20%20on%20women%20and%20Children%20in%20Nepal%20-%202012.pdf).

<sup>22</sup> NHRC, Human Rights e-newsletter, Volume 9, Issue 9, September, 2013, p.7 available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/e-NewsletterVol9-Iss9N.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/e-NewsletterVol9-Iss9N.pdf)

<sup>23</sup> NHRC, Human Rights e-newsletter, Volume 9, Issue 3, March, 2013, pp. 1-5 available at [http://www.nhrcnepal.org/nhrc\\_news\\_details-9213.html](http://www.nhrcnepal.org/nhrc_news_details-9213.html)

<sup>24</sup> NHRC, Human Rights e-newsletter, Volume 9, Issue 2, February, 2013, p.1 available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/e-NewsletterVol9-Iss2.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/e-NewsletterVol9-Iss2.pdf)

manipulation and engagement of school going children by political parties in pre and post-election campaigns in the country. The two entities urged all parties to take all necessary measures to avoid exposing boys and girls under the age of 18 to political activities and party sponsored protest programs like closures.<sup>25</sup> NHRC Nepal, in its preliminary report on Constituent Assembly Election Monitoring, concluded that numerous obstructions were faced by the general citizens to participate in the election in peaceful, free and fair environment. The NHRC had deployed election monitoring teams in all seventy five districts of the country.

The NHRC made public books and reports on Implementation Status of the UPR Conclusions and Recommendations, Human Rights situation of Nepalese Migrant Worker Report (Observation and Monitoring Report, South Korea and Malaysia) 2013, Human Rights Manual for School Teacher, 2013 and Human Rights Manual for Security, 2013. Upon having the comprehensive consultation among the Government bodies, NGOs, civil society and other cornered stakeholders the report on the Implementation Status of the UPR Conclusions and Recommendations was made public.<sup>26</sup>

Various programmes including interactions, trainings, orientations, day celebrations, workshops, were organised by the Commission. The programmes were conducted on issues related to CERD, regional conference of HRDs, human rights reference manual for teachers, transitional justice, implementation status of Comprehensive Peace Accord, Juvenile Justice Procedural Rules-2006, right to health of women, senior citizens, corporal punishments, gender based violence, rights of indigenous and minority communities, food security in Karnali region, human rights education in informal education, right to fair trial, rights of indigenous people. Lawyers, professors, media persons, representatives of civil society, government bodies, and security agencies, among others participated in the programmes.

The Commission adopted NHRC Complaints Handling and Compensation Determination Regulation-2013, NHRC Complaints Handling Guidelines and Communication Management Guideline.<sup>27</sup>

The Government is the source of finance for the Commission. The Secretary of the Commission can prepare the annual budgets that are required for the functioning of the Commission<sup>28</sup> but again the approval of the budget of the NHRC is done by the Ministry. Also it requires the approval of the government if it wishes to accept grants from external agencies.

Since the approval from the Ministry of Finance is required for the travel and investigation expenses, the shortcomings in resourcing is a negative aspect of the Commission.

#### **4. Engagement with other stakeholders**

##### **4.1 Civil Society**

Article 132 (2) (d) of the Interim Constitution and Section 20 of the NHRC Act stresses on coordination and collaboration with civil society organisations regarding awareness raising on human rights but does not make it mandatory. The NHRC has been carrying out advocacy and promotional activities for the protection and promotion of human rights. The NHRC has also adopted collaboration guideline to work

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<sup>25</sup> NHRC, Human Rights e-newsletter, Volume 9, Issue 9, September, 2013, p.6 available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/e-NewsletterVol9-Iss9N.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/e-NewsletterVol9-Iss9N.pdf)

<sup>26</sup> NHRC, Human Rights e-newsletter, Volume 9, Issue 12, December, 2013, p.9 available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/e-NewsletterVol9-Iss-12a.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/e-NewsletterVol9-Iss-12a.pdf)

<sup>27</sup> NHRC, Human Rights e-newsletter, Volume 9, Issue 1, January, 2013, p.6 available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/NHRC%20Newsletter%20Jan%20Issue\\_12Feb\\_2013low.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/NHRC%20Newsletter%20Jan%20Issue_12Feb_2013low.pdf)

<sup>28</sup> Section 28 (5) (b).

with the civil society organisations. The CSOs and the NHRC jointly organise programmes at the central as well as local level. The Commission involves the CSOs during any kind of consultations, programmes or the trainings. For instance, a two-day workshop on the ‘Effective Use of Writ Jurisdiction in the Protection of Human Rights was organised jointly by the Judges’ Society Nepal and the National Human Rights Commission from 28 April 2013.<sup>29</sup> The Commission organized a workshop on mental illness with KOSHISH Nepal, an organisation working in the field of mental health.<sup>30</sup> The NHRC conducted programmes as part of their advocacy work to review of mental health policy.<sup>31</sup> Similarly, NHRC Sub Regional Office and INSEC jointly organized ‘Status of Consumer Rights and Responsibilities of the Stakeholders’ in Gulmi district.<sup>32</sup> NHRC held a consultation with the civil society organizations to discuss strategies and preparation for the mid-term UPR report to Human Rights Council on the status of implementation of UPR recommendations by the government.<sup>33</sup>

The Commission made preparation for setting up its offices in all 75 districts of the country. The Commission dispatched a letter including the concept paper to the Office of Prime Minister and the Council of Ministers notifying about its endeavour to gradually set up the contact offices in all 75 districts.<sup>34</sup> There are 5 regional offices of the commission and 3 sub-regional offices. The strategic Plan of 2011-2014 has included a plan to add three more sub-regional offices within the period. Expanding its purview will help the Commission to raise awareness of human rights among people at local level and increase public access to the Commission regarding issues of human rights violations and abuses.

Pursuant to Section 20 (3) of NHRC Act, if any foreign organization wants to conduct programmes on the protection and promotion of human rights in Nepal, such an organisation shall have to seek consent of the Commission. The 6 March 2013 verdict of the Supreme Court also rejected the plea to scrap this provision stating that this provision expands the role of NHRC instead of reducing its role. The petitioners had claimed that the Act has violated the provision of such activities being overseen by the Social Welfare Council under the government.<sup>35</sup> The human rights community has reservation on this part of the verdict.

The NHRC has been complaining about lack of implementation of its recommendations. If it decides to take the support of the civil society to exert pressure on the government and other government authorities, then the government might implement its recommendations. The Commission is also highly concerned about the rights of the Human Rights Defenders. Though there is no formal desk on the Human Rights Defenders at NHRC; the Commission has expressed its concern over the rights and duties of the human rights defenders. The Human Rights Defenders Directive, 2069 in Section 11 provides for the role of the responsibility of the NHRC for strengthening the role of defenders and making them accountable and transparent.<sup>36</sup>

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<sup>29</sup> NHRC, Human Rights e-newsletter, Volume 9, Issue 4, April, 2013, p.1 available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/e-NewsletterVol9-Iss4-N.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/e-NewsletterVol9-Iss4-N.pdf)

<sup>30</sup> NHRC, Human Rights e-newsletter, Volume 9, Issue 6, June, 2013, p.5 available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/e-NewsletterVol9-Iss6.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/e-NewsletterVol9-Iss6.pdf)

<sup>31</sup> *Ibid.*, p. 3

<sup>32</sup> *Ibid.*, p. 26

<sup>33</sup> NHRC, Human Rights e-newsletter, Volume 9, Issue 8, August, 2013, p.1 available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/e-NewsletterVol9-Iss8.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/e-NewsletterVol9-Iss8.pdf)

<sup>34</sup> *Ibid.*, p. 26

<sup>35</sup> <http://www.ekantipur.com/the-kathmandu-post/2012/04/01/top-story/writ-in-sc-challenging-provisions-in-nhrc-act/233317.html>

<sup>36</sup> Directive no. 11, Human Rights Defender Directive, 2012

#### **4.2 Relationship with the Executive, Legislature, Judiciary, and other specialised institutions in the Country:**

The Commission can initiate itself the investigation/inquiries to instances of violation or abetment of violation of human rights of any person or group pursuant to article 132(2) (a) of the Interim Constitution of Nepal. NHRC also has the right of full cooperation of the public authorities and generally that happens in practice too. NHRC can visit any place without any prior notice where some kind of violation is occurring or has the potential of occurring.

Constitutionally and legally, NHRC has free access to detention centres and other government institution. Nepal's Army Act of 2007 has barred NHRC from intervening in the jurisdiction of Army Act. Article 132 of the Interim Constitution of Nepal also mentions that the matters falling within the jurisdiction of Army Court cannot be reviewed by the NHRC. The restrictive clause on this article, however, states "Provided that nothing shall bar the institution of, actions on any matters of the violations of human rights or humanitarian laws". The NHRC carried out an investigation into the death of one Maina Sunar following torture at the army barracks in Kavre even during the conflict.<sup>37</sup>

Pursuant to Article 133 (1) of the Constitution, the Commission is required to submit its Annual Report to the President and the President through the Prime Minister shall submit the report to the Legislature-Parliament. Article 132 (2) confers the right to the Commission to forward its recommendation to the concerned authority to take departmental action against who is responsible for human rights violation, and if necessary, it can make recommendation to lodge a petition in the court, and exercise the same power as the court<sup>38</sup> to appear before the commission for recording their statement and information or examining them, receiving and examining the evidence, ordering for the production of physical proof. It may also order compensation for victims of human rights violations.

On 6 March 2013, the Supreme Court declared Sections 17(10) (non-implementation) and 10(5) (six month time limit) of the National Human Rights Commission Act, 2012 null and void. The judgment means the Attorney General now must follow NHRC recommendations as per Section 17(5) of the Act, if the NHRC recommends legal action against alleged human rights violators. The legislation has not yet been amended to reflect this ruling, and particularly given the government's history of non-compliance with NHRC recommendations this should be done as a priority.<sup>39</sup>

#### **5. Conclusion and Recommendations**

Lack of the financial and administrative autonomy has affected the functional independence of the commission. Adequate funding and autonomous management of the financing is utmost requirement for the Commission. The non-implementation of the recommendations made by the concerned agencies is another biggest challenge of the Commission in ensuring rule of law and fighting against the culture of impunity. Strong cooperation and collaboration with rights based organisations to pressure the government in implementation of the recommendations is necessary. The committee to recommend members the future TRC and CIDP constituted by the government is incomplete due to lack of representatives of the NHRC. Delay in the appointment of NHRC commissioners has also hampered the

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<sup>37</sup> Ibid, p. 3

<sup>38</sup> Article 133(3) of the Interim Constitution of Nepal 2007.

<sup>39</sup> [http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/NPL/INT\\_CCPR\\_CSS\\_NPL\\_16464\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/NPL/INT_CCPR_CSS_NPL_16464_E.pdf)

formation of TRC, which has affected transitional justice process in Nepal. The TRC act requires a member designated by the NHRC Chairperson/commissioners. There has been no recommendation for reparations to victims after the Commissioners retired in September. No recommendation for action against rights violators have been made in their absence resulting in perpetrators enjoying impunity.

### **To the Government of Nepal**

1. Promptly fill the vacancies in the NHRC Nepal in compliance with the standards and practices in the Paris Principles and ensure that members should be selected on the basis of proven expertise, knowledge and experience in the promotion and protection of human rights.
2. Appointments should be made following an open and transparent process with the involvement of civil society and free of political deal-making. Commissioners should also be representative of society, including women and people from minority groups.
3. Remove any limitations to the jurisdiction of the NHRC Nepal and ensure that it is able to investigate all allegations of violations by all branches of the State and all types of actors, including armed forces on all sides of the conflict. Clarify the ambiguous provisions on jurisdiction in relation to the Army.
4. The NHRC Nepal should be provided with adequate resources, financial, material and human, as well as with the necessary autonomy to propose and manage their own budgets and recruit their own staff, including the position of Secretary. Ensure that such procedures are clearly stated and secured in the regulatory framework.
5. Ensure the effective participation of the NHRC Nepal in the truth and reconciliation process and ensure that any mechanism for transitional justice must conform to international standards.
6. Ensure that the NHRC Nepal has clear powers to refer cases for prosecution directly to the AG's office either through an amendment to the NHRC Act or through a policy directive.
7. Amend law in accordance to the Supreme Court verdict of 6 March 2013 relating to the functional independence and statute of limitations of complaint.
8. Fully implement recommendations of NHRC with seriousness.

### **To the National Human Rights Commission of Nepal**

1. Advise the new government and legislators on draft and existing legislation and submit recommendations to the Parliament to resolve human rights violations.
2. Monitor government compliance with human rights treaty obligations, including the International Covenant on Civil and Political Rights and ensure that recommendations from the Human Rights Committee and all other treaty bodies are implemented.
3. Analyse all existing and proposed legislation, in particular the TRC Act, and make recommendations regarding consistency with international human rights norms.

4. Involve and ensure meaningful civil society participation in the drafting process of the new Constitution to be in line with international human rights treaties that Nepal has ratified or is party to.
5. File litigation if government shows complete neglect to NHRC in cases pertaining to policy and principles.

# SRI LANKA: PROTECTING HUMAN RIGHTS OR THE GOVERNMENT?

## Law & Society Trust<sup>1</sup>

### 1. General Overview

In 2013, Sri Lanka had many visits by high profile international human rights advocates that looked to improve the human rights climate and that were officially welcomed and supported by the Government of Sri Lanka (hereinafter, GoSL).<sup>2</sup> Significantly, the United Nations High Commissioner for Human Rights, Navi Pillay's visit to Sri Lanka was considered pivotal in recent human rights discourse between the government and the international community.<sup>3</sup>

However, the Office of the United Nations High Commissioner for Human Rights post-visit report<sup>4</sup> delineates the inadequate measures of the GoSL, in its efforts to implement recommendations or to receive technical support offered repeatedly by UN bodies and other experts. The GoSL has rejected the report "in its entirety" and has proceeded to provide an official response.<sup>5</sup> Navi Pillay, during her visit also faced some criticism<sup>6</sup> questioning her intentions, to which she responded in her end-of-mission press conference in Colombo.<sup>7</sup> The Government of Sri Lanka also received the UN Special Rapporteur for Human Rights of Internally Displaced Persons, Chaloka Beyani, who stressed the importance of a joint needs assessment as well as durable solutions for Internally Displaced Persons (IDPs) that should include return to normalcy without undue interference from the authorities.<sup>8</sup>

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<sup>1</sup> Contact Person: K. Aingaran, Human Rights in Conflict Program, Law & Society Trust, 3 Kynsey Terrace, Colombo 8, <[kaingaran@gmail.com](mailto:kaingaran@gmail.com)>. This report is prepared based on the information gathered from other human rights organizations, civil society and from media monitoring, and the brief information provided by the HRCSL in its response to the ANNI questionnaire. In spite of the writers' constant effort(s) to obtain detailed relevant information from the Human Rights Commission of Sri Lanka (HRCSL) officials, including the Chairman, Commissioners, Secretary, Secretary – Legal and Directors, the HRCSL has not been forthcoming with any of the information requested.

<sup>2</sup> See: Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General. Report of the Office of the United Nations High Commissioner for Human Rights, "Promoting reconciliation and accountability in Sri Lanka.", available at [www.ohchr.org/EN/HRBodies/HRC/.../A-HRC-25-23\\_AEV.doc](http://www.ohchr.org/EN/HRBodies/HRC/.../A-HRC-25-23_AEV.doc), accessed on 29<sup>th</sup> May 2014

<sup>3</sup> "UN's Navi Pillay to visit Sri Lanka former war zone", BBC News Asia, August 25, 2013, available at <http://www.bbc.com/news/world-asia-23833804> and "Navi Pillay Visits Sri Lanka", Daily Mirror, August 26, 2013, available at <http://www.dailymirror.lk/news/infographics/34392-navi-pillay-visit-sri-lanka.html>, accessed on 29 May 2014.

<sup>4</sup> See: Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, Report of the Office of the United Nations High Commissioner for Human Rights: "Promoting reconciliation and accountability in Sri Lanka", Office of the High Commissioner for Human Rights, available at [www.ohchr.org/EN/HRBodies/HRC/.../A-HRC-25-23\\_AEV.doc](http://www.ohchr.org/EN/HRBodies/HRC/.../A-HRC-25-23_AEV.doc), accessed on 29<sup>th</sup> May 2014.

<sup>5</sup> Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, "Comments received from the Permanent Mission of Sri Lanka on the draft report of the Office of the United Nations High Commissioner for Human Rights on promoting reconciliation and accountability in Sri Lanka", available at [http://ap.ohchr.org/documents/E/HRC/c\\_gov/A\\_HRC\\_25\\_G\\_10AEV\\_2.doc](http://ap.ohchr.org/documents/E/HRC/c_gov/A_HRC_25_G_10AEV_2.doc), accessed on 29 May 2014.

<sup>6</sup> "Morality of Navi Pillay's Visit", Daily Mirror, Gammanpila, Udaya, August 28, 2013, available at <http://www.dailymirror.lk/opinion/172-opinion/34482-morality-of-navi-pillays-visit.html>, accessed on 29 May 2014.

<sup>7</sup> "Opening remarks by the UN High Commissioner for Human Rights", United Nations in Sri Lanka, 31.08.2013, available at <http://un.lk/news/opening-remarks-by-un-high-commissioner-for-human-rights-navi-pillay/>, accessed on 29 May 2014.

<sup>8</sup> See "Constructing a development based strategy for durable solutions for internally displaced persons (IDPs) in Sri Lanka in the aftermath of conflict is now essential", Office of the High Commissioner for Human Rights, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14086&LangID=E>, accessed on 29 May 2014.

Sri Lanka, amidst much controversy<sup>9</sup> also hosted the Commonwealth Heads of Government Meeting<sup>10</sup> (hereinafter referred to as the CHOGM), which two of the member countries boycotted due to the human rights record of Sri Lanka.<sup>11</sup> Many incidents with regard to suppression of protests<sup>12</sup> and media freedom<sup>13</sup> were noted during the CHOGM. The protest ban contradicted GoSL's prior statement<sup>14</sup> of not banning protests during the CHOGM.

The first Northern Provincial Council elections were held in September 2013, and were won by the opposition Tamil National Alliance (TNA) in a landslide victory that was considered a welcome sign that expressed the will of the people of the region.<sup>15</sup> Pertaining to the human rights climate, Sri Lanka saw continuing reports of attacks on journalists both in Colombo<sup>16</sup> as well as in Jaffna.<sup>17</sup> The attacks in Jaffna were a continuation from previous months which raised concerns with regard to the effort deployed towards preventing them by the authorities.<sup>18</sup> Sri Lanka also continued to block websites that were critical of the government, against which a petition has been filed at the Human Rights Commission of Sri Lanka<sup>19</sup> (HRCSL). The suppression of activists was also noted through arrests of human rights defenders Ruki Fernando and Fr. Praveen Mahesan<sup>20</sup> under the Prevention of Terrorism Act (PTA) which led to widespread protests both locally<sup>21</sup> and internationally<sup>22</sup> and eventually led to their release under strict

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<sup>9</sup> "Open Letter Regarding Sri Lanka Hosting the 2013 Commonwealth Heads of Government Meeting (CHOGM)", Human Rights Watch, February 6, 2013, available at <http://www.hrw.org/news/2013/02/06/open-letter-regarding-sri-lanka-hosting-2013-commonwealth-heads-government-meeting-c>, accessed on 29 May 2014; and "Commonwealth giving Sri Lanka carte blanche for human rights abuses", Amnesty International, September 27, 2013, available at <http://www.amnesty.org/en/for-media/press-releases/commonwealth-giving-sri-lanka-carte-blanche-human-rights-abuses-2013-09-27>, accessed on 29 May 2014.

<sup>10</sup> "Commonwealth Heads of Government Meeting 2013 – Outcomes", The Commonwealth Website November 17, 2013, available at <http://thecommonwealth.org/media/event/commonwealth-heads-government-meeting-2013-outcomes>, accessed on 29 May 2014.

<sup>11</sup> "Statement by the Prime Minister of Canada", Office of the Prime Minister of Canada, October 7, 2013, available at <http://pm.gc.ca/eng/news/2013/10/07/statement-prime-minister-canada>, accessed on 29 May 2014, and "PM Not to Attend Commonwealth Meeting in Sri Lanka", Republic of Mauritius, November 13, 2013, available at <http://www.gov.mu/English/News/Pages/PM-Not-to-Attend-Commonwealth-Meeting-in-Sri-Lanka.aspx>, accessed on 29 May 2014.

<sup>12</sup> "Court bans protests during CHOGM", Sunday Times, Financial Times, November 11, 2013, available at <http://www.ft.lk/2013/11/15/court-bans-protests-during-chogm/>, accessed on 29 May 2014, and "Sri Lanka: Banning Commonwealth summit protests a blatant attempt to silence criticism", Amnesty International, October 10, 2013, available at <http://www.amnesty.org/en/news/sri-lanka-chogm-ban-protests-2013-10-10>, accessed on 29 May 2014.

<sup>13</sup> "Sri Lanka Blocks Freedom Of Movement During CHOGM", Colombo Telegraph, November 13, 2013, available via web proxy at <https://www.colombotelegraph.com/index.php/sri-lanka-blocks-freedom-of-movement-during-chogm/>, accessed on 29 May 2014.

<sup>14</sup> "No ban on protests during CHOGM – Govt", The Nation, October 11, 2013, available at <http://www.nation.lk/edition/breaking-news/item/21777-no-ban-on-protests-during-chogm-govt.html>, accessed on 29 May 2014.

<sup>15</sup> "Tamil National Alliance wins Lankan Northern Provincial Polls", Times of India, Karthik, S., September 23, 2013, available at <http://timesofindia.indiatimes.com/world/south-asia/Tamil-National-Alliance-wins-Lankan-Northern-Provincial-Polls/articleshow/22910525.cms>, accessed on 29 May 2014.

<sup>16</sup> "Sri Lanka Sunday Leader's Mandana Ismail Abeywickrema flees", BBC News Asia, September 18, 2013 available at <http://www.bbc.com/news/world-asia-24148142>

<sup>17</sup> "Uthayan reporter attacked.", Ceylon Today, July 11, 2013, available at <http://www.ceylontoday.lk/16-37395-news-detail-uthayan-reporter-attacked.html>

<sup>18</sup> "Attack on 'Uthayan' Newspaper and Other Incidents Affecting Media in the North Condemned by SAFMA", dbsjeyaraj.com, April 13, 2013 available at <http://dbsjeyaraj.com/dbsj/archives/20060>

<sup>19</sup> "Sri Lanka blocks two more websites critical of government: rights group", Reuters, May 21, 2014 available at <http://in.reuters.com/article/2014/05/21/uk-sri-lanka-censorship-media-idINKBN0E11TT20140521>

<sup>20</sup> "Sri Lanka arrests prominent rights activists under anti-terrorism law", The Guardian, March 17, 2014 available at <http://www.theguardian.com/world/2014/mar/17/sri-lanka-arrests-human-rights-activists-terrorism-law>

<sup>21</sup> "Statement condemning arbitrary arrest and detention of human rights defenders, Ruki Fernando, Fr. Praveen Mahesan, victims and their families", Daily FT, March 22, 2014 available at <http://www.ft.lk/2014/03/22/statement-condemning-arbitrary-arrest-and-detention-of-human-rights-defenders-ruki-fernando-fr-praveen-mahesan-victims-and-their-families/>

conditions including restrictions on overseas travel and speaking in public on the circumstances of their detention. Policy advocates have already voiced concern over the misuse of Prevention of Terrorism Act in Sri Lanka.<sup>23</sup> It is noted that the HRCSL also lodged concern over the latter arrests; its officers visited the detention facilities, and also advised the authorities on adhering to the rule of law in handling the investigation.<sup>24</sup>

Excessive use of power was also another area of concern<sup>25</sup> in relation to the residents of Weliveriya (a small town in the Gampaha district, north of Colombo), who were protesting against a factory that they alleged caused water contamination, and the state's failure to address the issue. The result of an official inquiry has justified<sup>26</sup> the use of force by the military personnel, raising disconcertment among rights activists in Sri Lanka.<sup>27</sup> Cases of torture and abuse of female recruits in the Army were also reported, to which Sri Lankan military reportedly admitted guilt.<sup>28</sup> The Army promised to punish those who were involved but curiously, also promised to punish those who had filmed this incident.<sup>29</sup>

Religious political groups such as *Bodu Bala Sena* (BBS—'Buddhist Power Army') have come under criticism for storming a press conference<sup>30</sup> and attacking another Buddhist monk opposed to them.<sup>31</sup> Subsequent to a case filed by the police,<sup>32</sup> the accused members of BBS were later released on bail.<sup>33</sup> The BBS has a track record of speaking and acting against Muslim minorities, leading a public campaign to boycott Muslim-operated stores, and ban Halal certification.<sup>34</sup> They have also issued a warning against Christians, especially citing religious conversions as a key issue.<sup>35</sup> The BBS has also publicly decried

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<sup>22</sup> "Sri Lanka: Free prominent human rights defenders Ruki Fernando and Father Praveen", Amnesty International, March 17, 2014 available at <http://www.amnesty.org/en/news/sri-lanka-free-prominent-human-rights-defenders-ruki-fernando-and-father-praveen-2014-03-17>; and "Release Ruki Fernando and Father Praveen Immediately - Stop silencing our voices", Change.org, available at <http://www.change.org/petitions/h-e-mahinda-rajapakse-release-ruki-fernando-and-father-praveen-immediately-stop-silencing-our-voices>

<sup>23</sup> CPA on the need to repeal and replace the PTA", Ceylon Today, Center for Policy Alternatives, May 13, 2013, available at <http://www.ceylontoday.lk/51-32209-news-detail-cpa-on-the-need-to-repeal-and-replace-the-pta.html>

<sup>24</sup> "HRCSL Vigilant over the Conditions of Two Human Rights Defenders", Human Rights Commission of Sri Lanka, March 19, 2014, available at <http://hrcls.lk/english/?p=2254>, accessed on 30 May 2014.

<sup>25</sup> "Demand for Safe-water turns Weliveriya into a Battleground", ESCR Newsletter, Issue 7, Law and Society Trust, Zahid, Sabra, September 2013, available at [http://lawandsocietytrust.org/PDF/resource/ESCR%20NEWS%20LETTER\\_ENGLISH\\_IS7.pdf](http://lawandsocietytrust.org/PDF/resource/ESCR%20NEWS%20LETTER_ENGLISH_IS7.pdf)

<sup>26</sup> "Press Communique—Weliweriya Incident", Ministry of Defense and Urban Development, August 30, 2013 available at [http://www.defence.lk/new.asp?fname=Press\\_Communique\\_Weliweriya\\_Incident\\_20130830\\_03](http://www.defence.lk/new.asp?fname=Press_Communique_Weliweriya_Incident_20130830_03)

<sup>27</sup> "What has happened to the Weliveriya inquiry?", Sunday Times, Pinto-Jayawardena, Kishali, February 23, 2014 available at <http://www.sundaytimes.lk/140216/columns/what-has-happened-to-the-weliveriya-inquiry-85765.html>

<sup>28</sup> "Army admits abuse & torture of female recruits", The Republic Square, March 24, 2014 available at <http://www.therepublicsquare.com/politics/2014/03/24/army-admits-abuse-torture-of-female-recruits/>

<sup>29</sup> "Sri Lanka Army to take stern disciplinary action on soldiers in leaked video", Colombopage, March 22, 2014 available at [http://www.colombopage.com/archive\\_14A/Mar22\\_1395499138CH.php](http://www.colombopage.com/archive_14A/Mar22_1395499138CH.php)

<sup>30</sup> "JVP denounces BBS", Daily Mirror, April 10, 2014 available at <http://www.dailymirror.lk/news/45750-jvp-denounces-bbs.html>

<sup>31</sup> "Buddhist Monk attacked by Bodu Bala Sena and Police inaction", Groundviews, September 10, 2013 available at <http://groundviews.org/2013/10/09/buddhist-monk-attacked-by-bodu-bala-sena-and-police-inaction/>

<sup>32</sup> "Police file court report against BBS over press conference invasion", The Republic Square, April 22, 2014 available at <http://www.therepublicsquare.com/politics/2014/04/22/police-file-court-report-against-bbs-over-press-conference-invasion/>

<sup>33</sup> "Fort Magistrate advises BBS monks", Colombo Gazette, May 5, 2014, available at <http://colombogazette.com/2014/05/05/fort-magistrate-advises-bbs-monks/>

<sup>34</sup> "The headline Buddhists targeting Sri Lanka's Muslims", BBC News, March 25, 2013, available at <http://www.bbc.com/news/world-asia-21840600>

<sup>35</sup> "BBS warns against unethical conversions", Colombo Gazette, March 27, 2013, available at <http://colombogazette.com/2013/03/27/bbs-warns-against-unethical-conversions/>

pluralistic values, claiming that it is “killing the Sinhala race”.<sup>36</sup> As reports point out, more religious and ethno-centered groups have emerged and have been involved in similar incidents against minorities.<sup>37</sup> A call for banning BBS along with similar groups such as *Ravana Balaya* (‘Ravana Force’) and *Sinhala Ravaya* (‘Roar of the Sinhala’), is to be presented by the Minister of National Language and Social Integration, Vasudeva Nanayakkara, to the Cabinet.<sup>38</sup> The GoSL also came under scrutiny for deporting a British tourist for sporting a tattoo of the Lord Buddha on her arm.<sup>39</sup> The government established a special police unit on religious crimes in May 2014<sup>40</sup> and created a “Supreme Buddhist Council” which is expected to advise the President on policy with regard to religious issues in Sri Lanka.<sup>41</sup> However, the council comprises of only Buddhist clergy,<sup>42</sup> which raises questions about lack of representation of other minorities with regard to policy decisions in Sri Lanka.

Issues with regard to land rights also surfaced in the wake of mega development projects<sup>43</sup> and urban beautification.<sup>44</sup> The North and East of Sri Lanka has become a focal point with regard to land acquisition issues.<sup>45</sup> A protestor campaigning against land acquisition in Wanathamulla, was abducted by unknown persons in February 2014, and was later released due to protests by locals.<sup>46</sup> The residents of Wanathamulla have filed a complaint with the HRCSL against the police.<sup>47</sup>

The United Nations passed the resolution A/HRC/25/L.1/Rev.1<sup>48</sup> at the 25<sup>th</sup> session of the Human Rights Council that requested the High Commissioner to conduct a comprehensive investigation into alleged human rights violations in Sri Lanka.<sup>49</sup> The GoSL has rejected the resolution as an unacceptable violation of Sri Lanka’s sovereignty and vowed to continue with its own reconciliation process.<sup>50</sup>

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<sup>36</sup> “This is a Sinhala country, Sinhala Government: Bodu Bala Sena”, Daily FT, June 5, 2014, available at <http://www.ft.lk/2013/02/18/this-is-a-sinhala-country-sinhala-government-bodu-bala-sena/>

<sup>37</sup> “Muslim Photographer Attacked by Marching Sinhala Ravaya Protesters”, dbsjeyaraj.com, June 19, 2013, available at <http://dbsjeyaraj.com/dbsj/archives/22062>

<sup>38</sup> “Ban BBS”, The Sunday Leader, Sri Aravinda, Indika, March 31, 2014, available at <http://www.thesundayleader.lk/2013/03/31/ban-on-bbs/>

<sup>39</sup> “Sri Lankan officials apologise to British nurse arrested over Buddha tattoo”, The Telegraph, April 24, 2014 available at <http://www.telegraph.co.uk/news/worldnews/asia/srilanka/10785323/Sri-Lankan-officials-apologise-to-British-nurse-arrested-over-Buddha-tattoo.html>

<sup>40</sup> “Tattoos, Feelings and Religion”, Law and Society Trust blog, ESCR Team, May 7, 2014, <http://lawandsocietytrust.blogspot.com/2014/05/tattoos-feelings-and-religion.html>

<sup>41</sup> “Supreme Buddhist Council to advise Govt. on religions”, Sunday Times, May 25, 2014, available at <http://www.sundaytimes.lk/140525/news/supreme-buddhist-council-to-advise-govt-on-religions-100441.html>

<sup>42</sup> *id*

<sup>43</sup> ESCR Newsletter, Issue 8, Law and Society Trust, December 2013, available at [http://lawandsocietytrust.org/PDF/resource/ESCR\\_issue\\_8\\_dec\\_Newsletter%20\(English\).pdf](http://lawandsocietytrust.org/PDF/resource/ESCR_issue_8_dec_Newsletter%20(English).pdf)

<sup>44</sup> “Are the poor “lesser” stakeholders of development?”, ESCR Newsletter, Issue 9, Law and Society Trust, Mendis, Rasika, May 2014, available at [http://lawandsocietytrust.org/PDF/resource/escr/ESCR%20Newsletter%20Issue%208%20\(May%202014\).pdf](http://lawandsocietytrust.org/PDF/resource/escr/ESCR%20Newsletter%20Issue%208%20(May%202014).pdf)

<sup>45</sup> “Policy Brief: Politics, Policies and Practices with Land Acquisitions and Related Issues in the North and East of Sri Lanka”, Center for Policy Alternatives, “March 5, 2014, available at <http://www.cpalanka.org/policy-brief-politics-policies-and-practices-with-land-acquisitions-and-related-issues-in-the-north-and-east-of-sri-lanka/>

<sup>46</sup> “Duminda chased out of Wanathamulla”, Ceylon Today, Indrakumar, Menaka; Weerasinghe, Gihan, February 16, 2014, available at <http://www.ceylontoday.lk/51-56184-news-detail-duminda-chased-out-of-wanathamulla.html>

<sup>47</sup> “Wanathamulla residents go to HRCSL against police”, Ceylon Today, March 6, 2014, available at <http://www.ceylontoday.lk/51-57880-news-detail-wanathamulla-residents-go-to-hrcsl-against-police.html>

<sup>48</sup> United Nations Human Rights Council, 25<sup>th</sup> Session, “Promoting reconciliation, accountability and human rights in Sri Lanka”, A/HRC/25/L.1/Rev.1, March 27, 2014, available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/HRC/25/L.1/Rev.1](http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/25/L.1/Rev.1)

<sup>49</sup> “Human Rights Council adopts a resolution on reconciliation, accountability and human rights in Sri Lanka”, UN Human Rights Council, March 27, 2014, available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14447&LangID=E>

<sup>50</sup> “We reject this - President tells AFP”, Ada Derana, March 28, 2014, <http://www.adaderana.lk/news.php?nid=26239>

The HRCSL has published statements on its website, on action taken by it, with regard to high priority incidents such as the Weliveriya<sup>51</sup> incident, the case of the arrests of two human rights activists<sup>52</sup> etc., that consist of advising, meeting and submitting reports. However, HRCSL’s calls for immediate reports on railway safety gates,<sup>53</sup> or directives with regard to interviews of Irrigation Department seem to carry a higher level of authority in terms of execution. In addition, as understood from the official records, incidents like school admission cases take higher priority consuming energy and time over serious incidents like Weliveriya.

The lack of responses and effectiveness of the rulings issued by HRCSL towards rights violations is noted. For instance, despite starting the inquiry, the response by HRCSL to the petition against website blocking citing national security raises concerns;<sup>54</sup> on the other hand Wanathamulla residents remain concerned for their safety, despite a ruling by HRCSL.<sup>55</sup> Concurrently, it was noted that the number of fundamental rights petitions filed in the Supreme Court have decreased, which, according to the Bar Association of Sri Lanka, was due to increasing lack of faith in the system. The HRCSL claims on the other hand that it is due to the elongated process, which leaves out-of-court settlements preferable, saving cost and energy.<sup>56</sup> In either instance this should be a point of concern for the HRCSL. While, the HRCSL reportedly attempts to strengthen their mandate through amendments<sup>57</sup> and capacity building projects,<sup>58</sup> much is left to be desired by the public in terms of asserting equal authority and involvement for all cases of human rights violations across the board,<sup>59</sup> with timely and effective responses.

## 2. Independence

<b>Establishment of NHRI</b>	
Established by Law	Human Rights Commission of Sri Lanka Act, No.21 of 1996 <sup>60</sup>
Mandate	To give force to the commitment of Sri Lanka as a member of the United Nations in protecting human rights, and to perform the duties and obligations

<sup>51</sup> “HRCSL concludes probe on Rathupaswala crisis”, Daily Mirror, May 4, 2014, <http://www.dailymirror.lk/news/46682-hrcsl-concludes-probe-on-rathupaswala-crisis-.html>

<sup>52</sup> “HRCSL Vigilant over the conditions of two Human Rights Defenders”, Human Rights Commission of Sri Lanka, March 19, 2014 available at <http://hrcsl.lk/english/?p=2254>

<sup>53</sup> “HRCSL Calls For An Immediate Report From The Railway Authorities”, Human Rights Commission of Sri Lanka, July 3, 2013 available at <http://hrcsl.lk/english/?p=2156>

<sup>54</sup> “Govt. must Modi-fy policy on news websites”, Daily Mirror, May 28, 2014 available at <http://www.dailymirror.lk/opinion/172-opinion/47664-editorial-govt-must-modi-fy-policy-on-news-websites-.html>

<sup>55</sup> “Wanathamulla Residents Raise Concerns”, The Sunday Leader, Nathaniel, Camelia, May 30, 2014, available at <http://www.thesundayleader.lk/2014/04/20/wanathamulla-residents-raise-concerns/>

<sup>56</sup> “Drop in FR petition filings”, Ceylon Today, Jayakoday, Ruwan, May 26, 2014, available at <http://www.ceylontoday.lk/16-64821-news-detail-drop-in-fr-petition-filings.html>

<sup>57</sup> “Amendments To The Human Rights Commission Act No. 21 Of 1996”, Human Rights Commission of Sri Lanka, December 24, 2013, available at <http://hrcsl.lk/english/?p=2234>

<sup>58</sup> “Commonwealth Secretariat Capacity Development Intervention For Human Rights Commission Of Sri Lanka”, Human Rights Commission of Sri Lanka, April 4, 2014, available at <http://hrcsl.lk/english/?p=2274>

<sup>59</sup> “HRCSL should defend human rights, not the regime”, Ceylon Today, December 24, 2013, available at <http://www.ceylontoday.lk/52-51045-news-detail-hrcsl-should-defend-human-rights-not-the-regime.html>

<sup>60</sup> Human Rights Commission of Sri Lanka Act No. 21 of 1996”, Human Rights Commission of Sri Lanka, available at <http://hrcsl.lk/english/ACT/english.pdf>

	imposed on Sri Lanka by various international treaties at international level; as well as to maintain the standards set out under the Paris Principles. <sup>61-62</sup>
<b>Selection and Appointment</b>	
	The selection process is clear. However it is not transparent or participatory. Under the enabling legislation, the members of the Commission were to be appointed by the President, on the recommendation of the Constitutional Council. <sup>63</sup> There is little transparency as to the grounds on which certain members of the Commission have been selected.
	The Constitutional Council was meant to be an independent and impartial body which was responsible for selecting members to the Commission. <sup>64</sup> However, with the passing of the 18 <sup>th</sup> Amendment in 2010, the Constitutional Council was transformed into a Parliamentary Council according to which the President is merely required to seek observations from the Council, which in effect makes it to a certain extent redundant. <sup>65</sup> Therefore, the independence and credibility has been severely compromised. The process does not envisage extensive consultations with civil society or NGOs in appointing members to the Commission.
	Section 3(1) of the HRCSL Act <sup>66</sup> requires the members of the Commission to be chosen from among persons having knowledge of, or practical

<sup>61</sup> Paris Principles (Principles Relating to the Status of National Institutions) available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>

<sup>62</sup> See: Establishment, *HRCSL website*, available at [http://hrctl.lk/english/?page\\_id=615](http://hrctl.lk/english/?page_id=615).

<sup>63</sup> “Art. 3 (2) Human Rights Commission of Sri Lanka Act No. 21 of 1996”, HRCSL Website, available at <http://hrctl.lk/english/ACT/english.pdf>

<sup>64</sup> Article 41 (B) 17th Amendment: ‘No person shall be appointed by the President as the Chairman or a member of any of the Commissions specified in the Schedule to this Article, except on a recommendations of the Council’. The persons appointed through nominations are required to be persons of eminence and integrity who have distinguished themselves, who are not members of any political party and nominated to represent minority interests. The Constitutional Council comprised of the Prime Minister, the Speaker, the Leader of the Opposition in Parliament, one person appointed by the President, five persons appointed by the President, on the nomination of both the Prime Minister and the Leader of the Opposition, and one person nominated upon agreement by the majority of the Members of Parliament belonging to political parties or independent groups other than those to which the Prime Minister and the Leader of the Opposition belongs and appointed by the President – See 17th Amendment to the Constitution of the Democratic Socialist Republic of Sri Lanka 1978.

<sup>65</sup> The Parliamentary Council comprising primarily of members drawn from government and ruling coalition members of parliament of: the Prime Minister, the Speaker, the Leader of the Opposition, a nominee (who is an MP) of the Prime Minister, and a nominee (who is an MP) of the Leader of the Opposition - Article.41 (A) of the 18th Amendment to the Constitution of the Democratic, Socialist Republic of Sri Lanka.

<sup>66</sup> “Art. 3 (1) Human Rights Commission of Sri Lanka Act No. 21 of 1996”, HRCSL Website, available at <http://hrctl.lk/english/ACT/english.pdf>

	<p>experience in, matters relating to human rights. This section does not specify as to how these persons are to be selected, nor does it provide for a mechanism through which the qualifications of such appointees can be measured.</p>
	<p>Section 3(3) of the HRCSL Act<sup>67</sup> makes a vague statement to the effect that (3) in making recommendations to the President, the Constitutional Council and the Prime Minister shall have regard to the necessity of the minorities being represented of the Commission. Unfortunately, the section does not define the term ‘minorities’ and whether this means representation of each racial, ethnic and religious minority in Sri Lanka, nor does the section encompass gender representation.</p> <p>The Commission also does not strive to be inclusive of diverse sectors of society. There is no process which ensures representation or involvement of NGOs and other civil society actors.</p>
<b>Terms of office</b>	
	<p>As per Section 3(5) every member of the Commission shall hold office for a period of three years.</p>
Next turn-over of members	<p>The latest appointment was in February 2014, therefore the Commissioners must be re-appointed in 2017.<sup>68</sup></p>

## 2.1 Appointment/Selection process & Composition

Human Rights Commission of Sri Lanka appointed its members for the latest tenure on February 18, 2014.<sup>69</sup> The HRCSL members nominated by the Parliamentary Council and appointed by the President with effect from 18 February 2014 are: retired Supreme Court Judge Justice Priyantha Perera – Chair of the Commission; Mr. T. E. Anandarajah, former Inspector-General of Police; Dr. Sri Warna Prathiba Mahanamahewa, Dean of the Faculty of Law at General Sir John Kotelawala Defence University;<sup>70</sup> Dr. Bernard de Zoysa, Private Medical Practitioner; and Mrs. Jezima Ismail, former Chancellor of the South

<sup>67</sup> Section 3(3), HRCSL Act, *Supra*

<sup>68</sup> “Appointments Of Members To The HRCSL For The Present Term”, HRCSL Website. February 25, 2014, available at <http://hrsl.lk/english/?p=2244>

<sup>69</sup> *id.*

<sup>70</sup> Kotelawala Defence University is a military academy primarily established for officer cadets to pursue graduate and post-graduate qualifications and consequently raises the issue of independence of the commissioner from the conduct of the armed forces.

Eastern University. Members of the Commission have not changed since the issuance of the 2013 ANNI Report, which explores in depth the qualifications of the individuals within the committee.<sup>71</sup>

The re-appointment of the members of the Human Rights Commission in 2014 of Sri Lanka, needs to be evaluated alongside the fact that the Commission has been downgraded from an 'A' rating to a 'B' rating in 2007, partially due to the concerns relating to the appointment process of the Commissioners.<sup>72</sup> The confidence of the public seems to be dwindling with actions such as indefinitely postponing the establishment of a National Inquiry on Torture,<sup>73</sup> which in turn projects an image of unreliability with regard to HRCSL. This indeed has raised questions of the objectivity of HRCSL.<sup>74</sup>

Replacing a member of the Commission remains non-transparent. Replacing members falls under section 3 of the HRCSL Act,<sup>75</sup> in terms of which, the selection mechanism and measuring the qualifications of the candidates, remain obscure.

## 2.2 Terms and Conditions of Office

Section 4 of the HRCSL Act<sup>76</sup> specifies the process in which a member of the Commission may be removed from office, by the President.<sup>77</sup> Among the several bases on which a dismissal may occur, a Commissioner may be dismissed if the President forms an opinion, (based on a recommendation made by the Prime Minister in consultation with the Speaker and the Leader of Opposition), to the effect that a member of the Commission engages in paid employment outside the duties of his office, which conflicts with his duties as a member of the Commission.

An alternative to the above grounds of dismissal is removal by an order of the President, made after an address of Parliament, on the ground of proved misbehaviour or incapacity. Such order needs to be supported by a majority of the total number of members of Parliament (including those not present). The Speaker will not entertain a resolution for the presentation of such an address to be placed on the Order Paper of the Parliament, unless the notice of such resolution is signed by at least one-third of Parliament and sets out full particulars of the alleged misbehaviour or incapacity.

The process of dismissal is similar to the process adopted in relation to other independent institutions. In fact, the procedure adopted for the presentation and passing on an address of Parliament for the removal

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<sup>71</sup> "Sri Lanka: The National Human Rights Commission Marionette of the State", ANNI Report on National Human Rights Institutions – 2013, Law & Society Trust, 190-216.

<sup>72</sup> "Document - Sri Lanka: Eighth session of the UN Human Rights Council: Review of Sri Lanka under the universal periodic review: Amnesty International's reflections on the outcome", Amnesty International, June 2008, available at <http://www.amnesty.org/en/library/asset/ASA37/023/2008/en/1ce995f8-37c8-11dd-9ec6-1d6085451ee8/asa370232008eng.html>

<sup>73</sup> "HRC Postpones Set Up Of Torture Commission On Alleged Requests By CSOs – Rights Now Asks Chairman To Name The Orgs", Rights Now, 14 December 2013, available from [www.rightsnow.net/?p=4347](http://www.rightsnow.net/?p=4347).

<sup>74</sup> "HRCSL should defend human rights, not the regime", Ceylon Today, December 24, 2013, available at <http://www.ceylontoday.lk/52-51045-news-detail-hrcsl-should-defend-human-rights-not-the-regime.html>

<sup>75</sup> Article 3, HRCSL Act. Supra

<sup>76</sup> Article 4, HRCSL Act. Supra

<sup>77</sup> Being adjudged an insolvent or being declared to be of unsound mind by a court of competent jurisdiction, or being convicted of an offence involving moral turpitude are valid grounds for dismissal. Furthermore, the President is given wide discretion to remove a member of the Commission for being unfit to continue in office by reason of infirmity of mind or body.

of a member of the Commission will be the same process that is adopted when removing a Judge of the Supreme Court or the Court of Appeal.

While the process of dismissal may be elaborate with multiple levels of safeguards, in practice the guarantees seem to be failing. Dr. Shirani Bandaranayake was dismissed from the office of Chief Justice in a blatant violation of due process and without the necessary degree of objectivity.<sup>78</sup> Given the overwhelming majority on the side of the ruling party in the Parliament, coupled with the fact that voting in Parliament is strictly based on party lines, garnering majority support for an order dismissing a member of the Commission may not be as difficult as the drafters envisioned when drafting the enabling legislation.

The dismissal process requires the complicity of two branches of the state, the executive and the legislature. Given the political backdrop of Sri Lanka and the composition of the members of the Parliament, these two arms of the state hardly act as a checking mechanism on the other.<sup>79</sup>

With regard to the functional immunity of the Commission, it is allowed in some capacity within Section 26 of the HRCSL Act,<sup>80</sup> which states that proceedings, civil or criminal cannot be instituted against any member of the Commission (or any officer or servant appointed to assist the Commission), for any act or omission done in good faith.

### 2.3 Staffing and recruitment

As per section 25 of the HRCSL Act,<sup>81</sup> the Commission may make requests for staff members. An officer in the public service may be appointed for such position with the consent of such officer and of the Secretary to the Ministry of the Minister in charge of the subject of Public Administration.

The HRCSL sought to expand their mandate by proposing an amendment to the HRCSL Act.<sup>82</sup> While this amendment would reportedly<sup>83</sup> allow the Commission more power, the independence of the Commission itself is in question, on the basis of statements by its members that may be considered pro-government,<sup>84</sup> and also the early resignation of Dr. Ananda Mendis citing interference from within the HRCSL.<sup>85</sup> Thus,

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<sup>78</sup> “President Mahinda Rajapaksa removed Sri Lanka's chief justice from office with immediate effect on Sunday, defying a Supreme Court ruling that the impeachment process was illegal and setting the stage for a possible constitutional crisis”, Reuters, Jan 13, 2013, available at <http://in.reuters.com/article/2013/01/13/srilanka-impeachment-idINDEE90C05R20130113>

<sup>79</sup> The January 2013 impeachment of Dr. Shirani Bandaranayake from the seat of Chief Justice, subjected Parliamentary Standing Order 78A under heavy criticism from civil society groups as well as the Bar Association. Standing Order 78A lays down the current internal parliamentary procedure for impeachment of judges. “[T]he process set out in Standing Order 78A, which lays down the current internal parliamentary procedure for impeachment of judges, is flawed”, Groundviews, Jan 10, 2013, available at <http://groundviews.org/2013/01/10/a-legal-primer-the-impeachment-of-the-chief-justice-in-sri-lanka/>.

<sup>80</sup> Section 26, HRCSL Act, *Supra*

<sup>81</sup> Section 25, HRCSL Act, *Supra*

<sup>82</sup> “Amendments to The Human Rights Commission Act No. 21 Of 1996”, HRCSL Website, December 24, 2013 available at <http://hrctl.lk/english/?p=2234>

<sup>83</sup> “HRCSL should defend human rights, not the regime”, Ceylon Today, December 24, 2013, available at <http://www.ceylontoday.lk/52-51045-news-detail-hrcsl-should-defend-human-rights-not-the-regime.html>

<sup>84</sup> “Resolution both toothless and dangerous: Human Rights Commissioner”, Daily FT, 25 March 2013, available at <http://www.ft.lk/2013/03/25/resolution-both-toothless-and-dangerous-human-rights-commissioner>

<sup>85</sup> “I leave the HRC with a clear conscience”, Ceylon Today, 05 February 2012

despite existing provisions within the statute, and proposed amendments, the public reportedly remains skeptical of the independence of the Commission.<sup>86</sup>

### 3. Effectiveness

No progress appears to have been made in improving the effectiveness of the HRCSL in addressing allegations of grave human rights violations, in spite of the concerns and criticisms expressed by legal scholars, social activists, human rights defenders and community-based-organisations. No major achievements appear to have been made, though the HRCSL is vested with a broad mandate, including, to make recommendations to the Government regarding measures which should be taken to ensure that national laws and administrative practices are in accordance with international human rights norms and standards,<sup>87</sup> advise and assist the government in formulating legislation and administrative directives and procedures, in furtherance of, the promotion and protection of fundamental rights,<sup>88</sup> make recommendations to the Government on the need to subscribe or accede to treaties and other international instruments in the field of human rights<sup>89</sup> and inquire *suo moto* into infringements of fundamental rights.<sup>90</sup>

A set of benchmarks<sup>91</sup> based on the Paris Principles and good practices of national institutions<sup>92</sup> is outlined by the International Council on Human Rights Policy and the Office of the United Nations High Commissioner for Human Rights. The Paris Principles state that the national institutions should have authority to call for evidence<sup>93</sup> [Section 18(1)(a) of the Human Rights Commission of Sri Lanka Act – HRCSL Act, No. 21 of 1996] and require witnesses<sup>94</sup> [Section 18(1)(c) of HRCSL Act] to appear before their officers, that they have the power to recommend sanctions in case of refusal [Section 21(3)(a) of HRCSL Act] and production of evidence [Section 21(3)(d) of HRCSL Act], power to visit all places of detention [Section 11(d) of HRCSL Act], and the authority to initiate and publish inquiries. Public inquiries into specific human rights issues fall within the general monitoring function of national institutions. Such inquiries entail not only monitoring, but also public hearings of witnesses and the release of public reports containing recommendations for action to the relevant authorities. NHRIs that conduct such inquiries find them invaluable to secure official action and raise public awareness of particular human rights issues.

It is a legal requirement for the HRCSL to report annually and to make reports widely available to ensure accountability.<sup>95</sup> It is noted that the 2012 Annual Report of the HRCSL, and a few of the

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<sup>86</sup> “HRCSL unconcerned about rights”, Ceylon Today, 3 July 2013, available at <http://www.ceylontoday.lk/16-36636-news-detail-hrcsl-unconcerned-about-rights.html>, accessed on 7 June 2014.

<sup>87</sup> Section 10(d) of the HRC Act.

<sup>88</sup> Section 10 (c) of the HRC Act.

<sup>89</sup> Section 10 (e) of the HRC Act

<sup>90</sup> Section 14 of the HRC Act.

<sup>91</sup> Benchmarks, Assessing the effectiveness of national human rights institutions, International Council on Human Rights Policy, pp. 11-23, 2005.

<sup>92</sup> Neither restraint or remedy: The Human Rights Commission of Sri Lanka, Law and Society Trust, B. Skanthakumar, Introduction part, pp. 7–9 ( December 2012).

<sup>93</sup> National institutions should have authority to call for evidence and require witnesses to appear before their monitors; they should be able to recommend sanctions in case of refusal

<sup>94</sup> Ibid.

<sup>95</sup> Art. 30, Human Right Commission of Sri Lanka Act No.21 of 1996, <http://hrcsl.lk/english/ACT/english.pdf>

decisions/activities/events undertaken by the HRCSL, are published on its official website. Apart from this, the HRCSL made no effort in publishing special or periodic reports in respect of matters referred to the commission, publicise the Commission's findings, advice and recommendations to the government and on any action taken by the Commission. This practice would add considerable authority and value to urgently address unresolved or ongoing violations of human rights<sup>96</sup> and increase government's accountability, the NHRI's credibility and public legitimacy, as well as public confidence in the HRCSL.

The Paris Principles recognize that relationships with civil society can enhance their effectiveness by deepening their public legitimacy, ensuring that they reflect public concerns and priorities, and giving them access to expertise and valuable social networks.<sup>97</sup> It further acknowledges that NHRIs, to be more effective, should consult regularly with the public, with community-based bodies and with organizations that have a professional interest in human rights to clearly understand what their public wants and needs.<sup>98</sup>

Even though the Commission made efforts to effectively engage with civil society in early 2013, no progress was made in achieving the goal. It is undeniable that the regional offices of the HRCSL conducted regular meetings in the regions. According to the Secretary, the Civil Society Steering Committee, a committee appointed to facilitate corporation between the HRCSL and the civil society, was actively engaged with the civil society at the regional level. On the other hand, the level of engagement of the HRCSL with civil society at national level deteriorated to an even worse condition. When the Rights Now-Collective for Democracy (hereinafter, Rights Now), a well-known human rights organization, requested the Human Rights Commission of Sri Lanka (HRCSL) to be transparent about real reasons as to why the previously announced National Inquiry on Torture has been postponed, citing a media report<sup>99</sup>, through a letter<sup>100</sup> to the Chairman of the HRCSL, the HRCSL Chair's was defensive<sup>101</sup> and refused to provide any credible information or response.<sup>102</sup>

In their final response to *Rights Now*, the HRCSL stated that the Commission respects the right of civil society organizations to inquire into matters and considers the criticisms as part and parcel of that right, and the Commission holds a different view, as opposed to the view held by the civil society organizations (CSO's) regarding some matters. It further stated that the Commission does not anticipate having any further discussions with regard to this matter.<sup>103</sup>

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<sup>96</sup> Public accountability, Benchmarks, Assessing the effectiveness of national human rights institutions, International Council on Human Rights Policy, p. 23, 2005.

<sup>97</sup> Composition and guarantees of independence and pluralism, Principles relating to the Status of National Institutions (The Paris Principles) Adopted by General Assembly resolution 48/134 of 20 December 1993

<sup>98</sup> Methods of operation, Principles relating to the Status of National Institutions (The Paris Principles) Adopted by General Assembly resolution 48/134 of 20 December 1993

<sup>99</sup> Torture probe postponed, The Sunday Leader, December 8, 2013, available at <http://www.thesundayleader.lk/2013/12/08/torture-probe-postponed/>, accessed on May 27, 2014

<sup>100</sup> HRC postpones set up of Torture Commission on alleged requests by CSOs – Rights Now asks the Chairman to name the organization, rightsnow.net, December 14, 2013, available at <http://www.rightsnow.net/?p=4347>, accessed on May 14, 2014,

<sup>101</sup> "Rights Now challenges the Human Rights Commission's lame excuses on postponing National Torture Inquiry", rightsnow.net, January 16, 2014, available at <http://www.rightsnow.net/?p=4532>, accessed on May 18, 2014

<sup>102</sup> Information on the list of civil society organisations that had advised the commission not to hold a national inquiry and how a national inquiry could negatively affect reconciliation.

<sup>103</sup> Re: Letter sent to the Chairman Human Rights Commission (2014.1.13)

Though the HRCSL continues to claim that they have been thriving to have a close cooperation with the civil society, in reality the engagement appears highly superficial. There is no mechanism in place to effectively engage with civil society. Although the importance of civil society engagement is repeatedly affirmed in the ICC declarations by allowing the civil society presence in the process, the HRCSL appears to show little interest in working with civil society in implementing their mandates.

The HRCSL wrote to the President asking for sweeping powers through amendments to the Human Rights Act No. 21 of 1996. Some of the amendments seek to permit the HRC to be empowered to go to the High Court to implement its recommendations and/or directives. Some of the other recommendations / amendments that the HRC had sought include powers to initiate National Inquiries on specific matters, issue warrants to State Officials who do not appear for inquiries, powers to issue regulations where any document could be recalled, and the right to investigate persons or institutions during which period the person or institution could not be investigated parallel and simultaneously, while the HRC inquiry was continuing.<sup>104</sup>

The HRCSL has the mandate to take up individual or collective issues on their own initiative, without a complaint having been lodged (*suo motu*).<sup>105</sup> Nevertheless, the HRCSL hardly exercises that power to investigate politicized violations.<sup>106</sup> The HRCSL made no effort to investigate on its own initiative, various grave fundamental and/or human rights violations, including attacks on, and harassment of, civil society activists, journalists, and persons viewed as sympathisers of the Liberation Tigers of Tamil Eelam (LTTE) terrorist organization, by individuals allegedly tied to the government, creating an environment of fear and self-censorship;<sup>107</sup> torture and other ill-treatments of persons in custody by the security forces and police;<sup>108</sup> neglect of the rights of the IDPs;<sup>109</sup> breakdown in rule of law and widespread impunity;<sup>110</sup> suppression of freedom of expression including violence against media personnel and institutions;<sup>111</sup> continued misuse of the Prevention of Terrorism Act (PTA) to repress critics;<sup>112</sup> arbitrary detention policies; internal displacement and forced relocation due to state land acquisition for development and

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<sup>104</sup> HRC seeks sweeping powers, Ceylon Today, Ravi Ladduwahetty, December 17, 2013, available at <http://www.ceylontoday.lk/16-50354-news-detail-hrc-seeks-sweeping-powers.html>, accessed on May 17, 2014

<sup>105</sup> Section 14 of the HRC Act: The Commission may, on its own motion or on and complaint made to it by an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or a group of persons, investigate an allegation at the infringement or imminent infringement of a fundamental right of such person or group of persons caused. (a) by executive or administrative action; or (b) as a result of an act which constitutes an offence under the Prevention of terrorism Act. No.48 of 1979, committed by any person.

<sup>106</sup> Escalation in attacks by militant Buddhist groups against Muslims and Hindus, election violations such as intimidation, violence and improper military interference, arbitrary detention, restrictions on civil society organisations, HRDs and media, military intervention in civilian life,

<sup>107</sup> Sri Lanka must end its aggressive campaign against Ruki Fernando, Father Praveen and other human rights defenders, activists, journalists, lawyers and others: Amnesty International oral statement to the 25th Session of the UN Human Rights Council, (3 – 28 March 2014), 19 March, 2014

<sup>108</sup> Human Rights Watch World Report 2013

<sup>109</sup> Protracted displacement, urgent solutions: Prospects for durable solutions for protracted IDPs in Sri Lanka. Centre for Policy Alternatives, Mirak Raheem, Introduction, September 2013, available at <http://www.scribd.com/doc/168824135/Protracted-Displacement-Urgent-Solutions-Prospects-for-Durable-Solutions-for-Protracted-IDPs-in-Sri-Lanka>, accessed on May 17, 2014

<sup>110</sup> Island of Impunity: Investigation into international crimes I the final stages of the Sri Lankan civil war, International Crimes Evidence Project, February 2014.

<sup>111</sup> Journalism and the safety of the journalists, Rights Now, S. Skanda, April 2, 2014, available at <http://www.rightsnow.net/?p=5350>, accessed on May 12, 2014.

<sup>112</sup> Further acts of harassment against Mr. Ruki Fernando and Rev. Praveen Mahesan, the observatory for the protection of human rights defenders, March 25, 2014, available at <http://www.fidh.org/en/asia/sri-lanka/15011-sri-lanka-further-acts-of-harassment-against-mr-ruki-fernando-and-rev>, accessed on April 26, 2014

military occupation especially in the North and East leading to loss of homes and livelihoods; military mechanisms overrule local administrative structures in previously conflict affected areas and regulate civilian lives; unresolved cases of involuntary or enforced disappearances; repressive economic policies which penalise the poor,<sup>113</sup> and continued anti-Muslim propaganda/violence by the '*Bodu Bala Sena* (BBS).<sup>114</sup>

In fact the HRCSL denied jurisdiction to act against the BBS.<sup>115</sup> In the recent past incidents of religious extremism has risen in Sri Lanka. A series of high profile attacks on places of worship, (including mosques, Christian Churches and Hindu temples) have been recorded. The GoSL had set up a special police unit to investigate religious issues.<sup>116</sup> While there are several conflicting opinions expressed<sup>117</sup> by community leaders and politicians on the appointment of the special unit, the HRCSL remains silent on this fundamental right issue.

The annual report of the HRCSL for the year 2013 is yet to be published at time of writing (May 2014). Though it is claimed by the Commission that the civil society has an easy access to their staff both at regional and national level, accessibility to the senior officers at the head office as well as the regional office continues to be a huge challenge as they refuse to communicate without permission from the Secretary. It has been an unspoken rule of the senior officials of the Commission not to communicate with the CBOs and NGOs without permission from the Secretary or the Commissioners.

The response to questionnaires prepared by ANNI for the 2014 Report was received on 10<sup>th</sup> June 2014, after the second draft of the report was also formulated. However the brief and concise responses make it impossible to analyse the number and type of complaints received by the HRCSL, and measures taken by the commission to address them, during the reporting period, without the co-operation of HRCSL in providing information. Attempts to meet with officials of the HRCSL prior to the drafting and finalisation of the report proved fruitless.

#### **4. Engaging with Other Stakeholders**

The HRCSL in its response to ANNI, has stated that it has “discussed the issues and conducted a fact finding mission” in relation to issues faced by the fishing community in Mannar. Though told that the report of the fact-finding mission was ready, no further details have been given on the nature of the issues faced, the result of these discussions and fact finding missions, or the present status of the ‘issues’. The HRCSL have also noted that they held consultations with civil society representatives in relation to the

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<sup>113</sup> Forced evictions in Colombo: The ugly price of beautification, Centre for policy Alternatives, April 2014

<sup>114</sup> “Bodu Bala Sena secretary GalagodaAththe Gnasara Thero asked to appear before police”, Hiru News, April 10, 2014, available at <http://www.hirunews.lk/81021/bodu-bala-sena-secretary-galagoda-atththe-gnasara-thero-asked-to-appear-before-police-video>, accessed on 30 May 2014.

<sup>115</sup> “Monk complains to HRCSL against BBS”, Ceylon Today, NiranjalaAriyawansa, February 16, 2014, available at <http://www.ceylontoday.lk/51-56186-news-detail-monk-complains-to-hrcsl-against-bbs.html>, accessed on 30 May 2014.

<sup>116</sup> Religious complaints police special investigation unit opened by PM, Financial Times, April 29, 2014, available at <http://www.ft.lk/2014/04/29/religious-complaints-police-special-investigation-unit-opened-by-pm/>, accessed on June 3, 2014

<sup>117</sup> New religious police receive over 200 complaints in first day, the republic square, April 29, 2014, available at <http://www.therepublicsquare.com/politics/2014/04/29/new-religious-police-receive-over-200-complaints-in-first-day/>, accessed on June 3, 2014

water pollution allegations in Rathupaswela, Welweriya, in the Gampaha District, which is discussed in more detail hereinafter.

In relation to forced evictions, the HRCSL has merely stated “Ensure rule of law; some interventions were able to suspend the decisions of government authorities”. No further details have been set out.

In relation to accessibility to civil society stakeholders, it appears that by having mobile offices<sup>118</sup> as well as 10 regional offices, as well as its head-office in Colombo, the NHRI is fairly accessible geographically. The NHRI reports that it also plans to open several other mobile offices in Mullaitivu, Kurunegala, Hambantota, Moneragala, and Ratnapura Districts.<sup>119</sup> In relation to outreach, several examples are cited by the NHRI, and it appears that the NHRI has engaged with school children, with “Non-Governmental organizations, Law Enforcement Officials, Public Officers and students including Law students”, on the occasion of the International Human Rights Day 2013.<sup>120</sup> The NHRI reports that a national event as well as 10 regional events were conducted.

In relation to language rights, HRCSL reports that it issued three directives to the Irrigation Department, for having issued letters calling for applications to the post of lab assistants only in the Sinhala language, which the HRCSL has noted is a violation of the language rights enshrined in the Constitution.<sup>121</sup> The Irrigation Department falls under the Ministry of Irrigation and Water Resource Management.

In a commendable undertaking, the HRCSL, on 22-23 September 2013, along with the Commonwealth Secretariat organized a workshop on reconciliation, in Vavuniya, at which, CSOs from the Northern Province had participated.<sup>122</sup> Thereafter on May 22-23, 2014, conducted a follow-up program of work on reconciliation, bringing in officers from its regional branches, as well as its Chairman, Commissioners and Staff, and reaching out to national and international experts for technical knowledge on how the NHRI can engage better with the reconciliation process.<sup>123</sup> The HRCSL reports that local resource persons from CSOs also participated.<sup>124</sup> The NHRI has reported in its website that Advocate Lawrence Mushwana, Chair of the South African Human Rights Commission, and Advocate John Walters, Ombudsman for Namibia, had shared best practice from their respective countries and institutions, and also included local experts. The workshop reportedly addressed several issues including “the role of civil society, academia and human rights defenders in national reconciliation efforts” and was the fourth in a series conducted under the Commonwealth Secretariat’s Good-Office Remit.

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<sup>118</sup> Killinochchi, Vavuniya (since 2012) and Puttalam (opened on 13 October 2013).

<sup>119</sup> “Mobile Offices Established for the convenience of the Public”, October 22, 2013, HRCSL available at <http://hrcls.lk/english/?p=2195>, accessed on 29 May 2014.

<sup>120</sup> “International Human Rights Day 2013 Celebration by the HRCSL”, 9 December 2013, HRCSL, available at <http://hrcls.lk/english/?p=2202>, accessed on 29 May 2014.

<sup>121</sup> “HRCSL issues a directive and monitored on Language policy”, 20 December 2013, HRCSL, available at <http://hrcls.lk/english/?p=2231>, accessed on 29 May 2014. Please note that it is unclear however whether these directives were issued on its own initiative or whether it was as a result of a complaint made in that regard. In addition, it is unclear whether the Department had taken action based on the directives of the NHRI.

<sup>122</sup> HRCSL comments/observations to ANNI draft report.

<sup>123</sup> “Human Rights Commission of Sri Lanka develops Programme of Work on Reconciliation”, May 23, 2014, HRCSL, available at <http://hrcls.lk/english/?p=2283>, accessed on 29 May 2014.

<sup>124</sup> HRCSL comments/observations to ANNI draft report.

However, while it appears that the NHRI did reach out to some civil society organizations (CSO), and to local and international experts, for capacity building purposes of the NHRI, there does not seem to have been any reported attempt to foster closer relations with vulnerable groups through the established networks of such CSOs.<sup>125</sup> It appears therefore that the HRCSL continues to fail to understand the importance of engagement with civil society.

The HRCSL has also participated in a capacity building program with the Commonwealth Secretariat, in Geneva, on 10-13 March 2014.<sup>126</sup> Therefore, certainly there does appear to have been some level of information sharing, capacity building and training, in the year under review, in partnership with CSO's. The NHRI also reports that it conducted a meeting on 7 March 2014, with the participation of human resource departments of relevant Ministries, on the issue of sexual harassment on the occasion of commemorating International Women's Day 2014.<sup>127</sup>

While there has been a working relationship with CSOs on different levels, for example in organizing advocacy on disability rights, and on international human rights day, there does not appear to be evidence of a regular and systematic working relationship with CSOs. In what it describes as an attempt to facilitate dialogue in the issue of the rights of the disabled, the NHRI had organized a conference for 150 participants in December 2013, on the rights of the disabled,<sup>128</sup> in collaboration with the United Nations Program on Human Rights. The NHRI reports that it "would like to play the role of a moderator as the National Independent Authority for human rights in the Country, to facilitate a consensus among the disabled community, government sectors and local and international non-governmental sectors in order to secure and enhance better rights for persons' with disabilities in our country".<sup>129</sup> However evidence of a systematic working relationship with stakeholders on the issue of the rights of the disabled or in any other area of fundamental rights has not been forthcoming. HRCSL has observed that its intervention in the issue was on the request of organizations/societies relating to disabled persons, and that on their intervention, the GoSL provided an opportunity for stakeholders to meet with and discuss the disabled rights bill [sic], and further resulted in the proposal of a fresh bill which would take their issues into consideration.

There also does not appear to have been any robust engagement with CSOs at planning or policy level, for example in relation to the publication of the election guidelines by the NHRI. In a commendable initiative, the NHRI issued a set of guidelines in March 2014 on "Election Guidelines from Human Rights

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<sup>125</sup> Please note that attempts to ascertain the ground situation from the NHRI were unforthcoming.

<sup>126</sup> "Commonwealth Secretariat Capacity Development Intervention For Human Rights Commission of Sri Lanka", April 4, 2014, HRCSL, available at <http://hrcls.lk/english/?p=2274>, accessed on 29 May 2014.

<sup>127</sup> "HRCSL emphasises the importance of implementing a Policy on Sexual Harassment To commemorate the International Women's day -2014", 7 March 2014, HRCSL, available at <http://hrcls.lk/english/?p=2250>, accessed on 29 May 2014.

<sup>128</sup> "Urgent call from HRCSL to Government and Non-Governmental Institutions", 11 December 2013, HRCSL, available at <http://hrcls.lk/english/?p=2206>, accessed on 29 May 2014.

<sup>129</sup> *Id.* This is in light of the decision of the Supreme Court of Sri Lanka on the rights of the disabled, as reported in "SC Orders More Facilities For the Disabled", 18 October 2009, News, Sunday Times, available at [http://www.sundaytimes.lk/091018/News/nws\\_26.html](http://www.sundaytimes.lk/091018/News/nws_26.html), accessed on 29 May 2014. By its' order, the Supreme Court reportedly held that "all new public buildings defined under the accessibility regulations No. 1 of October 17, 2006, should provide reasonable access in accordance with the design standards of regulations in force, to those who are physically challenged". For a more detailed exposition on the currents state of the law in Sri Lanka in relation to the rights of the disabled please see "Rights of Persons with Disabilities", 25 September 2013, Thamarashi Wickramanayake, AAL, Bar Association of Sri Lanka, available at [http://www.basl.lk/article\\_details.php?id=5](http://www.basl.lk/article_details.php?id=5), accessed on 29 May 2014.

Commission of Sri Lanka”.<sup>130</sup> These guidelines were intended particularly to benefit state officials engaging in election duties during the Provincial Council elections. However, there does not appear to have been any collaboration with CSOs or other stakeholders in formulating the guidelines.<sup>131</sup> HRCSL has observed however that organizations related to election monitoring such as PAFFREL, CAFFE, Sarvodaya, and Transparency International had submitted complaints, observations and comments to the HRCSL, and also attended discussions.<sup>132</sup> HRCSL states that it discussed the guidelines with election authorities, and further obtained the opinion of relevant CSOs on the issues in question.<sup>133</sup>

The relationship of the HRCSL with CSOs would therefore appear to be ad hoc rather than formal. There is insufficient information available to assess the potential overlaps that may occur with CSOs in setting policies and implementation strategies, since the HRCSL, although commendably has undertaken several outreach events over the year under review, has not formally set policies/priorities in collaboration with CSO’s.

Among the powers vested in the HRCSL in terms of the enabling legislation, it can advise the GoSL in relation to furthering and protecting fundamental rights via legislation and administrative directions and practices.<sup>134</sup> Therefore there is a formal framework, which is statutorily prescribed, for the NHRI to advise and assist the Government in meeting its human rights objectives, and for the NHRI to be involved in the legislative drafting and reform process. Whether the NHRI does in fact get involved in this process is unascertained, and there does not appear to be any publicly available data of the NHRI getting involved in legislative processes, other than having proposed amendments to the Human Rights Commission Act No. 21 of 1996<sup>135</sup> referred to previously. In this latter process though, the NHRI also appears to have consulted CSOs which is commendable.<sup>136</sup>

There appears to be no statutory requirement for the annual report to be discussed by parliament or for its inclusion in the budget proposals. However, in his budget speech on 21 November 2013, the President of Sri Lanka did mention that the strengthening of the HRCSL is important to facilitate the orderly functioning of the administrative system,<sup>137</sup> whilst the recurrent and capital expenditure of the NHRIs are also discussed under a separate heading under the Government Expenditure Estimates for 2014.<sup>138</sup>

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<sup>130</sup> “Election Guidelines from Human Rights Commission of Sri Lanka”, 5 March 2014, HRCSL, available at <http://hrctl.lk/english/?p=2247>, accessed on 29 May 2014.

<sup>131</sup> See the Election Guidelines, *id.*

<sup>132</sup> HRCSL comments/observations on draft ANNI report.

<sup>133</sup> *Id.*

<sup>134</sup> Sections 10(d) and (c) of the HRCSL Act.

<sup>135</sup> “Human Rights Commission to amend its Act”, Lakmal Sooriyarachchi, Daily FT, 27 June 2013, available at <http://www.ft.lk/2013/06/27/human-rights-commission-to-amend-its-act/>, accessed on 29 May 2014.

<sup>136</sup> “These are not just our own proposals. The document is the result of intense and long deliberations. Law enforcement organisations in the country too had their share of inputs. All stakeholders have contributed to this outcome”, Prathiba Mahanamahewa, Commissioner of the HRCSL, as reported in “Amendments to empower Human Rights Commission”, Manjula Fernando, 13 December 2013, Sunday Observer, available at <http://www.sundayobserver.lk/2013/12/15/fea01.asp>, accessed on 29 May 2014.

<sup>137</sup> Budget Speech, 21 November 2013, President Mahinda Rajapakse, p.22, para 45.1, available at <http://www.treasury.gov.lk/images/depts/fpd/docs/budgetspeech/2014/budgetspeech2014-eng.pdf>, accessed on 29 May 2014.

<sup>138</sup> National Summary Expenditure, Summary of Expenditure by Category and Object Code, Department of National Budget, <http://www.treasury.gov.lk/images/depts/nbd/docs/budgetestimates/2014/nationalexpenditure/3.ExpenditureMinistryObjectcode wise.pdf>, accessed on 29 May 2014.

As will be discussed hereinafter, there is provision for a report by the HRCSL to be tabled in Parliament by the President, where the HRCSL reports that the recommendations by it have not been properly implemented by the relevant authority(s) or person(s). This is in order to ensure that recommendations are properly considered by the public authorities. Although attempts were made to ascertain from the HRCSL on the actual situation of whether such reports are submitted and considered and discussed by Parliament, information on this has not been forthcoming at the time of writing. Other than this, there appears to be no statutory basis or administrative practice on which Parliament is required to discuss the annual report of the HRCSL.

In terms of the Human Rights Commission Act No. 21 of 1996, the HRCSL is empowered to “intervene in any proceedings relating to the infringement or imminent infringement of fundamental rights, pending before any court, with the permission of such court”.<sup>139</sup> The HRCSL can also take steps as directed to it, and inquire and report on such matters, when a matter is referred to it by the Supreme Court.<sup>140</sup> In fact, in relation to the fundamental rights jurisdiction of the Supreme Court, the prescriptive period of one month will be calculated excluding the period in which the matter is pending before the HRCSL.<sup>141</sup> The HRCSL can also investigate alleged violations of fundamental rights on its own motion.<sup>142</sup> In relation to dispute resolution, the HRCSL can recommend prosecution by the authorities where a violation of fundamental rights is discovered.<sup>143</sup> It can also refer the matter to any Court which has jurisdiction to hear and determine the matter.<sup>144</sup> The HRCSL can also independently make recommendations, that the decision, recommendation, act or omission complained of, be reconsidered or rectified.<sup>145</sup>

In relation to enforcement of HRCSL recommendations, the procedure set out in the Act is for the HRCSL to report to the President that the authority(s) or person(s) who were to have acted, have failed to do so, and the President may cause a copy of the report to be placed before Parliament. The amendments proposed by the HRCSL to the HRC Act, include the insertion of provisions for Courts to initiate contempt of court proceedings when NHRI recommendations are not implemented by the relevant authority(s) or person(s).<sup>146</sup>

The inclusion of powers for Courts to take action where HRCSL recommendations are not implemented, is essential to properly empower the HRCSL, since some of the recommendations of the HRCSL are ignored, or not properly implemented, by the relevant authority(s) or person(s), since the current

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<sup>139</sup> Section 11(c), Human Rights Commission Act No. 21 of 1996 (hereinafter HRC Act)

<sup>140</sup> Section 11(e) and section 12(1) and (2), HRC Act *supra*

<sup>141</sup> Section 13, HRC Act, *supra*

<sup>142</sup> Section 14, HRC Act, *supra*. In fact, not only is the NHRC empowered to investigate alleged violations by executive or administrative actions, but it can also investigate alleged violations of fundamental rights “as a result of an act which constitutes an offence under the Prevention of Terrorism Act. No.48 of 1979”, by any person, Section 14, HRC Act, *supra*.

<sup>143</sup> Section 15 HRC Act, *supra*

<sup>144</sup> Section 15 (3) b, HRC Act, *supra*

<sup>145</sup> Section 15 (4) (a)-(d), HRC Act, *supra*

<sup>146</sup> “When an official or an institution fails to carry out a recommendation by the HRC within the stipulated period, we have proposed powers for the Commission to submit a certificate to the Court of Appeal or Provisional High Court as appropriate, seeking a Court Order to implement the HRC recommendation”, Prathiba Mahanamahewa, Commissioner of the HRCSL, reported in “Amendments to empower Human Rights Commission”, Manjula Fernando, 13 December 2013, Sunday Observer, available at <http://www.sundayobserver.lk/2013/12/15/fea01.asp>, accessed on 29 May 2014. However, note that section 21 of the Act already provides for the Supreme Court to try every offence of disrespect towards the Commission, as an act of contempt of court against itself<sup>146</sup> and to issue interim injunctions.. Failure to comply with a direction of the Commission, or a notice or written order, can also amount to contempt, Section 21 (3) (c), HRC Act, *supra*

procedure is only for a report on non-compliance to be tabled by the President in Parliament. However, Commissioner Dr. Prathiba Mahanamaheewa is quoted in September 2013 as having said that under the present Act almost 90 percent of the recommendations are being implemented.<sup>147</sup> The annual report of 2012 of the HRCSL however reports that non-enforceability has been an issue in 42 of its decided cases (out of 90).<sup>148</sup> The official implementation statistics for the year under review have not been forthcoming. The HRCSL observes in response to this report, that the present Commission has introduced a mechanism where both parties are summoned where the recommendations are not implemented, and the Respondent is directed to comply.<sup>149</sup> This, they state, is the reason for improved figures in relation to implementations.<sup>150</sup>

In relation to mediation and conciliation, where an inquiry reveals the infringement or imminent infringement of a fundamental right, the HRCSL is empowered, where appropriate, to refer the matter for non-judicial remedies such as conciliation and mediation.<sup>151</sup> The procedure for such conciliation and mediation is also set out in the statute.<sup>152</sup>

## 5. Thematic Focus

### 5.1 Protection of HRDs / WHRDs and shrinking civil society space (Freedom of expression/association/peaceful assembly/reprisals)

The annual report of the HRCSL for the year 2013 is yet to be published and the efforts made by the LST staff to communicate with the HRCSL officials proved unforthcoming. Therefore the information used herein is from third party sources/ sourced from previous information publicly released by the HRCSL. It has not been possible to analyse first-hand the efforts undertaken by the HRCSL in the year under review.

The ANNI Report 2014 focuses on two thematic issues, namely 1) The Protection of HRDs/WHRDs and Shrinking Civil Society Space and 2) The Implementation of the APF Advisory Council of Jurists References by NHRIs. Questionnaires prepared by ANNI were sent to the HRCSL regarding its work in the chosen thematic areas, but the Commission failed to respond as of the time this report was finalised.

Since there is insufficient information to analyse the effectiveness of the HRCSL in protecting the rights of HRDs, this report is primarily focusing on international instruments and other documents that guarantee the protection of HRDs and prescribe the obligations of NHRI's in protecting the rights of HRDs, such as the report of the UN Special Rapporteur (SR) on the role of National Institutions as human

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<sup>147</sup> "Amendments will strengthen Human Rights Commission", Asela Kuruluwansa, Daily News, 11 September 2013, available at <http://www.dailynews.lk/?q=local/amendments-will-strengthen-human-rights-commission>, accessed on 29 May 2014.

<sup>148</sup> "The non enforceability of the recommendations issued by the Commission has been a matter of concern for many years. In the year under review the Chairman and the Secretary Legal called 90 state parties cases where recommendations of the Commission were not carried out and inquired into the problems faced by them in giving effect to the HRCSL recommendations. This action has been successful in 48 cases where the parties have agreed to carry out the recommendations issued by the HRCSL," Annual Report 2012, Introduction, Human Rights Commission of Sri Lanka, at p. 9, available at [http://hrctl.lk/PFF/annual\\_report\\_2012/English.pdf](http://hrctl.lk/PFF/annual_report_2012/English.pdf), accessed on 29 May 2014.

<sup>149</sup> HRCSL comments/observations to draft ANNI report

<sup>150</sup> *Id.*

<sup>151</sup> Section 15(2), HRC Act, *supra*

<sup>152</sup> Section 16, HRC Act, *supra*

rights defenders but also their role in protecting other human rights defenders. The HRCSL in response has stated that it took action in relation to prominent HRDs, namely Paikiasothy Saravanamuttu and Nimalka Fernando in 2013, and Ruki Fernando in March 2014.<sup>153</sup>

The Special Rapporteur observes that while the HRDs should continue supporting the work of national human rights institutions by cooperating with them, advocating for their strengthening and collaborating in the planning and implementation of their activities and programmes,<sup>154</sup> the NIs are human rights defenders, being mandated to protect and promote human rights, and recommends that they should work together with other human rights defenders to assess the human rights situation on the ground, ensure accountability and prevent impunity.<sup>155</sup>

Several incidents of grave human rights violations were reported in the media with the current plight faced by the general public, human rights defenders and human rights organisations (NGOs/CBOs), across the island, that are subject to and experiencing, extreme forms of repression and crackdowns during the reporting period.

The Human Rights Defenders (HRDs) and human rights organisations (NGOs / CBOs) across the island experienced and continue to experience a rise in repression and crackdowns. Increasingly, the Government of Sri Lanka (GoSL) has been using repressive measures intended to reduce civil society space and restrict the work of human rights defenders and / or not taking any steps to protect people's democratic rights and liberties guaranteed within the constitution itself.

The issue of threats to HRDs' lives and physical integrity, recognizing that physical attacks, arrests, detention, interrogation and torture or ill-treatment are being used to intimidate and silence HRDs and media personnel for fighting against human rights violations and reporting on human rights abuses.

A peaceful demonstration conducted by parents, spouses and near relatives of missing persons in Trincomalee on Human Rights Day (December 10, 2013), was reportedly attacked by unidentified men<sup>156</sup> and it is alleged that no action has been taken by the police. Mr. Sunesh Soosai,<sup>157</sup> an activist and the district coordinator for the National Fisheries Solidarity Movement, (a non-governmental organisation that is engaged in campaigns against enforced disappearances, promoting the rights of fishermen, protesting land grabs by the military and advocating for the rights of the internally displaced) had reportedly been

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<sup>153</sup> HRCSL comments/observations to draft ANNI report

<sup>154</sup> Strong, dynamic and diverse community of human rights defenders, Report of the Special Rapporteur on the situation of human rights defenders, A/HRC/25/55, December 23, 2013, Para. 123.

<sup>155</sup> See recommendations by the SR to member states and NHRIs, Report of the UN Special Rapporteur on the situation of human rights defenders, pp. 20-21, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/101/79/PDF/G1310179.pdf?OpenElement>, accessed on May 2, 2014

<sup>156</sup> "Corporate report: Human Rights in Countries of Concern: Sri Lanka", Foreign and Commonwealth Office, United Kingdom, April 17, 2014, available at <https://www.gov.uk/government/publications/human-rights-in-countries-of-concern-sri-lanka>, accessed on 30 May 2014, see also, "Attack on the Human Rights Campaigners On the International Human Rights Day - 2013", Suntharam Mahendran, The Committee for Investigation of Disappearances, , December 16, 2013, available at [http://www.nssp.info/Action/Human\\_Rights\\_Day\\_Attack\\_2013.html](http://www.nssp.info/Action/Human_Rights_Day_Attack_2013.html), accessed on 30 May 2014.

<sup>157</sup> Sri Lanka: Suppressing calls for justice, Amnesty International, 2014, available at <http://www.amnesty.org/en/library/asset/ASA37/003/2014/en/t9207164-9b1b-4def-87da-9923bd78b1bb/asa370032014en.html>, accessed on 30 May 2014.

constantly threatened and intimidated by unidentified men believed to be intelligence operatives. Despite the complaints filed with the police, it is alleged that no actions had been taken.<sup>158</sup>

Mr. Sunil Samaradeera, a human rights activist and the organiser of the organisation to protect the ownership of the houses in Wanathamulla, was abducted and later released.<sup>159</sup> Two HRDs, Mr. Ruki Fernando and Fr. Praveen Mahesan were arrested and were later released. It is believed that one of the reasons for their arrest was for gathering information on the arrest of Ms. Jayakumari<sup>160</sup> and the taking into state care of her 13 year old daughter.<sup>161</sup> Eight HRDs and twenty four civil society organisations had been accused of submitting false information to the UN Human Rights Council, on the state owned TV station, Rupavahini<sup>162</sup> on March 6, 2014. Two other HRDs, Mr. Sunanda Deshapriya and Ms. Nimalka Fernando had been showed during the prime time news and called local enemies<sup>163</sup> on March 14, 2014. A street drama group of “Society for Socialist Art” had been assaulted, allegedly by persons associated with the government, while they were performing at Panadura bus stand to educate the public about political issues on March 13, 2014.<sup>164</sup> It appears that no measures or actions, or inadequate action has been taken by the government authorities to conduct investigations and to bring the perpetrators to justice. The HRCSL in its response to the ANNI questionnaire has indicated that it has taken steps to make the environment conducive for HRDs to act, and the steps have been described as “They can complaint to HRCSL for remedial actions”. It appears however that these steps may be inadequate to create meaningful remedies for the issues faced by HRDs.

These incidents highlight the fact that the contribution of NGOs and other representatives of civil society are crucial to monitor Sri Lanka’s effort to implement the recommendations of the LLRC and international laws, standards and norms accepted by Sri Lanka.

As mentioned previously, little or no action was taken by the HRCSL to stop the attacks on, and harassment of, civil society activists, journalists, and persons viewed as sympathizers of the Liberation Tigers of Tamil Eelam (LTTE) terrorist organization by individuals allegedly tied to the government,

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<sup>158</sup> Tamil activist gets death threats for his work defending the families of the missing, asianews.it, Melani Manel Perera, October 12, 2013, available at <http://www.asianews.it/news-en/Tamil-activist-gets-death-threats-for-his-work-defending-the-families-of-the-missing-29776.html>, accessed on May 29, 2014.

<sup>159</sup> Wanathamulla residents file FR petition, Ceylon Today, Mirudhula Thambiah, December 13, 2013, available at <http://www.ceylontoday.lk/27-49952-news-detail-wanathamulla-residents-file-fr-petition.html>, accessed on April 26, 2014

<sup>160</sup> The Sri Lankan government retaliates to the proposed Human Rights Council resolution by arresting activists and witness, Asia Human Rights Commission, March 17, 2014, available at <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-045-2014>, accessed on May 27, 2014

<sup>161</sup> “Are Sri Lanka’s ‘anti-terror’ arrests an attempt to intimidate activists?”, Tim Hume, CNN, March 22, 2014, available at <http://www.cnn.com/2014/03/19/world/asia/sri-lanka-ruki-fernando-arrest/>, accessed on 30 May 2014. See also, A fundamental rights petition filed challenging the arrest and detention of Ms. Jayakumari is pending before the Supreme Court of Sri Lanka. “Mother and daughter’s FR plea fixed for June 6”, S. S. Selvanayagam, Daily Mirror, 6 June 2014

<sup>162</sup> Reprisals against HRDs in Sri Lanka: Civil Society Organizations accused by state broadcaster for their appeal to the UNHRC, March 8, 2014, available at <http://oneislandtwonationsblogsptecom.typepad.com/blog/2014/03/reprisals-against-hrds-in-sri-lanka-civil-society-organisations-accused-by-state-broadcaster-for-their-appeal-to-unhrc.html>, accessed on May 19, 2014

<sup>163</sup> Available at [http://varunamultimedia.com/videos/btv/vtube/wimasuma/wimasuma\\_-28-03-14/play.html?1](http://varunamultimedia.com/videos/btv/vtube/wimasuma/wimasuma_-28-03-14/play.html?1) (Sinhalese), accessed on April 16, 2014

<sup>164</sup> Government goons attack street drama troupe, People’s Liberation Front, JVP-Sri Lanka, available at [http://www.jvpsrilanka.com/en/index.php?option=com\\_content&view=article&id=402:govt-goons-attack-street-drama-troupe&catid=40:jvpnews&Itemid=73](http://www.jvpsrilanka.com/en/index.php?option=com_content&view=article&id=402:govt-goons-attack-street-drama-troupe&catid=40:jvpnews&Itemid=73), accessed on May 11, 2014, see also, Govt. thugs attack street drama troupe, Lanka Truth, March 13, 2014, available at [http://www.lankatruth.com/home/index.php?option=com\\_content&view=article&id=6602:govt-thugs-attack-street-drama-troupe-&catid=36:top-stories&Itemid=124](http://www.lankatruth.com/home/index.php?option=com_content&view=article&id=6602:govt-thugs-attack-street-drama-troupe-&catid=36:top-stories&Itemid=124), accessed on May 11, 2014

creating an environment of fear and self-censorship<sup>165</sup> as the HRCSL is yet to internalise the concept of a HRD as defined in the *UN Declaration on the Rights of Human Rights Defenders* which clearly states that ‘everyone has the right individually and in association with others to strive for the protection and realisation of human rights and fundamental freedoms at the national and international levels’.<sup>166</sup> The HRCSL members and staff need to also recognise itself as the primary human rights defender in the country which would perhaps sensitise them to the common goals, risks and obstacles facing other human rights defenders and the legitimate need to protect them.<sup>167</sup> It is, as a HRD and a defender of HRDs, that the HRCSL’s obligation arises, to promote and protect the rights of the HRDs, non-governmental organisations and civil society, and to take immediate and necessary actions to enable the human rights organisations, CSOs and HRDs to operate without executive interference.

Margaret Sekaggya, the UN Special Rapporteur on the Situation of Human Rights Defenders, recommends the following measures by any NHRIs to ensure the protection of HRDs: Protection constitutes a wide range of possible measures and interventions, including formal complaints mechanisms and protection programs; advocacy in favour of a conducive work environment for defenders; public support when violations against defenders are perpetrated; visits to defenders in detention or prison and provision of legal aid in this context; mediation when conflicts occur between defenders and other parts of society; and strengthening of the capacity of defenders to ensure their own security. In tandem with the Special Rapporteur’s recommendations, the HRCSL should take measures to establish a focal point or unit within the NHRI for human rights defenders to guarantee their protection and safety, support the work of human rights defenders, for example through sharing best practices and holding training workshops, presenting awards, conduct training programs to sensitize the staff of HRCSL, the general public and particular target groups (state institutions, lawyers, etc.) on the importance of respecting the work of human rights defenders, advocate on behalf of human rights defenders at risk, for example through protection programs or by submitting complaints to regional bodies, appoint a Rapporteur on freedom of expression, create a pool of staff who are sensitive to and aware of issues that pertain of protecting HRDs from attacks and reprisals,<sup>168</sup> work in close collaboration with human rights defenders and receive and handle complaints from human rights defenders.

## 5.2 Implementation of ACJ reference by NHRIs

The HRCSL in its response to ANNI has stated that it has conducted advocacy, monitoring, documentation and education, in relation to implementing the ACJ reference. It appears that the three

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<sup>165</sup> Sri Lanka must end its aggressive campaign against Ruki Fernando, Father Praveen and other human rights defenders, activists, journalists, lawyers and others: Amnesty International oral statement to the 25th Session of the UN Human Rights Council, (3 – 28 March 2014), 19 March, 2014

<sup>166</sup> Article 1, Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UN GAR A/ RES/ 53/144, March 8, 1999, available at <http://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>, accessed on May 14, 2014

<sup>167</sup> Report of the UN Special Rapporteur on the situation of human rights defender; The Role of National Human Rights Institutions in the protection of Human Rights Defenders, p.15-19, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/101/79/PDF/G1310179.pdf?OpenElement>, accessed on May 12, 2014

<sup>168</sup> Protecting witnesses and HRDs, UNDP-OHCHR toolkit for collaboration with National Human Rights Institutions, United Nations Development Programme-Democratic Governance Group and Office of the High Commissioner for Human Rights-National Institutions and Regional Mechanisms Section (December 2010), p. 183, available at <http://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf>, accessed on May 16, 2014

examples given (Rathupaswela, Fisher community in Mannar, and forced evictions), do not provide details on the nature, number of, depth, consistency or results of these interventions.<sup>169</sup>

According to the HRCSL, the ACJ references have been set out as useful in, identifying the priority areas to work; to understand the new thematic human rights issues, and to set standards, interpret and apply international law, and to provide information and practical recommendations.<sup>170</sup>

The HRCSL has also stated that in the following instances the HRCSL had occasion to use the ACJ references:- (Sexual Orientation and Gender Identity) – the HRCSL states that it re-introduced policy against sexual harassment, conducted a seminar for government officials on the said policy, it used the references to form committees within the institutes, to handle complaints on sexual harassment and to develop a banner to promote gender equality.<sup>171</sup> In relation to the right to education - the HRCSL has conducted '[a] seminar/workshop/meeting to identify areas where human rights education are included to the school curriculum and how to improve it further'.

More importantly, in relation to torture the HRCSL states that it improved the visiting mechanism, conducted night visits, "also quick actions have been taken to monitor detention conditions".<sup>172</sup> This appears true to the extent of having visited Ruki Fernando and Father Praveen in their detention facilities, although the HRCSL has not provided any further information or examples.

In relation to terrorism and the rule of law the Commission states that it conducted inquiries and investigations on critical incidents (Weliweriya, Rathupaswala – Right to Water) and issued recommendations to relevant agencies. It is noted that the HRCSL has not set out the basis on which it defines the incident at Rathupaswela (and the right to water), as an issue which relates to terrorism, although the violence that resulted may well be an indictment on the rule of law (or lack of it). In its observations on this report, the HRCSL has stated that its monitoring and review division organized consultation meetings with relevant stakeholders, and received reports from government authorities.<sup>173</sup> A report had been prepared and handed over to the Commission, which has further approved the said report.<sup>174</sup> The Inquiry and investigation division has also prepared a report, which too has been submitted for approval to the Commission.<sup>175</sup> The contents of these reports are not apparent.

In relation to trafficking the Commission states that it has been working on trafficking issues since 2007 along with the American Labour Solidarity,<sup>176</sup> and that the 'legal aspect and human rights aspect of trafficking has been discussion [sic] in the awareness and training programme at HRCSL to different target group'.<sup>177</sup> The target groups have been identified as police officers attached to the children and

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<sup>169</sup> HRCSL's response to the ANNI questionnaire

<sup>170</sup> HRCSL's response to the ANNI questionnaire, at page 4.

<sup>171</sup> This appears to be a reference to the activities previously referred to as events held on the occasion of International Women's Day, discussed previously.

<sup>172</sup> HRCSL response to the ANNI questionnaire.

<sup>173</sup> HRCSL comments/observations to the draft ANNI report

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> HRCSL comments/observations to the draft ANNI report

<sup>177</sup> HRCSL response to the ANNI questionnaire.

women desks at police stations, probation officers, community leaders, as well as school principals in the Nuwara Eliya district.<sup>178</sup>

The Commission state that in relation to the death penalty, it conducted meetings with government officials on death penalty and human rights protection, ‘decided to recommend to the government [to] signed [sic] the 2nd the Optional Protocol to [the] ICCPR’, and that debates were conducted among school children relating to the death penalty.<sup>179</sup> The Commission’s stance on the death penalty is not evident in its response. The death penalty is technically in operation in Sri Lanka although executions have not been implemented in the last three decades or more.

In relation to child pornography, the Commission states that this issue was discussed in child rights awareness programs with Police Officers/Probation Officers/Child Rights Promotion Officers.<sup>180</sup>

There is no indication of the HRCSL having taken any action on corporate accountability for human rights violations, which is another key concern for NHRIs.<sup>181</sup> In its final report, the ACJ has noted that soft law initiatives have made some headway in relation to holding transnational corporations accountable for human rights violations.<sup>182</sup> The ACJ also recommended that NHRIs should ‘use their core functions of monitoring, education, advocacy and complaint handling to promote corporate respect for human rights’.<sup>183</sup>

Sri Lanka has seen an exponential rise in foreign investment, particularly in relation to public private partnerships, since May 2009.

In one incident, in or about July 2013, Dipped Products PLC, a subsidiary of Hayleys Group, was embroiled in a controversy involving the pollution of ground water in Weliveriya, in the Gampaha District. The Group describes itself as a multinational conglomerate with operations in all major international and strategic markets.<sup>184</sup> Dipped Products had established its factory in Weliveriya almost

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<sup>178</sup> HRCSL comments/observations to the draft ANNI report

<sup>179</sup> HRCSL response to the ANNI questionnaire.

<sup>180</sup> HRCSL response to the ANNI questionnaire.

<sup>181</sup> The Advisory Council of Jurists (ACJ), in July 2008, issued a series of references on this issue. Asia Pacific Forum, See *ACJ Reference on Human Rights, Corporate Accountability and Government Responsibility*, The 13<sup>th</sup> Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, Malaysia, 27-28 July 2008, p.13-19, [www.asiapacificforum.net/support/issues/acj/references/corporate-accountability](http://www.asiapacificforum.net/support/issues/acj/references/corporate-accountability)

<sup>182</sup> These initiatives include the OECD Guidelines for Multinational Enterprises, and the ILO Declaration of Principles for Multinational Enterprises *Id.*

<sup>183</sup> *Ibid.*

<sup>184</sup> Hayleys PLC Annual Report 2012/2013, available at [http://hayleys2012\\_13.annualreports.lk/pdf/this\\_is\\_hayleys.pdf](http://hayleys2012_13.annualreports.lk/pdf/this_is_hayleys.pdf), accessed on 29 May 2014. The official website of the group states as follows :- “In addition to Sri Lanka, Hayleys today has manufacturing facilities in Indonesia and Thailand, and marketing operations in Australia, India, Bangladesh, Italy, Japan, The Netherlands, UK and USA.” Hayleys, available at <http://www.hayleys.com/about>, accessed on 29 June 2014. For the purpose of this discussion, the Hayleys Group is considered a transnational corporation in line with the definition adopted by the United Nations Conference on Trade and Development (UNCTAD). Hayleys Group has both manufacturing operations and marketing operations in several other economies, and controls the UNCTAD threshold percentage of assets of several international investment partners (holds more than 10% equity stake in entities in other economies), which is taken to amount to foreign affiliates within the meaning of the UNCTAD definition of a transnational corporation for the purpose of this discussion. Please note that this is an opinion of the writers and is not an authoritative conclusion of the same. United Nations Conference on Trade and Development, available at [http://unctad.org/en/Pages/DIAE/Transnational-corporations-\(TNC\).aspx](http://unctad.org/en/Pages/DIAE/Transnational-corporations-(TNC).aspx), accessed on 27 March 2014.

18 years prior to the incident.<sup>185</sup> The violent protests sparked as a result of allegations by residents that effluents from the factory had polluted the ground water in the area, and the violent means used to quell these protests led to several deaths at of civilians at the hands of the military, that was called in to quell the protestors, as well as property damage.<sup>186</sup> An inquiry was held by the military, whilst several court cases were also instituted in this connection. In relation to the role of the NHRI, it appears that apart from having questioned the Water Resources Board on the water in Weliveriya,<sup>187</sup> the HRCSL does not appear (from publicly available information), to have taken any meaningful steps to monitor the situation, to educate the people on their rights, or to advocate a human rights based approach to resolving the issue between the transnational corporation and the residents. It has not been possible to ascertain at this time whether a complaint was made invoking the complaint mechanism of the Human Rights Commission. Meanwhile Human Rights Watch expressed its dissatisfaction with the possible inquiries that were being made by the National Human Rights Commission.<sup>188</sup> The HRCSL, in its response to the ANNI questionnaire has stated that it conducted inquiries and investigations and had consultations with civil society, in relation to this incident.<sup>189</sup> Attempts to meet the officers to ascertain further facts prior to drafting this report proved fruitless.

The HRCSL has reported that it held a special discussion on the incident, with civil society, religious dignitaries and the public (with no mention made of the corporation involved), as a ‘preliminary step’ to monitoring the situation, but no further action appears to have been forthcoming thereafter,<sup>190</sup> especially in terms of advising corporations on their responsibilities in relation to human rights. It appears that the HRCSL could have taken its role more seriously in terms of monitoring and advocating for corporate responsibility for possible human rights violations, both prospectively and retrospectively in the year under review in relation to the ACJ references.

The HRCSL has also significantly not cited any steps taken in relation to the Right to Environment, in using the ACJ references thereof, in its response to the ANNI questionnaire, although it also observes that it has made several landmark recommendations on environmental issues, referred to in its website and annual report.<sup>191</sup> The only difficulties identified by the HRCSL in implementing the ACJ references has been that “(a) Ground situation is not suitable to implement or discuss some ACJ references” and “(b) Attitudes of general public”. It appears that this is an overly optimistic view of the HRCSL’s commitment and ability to use and implement the ACJ references, and a more realistic and internalized self-audit may reveal institutional gaps that challenge the HRCSL’s ability to implement the references. This is evident

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<sup>185</sup> “Dipped Products Awaiting Green Light”, The Sunday Leader, Faraz Shauketaly, available at <http://www.thesundayleader.lk/2013/08/18/dipped-products-awaiting-green-light/>, accessed on 27 May 2014.

<sup>186</sup> “Woes of Weliveriya Water War”, The Sunday Times, Aanya Wipulasena, 4 August 2013, available at <http://www.sundaytimes.lk/130804/news/woes-of-weliveriya-water-war-55854.html>, accessed on 27 May 2014

<sup>187</sup> “Dipped Products Awaiting Green Light”, The Sunday Leader, Faraz Shauketaly, available at <http://www.thesundayleader.lk/2013/08/18/dipped-products-awaiting-green-light/>, accessed on 27 May 2014.

<sup>188</sup> “Human Rights Watch tells Sri Lanka to conduct an independent inquiry into protest deaths”, Aug 10, 2013, 12:36 pm SL Time, Colombo Page News Desk, Sri Lanka, available at [http://www.colombopage.com/archive\\_13B/Aug10\\_1376118375CH.php](http://www.colombopage.com/archive_13B/Aug10_1376118375CH.php), accessed on 27 May 2014.

<sup>189</sup> HRCSL responses to the ANNI questionnaire

<sup>190</sup> “Special discussion on the issue of problems faced by the public in a large number of villages including Rathupaswala in Weliveriya, on having discovered a high level of acidity or toxic chemicals in the water in their wells”, 6 August 2013, available at <http://hrcls.lk/english/?p=2161>, accessed on 27 May 2014.

<sup>191</sup> HRCSL comments/observations to the draft ANNI report

for example, in what the HRCSL considers to be a terrorism and rule of law issue, and its response to environmental rights.

## 6. Conclusions and recommendations

### 6.1 Recommendations to the HRCSL

**Information:** It appears that the biggest difficulty faced on analyzing the work of the HRCSL has been in relation to the lack of timely and detailed information. Whilst the HRCSL may be undertaking meaningful steps to address human rights concerns in Sri Lanka, if such information is not available and disseminated to the public in a timely manner, the purpose is lost- justice should not only be done, it should also be seen to be done. It is therefore strongly recommended that the HRCSL issue its annual reports within one month of the end of the calendar year at a minimum, and that its website be periodically updated with its activities. It must be commended that the news link of the HRCSL is fairly updated on some events- but much needs to be done in this connection (time frame one year). The HRCSL observes that translation of the report to all three languages requires at least three months and therefore that a one month time frame is not viable.<sup>192</sup> However, even as of mid-July 2014, the 2013 annual report has not been uploaded to the HRCSL website.<sup>193</sup>

**Engagement with other stakeholders:** It is noted that there has been no formal and sustained working relationship that the HRCSL has displayed in relation to CSOs. It is also clear that partnerships with CSO will enable the HRCSL to tap into established networks, to build its own capacities, and to create sustained relationships in defence of human rights. It is recommended therefore that the HRCSL build policy level dialogue and engage with CSOs in this connection (time frame six months). The HRCSL observes however that it has a strong working relationship with CSOs, with regional level committees that meet once a month.<sup>194</sup>

**Transnational corporations and human rights:** It is noted that Sri Lanka does not have domestic guidelines or laws which specifically address the ACJ references on the responsibility of transnational corporations for human rights violations in the country. Given that much foreign investment is currently taking place in post-war Sri Lanka, it is urged that

1. the HRCSL take the leadership and initiative to formulate guidelines based on the ACJ reference (time frame one year); and
2. take action against existing transnational corporations for human rights abuses in line with the ACJ recommendations (time frame one year);
3. provide support to transnational corporations to take proactive preventive measures to prevent human rights abuses (time frame one year); and
4. move independently to set up preventive structures/advisory services, such as regulatory institutions and dedicated officers within the HRCSL to monitor such corporations, to discourage such abuses (time frame one year).

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<sup>192</sup> HRCSL comments/observations to the draft ANNI report

<sup>193</sup> As of 15<sup>th</sup> July 2014.

<sup>194</sup> HRCSL comments/observations to the draft ANNI report

**Suo Moto investigations of human rights abuses:** The HRCSL should vastly exercise its mandate to take up individual or collective issues at their own initiative, without a complaint having been lodged (*suo motu*). Regardless of the ‘political’ nature of the human rights violation, the HRCSL should exercise its power to intervene and investigate into fundamental rights issues. This practice would enable the HRCSL to address unresolved or ongoing grave violations of human rights and increase government’s accountability, the NHRI’s credibility and public legitimacy as well as public confidence in the HRCSL (time frame one year).

It is, as a HRD and a defender of HRDs, the HRCSL’s obligation to promote and protect the rights of the HRDs, non-governmental organisations and civil society and to take immediate and necessary actions to enable the human rights Organisations, civil society organizations and HRDs to operate without executive interference. Having said that, it is urged the HRCSL should

1. form an advisory committee at a meeting of civil society partners of the HRCSL (time frame six months).
2. conduct quarterly (at least bi-annual) discussions with the advisory committee to have facilitated dialogues and share information about human rights situation.
3. in line with the SR’s recommendations, take measures to prepare a set of guidelines, in consultation with the advisory committee that outlines the protection mechanism and (HRD related) complaints handling procedure (time frame twelve months).
4. establish a focal point to support HRDs’ work and respond rapidly when they are in danger (time frame three months).

The HRCSL should develop a plan / mechanism for follow-up on investigation & recommendations, monitoring of the implementation of its recommendations and decisions on the resolution of complaints. To function more effectively, the HRCSL should

1. create a multi-stakeholder committee to monitor the implementation of recommendations (time frame six months)
2. publish, as and where appropriate, the details and status of petitions filed on HRCSL’s official website in a timely manner (time frame four to six months).

The HRCSL observes that it has already established a mechanism by appointing/allocating a dedicated officer to follow up on recommendations.<sup>195</sup>

The HRCSL should develop a mechanism to effectively engage with the ANNI member in Sri Lanka, the civil society counterpart of APF that aims at enriching both the civil society and NHRIs through a synergistic pattern of working.

1. establish a focal point / assign an officer to coordinate with the ANNI member in Sri Lanka (time frame three months).
2. quarterly meetings between the HRCSL senior officials (Secretary, Secretary – Legal and directors) and the ANNI member.

## **6.2 Recommendation to Parliament and Government**

**Engagement with other stakeholders:** It is noted that parliament does not appear to be periodically updated on the work carried out by the HRCSL. Periodic reports and issuance of timely annual reports

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<sup>195</sup> HRCSL comments/observations to the draft ANNI report

can eliminate these informational lapses. The subject of human rights to be specifically assigned to a Ministry and require such Ministry to periodically report the work of the HRCSL to parliament, ensuring executive knowledge of and support for, the work of the Commission (time frame one year).

Engagement with other stakeholders: It is noted that the HRCSL faces a grave concern of non-implementation of its recommendations and directives. It is recommended that urgent amendments be made to the statutory powers of the HRCSL, permitting the HRCSL to move the High Courts of Sri Lanka in contempt proceedings against any person who fails to implement a recommendation or directive of the HRCSL. It is also recommended that the jurisdiction of the HRCSL be expanded to include other human rights, beyond the fundamental rights jurisdiction set out in the statute per the Constitution (time frame one year).

# Hong Kong: Watchdog Institutions with Narrow Mandates

Hong Kong Human Rights Monitor<sup>1</sup>

## 1. General Overview

The third Chief Executive CY Leung assumed office in July 2012. Since then, the new government had taken a wide array of policy and other measures to exercise influence and control over the freedom of expression, freedom of information and citizens' civil and political rights. These measures include arresting and pressing charges against activists and protestors, adopting hard-line approach in handling public gatherings, and appointing connected persons into human rights watchdogs and para-governmental organisations.

### 1.1 Political Screening against Pan-Democratic Candidates

Beijing said Hong Kong could have universal suffrage for the Chief Executive election by 2017. However, many Hong Kong people doubt whether it would be genuine universal suffrage; whether the rules would be construed to favour the Beijing-friendly camp, or to eliminate candidates from the pro-democratic camp by imposing a high nomination threshold for candidates.

Yu Zhengsheng, a member of the Communist Party Politburo Standing Committee, told Hong Kong representatives in the Chinese People's Political Consultative Conference that only those who were "patriotic" could be allowed to lead Hong Kong after the introduction of universal suffrage.

On the same lines, one definition of "patriotism" was outlined by Lu Xinhua, CPPCC spokesman and former commissioner for the Ministry of Foreign Affairs in Hong Kong, who remarked that someone who "loved China and loved Hong Kong" should be elected as Chief Executive.<sup>2</sup>

In March 2013 Qiao Xiaoyang, chairman of the Law Committee of the National Peoples' Congress listed two prerequisites for electing the chief executive by universal suffrage, among other conditions for the city's leader. "A prerequisite is that it has to be in line with the Basic Law and the relevant decision of the NPC Standing Committee." "Another prerequisite

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<sup>1</sup> Contact Person: Astor Chan <astorwschan@gmail.com>. This report is endorsed by the Civil Human Rights Front.

<sup>2</sup> The South China Morning Post Hong Kong, "Patriotic appeal states the obvious", 8 March 2013

is that those confronting the Central Government are not allowed to become the Chief Executive.” Qiao noted that “Firstly, the nomination committee will decide. Then the voters in Hong Kong will decide. Lastly, the Central Government will decide whether to appoint [the candidate] or not”.<sup>3</sup>

According to the remarks from Beijing officials, it is expected that the Central Government will manipulate the candidate election mechanism, so as to exclude pan-democratic candidates. The universal suffrage is unlikely to be a genuine one.

The Government initiated the public consultation on the constitutional reform in December 2013, setting out the basic principles of the constitutional reform, but said no words about international standards of universal and equal suffrage as stipulated in human rights treaties.

## **1.2 Occupy Central Campaign**

In January 2013, Benny Tai Yiu-ting, an academic in the school of law, the University of Hong Kong (HKU), proposed a campaign, ‘Occupy Central’. Tai was a member of the Basic Law Consultative Committee in the mid-1980s when he was a core member of the student union at HKU.<sup>4</sup>

Occupy Central is a civil disobedience protest for universal suffrage, which is proposed to take place in July 2014 if the government fails to come up with a democratic political reform proposal.<sup>5</sup>

Benny Tai stated that “the most lethal weapon of civil disobedience” is the road occupation plan, which Tai hopes will involve at least 10,000 protesters. Participants will be asked to sign an oath acknowledging the movement’s non-violent nature, and agree to surrender to police after the road blockade.

“When 10,000 people block the traffic in Central, prevent others from going home and bear the consequences of their actions, all seven million people in the city will have to ask themselves how much they are willing to pay for democracy ... It breaks the law, but it is for a higher goal of achieving justice ... We are not against the Central Government, nor Chief Executive Leung Chun-ying nor any pro-establishment parties. All we want is a set of fair rules that honour the promise of universal suffrage.”<sup>6</sup>

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3 South China Morning Post, “Opponents of Beijing ‘ineligible to be C.E.’”, 25 March 2013

4 South China Morning Post, “Law expert plans a blockade for vote”, 16 February, 2013

5 Manifesto of occupy central campaign. <http://ocphk.wordpress.com/2013/03/27/english/>

6 South China Morning Post, “Law expert plans a blockade for vote”, 16 February 2013

Both Hong Kong and Chinese officials, including the Chief Executive and Chinese Zhang Xiaoming, Head of the Liaison Office of the Central Government in Hong Kong, strongly criticized the campaign and attempted to label the campaign as not peaceful.

### **1.3 Prisoners of Conscience**

Political activist Koo Sze-yiu was jailed for nine months for desecrating the national and Hong Kong flags during protests. Koo said he burnt the national and Hong Kong flags because he was discontented with the Mainland regime, which had sent Nobel laureate Liu Xiaobo to jail and killed social activist Li Wangyang.

Melody Chan, an activist and volunteer of the Occupy Central campaign was arrested in May 2013. She was accused of organising an illegal public meeting which took place 2 years ago. To explain the reasons of delayed arrest, the Department of Justice issued a statement saying that the police had been unable to apprehend Chan previously. However, the fact that Chan had taken part in many public events in the past two years contradicted the official statement.

### **1.4 Freedom of Assembly and Expression**

A vibrant pro-democratic civil society has been developing in the past decade. The Police force takes a more hard-line approach to deal with protests and assemblies of these civil society organizations in the past few years. Measures taken by the police are more stringent whenever the protests or demonstrations are against mainland Chinese leaders. They failed to facilitate the public to exercise their right to demonstrate, for example, by locating the permissible area for demonstrations far away, to make sure the Chinese leaders would not be embarrassed.

Civil society organizations are used to setting up booths and displaying banners in pedestrian areas to disseminate their messages. These events and exhibitions are, however, frequently disturbed by state-sponsored groups in recent years. It is generally believed that these groups are affiliated to the Liaison Office of the Central Government in Hong Kong, with the spiritual movement Falun Gong and organisations concerning political reform as their major targets.<sup>7</sup>

On July 14 2013, a pro-Beijing group, Hong Kong Youth Care Association, barricaded a booth setup by Falun Gong in Mong Kok.<sup>8</sup> Instead of discharging its positive duty to assist

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7 South China Morning Post, "Counter-attacks rage in Falun Gong 'banner war'", 18 February 2013

8 South China Morning Post, "Pro-police protesters clash with rival group", 5 August 2013

the exercise of the right to free expression, and defending the demonstration of Falun Gong against the unreasonable and unlawful interference, police officers cordoned off the area. A primary school teacher, Ms. Lam Wai Sze, blamed the police, in rude language, for not stopping the Hong Kong Youth Care Association but conniving to help deny the freedom of expression of Falun Gong.<sup>9</sup>

Ms. Lam then faced political persecution. Netizens revealed her name, schools she worked at, and the address and the phone number of her employer. The school received an avalanche of complaints; banners attacking Lam were hung nearby; pro-Beijing newspapers joined the criticism; pro-Beijing groups held a campaign reprimanding her; the Junior Police Officers Association released a statement reprimanding the teacher; the Chief Executive announced that he asked the Secretary of Education to submit a report on whether Lam had violated the code of conduct for teachers; the Serious Crime Unit of the District Crime squad of the Hong Kong Police Force followed up the case and investigated whether the teacher had committed an offence of disorder in a public place, and whether she had resisted or obstructed a public officer in the course of his public duty. These acts of intimidation and harassment triggered a huge backlash from the general public.

### **1.5 Media Censorship**

The media is increasingly harassed by law enforcement agents, legal proceedings and even suffered violent attacks.

In March 2014, the former chief editor of a major Chinese newspaper “Ming Pao”, Kevin Lau, suffered a brutal chopper attack and was sent to hospital in a critical condition. The police agreed that it was a triad-style attack aimed at maiming without killing. Local journalists saw the attack as politically motivated and as part of an unhealthy trend in which the Communist Party seeks to reign in Hong Kong’s press. Thousand of outraged journalists and people of the public attended a rally to denounce violence and intimidation of the media. The police arrested nine people but the case remained unsolved, as in other cases of violence against journalists not aligned with the Chinese Government.

In 2013, the annual report of the Hong Kong Journalist Association (HKJA) was titled “Dark Clouds on the Horizon”. It criticised the Chief Executive for failing to respond adequately to cases of violence against Hong Kong journalists or media organisations in the territory and in the Mainland.

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<sup>9</sup> The Standard Post, “Butterfly effect in a teacher’s cussing”, 5 August 2013

HKJA also criticised the Government's policy in releasing information. There have been a few unannounced visits of the Chief Executive to Beijing, which have only come to light after non-Hong Kong agencies or members of the public have reported them.<sup>10</sup> Moreover, according to HKJA's research, the Chief Executive and his Ministers issued 182 written statements in July 2012 to May 2013, representing 21.5% of the total number of statements, stand-ups and press conferences. Issuing statements not only provides no chance for journalists to question details of the release and deprives the public's right to know, but also provide the government room to manipulate information and goes against government pledges of transparency.<sup>11</sup>

HKJA also criticised the Chief Executive for his remarkable degree of intolerance towards critics. A warning letter was sent by the Chief Executive's lawyers to Joseph Lian, a renowned columnist of Hong Kong Economic Journal, over a commentary he wrote about Mr Leung.

Self-censorship becomes increasingly prevalent in recently years. According to industry-wide surveys conducted by the HKJA in 2007 and 2012, more than 30 percent of the respondents admitted that they had practiced self-censorship—mainly related to news that they second-guessed was sensitive to the Chinese government.<sup>12</sup>

The recent incident of the Government rejecting Hong Kong Television Network's application for the third television license to broadcast free-to-air programming also arouses massive discontent and drew protesters onto the streets. For a long time, the general public has been unhappy with the lack of free-television choices, with the poor quality programmes provided by the Asia Television Limited and the consequential dominance of the market by the Television Broadcast Limited. The government's refusal to grant the third license not only deprives the people's right to choose, but also breaches the policy to liberalise the broadcasting market. The refusal of the Government to disclose information on the discussion that lead to their decision, led to further criticism on the lack of transparency in the Government's decision making, speculation on media interests, and political considerations.

## **1.6 Threats to RTHK and Public Service Broadcasting**

RTHK (Radio Television Hong Kong) is the territory's quasi public service broadcaster; "quasi-public" because it is technically a government department operating on public funds and staffed by government employees; although supposed to be autonomous and editorially

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10 The Hong Kong Journalist Association's annual report: Dark Clouds on the Horizon. July 2013 [http://www.hkja.org.hk/site/Host/hkja/UserFiles/file/annualreport/e annual\\_report\\_2013.pdf](http://www.hkja.org.hk/site/Host/hkja/UserFiles/file/annualreport/e%20annual%20report%202013.pdf)

11 The Hong Kong Journalist Association's annual report: Dark Clouds on the Horizon. July 2013, p. 8

12 The Hong Kong Journalist Association's annual report: Dark Clouds on the Horizon. July 2013, p. 17

independent of the government. Their programme staff have over the years developed a strong commitment to professionalism, and have been critical of the Hong Kong Special Administrative Region (HKSAR) Government and the Central Government.

RTHK’s programme staff members have accused the Head of RTHK, Roy Tang, of executing political missions to promote the Hong Kong and Beijing Governments’ policies and to defend the public image of top government officials. During an interview on the Commercial Radio station, Sze Wing-yuen, an acting assistant director of TV and Corporate Business of RTHK said he was facing “the biggest pressure ever” since he joined RTHK over 30 years ago. “My colleagues are telling me they are feeling the political pressure ... and diversity [in production] is weakening”, he said.<sup>13</sup>

## 2. Establishment of the watchdogs

There is no National Human Rights Institution in Hong Kong but there are watchdogs in some human rights areas. Each of these watchdogs has a narrow focus on certain human rights aspects. Most of the major human rights issues raised above are not covered in the mandates of these watchdogs.

### (i) Table on Law related to Watchdogs

Legal Basis	
	Equal Opportunities Commission was established based on the Sex Discrimination Ordinance (Chapter 480); Privacy Commissioner for Personal Data was established based on the Personal Data (Privacy) Ordinance (Chapter 486); Independent Police Complaints Council was established based on the Independent Police Complaints Council Ordinance (Chapter 604); Independent Commission Against Corruption was established based on the Independent Commission Against Corruption Ordinance (Chapter 204).
Impetus/motivation for establishment of NHRI	Current watchdogs are of limited mandate and most human rights areas are not covered. However, the Government has no motivation to establish an NHRI.
Selection and Appointment	
What is the selection process?	Selection processes for members of watchdogs lack

<sup>13</sup> South China Morning Post, “RTHK veteran under ‘political pressure’”, 13 March 2013

	<p>transparency and public participation.</p> <p>The EOC is governed by the Board which comprised of a Chairperson and 16 members, all appointed by the Chief Executive. The Privacy Commissioner for Personal Data, Independent Police Complaints Council and the Commissioners against Corruption are also appointed by the Chief Executive. There is no description of the selection process in legislation or regulations.</p>
What are the qualifications for membership?	There is no clear indication of membership qualification or criteria of applicant assessment of the watchdogs.
Does the law provide that the composition must reflect pluralism, including gender balance and representation of minorities and vulnerable groups?	There is no provision in laws regarding the pluralism of the composition of the watchdogs.
Does the law provide for a fixed term of office, of reasonable duration? Is there a clear process for removal or impeachment?	There are provisions in law for the term of office of Chairperson of Equal Opportunities Commission (5 year term), Privacy Commissioner of Personal Data (5 years and no more than one reappointment), Independent Police Complaints Council (3 year term and one reappointment).
What is the policy on secondees or appointments by government?	Appointments policy unknown.
Are there elements of the state that are beyond the scrutiny of the watchdogs?	Although the Government is not exempted from the scrutiny of the watchdogs, most government functions are beyond the watchdogs' scrutiny due to their narrow mandates.

**(ii) Efforts or initiatives undertaken**

The government insisted that “there is no obvious need for establishing another human rights institution to duplicate the functions of or supersede the existing mechanisms”. It claimed that “Human rights are fully protected by law. The legislative safeguards are enshrined in the Basic Law, the Hong Kong Bill of Rights Ordinance and other relevant ordinances. They are buttressed by the rule of law and an independent judiciary. Hong Kong has an existing institutional framework of organisations which helps promote and safeguard different rights,

including the EOC, the PCPD, The Ombudsman, and the legal aid services. The Government's performance in promoting and safeguarding human rights is open to scrutiny through regular reports to the United Nations and is constantly watched over by the LegCo, the media and various human rights NGOs. The Administration considers that the existing mechanism has worked well. Therefore, an additional independent monitoring mechanism is not necessary to give effect to the International Covenant on Civil and Political Rights or its requirements<sup>14</sup>, according to the report the Government submitted to the Human Rights Committee of the United Nations in 2013.

### **3. Critique of Existing Watchdogs**

#### **3.1 Equal Opportunity Commission (EOC)**

##### **3.1.1 Membership**

The Equal Opportunity Commission (EOC) is a statutory body set up in 1996 to implement the Sex Discrimination Ordinance (SDO), the Disability Discrimination Ordinance (DDO), the Family Status Discrimination Ordinance (FSDO), and the Race Discrimination Ordinance (RDO). The Commission is not an agent or servant of the government,<sup>15</sup> and the law stipulated that the Chairman cannot be a public servant,<sup>16</sup> in the interests of independence from the government.

However, the Board members and the Chairman need not have knowledge and expertise in human rights, and their remuneration and terms of appointment are at the discretion of the Chief Executive.<sup>17</sup> It had been criticised that the members did not possess solid track records in anti-discrimination or substantial knowledge in human rights, and that the appointment process lacks transparency and excludes civic society participation.

The Chairperson, Dr. York Chow, appointed last year for a three year term is the past Secretary of Food and Health. The appointment aroused discontent among the civic society as the newly appointed Chairman lacks experience in human rights. NGOs also stressed that appointing a retired senior official as the Chairman resulted in the lack of perceived independence. It is also criticised that the EOC is an exclusive club for retired senior officials.

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14 "Administration's paper on Hearing of the United Nations Human Rights Committee on the Third Report of HKSAR in the light of ICCPR" LegCo Paper No. CB(2)621/12-13(03), 18 February 2013 <http://www.legco.gov.hk/yr12-13/english/panels/ca/papers/ca0218cb2-621-3-e.pdf>

15 Sections 63(7) of Sex Discrimination Ordinance

16 Sections S.65(3) of Sex Discrimination Ordinance

17 Sections S.63(9) of Sex Discrimination Ordinance

The government has no plans to improve the EOC's transparency and independence, or to take any measures for the EOC to be in line with the Paris Principles.

### 3.1.2 Protection of Sexual Minorities

The EOC announced a three-year strategic plan with five priority areas: (1) Discrimination Law Review; (2) Legal protection for sexual minorities from discrimination on the basis of sexual orientation and gender identity; (3) Education and employment opportunities for ethnic minorities; (4) Integrated education for students with special educational needs (SEN) and its impact on employment opportunities; and (5) Disability discrimination in the performance of government functions. Based on Members' advice, the Commission would develop action plans and timelines for the initiatives.<sup>18</sup>

It is expected that the EOC would conduct a public consultation on the review of the existing discrimination ordinances and additional grounds of sexual orientation and gender identity discrimination in 2014 and submit a proposal to the Administration after consultation with stakeholders and the public.<sup>19</sup>

## 3.2 Personal Data (Privacy) Commissioner (PDPC)

The scope of protection of the Personal Data (Privacy) Ordinance is narrow and inadequate to protect privacy invasions by the Administration.

### 3.2.1 CCTV

CCTV had been installed in many places, including public places, schools, public transports, railways and workplaces. However, the current legislation and principles mainly focus on the purpose and use of information, which requires the data user to inform the data subject about the purpose of gathering information and that the data user shall not use the data in a way that deviate from the purported purpose. The scope of protection may not covers privacy intrusion by CCTV that are present everywhere.

### 3.2.2 Police Body Worn Camera

The Police launched a plan of testing and using body wear camera despite privacy concerns in March 2013. The Police suggested that people who block the lenses may be committing the

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18 Press Release of the Equal Opportunities Commission (EOC), 20 June 2013, <http://www.eoc.org.hk/eoc/GraphicsFolder/ShowContent.aspx?ItemID=11443>

19 Press Release of the Equal Opportunities Commission (EOC), 20 June 2013

crime of obstructing officers in their duty.<sup>20</sup> According to the Police, the officer will notify the person prior to the commencement of the recording if reasonably practicable, they will retain only footage which carries investigative or evidential value and delete those carrying no investigative nor evidential value in 31 days.<sup>21</sup> However, the police give no clear definition of “investigative/ evidential” value and the senior superintendent has the authority to extend the storage period. Activists worried that the police might use the cameras to build up a database on social activists for political prosecutions.

### **3.3. Independent Police Complaints Council (IPCC)**

The Independent Police Complaints Council (IPCC) is an independent body established under the Independent Police Complaints Council Ordinance (IPCCO) (Cap. 604). Their members are appointed by the Chief Executive and their functions include observing, monitoring and reviewing the handling and investigation of reportable complaints by the Police, but the IPCC doesn't have the power to conduct investigations.

### **3.4. Independent Commission Against Corruption (ICAC)**

The Independent Commission Against Corruption (ICAC) used to be considered as the major player to keep Hong Kong free and clear from corruption.<sup>22</sup> However, its former Head, Timothy Tong, was accused of extravagance and collusion during his service.

He was found not only have spent large amounts of money on numerous overseas visits, and gifts to Mainland officials,<sup>23</sup> while dinners he hosted exceeded the budget limit<sup>24</sup> but was also suspected of spending public money for private purposes: such as on banquets to treat officials of the Liaison Office of the Central People's Government in HKSAR who should not be considered the ICAC's working partner.<sup>25</sup> His appointment to the Chinese People's Political Consultative Conference, China's top political advisory body, after his retirement<sup>26</sup> was controversial as it confirmed the close political links between the Beijing Government and himself. This scandal tremendously jeopardised the public image and internal morale of the ICAC.

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20 South China Morning Post, “Police to don cameras on duty”, 23 Feb 2013

21 LegCo Paper No: CB(2)875/12-13(05), “Police's Handling of Public Meetings and Public Processions”, 5 April 2012, <http://www.legco.gov.hk/yr12-13/english/panels/se/papers/se0405cb2-875-5-e.pdf>

22 [http://www.icac.org.hk/en/about\\_icac/mp/index.html](http://www.icac.org.hk/en/about_icac/mp/index.html)

23 Ming Pao Hong Kong, “踢爆湯顯明 狂外訪燒 400 萬 似足貪會 掌廉署拉大隊 五年遊埠 34 次”(Chinese only), 2 April 2013

24 LegCo paper, “A summary of press reports on events relating to the handling of official entertainment, gifts and duty visits by Mr. Timothy TONG, former Commissioner of the Independent Commission Against Corruption from 1 April 2013 to 10 July 2013”(Chinese Only), 16 July 2013

25 Ming Pao Hong Kong, “湯顯明宴中聯辦逾 20 次 議員詫非「對口單位」 函立會促跟進”(Chinese only), 25 April 2013

26 South China Morning Post, “ICAC reputation pays price for Tong's spending”, 10 May 2013

#### 4. Conclusion

The government reiterated that it had no plan or timetable to set up an NHRI despite the UN Human Rights Committee reiterating its previous recommendation (CCPR/C/HKG/CO/2, para.8) that Hong Kong, China should consider establishing a human rights institution, in accordance with the Paris Principles (General Assembly resolution 48/134), with adequate financial and human resources, with a broad mandate covering all international human rights standards accepted by Hong Kong, China and with competence to consider and act on individual complaints of human rights violations by public authorities and to enforce the Hong Kong Bill of Rights Ordinance, which incorporated most articles of the International Covenant on Civil and Political Rights.<sup>27</sup>

However, the reason of not establishing an NHRI is obviously for the ease of the Administration. An NHRI with a broad mandate and authority to enforce the Bill of Rights Ordinance, would inevitably monitor the government's policy decisions and administration, and possibly criticise or make unfavourable comments on certain government policies.

The United Nations Committee on Economic, Social and Cultural Rights held a hearing on Hong Kong's implementation of the International Covenant on Economic, Social and Cultural rights in May 2014, while the Committee on the Elimination of All Forms of Discrimination against Women will hold its hearings in October. Hong Kong civil society submitted joint shadow reports to these Treaty Bodies and the establishment of a NHRI is high on the list of requests for the expert committees to take up with the government.

However, considering the government's refusal to establish an NHRI over the years and despite repeated recommendations by UN treaty bodies, the general public does not expect the government would take any positive action to establish an NHRI.

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<sup>27</sup> Concluding observations on the third periodic report of Hong Kong, China, 107th Session The Human Rights Committee, p. 3

# **JAPAN: Government opposes establishing a National Institution**

## **Joint Movement of NHRI and OPs<sup>1</sup>**

### **1. General Overview**

#### **Rights of Persons with Disabilities**

In 2007, Japan signed the Convention on the Rights of Persons with Disabilities (hereinafter referred to as CRPD), then on December 4, 2013, gained Diet approval to ratify it. Japan deposited its instrument of ratification with the United Nations on January 20, 2014, consequently, on February 19, 2014, 30 days from its deposit, the Convention came into effect in Japan.

In December 2009, the then Democratic Party of Japan administration established the Task Force on Reforming Systems for Persons with Disabilities, aiming to extensively reform the relevant domestic laws required for compliance with the CRPD, and systems for persons with disabilities. The Working Group on antidiscrimination and Working Group on comprehensive welfare, was established under the Task Force. Civil society groups for persons with disabilities, researchers or lawyers become its members to discuss the issues.

Based on such discussions, several laws were passed including the Basic Act for Persons with Disabilities on August 2011, the Comprehensive Support for Persons with Disabilities Act on June 2012, the Act on Promoting to “Resolve” the Discrimination Against the Persons with Disabilities<sup>2</sup> on June 2013, and the Act on Promoting the Employment of Persons with Disabilities was revised on June 2013.

In the discussion toward the establishment of the Act on Promoting to “Resolve” the Discrimination Against the Persons with Disabilities, a monitoring organization was proposed, as stipulated in Section 33 of CRPD; thus it was expected that an independent monitoring organization would be established. Subsequently, however, the Government decided not to establish a separate organization but instead, to have the Committee for Policy on Persons with Disabilities perform that role.

This Committee is obliged to monitor the implementation of the Basic Action Plan for Persons with Disabilities which the government is supposed to make under Section 11 of Basic Act for Persons with Disabilities. However, the Committee for Policy on Persons with Disabilities is established based on the third clause of Section 37 of the Cabinet Office Establishment Act, consequently the Committee is regarded as a ‘Council’ based on Article 8 of the National Government Organization Act.<sup>3</sup> Thus, some have criticized the Committee for not having the status of an independent administrative agency.

#### **Public Assistance and Social Services Laws**

On December 6, 2013, the laws on Public Assistance and Services and Supports for Needy Persons were enacted. The Japan Federations of Bar Associations, civil society groups for persons with disabilities, and other groups, pointed out these two laws are problematic. Specifically, the stipulations to oblige a submission of the application form upon application; and to notify upon application the persons obliged to support the needy persons in writing, and then request a report from them as to why they cannot support such needy

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<sup>2</sup> When the outline of the law was considered under the Cabinet Office, it was tentatively called “Act to prohibit any discrimination based on the disability”. For whatever reason, however, when the bill was submitted to the Diet, it was named as “the Act on Promoting to “Resolve” the Discrimination Against the Persons with Disabilities”.

<sup>3</sup> Act for Establishment of the Cabinet Office. In its Section 37, article 1 specifies that The Quality of Life Council shall be established under the Cabinet Office. Article 2 says “Other than the organization prescribed in the preceding Section, within the scope of the affairs under jurisdiction as prescribed by Sub-Section 3 of Section 4, an organ having a council system for taking charge of the study and deliberation of important matters, administrative appeals or other affairs that are considered appropriate to be processed through consultation among persons with the relevant knowledge and experience, shall be established under the Cabinet Office pursuant to the provisions of an Act or a Cabinet Order”.

persons.

As for the application for the public assistance, previously a verbal application was sufficient. The revision to the law makes it obligatory for the applicant to submit a written application along with attachment of other documents required. Considering that applicants are likely to be either victims of domestic violence, or the homeless, or persons unable to work due to illness, this new requirement, especially to collect and prepare the supporting documentation, adds new difficulties and troubles on them.

As for the requirement for a report from those family members deemed responsible for support of the applicant, including on the details of their income; this new provision makes the application psychologically difficult for the potential applicants. The end result of both these conditions is that many people who are eligible and in need of these state services will be discouraged from applying, thereby denying them due protection of their rights.

### **Government Position on NHRI**

Prior to the Universal Periodic Review (UPR) for Japan, scheduled in October 2012, the Government submitted the Second National Report in July, stating that “the Government of Japan is now making necessary preparations to submit a bill to the Diet to establish a new human rights commission as the national human rights institution in accordance with the Paris Principles”.

In the general election held in December 2012, the Liberal Democratic Party (LDP) contesting against the Democratic Party of Japan (DPJ), declared that it would “strongly oppose the bill to establish the Human Rights Commission, submitted by the DPJ.” Instead the LDP intended to develop specific legislation for various forms of human rights violations and deliver human rights remedies in that piece-meal way.

In fact, the persons in charge of the Civil Liberties Bureau (CLB) of the Ministry of Justice (MOJ) repeatedly stated, “Based on various arguments conducted so far, we have been discussing the issue in an appropriate manner”, thus “we could not make any comments on its timeline [for establishment]”. They did not even clarify if they have any intention to establish an NHRI or not.

The MOJ told a press conference on May 10<sup>th</sup> 2013 regarding hate speech violations, that the CLB has conducted various educational activities on human rights issues including discrimination against foreigners; and that nowadays words and deeds to ostracize foreigners receive wide media attention and garner much concern within society; thus they intend to conduct more promotional activities on realizing a nondiscriminatory society. These statements suggested that the MOJ is content to conduct only awareness-raising activities through the CLB; rather than take strong action through human rights protection mechanisms.

### **No Legal Obligations for Recommendations of International Mechanisms**

On June 18<sup>th</sup> 2013, the Japanese Government adopted a Cabinet resolution regarding the Concluding Observations by the UN Committee Against Torture on May 31<sup>st</sup>. The Cabinet resolved that the Concluding Observations are not legally binding and therefore do not require the state party to comply with them. This makes clear the attitude of the Government towards international human rights mechanisms; and indirectly its objection to international human rights law where it conflicts with national law and policy. This resolution also indicates that the Government of Japan is not prepared to take seriously other recommendations of international bodies, including that to establish a national human rights institution in full compliance with the Paris Principles, in Japan.

## **2. Establishment of an NHRI**

Therefore, in light of the above, it appears that the Japanese Government intends to leave human rights related services to the Civil Liberties Bureau alone, and to limit its functions to human rights education and handling of individual cases of human rights violations.

The CLB receives more than 20,000 human rights violation cases annually. However, 93% of those are classified as “support”, that is, referral to other organizations including NGOs. Follow-up of such cases after

the referral does not automatically take place, so it is uncertain if those cases are effectively resolved or not.

On the other hand, as the main program of its human rights education CLB focuses on activities such as producing audio materials, posters, or organizing lectures. These are not at all effective and far from the substantial human rights education that should make people properly understand what human rights are.

What's more, the Civil Liberties Volunteers, the persons responsible for responding to filings of human rights violations are involved in these activities on a voluntary basis. Most of them do not have any experience of human rights protection. No specialist trainings are conducted for them, even though general lectures are organized.

Considering such a situation, the existing CLB cannot be considered as a Paris Principles compliant institution. Thus, Japan does not have any specialized national human rights institution with the functions and powers necessary to promote and protect human rights.

As stated in the LDP's public pledge, the current administration intends to utilize individual legislation for responding to human rights violations rather than respond to the issues in a comprehensive manner by establishing an NHRI. The LDP has long opposed an NHRI for the reason that it would be a strong and independent agency.

This political party has cited spurious reasons for objecting to an NHRI, such as the fear that it would "over-regulate the media" and it would "restrict the right to freedom of expression", for instance, by judging criticism against a specific country (especially the Democratic People's Republic of Korea) to be a violation of the right to the freedom of expression. These apprehensions are more imagined than real, as the role and functions of an NHRI would have to be determined and approved by the legislature, and be relevant to the mandate of such an institution for the promotion and protection of the human rights of citizens and residents of Japan.

The Government of Japan's Reply to the List of Issues of the UN Human Rights Committee says, "Appropriate consideration as to what the human rights remedy system ought to be is underway, with a review of various discussions made so far" (para. 7<sup>4</sup>). However, this statement does not make clear the content of the "consideration" that is currently underway; nor by which date the Government will present the result of its discussions. The refrain "consideration is underway" is repeated on numerous occasions and in numerous venues but to date, the Government has never shown any results of its "consideration". Many expert members of international human rights bodies have raised the question as to whether the Japanese Government is in fact seriously willing to accept their recommendations, including for the establishment of an NHRI in Japan.

As the CLB is an internal organization of the MOJ, it could not effectively investigate the cases of human rights violations, and take up the issues with other ministries and agencies due to the sectionalism amongst such organizations. As a result, it is almost impossible for the CLB to manage adequately the human rights violations allegedly committed by public authorities and not public individuals. The biggest problem is that the CLB, being a governmental institution, is not independent from the Government, nor has the primary function of a National Human Rights Institution as defined in the Paris Principles, such as, to make recommendations regarding human rights issues or to closely cooperate with civil society in the promotion and protection of human rights.

From civil society organizations' point of view, the CLB is not considered as an institution that is compliant with the Paris Principles, mainly due to the two reasons mentioned above.

The perspective of the LDP government is to try and leave the CLB as it is, and instead to change its name to imply a broader human rights mandate but without making any substantial changes to its functions, powers, constitution and relationship with the state. However, with reference to the Paris Principles, it is

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<sup>4</sup> Online at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fJPN%2fQ%2f6%2fAdd.1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fJPN%2fQ%2f6%2fAdd.1&Lang=en)

incomprehensible to recognize the existing CLB as an NHRI, unless radical changes are made to it.

### 3 . Comparison of Government and Civil Society Bills for Establishment of an NHRI

As recalled at the beginning, the previous Democratic Party of Japan government was, unlike its current successor, supportive of the establishment of a national human rights institution and in fact submitted the Human Rights Commission Bill on November 9, 2012. The Bill proceeded no further because of the dissolution of the House of Representatives on the 16<sup>th</sup> of the same month. Earlier, in 2008, the Japan Federation of Bar Associations made public their outline of an NHRI; and in 2011, a study group consisting of lawyers and academics made their own proposal for an NHRI. The table below compares some aspects of the only official draft (2012 Bill) and the two civil society versions.

	Democratic Party of Japan Human Rights Commission Bill	Japan Federation of Bar Associations Outline of NHRI proposed by JFBA	Study Group for Establishing NHRI Outline of a bill to Establish a Desirable NHRI
Ministries and agencies under which NHRI is established	Extra-ministerial bureau of MOJ <sup>5</sup>	Cabinet Office <sup>6</sup>	Cabinet <sup>7</sup>
Organizational structure	Central Commission (state institution)	Central Commission (state institution) + Local Commissions (prefectural governments institution)	Central Commission (state institution) + Nine Local Commissions (in eight prefectures where High Court exists and Okinawa Prefecture)
Number of Commissioners	5 (2 of them are full time)	Central: 15 Local: set forth in a regulation according to the size of each prefecture	Central: 7 (majority are full time) Local: 5 in principle (majority are full time)
Terms of Commissioners	3 years (reappointment is allowed)	5 years (reappointment is allowed only once)	5 years (reappointment is allowed only once)

<sup>5</sup> MOJ was planning to reorganize the existing CLB into this.

<sup>6</sup> The Cabinet Office is one of administrative agency headed by the PM. Not only Ministers of State but also other ministers are also specified to be the members.

<sup>7</sup> The Cabinet is a collegial decision making administrative body consisting of the PM and Ministers of State.

Requirement for Commissioners	<ol style="list-style-type: none"> <li>1. The Commissioners shall be appointed among those who have moral character and insight regarding human rights, are able to make a fair and neutral judgment to carry out the affairs under the jurisdiction of Human Rights Commission, and have academic backgrounds and experience concerning law or society</li> <li>2. It shall be ensured that one of the genders should not be fewer than two.</li> </ol>	<ol style="list-style-type: none"> <li>1. The Commissioners shall be appointed among those who have deep insight regarding human rights, and have knowledge and experience required to protect human rights.</li> <li>2. It shall be ensured that one of the genders should not exceed two-thirds.</li> </ol>	<ol style="list-style-type: none"> <li>1. The Commissioners shall be appointed among those who have deep insight regarding human rights, and have knowledge and experiences required to protect human rights.</li> <li>2. It shall be ensured that one of the genders should not exceed two-thirds.</li> <li>3. It shall be considered that the independence of the Commission and the diversity of the society must be secured.</li> </ol>
Appointing Authority	Prime Minister	Prime Minister for both Central and Local	Prime Minister for both Central and Local
Appointment Procedure	Consent of both Houses of the Legislature	<p>Central: Recommendation Committee established in the Diet with the consent of both Houses. The members of the Recommendation Committee are selected from members of both Houses, Courts, the Cabinet Office, media, bar associations etc.</p> <p>Local: Recommendation Committee established in the Prefectural Assemblies with the consent of both Houses. The members of the Recommendation Committee are selected from members of the Prefectural Assemblies, Courts, the Prefectural Government, media, bar associations etc.</p>	<p>Central: Recommendation Committee established in the Diet with the consent of both Houses. The members of the Recommendation Committee are selected from members of both Houses, Courts, the Cabinet Office, media, bar associations, human rights organizations etc.</p> <p>Local: Recommendation Committee established in the Prefectural Assemblies with the consent of both Houses. The members of the Recommendation Committee are selected from members of the relevant Prefectural Assemblies, the Prefectural Governors, Courts, media, bar associations, human rights organizations etc.</p>

Independence		<ol style="list-style-type: none"> <li>1. The chairperson and members of the Commission shall independently exercise their authority.</li> <li>2. The Prime Minister shall not have any power of control and supervision over authorities of the Commission.</li> <li>3. The Prime Minister shall not have any right to request reports concerning the authorities of the Commission.</li> <li>4. The activities of the Commission shall not be subjected to a review by other departments of the Government.</li> <li>5. The expenses of the Commission shall be independently included in the state budget.</li> </ol>	<ol style="list-style-type: none"> <li>1. The chairperson and members of the Commission shall independently exercise their authority.</li> <li>2. The Prime Minister shall not have any power of control and supervision over authorities of the Commission.</li> <li>3. The Prime Minister shall not have any right to request reports concerning the authorities of the Commission.</li> <li>4. The expenses of the Commission shall be independently included in the state budget.</li> </ol>
Scope of human rights mandate	All human rights prescribed in the Constitution, human rights treaties Japan has ratified, and national laws and regulations	All human rights prescribed in the Constitution, international human rights treaties and national laws and regulations	All human rights prescribed in the Constitution and human rights treaties Japan has ratified
Definition of human rights violations	Unjustifiable discrimination, abusive treatment and other violations of human rights	Violations of all human rights prescribed in the Constitution, the international human rights treaties and Japan's laws and regulations	All acts that limit or deny human rights without any reasonable reason
Definition of discrimination	Politically, economically or socially unjust and discriminatory treatment	Discriminatory acts without any reasonable reasons (including the lack of legitimate considerations in case of the disabilities)	Discriminatory acts without any reasonable reasons (including the lack of legitimate considerations in case of discriminatory treatments due to the pregnancy and delivery, disabilities or diseases)

Grounds of Discrimination	Race, ethnicity, creed, sex, social status, family origin, disabilities, sickness or sexual orientation	Race, ethnicity, nationality, creed, sex, family origin, social status, disabilities, sickness, sexual orientation	Race, color of the skin ethnicity, nationality, sex, language, creed, social status, family origin, birth, marital status, family structure, disabilities, sickness, sexual orientation, sexual identity, pathogenic agent carriers <sup>8</sup>
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#### 4. Civil Society Efforts

The Democratic Party of Japan, assuming power on July 2009, unveiled the establishment of the Human Rights Commission as one of their policy pledges, thus the then Minister of Justice mentioned it as an important priority in her inaugural press conference. Therefore, many civil society organizations started to lobby the members of the Diet for its establishment. The Joint Movement for Establishing an NHRI and Optional Protocols was one such organization, and organized public meetings at the Diet members buildings; study sessions for Diet members; lobbied Diet members individually; submitted statements requesting speedy establishment; made representations to the Minister of Justice, etc.

In addition, the civil society network reported on the situation in Japan in a meeting with Ms. Navanetham Pillay, the former High Commissioner of the UN Office of the High Commissioner for Human Rights; and through submission of an NGO report to the UN human rights treaty bodies. There was also sharing of information and exchange of views with regional stakeholders through participation in meetings of the Asia-Pacific Forum of National Human Rights Institutions (APF), and the Asian NGOs Network on the Establishment and Performance of NHRI (ANNI).

The Japan Federation of Bar Associations has also conducted its own advocacy and lobbying through preparing and publicising its draft on an NHRI; making representations to the Government, MOJ, or individual Diet members concerning this issue; and exchanging views with them. Most recently, on February 20, 2014, the JFBA released an “opinion paper requesting the establishment of NHRI.”

#### 5. Conclusion and Recommendations

As weak as it may have been, there was still a movement demanding the establishment of an NHRI under the then Democratic Party of Japan government. However, under the current LDP administration, the civil society movement for an NHRI in Japan is almost non-existent. In the context of multiple human rights issues in Japan, limitations on the human and financial resources of civil society organizations, and an unfavorable political environment, the establishment of an NHRI has almost fallen off the human rights agenda.

Therefore, the current focus of the civil society network for establishment of an NHRI is to gather and analyze information on current government initiatives and perspectives, while striving to consolidate and strengthen an NGO network to seize the next opportunity for creation of a national institution for human rights promotion and protection in Japan.

As mentioned above, it would be almost impossible to establish an NHRI under the current administration, therefore the NGO network will exert efforts to gather and analyze information while briefing anyone interested in this issue. In particular, advocacy will centre on the reasons for ineffectiveness of the current Civil Liberties Bureau; the shortcoming of the system of Civil Liberties Volunteers (CLVs); and critique of

<sup>8</sup> It quite often happens the infectious diseases carriers, such as HIV/AIDS or Escherichia Coli O157, have been discriminated exactly because of that. There are some cases of patients of non-infectious diseases being discriminated. Based on such various human rights violations in the past, the Act Concerning Prevention of Infection of Infectious Diseases and Patients with Infectious Diseases was amended in 2006. Among other things, the wording, “to respect human rights,” was inserted in its fundamental principles.

the grounds specified by the Cabinet Office for not establishing an NHRI.

Also it would be helpful to monitor the effort by the Committee for Policy on Persons with Disabilities, designated as a monitoring organization of the Convention on the Rights of Persons with Disabilities; on how well it functions, or not, and, if not, why that is so.

Internationally, up-to-date information on the Japanese government official position will be provided on the occasion of APF meetings, UPR reviews, or reviews by the international human rights treaty bodies, to apply pressure for the establishment of an NHRI. Some such opportunities include reviews of the state report by the UN Committee of Elimination of Racial Discrimination and the UN Human Rights Committee on July 2014. NGO reports have been submitted for the information of those Committees.

## **Recommendations**

### To the Government of Japan:

- To recognize that Japan clearly stated to the international community that it takes recommendations by the international human rights mechanisms seriously and promote all human rights, while taking concrete measures within a time schedule in order to realize such recommendations.
- To clearly define in its founding statute that the main aim of the institution is for domestic implementation of international human rights standards.
- To clearly define in its founding statute that the functions of an NHRI include (1) recommendations to the Japanese Government or any other governmental agencies on human rights issues; and (2) co-operating with the international human rights system, such as the United Nations, its Human Rights Bodies, and other National Human Rights Institutions.
- To clearly position it as a separate organization from MOJ in order to make it a Paris Principles compliant NHRI.
- To recognize that human rights violations are most serious when caused by the State; and to have the political will to establish a National Human Rights Institution which makes recommendations on comprehensive human rights policies from an independent standpoint as an institution outside of the Ministry of Justice and other governmental agencies.
- To make sure that the NHRI has the function to provide remedies to victims of human rights violations committed by state institutions such as the central or the local governments.
- Entrust the organization with the power to handle the human rights violation cases conducted by the state, the local governments or the governmental agencies as well as the public figures such as politicians who bear the obligations to comply with the Constitution.

### To the Diet of Japan:

- To encourage the Government to accept recommendations on human rights from the international community in a serious manner.
- To propose concrete processes with a clear cut timeline toward establishing the National Human Rights Institution.
- To make the human rights standards of the international human rights treaties into reality by ensuring that National Human Rights Institution interprets its mandate based on such treaties.
- To ensure that National Human Rights Institution has a function to make comprehensive recommendations on human rights policies from an independent standpoint as an institution outside of the Ministry of Justice and other governmental agencies.

### To the United Nations Human Rights Council:

- To point out repeatedly that it is an obligation of the member states of the United Nations to respond seriously to recommendations by UN human rights agencies, and to realize such recommendations in their own territory.
- To support and encourage Japan in a concrete manner to establish a National Human Rights Institution in compliance with the Paris Principles in consultation with the Office of the United Nations High

Commissioner for Human Rights.

To the Asia-Pacific Forum:

- To support and encourage the Government of Japan and the relevant governmental agencies in a more concrete manner to establish a National Human Rights Institution in compliance with the Paris Principles.
- To encourage the Government of Japan and the relevant governmental agencies to provide information, as well as collaborate with civil society organizations in order to establish the National Human Rights Institution.

# MONGOLIA: SELECTION PROCESS NEEDS FIXING

## Center for Human Rights and Development<sup>1</sup>

### 1. General Overview

In recent years, the NHRC has made progress in research and reporting on the status of human rights, developing working relationships with other human rights organizations and carrying out human rights training and awareness raising activities. Cooperation with CSOs and establishment of representation at provincial level should specifically be mentioned as good progress that resulted from a UN-funded project and gradual increase in budgets allocated to the NHRC.

In addition, the Chief Commissioner's personal and political experience will have played a role in energizing and enhancing the impact of the NHRC. In this connection, mention should be made of annual human rights status reports discussed by the Legal Standing Committee of the Legislature, resulting in parliamentary resolutions on specific issues and open discussions involving the CSOs that have taken place in the past three years. There is hope that this will continue in the future.

This year, the NHRC submitted a draft amendment law to the Office of the President as continuation of the initiative to improve its enabling law. In collaboration with the President's office they put out the draft for public discussion by CSOs. The draft law has faced a good deal of criticism from the civil society. That is because: 1) draft law's name is Mongolian law on Human Rights. Unfortunately, this law does not include the human rights defenders, their protection and safety, or support for their activities; 2) inadequate expertise and experience requirements of Commissioners.

The draft assumes all Commissioners should have legal knowledge; however, human rights expertise is to be found in diverse disciplines as recognized by the Paris Principles itself; 3) appointment of Commissioners is not transparent, and there is inadequate scope for participation of all stakeholders in the selection process; 4) weak role of the Ex-Officio Board of the National Human Rights Commission, which has an important role to play in identifying the NHRCM's strategic priorities and interventions; 5) too focused on guarantees for the powers of commissioners, which are economic and social guarantees and ranks; when there should be attention paid to the compensation for damages to human rights victims.

The NHRCM submitted "the 13<sup>th</sup> report on human rights and freedoms in Mongolia" to the State Great Hural on 31 March 2014. the Commission has given 6 recommendations to the State Great Hural through its 13<sup>th</sup> report, which contains the implementation of 2 resolutions of the Standing Committee on Justice. Those resolutions are thought to implement "the 11<sup>th</sup> and 12<sup>th</sup> report on human rights and freedoms in Mongolia".

Recommendations of the NHRCM to the State Great Hural:

**One.** Ratify the *ILO Convention No.187 on the Promotional Framework for Occupational Safety and Health Convention* (2006), and *ILO Convention No.167 on the Safety and Health in Construction* in order to adhere to the procedures and rules of labor safety and health;

**Two.** Make the legislation on employment of conscripts and prisoners comply with *ILO Convention No.29 on Forced Labor*, and *ILO Convention No.105 on Abolition of Forced Labor*;

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**Three.** Revise the *Law against Domestic Violence* in compliance with the needs/requirements of investigation and elimination of domestic violence, effective and prompt protection and safety of victims, efficient accountability system for offenders, and improvement of coordination and duties of responsible bodies and other relevant stakeholders, and immediately resolve the issue regarding amendments to the relevant laws;

**Four.** Develop and adopt the state policy on awareness raising and sensitization of domestic violence aiming to change the social misconception and attitudes toward domestic violence;

**Five.** Make the Mongolian laws in compliance with UN *Convention against Torture* and all UN principles and standards related to human rights, and apply them in practice;

**Six.** In order to fulfill the implementation of employment and gender equality in labor relations, include and reflect the responsibilities of the employer which is stipulated in the article 11 of the *Law on Promotion of Gender Equality* into the *Labor Law* and make it precise<sup>2</sup>;

Mongolian legal reform in law enforcements has been ongoing for the 2nd year. In 2013, the Great State Hural adopted a new package of court laws. In addition, they adopted several new laws for human rights provision and protection, which are important in protecting the interests of the victim, witness and suspect. These laws are the Law on Protection for Victim and Witness, the Law on Marshal Office, the Law on Police Office and the Law on Legal Assistance for Indigent convicts.<sup>3</sup>

Approval of these new laws was greatly contributed to by women parliament members, activities of CSOs involved in victim and witness protection, and human rights lawyers.

This year, another draft law against domestic violence was strengthened by broadcasting several cases of domestic violence in public and social media as result of efforts from CSOs,

## 2. INDEPENDENCE

<b>Establishment of NHRI</b>	
Established by Law/Constitution/Presidential Decree	<i>National Human Rights Commission of Mongolia Act</i>
Mandate	<i>National Human Rights Commission of Mongolia Act</i> 3.1. The Commission is an institution mandated with the promotion and protection of human rights and charged with monitoring over the implementation of the provisions on human rights and freedoms, provided in the Constitution of Mongolia, laws and international treaties of Mongolia.
<b>Selection and appointment</b>	
Is the selection process formalized in a clear, transparent and participatory process in relevant legislation, regulations or binding administrative guidelines?	<i>No. The law has very few provisions on nomination and appointment of candidates for commissioners. The provisions relate to criteria, nominating bodies, appoint process. The process has no room for transparency and participation.</i> <b>Article 4. Candidates for Commissioners</b> 4.1. A candidate for Commissioners shall be a Mongolian citizen of high legal and political qualification, with appropriate knowledge and experience in human rights, with a clean criminal record and who has reached the age of 35 (thirty-five).

<sup>2</sup> The 13<sup>th</sup> report on human rights and freedoms in Mongolia (in Mongolian) <http://www.mn-nhrc.org/32>

<sup>3</sup> The new adopted laws of Mongolia in 2013 (in Mongolian) <http://www.legalinfo.mn/law/?cat=27>

	<p><b>Article 5. Nomination of Candidates for and Appointment of Commissioners</b></p> <p>5.1. The Speaker of the State Great Hural (Parliament) shall nominate names for candidates for Commissioners to the State Great Hural on the basis of respective proposals by the President, the Parliamentary Standing Committee on Legal Affairs and the Supreme Court.</p> <p>5.4. The State Great Hural shall consider and decide on this issue within 30 (thirty) days from the date of submission of the names for candidates.</p>
Is the selection process under an independent and credible body which involves open and fair consultation with NGOs and civil society?	<p><i>No. There are 3 nominating bodies: Supreme court, President and Legal Standing Committee of the Parliament. Final appointment is made by the Parliament. These bodies don't have any consultation with NGOs or public. The law does not oblige them to consult.</i></p> <p><b>Article 5. Nomination of Candidates for and Appointment of Commissioners</b></p> <p>5.1. The Speaker of the State Great Hural (Parliament) shall nominate names for candidates for Commissioners to the State Great Hural on the basis of respective proposals by the President, the Parliamentary Standing Committee on Legal Affairs and the Supreme Court.</p> <p>5.4. The State Great Hural shall consider and decide on this issue within 30 (thirty) days from the date of submission of the names for candidates.</p> <p>5.6. A Chief Commissioner shall be appointed for a term of 3 (three) years from among Commissioners by the State Great Hural, based on the proposal by the Speaker of the State Great Hural.</p>
Is the assessment of applicants based on pre-determined, objective and publicly available criteria?	<p><i>No, because public knows about new commissioners only when they are discussed in the parliament. Before that they have no idea is there vacancy, who and why is nominated on what grounds.</i></p> <p>5.1. The Speaker of the State Great Hural (Parliament) shall nominate names for candidates for Commissioners to the State Great Hural on the basis of respective proposals by the President, the Parliamentary Standing Committee on Legal Affairs and the Supreme Court.</p>
How diverse and representative is the decision making body? Is pluralism considered in the context of gender, ethnicity or minority status?	<p><i>No. The State Great Hural of Mongolia has 76 members in total. Out of that only 11 are women and 2 members are Kazakh.<sup>4</sup> There is no other minority representation. The law does not have any provision to secure pluralism.</i></p> <p><b>Article 5. Nomination of Candidates for and Appointment of Commissioners</b></p> <p>5.1. The Speaker of the State Great Hural (Parliament) shall nominate names for candidates for Commissioners to the State Great Hural on the basis of respective proposals by the President, the Parliamentary Standing Committee on Legal Affairs and the Supreme Court.</p> <p>5.4. The State Great Hural shall consider and decide on this issue within 30 (thirty) days from the date of submission of the names for candidates.</p>
<b>Terms of office</b>	
Term of appointment for members of the NHRI	<p><i>6 years per term (maximum of 2 terms)</i></p> <p><b>Article 6. Term of Office of Commissioners</b></p> <p>6.1. A single term of office for Commissioners shall be 6 (six) years.</p>

<sup>4</sup> Members of Parliament of Mongolia <http://www.parliament.mn/en/who?type=3>

The NHRCM has three full-time Commissioners. The actual law requires the candidates for Commissioners to be Mongolian citizens of high legal and political qualification, with appropriate knowledge in human rights, with a clean criminal record and as having reached 35 years of age. In accordance with this law, the Speaker of the State Great Hural (Parliament) nominates candidates for Commissioner to the State Great Hural on the basis of proposals by the President, the Parliamentary Standing Committee on Legal Affairs, and the Supreme Court.

The State Great Hural appoints the Commissioners for terms of six years with a single possible re-appointment. The Chief Commissioner is appointed from the Commissioners for a term of three years. The third Commission was appointed in 2012. The Commissioners are Oyunchimeg. P (appointed for the 2<sup>nd</sup> time); Ganbayr. N (appointed for the 1<sup>st</sup> time); and the Chief Commissioner is Byambadorj. J.<sup>5</sup>

Under the current National Human Rights Commission of Mongolia Act, the selection and appointment process of members is not clear, not transparent, and without public and civil society participation. Mongolia's civil society organizations and the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) recommended a clear, transparent and participatory selection and appointment process.

However, these recommendations have not been fully included in the draft amendment law put out by the NHRC for public discussion. In particular, the recommendations include the need to publicize vacancies broadly; maximize the number of potential candidates from a wide range of societal groups; promote broad consultation and/or participation in the application, screening, selection and appointment process; assess applicants on the basis of pre-determined, objective and publicly available criteria; and select members to serve in their own individual capacity rather than on behalf of the organization they represent.

The draft amendment law, however, proposes three (3) entities (Parliamentary Legal Standing Committee, Supreme Court and Chancery of the president which are in the current law) to announce the job vacancy through their channels for 10 days, to select two nominees for Parliament to select and appoint. There is no mention of merit based selection of a candidate capable of taking independent positions on human rights issues.

The expenses for the activities of Commissioners shall be financed from the State Consolidated Budget, and the State shall provide economic guarantees for carrying out his/her activities. According to the law, the State Great Hural shall approve and reflect specifically the budget of the Commission in the State Consolidated Budget on the basis of the latter's proposal, and this budget shall fulfill the requirements for the independent conduct of its activities.

The Commissioners shall receive a salary equal to that of the Member of the Government Cabinet. In case the term of office of Commissioners has expired, or he/she has been relieved from the office because of their health condition, or for any other excusable reason, Commissioners shall be provided with the allowance for a period of up to 6 (six) months. The allowance should not be less than salary when he/she was Commissioner until he/she gets transferred to another job or official position in line with his/her profession or expertise, or get a different job without scaling down the salary, and if he/she is employed and gets a lower salary, then he/she shall be provided with the difference of that salary during the same period.

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<sup>5</sup> Human Rights Commissioners <http://www.mn-nhrc.org/eng/main/2/>

If a Commissioner has been arrested for a criminal act or on the site of crime with all implicating evidence, it shall be reported by the relevant official to the Chairperson of the State Great Hural within the following 24 (twenty-four) hours. In all other cases it shall be prohibited to detain, imprison or impose administrative sanctions by way of a judicial process on Commissioners, and to conduct searches at his/her home, office room, and on her/his body. Unless provided by the law, it shall be prohibited to release and/or dismiss Commissioners as well as to transfer him/her to another job or official position without his/her consent.

It shall be prohibited to divulge the confidentiality of correspondence related to the exercise of powers by Commissioners. Business entities, organizations and their officials as well as citizens shall have obligations to render all kinds of assistance to Commissioners in exercise of his/her powers.

According to the Law of the National Human Rights Commission of Mongolia, the Commission has a secretariat. The rules and regulations of the secretariat are adopted by the Chief Commissioner, and the staff and salary fund are included in the budget approved by the State Great Hural. Staff members of the Secretariat are civil administrative workers. The secretariat primarily aims at providing the Commission with stable and steady activity, supporting the Chief Commissioner and the Commissioners in fulfilling their authority with methodological assistance. The secretariat began with staff of 12 employees, and today has three divisions and 48 employees.<sup>6</sup>

### 3. EFFECTIVENESS

The NHRCM has a complaints handling department and Article 9.1 of the National Human Rights Commission Act states that “Citizens of Mongolia, either individually or in a group, shall have the right to lodge complaints to the Commission in accordance with this Law, in case of violations of human rights and freedoms, guaranteed in the Constitution of Mongolia, laws and international treaties of Mongolia, by business entities, organizations, officials or individual persons”.

Complaints can be sent in writing, orally at the offices of the NHRCM, or by email through the NHRCM website. Complainants must write his/her name, residential and postal address and have signed the complaint. They must also indicate which rights and freedoms guaranteed in the Constitution of Mongolia, laws and international treaties of Mongolia have been violated. A complainant shall lodge a complaint within one year from the date on which his/her rights and freedoms were violated or from the date on which he/she came to know about such a violation. The Commission shall give a reply within 30 (thirty) days from the date of receipt of a complaint, and if there is need for additional fact-finding and inquiry, the Chief Commissioner may extend it up to 60 (sixty) days.

In 2013, 669 complaints were received. This number has increased more than twice if compare to 2012. 619 cases were concluded and 50 complaints were not concluded in 2013. Interesting fact is that 289 complaints out of 619 or 47% of the complaints were received from suspects and defendants. Among 669 complaints only 19 were related to land or property rights, 19 on child rights, 11 on domestic violence issues, 28 on the right to work, 3 on right to information although Mongolia has been greatly challenged by human rights violations on these issues.

In 2013, the NHRCM filed 3 cases in court. In these 3 cases people were wrongfully accused of misleading an investigation and of serving an extra term without charge in prison. These cases were heard by the Court of Bayangol district, the Primary Court of Khuwsgul province and the Primary Court of Khentii province. The damage done to citizens in these cases were estimated at a total of 357 819 713 tugrug and they were compensated with 111,094,850 tugrug.<sup>7</sup>

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<sup>6</sup> Secretariat of Human Rights Commission Mongolia <http://www.mn-nhrc.org/eng/main/3/>

<sup>7</sup> The annual reports of NHRCM (in Mongolian) <http://mn-nhrc.org/index.php?newsid=5302>

### ***Case 1: Citizen E***

Citizen E. He was suspected in a severe crime and detained for 68 days in a pretrial detention centre and passed through 3 court trials for five years, from October 2007 until October 2012. As a result of the last court session his innocence was approved. The NHRC helped him to make a complaint to the Primary Court of Khuvsugul province. He claimed damage done at a total of 251 611 363 tugrug. According to the court's decision, he received 64 874 000 tugrug.

### ***Case 2: Citizen B***

City Court reviewed the decree of primary court and amended B.'s verdict from 6 years to 4 years of prison and decided to transfer him to an ordinary prison. However, the law enforcement agency didn't enforce the decision of the City Court. The result of this case was that citizen's B health deteriorated and he was emotionally damaged. The estimated claim for damages was about 32 057 500 tugrug and he received 22 070 000 tugrug.

### ***Case 3: Narantuul International shopping center***

The Narantuul Traders Union has complained to the NHRCM regarding the working conditions. Following the complaint, the NHRCM organized inspection of Narantuul's international shopping center and detected several violations and sent its recommendations to Narantuul's administration office. As a result, 5000 outdoor traders concluded rent agreements with Narantuul's administration office.

## **4. ENGAGEMENT WITH JUDICIARY, CIVIL SOCIETY, OTHER ACTIVITIES**

In recent years, civil society has increased its attention and cooperation with the NHRC as the key component of a national human rights mechanism, strengthening of which will improve the status of human rights protection in the country.

The most important institutionalized mechanism for cooperation between the Commission and civil society organizations is the Ex-Officio Council. The Council may play an important role in ensuring the representation of multiple stakeholders in the Commission's activities.

New rules for, and members (from 19 organizations) of, the Ex-Officio Council of NHRCM were approved during the 4<sup>th</sup> session in 2013. According to this rule Ex-officio members mostly will disseminate information of policies and activities of the Commission to their representing constituencies but not the other way around. Moreover the role of Ex-Officio members in defining strategies of the NHRCM has been disappeared from the new by-law of the Council. The Ex-Officio Council is chaired by one of commissioners as it is defined by its by-law. Currently the Council is chaired by Ms. Oyunchimeg.P, Commissioner of NHRCM, and its secretary is Munkhzul. Kh, chief of Administration and Cooperation within the secretariat of the NHRCM.

This year, the NHRCM organized the 6<sup>th</sup> and 7<sup>th</sup> regular meetings of the Council. The meetings are called 'The National Human Rights Commission and civil society partnership'. The issues discussed during these meetings were: a) the implementation of Mongolian Government Resolution No. 159 of 2011; b) the medium-term implementation report of the UPR recommendations; c) the report sent to UPR Info-report and future challenges; d) evaluation of collaborations in 2013; and e) discussions on cooperation in 2014 and beyond.

As stated in the Law on the State Great Hural (Parliament) and Law on the National Human Rights Commission of Mongolia (article 13.2.3): “The Commission shall submit to the State Great Hural a report on the human rights situation in Mongolia within the 1st quarter of every year.” In other words, this is not the same as an annual report (*or* activity report) of the NHRCM. Therefore one of the NHRCM’s activities is to produce annual report on the human rights situation in Mongolia. The NHRC has produced so far 13 annual reports on the human rights situation of Mongolia. Usually these reports focused on several thematic issues and did not cover the challenging human rights issues of the years. The issues for the reports have never been discussed and defined with CSOs. For the first time, this year, the NHRC informed CSOs about the issues for the following year’s report during the discussions on the presentation of this year’s report. CSOs raised questions how the issues were defined and whether in future the NHRC has plan to discuss and define issues for reports with CSOs but could not succeed in receiving definite answer.

Besides the annual human rights situation report, the NHRC produces an activity report annually which can be found in its website. During the preparation of this report, on the question of how activity report is presented to the parliament, a relevant staff member of NHRCM said that: “NHRCM shouldn’t present own annual report to someone, because according to the Law on the NHRCM “NHRC is an independent organization”. This answer shows that the NHRC needs to strengthen its understanding and practice on transparency, accountability and independence. In future it should report to the Parliament its activity report along with human rights situation report and use it as good opportunity for engaging with the parliament on budget issues.

The budget of the NHRCM is approved by parliament and then channeled to the NHRCM through the Ministry of Finance. The law on public budget organizations management and finance states that the NHRCM must report on the state of its finances to the Ministry of Finance twice a year. This fact has been raised by CHRD for long. Unfortunately the NHRC has not been able to build its capacity to work out this issue. The new developed draft law does not include a proper provision on this issue.

Although there has been gradual increase in the budget, the NHRC has failed to build capacity to protect itself from budget cuts. The financial resources necessary to support independent and effective work of the NHRC continues to be a challenge. Budget reductions due to financial constraints have affected the Commission as any other agency. This year, the Ministry of Finance has reduced the NHRC’s budget by 200M Tugrug, which constitutes around 25% of the organization’s total annual budget. This is not the first time, and it is additional evidence that unless the NHRC does work for proper regulations in securing and protecting itself from the risk of budget reductions, its financial independence will continue to be undermined.

The NHRC has organized jointly with the Legal Standing Committee of the Parliament in 2013, and with the Parliamentary Subcommittee of Human Rights in 2014, public discussions on its human rights situation reports. However, no formalization of this engagement of the Commission with the Parliament has been seen. Therefore the NHRC needs to make more efforts to utilize the Belgrade Principles in order to regularize and improve the effectiveness of its engagement with the Parliament.

The Sub-Committee on Human Rights is responsible for dealing with certain issues in the remit of the Standing Committee on Justice. It submits its conclusions on these issues for consideration to the Standing Committee on Justice, which may, if necessary, submit them to the State Great Hural (*articles 20.7.2 and 24.1.5 of the Law on the State Great Hural of Mongolia*).<sup>8</sup> The Sub-Committee is also responsible for guaranteeing human rights and freedoms, and for keeping under review issues on amnesty, immigration and citizenship. The Sub-Committee on Human Rights has the right to conduct examinations and surveys, to obtain all relevant information, seek explanations from concerned institutions, officials and citizens, and carry out auditing. To this end, it may set up individual and joint working panels.

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<sup>8</sup> *Law on the State Great Hural of Mongolia* (in Mongolian) <http://www.legalinfo.mn/law/details/354?lawid=354>

The Sub-Committee, may adopt resolutions and prepare draft resolutions for final adoption by the State Great Hural. The Sub-Committee works out draft resolutions and submits them for discussion by the Standing Committee or the State Great Hural plenary session. As stipulated in the Law on the State Great Hural, the Law on the National Human Rights Commission and other related laws and resolutions, the Sub-Committee on Human Rights cooperates with the Government, and the National Human Rights Commission.

In 2013, the Sub-Committee worked with NHRCM on “The 12<sup>nd</sup> Status report on Human rights and freedoms” discussion. According to the Law on the State Great Hural, expenses for the activities of Sub-Committee financed from the State Consolidated Budget. Also, this budget is part of the State Great Hural Budget.

As stated in the Law on the National Human Rights Commission of Mongolia, one of its functions is: “To put forward recommendations and/or proposals on whether laws or administrative decisions are in conformity with the key human rights principles”. However, this law does not authorize the NHRC to review draft laws in the legislative process. The NHRC has been invited to comment on draft laws or participate in drafting. For example, in 2013, the NHRC provided proposals for 17 draft laws to the legislature and participated in the working group on 3 draft laws. However the Commission does not know whether its comments are accepted, reflected or refused, and if refused what was the reason, according to the relevant staff of the NHRC.

## 5. THEMATIC ISSUES

### **Human Rights Defenders and Systematic Human Rights Violations**

The rapid expansion of the mining industry in Mongolia has resulted in human rights violations and abuses relating to poor business practices. Environmental rights defenders, in particular, have been subject to various forms of reprisals, harassment and intimidation by State and non-State actors for their legitimate human rights work. A prime example is the arrest and sentence of Goldman Environmental Prize winner Ts. Munkhbayar (*Annex 1*) on trumped up charges (national security, terrorism, illegal demonstrations).

In accordance with the enabling law governing the activities of the NHRC Mongolia, it has the mandate to comment and advise on all issues relating to the human rights situation in the country, including guiding the Government regarding their human rights obligations and ensure international human rights principles and standards are incorporated into the law and mainstreamed and implemented in public policymaking.

It is thus commendable that the NHRC Mongolia plans to include a mapping and assessment of the status of HRDs in their annual report this year.

However, despite the enactment of legislation that protects affected communities and HRDs against the harmful practices of the extractive industry, there have been repeated attempts to undermine the law by introducing amendments that give concessions to mining companies.

As such, there is a pressing need for improvements to the legal, administrative and institutional framework for adequate protection to HRDs. Given the worsening and recurring human rights violations relating to the extractive industry, the NHRC Mongolia must perform its role in the fight against impunity and ensure protection for HRDs, including advocating in favor of a safe and enabling environment for HRDs as well as collectively address systematic violations and take action that can lead to institutional change in the country.<sup>9</sup>

### **NHRC Law draft amendment**

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<sup>9</sup> The public inquiry on torture by the NHRC Mongolia was an example of a good practice where they responded to the exigencies of the human rights situation in the country.

The CSOs are very critical of the draft proposal that changes the name of the law to “Human Rights Law”. The proposed draft does not cover protection of victims of human rights violations, human rights defenders and remedy issues concentrating essentially on the NHRC. The draft law further strengthens the provisions on high level public service positions of commissioners, the 6 months’ salary retained after completion of the term or release from duties for other reasons provided as economic guarantee under the current law is proposed to increase to 36 months in the new draft. The CSOs see this as not a viable provision to upgrade the public service status of commissioners to the levels of MPs or Cabinet members without the ability to enforce the financial resources. The draft does not change the three authorities with the right to nominate candidates for commissioners retaining the principles of nomination and appointment process leaving it to continue to be a space for political bargaining.

The selection criteria for commissioners ~~also~~ has not changed either. The CSOs consider good knowledge and experience in human rights areas to be the most important criteria in the selection of the commissioners. The draft has eliminated “appropriate” from the requirement to have an “appropriate level of human rights knowledge” and makes no mention of experience. CSOs also criticize lack of provision in the proposed draft that would strengthen the human rights protection mandate.

#### Inability to make statement on grave violations of human rights

The NHRC lacks the capacity to express its position on grave violations of human rights based on independent judgment informed by accepted human rights norms. This is one area of continuous criticism by the CSOs. Only in the past year, in addition to the above-mentioned Ts. Munkhbayar case, there were cases of deportation to China of Inner Mongolian asylum seekers. The CSOs are very disappointed with such a weak NHRI, which could be explained as being the result of a lack of human resource capacity to be sensitized to such grave violations of human rights, lack of mechanisms and procedures for such public position statements. The second reason for such a weak institution is their political appointment that makes them incapable of viewing objectively government’s policy and practice and making an independent assessment.

#### Engagement with Other Stakeholders

CSOs also criticize the NHRC’s reluctance in using the expertise of and partnering with the members of their Ex-Officio Council in monitoring human rights. Ex-Officio CSO Council of NHRC consists of organizations working on a broad spectrum of human rights and therefore is a good resource to have. This resource should especially be used in developing and shaping the NHRC’s strategy.

## **6. CONCLUSION AND RECOMMENDATIONS**

As observed by the CSOs, Parliament and Cabinet members of Mongolia made repeated public statements that “...ensuring human rights will be possible when economic development achieves levels when average income of the population reaches 5,000 or 10,000 USD. This is a clear evidence of the need for the NHRC to work closer with the Parliament and its members to sensitize and educate them on human rights obligations, and the mutually supportive relationship between sustainable development and human rights.

While in the past few years there has been increase in allocated budget, it still is far from being sufficient for implementing its mandate effectively. At the same, the Ministry of Finance exercises the liberty of cutting the budget without consultation. In 2014, the NHRC’s budget was cut by 200 million tugrug, which represents almost 25% of its annual budget.

While the NHRC makes efforts to review and comment laws and policy documents aiming to improve the legal environment, it is weak in analyzing the impact of development policies on the implementation of

human rights, criticizing policies and laws that lead to, or could result in, systematic violation of human rights, and lacks the ability to advocate change.

As viewed by CSOs, the NHRC expends its budget and human resources on carrying out ad-hoc training on human rights to government and public sector organizations. It should instead concentrate on creating a formal and informal human rights education system, focusing on preparing expertise and let the civil society carry out the ad-hoc training activities.

The NHRC lacks the capacity to cooperate effectively in a mutually supportive manner with the civil society organization on cases of violation of human rights in the process of law enforcement. Therefore, the NHRC's monitoring and research activities are case or incident-based views limited by a project framework, which do not reflect the nationwide status. The NHRC lacks the capacity to cooperate effectively in a mutually supportive manner with the civil society organization on cases of violation of human rights in the process of law enforcement. The NHRC has expanded to include a representative in each of the 21 provinces. The intent is to create effective representation of the NHRC at the local level, close to the communities. At this point these representatives are yet to develop such capacity and capabilities. It is essential that the selection criteria are refined to bring in the right people, ensure independence from political party influence and create ways for close cooperation with CSOs.

The NHRC lacks the capacity to perform some of its duties assigned to them by law. In particular, there is a provision that allows the NHRC to sit in the Cabinet meetings, which is not implemented. This is a missed opportunity for the NHRC to make immediate representations on government policy or decisions that violate human rights; and to influence government policy in more human rights friendly ways.

### **Recommendations for Government and Parliament of Mongolia**

1. To focus on the implementation of Parliament Resolution for annual Status Report on Human Rights and Freedoms.
2. Scrutinize all proposed amendments in the draft Human Rights bill with a view to ensuring the independence and effective functioning of the NHRC Mongolia and carry out consultation with the members of the Commission, civil society organizations and all other stakeholders;
3. Ensure that amendments to the NHRC Act reflect positive changes and implementation of the ICC-SCA recommendations in compliance with the Paris Principles;
4. Ensure that the NHRC Mongolia is provided with broad and solid mandates in the draft bill and make sure that they are adequately resourced to be able to operate independently and to be credible and effective;
5. Publicly acknowledge and support the important role of the NHRC Mongolia, in particular in relation to protection of HRDs and combating impunity.

### **Recommendations for NHRCM**

1. Consult with HRDs and undertake to establish or review existing protection programs and ensure adequate financial resourcing of protection programs;
2. Continue to engage and harness the expertise of members of the Ex-Officio NGO Council in monitoring and implementing human rights programs and activities;
3. Advocate for improvements to the legal, institutional and administrative framework governing the work of HRDs, including a safe and enabling environment for HRDs;
4. Ensure timely pronouncements, quality of responses and interventions and develop a systematic follow-up plan to monitor implementation of its recommendations;

5. Commit to the implementation of the Edinburgh Declaration (2010) by engaging proactively on the issue of corporate responsibility and corporate abuse of human rights, including with reference to the new UN Guiding Principles on Business and Human Rights.

## ANNEX 1: Ts. Munkhbayar Case

The United Movement of Mongolian Rivers and Lakes (UMMRL) is a non-governmental organization, headed by Ts. Munkhbayar. The UMMRL's activities include protection of the natural balance and guarantee the livelihoods of herders, livestock and pastures; and to require implementation of the Mongolian Constitution guarantee that land, water, and terrestrial riches belong to the people and that the government carries responsibility for their protection.

In recent years, the UMMRL and its members and supporters have fought for the government to uphold its responsibility to protect the riches of the peoples from 'thieves with licenses'. However, the Mongolian Government did not fulfill its obligation under the Constitution to protect the peoples natural riches; did not fulfill the Parliamentary decision of July 16 2009; and did not fulfill the decision of the Supreme Court of October 20, 2011 to implement the law banning exploration and production of minerals in forests and near rivers and their headwaters.

Munkhbayar issued an appeal to the Supreme Court to force the government to implement the '*law with the long name*'<sup>10</sup>. The Court ruled that Munkhbayar is right, but then the Government decided to weaken the law. In Summer 2013 the New Democratic Party Government declared that the '*Law with the long name*' is a serious impediment to economic growth and the Gold Mining Association of Mongolia promised to quadruple gold output in exchange for weakened protection of rivers. Munkhbayar undertook every efforts to discuss with relevant authorities the hurriedly proposed legal amendments, but state authorities did not want to listen, and all doors were closed. An extraordinary Parliamentary session to abolish the law was summoned in haste on September 16, 2013. This caused Munkhbayar and his allies to protest this action.

UMMRL and its leaders, together with allies, organized a special demonstration on September 16, 2013 in order to attract public attention to these issues. That same morning of September 16, the Parliamentary special session began the process of weakening the law. The demonstration was planned as a symbolic action showing that the affected people had not been heard by the authorities. There was no violence and no one was hurt.

Although rifles and grenades were brought to the demonstration, they were brought as a purely symbolic act to focus attention on the need to implement the law banning exploration and production of minerals in forests and near rivers and their headwaters. The demonstration was broken up with force by state security forces and protestors were arrested. One of the rifles discharged accidentally after the arrests were made. No one was injured. In the subsequent trial, the state prosecution did not raise the issue of the accidental discharge.

Munkhbayar clearly stated right after his arrest: "*We did not intend to hurt anyone. We just tried to issue a warning to government officials who do not give any thought to the interests of Mongolian people, but only their own*". As a result of this demonstration both society and state authorities have finally recognized the importance of preserving the Law, and it has not been changed until now.

After taking this action Munkhbayar and friends handed themselves to the authorities and had a hope to appear before a fair open court in Ulaanbaatar that would judge this case against possible damages to nature and culture resulting from the amendment or the law. However, the court hearing was held in a remote jail

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<sup>10</sup> "Law to Prohibit mineral exploration and mining operations at headwaters of rivers, protected zones of water reservoirs and forested areas": Mongolians call it 'LLN' or the 'law with the long name', for short.

and the trial was neither open nor fair, and the sentence reflects the political influence of the mining lobby and is not just.

At the first District-level trial in January 2014, the movement leaders Ts. Munkhbayar, G. Boldbaatar, D. Tumurbaatar and J. Ganbold, who had been imprisoned for 6 months already, were found guilty and each received sentences of an additional 21 years and 6 months; while Munkhbold, a person who sold the firearms symbolically displayed during the demonstration, received a 2-year sentence. Other protestors, O. Sambuu-Yondon and B. Gantulga were found innocent.

On April 08, 2014, an appellate court hearing was held at the City Court for members of the ‘*Gal Undesten*’ [‘Fire Nation’ – coalition of environmental and human rights organizations] movement led by Ts. Munkhbayar. The City Court sentence of imprisonment for each accused is as follows: Ts. Munkhbayar – 7 years; G. Boldbaatar – 6 years and 11 months; D. Tumurbaatar – 10 years and 10 days; J. Ganbold – 1 year; and S. Dashseren – 2 years. On June 27, the Supreme Court upheld the April 8, 2014 decision of the Appellate Court.

The UMMRL demands that, in accordance with the Mongolian Constitution that the people of our homeland have the right to defend their native interests; and that the court’s sentence of Munkhbayar and his allies be annulled.

# SOUTH KOREA: SILENT AND INACTIVE

## Korean House for International Solidarity<sup>1</sup>

### 1. General Overview

#### 1.1 The overall human rights situation in Korea<sup>2</sup>

The Lee Myung-bak administration which was said to put the human rights situation in Korea back to ‘the dark retrogressive era’ ended,<sup>3</sup> and the Park Geun-hye administration began its term in government in February 2013. However, Korean civil society continued to be concerned about the deteriorating human rights situation under President Park Geun-hye’s rule, lacking as she is in interest or understanding of human rights.

The biggest issue in 2013 was ‘fair election’ as one of the fundamental elements of human rights and democracy. As systematic interventions of not only the National Intelligence Service (hereafter the NIS) but also the police, military, and the Ministry of Patriots and Veterans Affairs in the last presidential election were suspected, and later proven to be true: ‘infringement on political neutrality of state institutions’ and ‘undermining of fairness in election’ have aroused controversy and become matters of national interest.

While South Korea is among the world’s top ten economies, its standard of human rights has been criticized for not matching its economic prowess. With the local elections in June 2014, problems regarding freedom of expression, association and assembly have become more evident.

In April 2014, a tragic incident happened. The sinking of the Sewol ferry killed 294 people and bodies of 10 are still missing (as of July 28, 2014). While they had sufficient amount of time to respond, the authorities failed to rescue passengers, who were mostly high school students. The attitude of the government towards the families of the deceased led to nation-wide disappointment and resentment. It also gave rise to distrust and criticism over the government being irresponsible for its people’s lives and dignity, and to feelings of remorse within Korean society for the occurrence of this tragedy.

- **Freedom of association and assembly:** A commemoration event was held in Seoul in memory of 24 workers and their family members who took their own lives after years of conflict with the management of Ssangyong Motor following massive lay-offs. However, it was soon faced with interruption from the police. Despite the court’s decision to suspend the implementation and the NHRCK’s decision to provide emergency remedy, the police continued to disturb the peaceful assembly. On other occasions, such as those in Miryang and Jeju, the police was accused of having violated human rights while forcefully dispersing the villagers’ assembly.

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<sup>2</sup> This chapter analyzes the period of 2013 and the first half of 2014. Cases of human rights situation in Korea have been mainly extracted from Korean Bar Association (2014), 2013 Human Rights Report and MINBYUN-Lawyers for a Democratic Society (2013), 2013 Human Rights Report.

<sup>3</sup> MINBYUN-Lawyers for a Democratic Society, 2013 Human Rights Report, p. 7.

- **Migrant workers' rights:** Korea's employment permit system, which is closely related to migrant workers, imposes a limitation on the number of changes of workplace on the workers. Being restricted from transferring workplace, migrant workers are exposed to high risk of restriction of movement due to the long term contract and working conditions. In 2012, the UN Committee on the Elimination of Racial Discrimination criticized the system as modern-day slavery. Migrant workers who are working in agriculture, livestock, and fisheries are known to be suffering from long working hours, discriminatory low wages, violence, illegal confinement, and industrial accidents. As of the end of 2013, it was reported that 10% of 330,000 female migrant workers in Korea have experienced sexual abuse.

- **Rights of the disabled:** As a presidential candidate, Park had made many pledges regarding people with disabilities. After being elected, and within a year, she started to negate their rights which led to huge disappointment.<sup>4</sup> While individuals and organizations have been active in promoting and specifically demanding their rights, a paradigm shift at the governmental level, such as 'from being a beneficiary to a person with equal human rights,' and 'taking the initiative' is yet to be achieved.

- **Labor rights:** Issues regarding lack of jobs, temporary employees, and massive restructuring have been at the center of heated debates for many years. Abuse of indirect employment such as in-house subcontracting and illegal dispatching as well as polarization of employment structure have reached serious level. While many irregular workers were not confirmed as regular workers and most dispatched workers didn't receive their former jobs and work-roles after being reinstated, labor and management continued to dispute on the issue of reinstatement of in-house subcontracted workers.

The issue of workers at Samsung Semiconductors who died of leukemia (aplastic anemia) raised public concern on industrial safety. The increase in industrial disasters in the service industry has led to promoting awareness of psychological disorders of front-of-house workers, that is, those who directly interact with customers over the telephone or as sales clerks.

In August 2013, the Korea Government Employees' Union (KGEU) submitted the application for its recognition, which was turned down by the government for the reason that its platform might be "abused" by allowing dismissed workers to join the union and agitate for their reinstatement. In October 2013, the Ministry of Employment and Labor notified the Korean Teachers and Education Workers Union (KTU) that it was now illegal, after the KTU allowed some of its members who had been dismissed to retain their union membership. Such actions taken by the government contradicts the recommendation of the ILO's Committee on Freedom of Association to abolish the regulation that restricts union membership.

## 1.2 The response of the NHRCK

Unfortunately, the NHRCK is still being criticized for being regressive and irresponsible, by playing a minimal role in human rights protection and promotion, and only being pro-active and vocal when it comes to human rights concerns in North Korea. The Korean Bar Association, representing the legal community, noted in its 2013 Human Rights Report that the NHRCK's independence and neutrality has been criticized, due to its silence and passive response to major human rights issues.<sup>5</sup>

In advance of the UN Special Rapporteur on the situation of human rights defenders Margaret Sekaggya's, 2013 official mission to South Korea, human rights organizations in Korea expressed the concern that the NHRCK was impotent and irresponsible in discharging its mandate to protect human

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<sup>4</sup> Korean Bar Association (2014), 2013 Human Rights Report, p. 27.

<sup>5</sup> Korean Bar Association, 2013 Human Rights Report, p. 11.

rights and human rights defenders.<sup>6</sup> The media also criticized the NHRCK for trying not to upset the government authorities and responding to violations only after it was already too late.<sup>7</sup>

The NIS's intervention in the election – by manipulating online comments – has seriously impaired the people's political rights, for which the NHRCK has not expressed its position. Due to the scandal, the head of the NIS has resigned, and is on trial as of July 2014.<sup>8</sup>

The NHRCK has also not expressed its stance regarding the illegal investigation by the police on the families of the Sewol ferry victims although it is the biggest and the most sensitive case in Korea at the moment. The Gyeonggi Provincial Police Agency admitted their investigating into individuals and offered an apology to the families.<sup>9</sup>

With its untimely response and falling short of the international human rights standards, the NHRCK is losing its credibility and its decisions and recommendations are not being fully accepted by relevant agencies for some major and sensitive issues:

- There was a case where the police forcefully demolished a memorial altar for victims of Ssangyong Motor.<sup>10</sup> They also interrupted the assembly hosted by Lawyers for a Democratic Society (MINBYUN) by installing a police line. MINBYUN brought this case to the NHRCK asking for an emergency remedy after which the NHRCK recommended the police withdraw the police line. The police, however, pushed ahead with installing the police line.
- Mapo-gu Office and other local government offices that received recommendations from the NHRCK to practice affirmative action for sexual minorities still discriminate against them by disallowing sexual minority groups from using their venues for cultural events or to display banners.

In March 2014, the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights Sub-Committee on Accreditation (hereafter the ICC-SCA) deferred the re-accreditation of 'A' status on the NHRCK. The problems of the NHRCK that have been discussed since 2008 were once again raised in public through media reports. The NHRCK is now scheduled to be reviewed by the ICC-SCA in October 2014.

If the NHRCK fails to meet the ICC-SCA's standards, it would face its worst situation of being downgraded; which would then lead to the sinking of the NHRCK's status and honor both domestically and internationally. In preparing for the review, the NHRCK is seeking help from civil society and scholars. Human rights NGOs, however, strongly suspect that the measures taken by the NHRCK are perfunctory and motivated only by the reaccreditation process, instead of sincere measures to fulfill its mandate.<sup>11</sup> It is unquestionable that the NHRCK must take this opportunity to

<sup>6</sup> MINBYUN-Lawyers for a Democratic Society (2013), p. 129.

<sup>7</sup> The Kyunghyang Shinmun, August 7, 2014, [http://news.khan.co.kr/kh\\_news/khan\\_art\\_view.html?artid=201408072056085&code=990101](http://news.khan.co.kr/kh_news/khan_art_view.html?artid=201408072056085&code=990101)

<sup>8</sup> Lawissue, July 14, 2014, <http://www.lawissue.co.kr/news/articleView.html?idxno=17654>

<sup>9</sup> Newsis, May 20, 2014, [http://www.newsis.com/ar\\_detail/view.html?ar\\_id=NISX20140520\\_0012928125&clID=10202&pID=10200](http://www.newsis.com/ar_detail/view.html?ar_id=NISX20140520_0012928125&clID=10202&pID=10200)

<sup>10</sup> Since the massive layoffs and sit-in strike in 2009, the dismissed from Ssangyong have been suffering from serious economic difficulties and social stigma. As of April 2014, a total 25 people including the dismissed workers and their family members have either committed suicide or died unexpectedly. Upon the 22<sup>nd</sup> suicide of the late Lee Yoon-hyung, union members installed a memorial altar in front of Daehanmun Gate in hope of stopping any more death. At the same time, they demanded the company to inquire into the truth regarding the 2009 layoffs which included suspicions about account manipulation and intentional bankruptcy. Jung-gu Office in Seoul and Seoul Metropolitan Police Agency, on April 4, 2014, enforced the demolition of the incense altar and planted flowerbeds in its stead.

<sup>11</sup> Interview with human rights defender A.

do its best to take responsibility for making effective efforts and policies for the protection and promotion of human rights.

It is only when the NHRCK fulfills its mandate by following international human rights standards that its status and awareness in society will improve. If it continues to be an ineffective mechanism as it is criticized now, its responses and recommendations will not have any impacts on other governmental institutions, corporations, or individuals, and end up undermining itself and reducing its scope of activities.

## 2. Independence

Establishment of the NHRCK	
Established by Law	National Human Rights Commission of Korea (hereafter NHRCK) was established and has been operated in compliance with the National Human Rights Commission Act (Act No. 6481, established on May 24, 2001/Act No. 7427, amended on March 31, 2005)
Mandate	According to the National Human Rights Commission Act, the NHRCK shall perform duties falling under the following subparagraphs: 1. Investigation and research with respect to statutes, legal systems, policies and practices related to human rights; and recommendation for their improvement or presentation of opinion thereon; 2. Investigation remedy with respect to human rights violations; 3. Investigation and remedy with respect to discriminatory acts; 4. Survey on human rights conditions; 5. Education and public awareness on human rights; 6. Presentation and recommendation of guidelines for categories of human rights violations, standards for their identification, and preventive measures therefore; 7. Research and recommendation or presentation of opinion with respect to the accession of any international treaty on human rights and the implementation of the treaty; 8. Cooperation with organizations and individuals engaged in any activity for the protection and promotion of human rights; 9. Exchanges and cooperation with international organizations related to human rights and human rights institutions of other countries; and 10. Other matters deemed necessary to protect and promote human rights.
Selection and appointment <sup>12</sup>	

<sup>12</sup> The NHRCK commented that it plans to organize and operate a special committee in order to amend the NHRCK Act to secure transparency and fairness in selection process of commissioners which lack under the current legislation. It also said that it will do its utmost to identify measures and reflect them in making amendment to the NHRCK Act to secure diversity and pluralism in commissioners' composition. And it suggested that it plans to devise and present to institutions in charge of selection and appointment of human rights commissioners 'a guideline for selection of human rights commissioners' to secure independence of work and diversity of composition of the NHRCK before amendment to the NHRCK Act as making amendment to the NHRCK Act might require a long period of time. In fact, the NHRCK organized a joint committee with civil society to develop a guideline for selection of its commissioners in July 2014. However, its position that it cannot guarantee to which extent the opinions of the committee will be reflected in its final guideline makes Korean civil society question whether the joint committee is no more than an excuse to appeal to the ICC-SCA.

<p>Is the selection process formalized in a clear, transparent and participatory process in relevant legislation, regulations or binding administrative guidelines?</p>	<p>According to Article 5 of the National Human Rights Act, the president of the Republic of Korea shall appoint eleven commissioners among persons of whom possess professional knowledge of and experience with human rights matters and have been recognized to be capable of fairly and independently performing duties for the protection and promotion of human rights; four persons selected by the National Assembly; four persons nominated by the president of the Republic of Korea; and three persons nominated by the Chief Justice of the Supreme Court. The president of the Republic of Korea shall appoint the chairperson of the NHRCK from among the commissioners. In this case, the chairperson shall undergo hearings held by the National Assembly.</p> <p>However, in 2012, the president forced the reappointment of Mr. Hyun Byung-chul as the chairperson of the NHRCK against the opposition's protests. Moreover, the NHRCK has been repeatedly criticized for appointing those who have no professional knowledge of and experience with human rights matters as its commissioners. In this regard, there has been increasing public opinion to significantly revise the current laws and mechanisms of the selection process.</p> <p>According to Article 7 (2) and (3) of the National Human Rights Commission Act, in the event the position of a commissioner is vacated, the president of the republic of Korea shall appoint a successor within 30 days on the date of such vacancy and the term of office of the commissioner who is appointed as a successor shall start anew.</p>
<p>Is the selection process under an independent and credible body which involves open and fair consultation with NGOs and civil society?</p>	<p>The National Human Rights Commission Act has no clear provision to guarantee the participation or engagement of NGOs and civil society. In deferring the reaccreditation of the NHRCK in March, 2014, the ICC SCA reiterated its recommendation on this matter.</p>
<p>Is the assessment of applicants based on pre-determined, objective and publicly available criteria?</p>	<p>There is no provision in the National Human Rights Commission Act on the assessment criteria or procedure of applicants except the provision that commissioners shall be appointed by the president of the Republic of Korea among persons of whom possess professional knowledge of and experience with human rights matters and have been recognized to be capable of fairly and independently performing duties for the protection and promotion of human rights and that the chairperson shall undergo review in hearings held by the National Assembly.</p>
<p>How diverse and representative is the decision making body? Is pluralism considered in the context of gender, ethnicity or minority status?</p>	<p>There is no provision in the National Human Rights Commission Act on the measures to guarantee pluralism and diversity of commissioners, except Article 5 (5) which describes that four or more of the commissioners shall be women.</p>
<p>Terms of office</p>	

Term of appointment for members of the NHRI	The National Human Rights Commission Act stipulates that the term of office of the chairperson and commissioners of the commission shall be three years, and consecutive re-appointment may be only once.
Next turn-over of members	Prof. Hyung Byung-chul, chairperson took office on July 17 <sup>th</sup> , 2009 and was reappointed on August 13 <sup>th</sup> , 2012. His term is due to end on August 12 <sup>th</sup> , 2015. In the case of commissioners, one commissioner's term ends in 2014 and five commissioners in 2015, while two commissioners have begun their term in 2014.
Dismissal process	There is no specific provision on the dismissal process.
Security of tenure	Article 8 of the National Human Rights Commission Act says a commissioner shall not be removed from his/her office against his/her will unless he/she has been sentenced to imprisonment without labor or a heavier punishment.
Functional immunity	Article 56 of the National Human Rights Commission Act regulates the punishment in case of obstruction of performance of human rights protection duties. However, there is no provision to guarantee the functional immunity for commissioners or staff members of the NHRCK. In deferring the reaccreditation of the NHRCK in March, 2014, the ICC SCA reiterated its recommendation on this matter.
Staffing and recruitment	The NHRCK has the "Rule on Management of Manpower in the National Human Rights Commission" regulating recruitment and attainment of its staff members.
Government representatives	According to Article 54 of the National Human Rights Commission Act, the NHRCK may, if deemed necessary for the performance of its duties, request the head of any related entity, etc. to dispatch a public official or staff member under his/her control to the commission. As of July 2014, there are four public officials dispatched to the NHRCK, among them three officials are grade V or above. <sup>13</sup>

## 2.1 Appointment/Selection process & Composition

The members of the NHRCK are composed of a total of eleven commissioners, including one chairperson, and three standing commissioners. Four persons are selected by the National Assembly, four persons are nominated by the president of the Republic of Korea, and the remaining three persons are nominated by the Chief Justice of the Supreme Court. The chairperson of the NHRCK is appointed by the President of the Republic of Korea among the commissioners.<sup>14</sup>

However, there have been repeated criticisms raised in relation to the President's unilateral appointment of the chairperson for undermining the independence of the NHRCK. As the National Assembly Act was amended to expand the scope of high officials subjected to personnel hearings in

<sup>13</sup> The NHRCK suggested that the staff members from other institutions were dispatched to support the increase work of the NHRCK and the government does not intervene in major decision making processes of the NHRCK.

<sup>14</sup> Article 5 of the NHRCK Act

2012, the NHRCK Act was amended to have the chairperson undergo personnel hearings held by the National Assembly accordingly. However, there remains a serious limitation that regardless of whether serious deficits in relation to his or her qualifications are found during the personnel hearings, there is no way to rescind the appointment if the president authorizes it. In fact, in 2012 then President Lee Myung-bak enforced the re-appointment of Hyun Byung-chul as the NHRCK chairperson despite strong opposition by not only domestic, but also international human rights advocacy organizations. As such, the independence of the NHRCK in terms of its composition of commissioners has been persistently questioned.

Moreover, there is no provision in the National Human Rights Commission Act on the assessment criteria or procedure for applicants. Therefore, while Article 5 (2) of the NHRCK Act prescribes that commissioners should be appointed, “among persons of whom possess professional knowledge of and experience with human rights matters and have been recognized to be capable of fairly and independently performing duties for the protection and promotion of human rights,” its commissioners are, in practice, appointed by the arbitrary standards of the person who has the appointing powers. As a result, the position of the NHRCK commissioner has been criticized for being given as a reward to those who made a certain contribution to the President or political parties. More importantly, some commissioners even had past histories of committing human rights violations or receiving bribes.

In particular, the appointment of Hyun Byung-chul as the chairperson has been persistently opposed and condemned by civil society from the early days of his term in July 2009 to date, due to his lack of experience with human rights matters, which is a key qualification criterion. His professional career was limited to teaching at the college of law before being appointed as the chairperson.

The fact that the majority of the commissioners are jurists (legal scholars, lawyers, and former judges and prosecutors) demonstrates that the diversity and pluralism of the Paris Principles is not guaranteed. Consequently, there has been an increasing tendency in the NHRCK to take practical laws, rather than international standards, as the benchmark to handle human rights-related issues. As of July 2014, eight out of eleven commissioners have their backgrounds in the legal field.

More seriously, a significant number of the NHRCK commissioners have been former prosecutors who have faced continuous criticism of infringing human rights.<sup>15</sup> In fact, the only commissioner who was newly appointed between July 2013 and July 2014 was also a former prosecutor. Former prosecutor Yoo Yeong-ha nominated by the ruling Saenuri Party resigned on March 7, 2014 following a scandal of receiving gratifications from a nightclub owner.<sup>16</sup>

Moreover as a public prosecutor, when he recommended a plea of not-guilty for sexual violence offenders who gang-raped a middle school girl, he was strongly criticized by women’s rights advocate organizations for severely second-victimizing the victim and her family by giving them difficulties in protecting the minimum rights of the victim, such as summoning the victim as a witness, and strongly requesting the exclusion of her parents from the court room though they had been granted permission of the court to be present.<sup>17</sup>

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<sup>15</sup> Former commissioner Ryu Guk-hyeon who was appointed in 2002 also had resigned from the prosecution position due to the bribery scandal. Therefore, when he was nominated, human rights organizations strongly protested, Ohmynews, Dec. 24, 2002, [http://www.ohmynews.com/NWS\\_Web/View/at\\_pg.aspx?CNTN\\_CD=A0000100080](http://www.ohmynews.com/NWS_Web/View/at_pg.aspx?CNTN_CD=A0000100080)

<sup>16</sup> The Hankyoreh, Feb. 20, 2014, <http://www.hani.co.kr/arti/politics/assembly/625187.html>

<sup>17</sup> Ohmynews, Feb. 27, 2014, [http://www.ohmynews.com/NWS\\_Web/View/at\\_pg.aspx?CNTN\\_CD=A0001961959&CMPT\\_CD=P0001](http://www.ohmynews.com/NWS_Web/View/at_pg.aspx?CNTN_CD=A0001961959&CMPT_CD=P0001)

As such, concerns on the independence of the NHRCK, including the lack of transparency in its commissioner's appointment process have been repeatedly raised in and out of Korea. The ICC-SCA's deferral of the NHRCK's re-accreditation was the most recent expression of such concerns. The ICC-SCA "expressed a concern about the failure of the legislation to provide a clear, transparent and participatory selection process in compliance with the Paris Principles," and noted that "it does not contain provisions to ensure diversity" and that "there is no provision in the law to provide functional immunity for its members." It is estimated that the repeated appeals of Korean civil society on the weakening independence of the NHRCK were accepted by the ICC-SCA. Korean civil society has continued to request the amendment of the NHRCK Act in this regard.

## **2.2 Terms and conditions of office**

The term of office of the Chairperson and commissioners are three years, but the consecutive appointment can be extended only once, according to the NHRCK Act. In comparison with the term of office of other trades of somewhat similar duties such as the UN Special Rapporteur, it has similar conditions of office.

In terms of the guarantee of commissioners' status, Article 8 of the NHRCK Act stipulates that "a commissioner shall not be removed from his/her office against his/her will unless he/she has been sentenced to imprisonment without labor or a heavier punishment; however, in the event it is extremely difficult or impossible for him/her to perform his/her duties due to any physical or mental handicap, he/she may be dismissed from his/her office by the resolution of consent of 2/3 or more of all commissioners."

While Article 56 of the NHRCK Act describes the punishment for a person who obstructs performance of human rights protection duties, there is no provision to guarantee the functional immunity for commissioners or staff members of the NHRCK. As a result, there has been an increasing tendency among the NHRCK staff members to consider what their supervisors in the commission think of when dealing with human rights matters, rather than international human rights instruments; as the government and the NHRCK have conducted unfair punishments or dismissal of some staff members, in particular, those who had been active in civil society movements since 2008. Subsequently, their human rights and gender-sensitivity has been undermined. In deferring the reaccréditation of the NHRCK in March, 2014, the ICC SCA reiterated its recommendation on this matter.

## **2.3 Staffing and recruitment**

The NHRCK has the "Rule on Management of Manpower in the NHRCK" regulating recruitment and attainment of its staff members and recruits them through diverse ways and channels. Moreover, it continues to hire qualified persons such as legal experts, relevant researchers, or those who have experience with working in human rights-related fields in order to enhance its members' professional capacity, while prohibiting any discrimination against women and people with disabilities in recruitment. However, the scale and composition of the NHRCK's organization are mainly dependent on governmental policy as seen in Article 18 of the NHRCK Act, which has matters necessary for the organization of the commission be prescribed by Presidential Decree and Article 16 of the NHRCK Act, which prescribes that the secretary-general (senior-most executive officer) as well as public officials of grade V or above should be appointed by the President of Korea. As such, there have been repeated concerns about the lack of autonomy in staffing and recruitment of the NHRCK.

In this regard, at the SCA Session in November 2008, the ICC-SCA stressed “the need for the NHRCK to have more autonomy to appoint its own staff.”<sup>18</sup> The UN Special Rapporteurs on Freedom of Expression and Opinion, and on the Situation of Human Rights Defenders, also recommended the government to “ensure the full independence and effectiveness of the NHRCK, including by amending existing provisions... to grant the commission full autonomy in selecting its own staff.”<sup>19</sup>

In November 2013, Korean human rights advocate organizations submitted the amendment bill of the NHRCK Act through Rep. Jang Ha-na of the leading opposition party, requesting Article 16 and 18 of the NHRCK Act to be revised to give the NHRCK the authority to make regulations and grant the NHRCK full autonomy in selecting its own staff.

### **3. Effectiveness**

#### **3.1 The Brotherhood Welfare Center case**

The Brotherhood Welfare Center Case often dubbed as a “Korea’s Auschwitz” refers to the incident that around 4,000 orphans and persons with disability were detained, forced to labor, and assaulted in a welfare center in Busan between 1975 and 1987.<sup>20</sup> The case was first revealed to the public in March 1987 when an inmate who tried to escape from the center was beaten to death by the center staff and another 35 inmates succeeded in a massive escape. However, at the court, Park In-geun, the chairperson of the board was sentenced merely to two years and six months of imprisonment, while there was no indictment made against illegal detention, violence, and death of inmates.

The co-representatives of the Fact-Finding Committee of the Brotherhood Welfare Center Incident along with 28 victims submitted a complaint to the NHRCK in December 2013, requesting the NHRCK recognize the effect of the case continues today and conduct an investigation of the case as a serious human rights violation at the national level.

The NHRCK dismissed the complaint to investigate the human rights violation against the inmates of the welfare center at the national level in January 2014. The NHRCK decided to dismiss the complaint by the reason that “the case did not occur within one year before the petition was made,” referring to the provision on the rejection of petition in Article 32 (1) 4 “In the case a petition is filed after one or more years have elapsed since the facts causing the petition occurred, provided that this shall not apply to the case if the statutory limitation for civil case and public prosecution with respect to such facts is not completed and the commission determines to conduct an investigation.”

Meanwhile, the NHRCK said it would transfer the case to the commission’s Human Rights Policy Division to review the possibility to issue a policy recommendation on the case. The Human Rights Policy Division had a meeting with the fact-finding committee to discuss measures to investigate the case in February 2014. According to the NHRCK, currently it is seeking measures to raise awareness on the issue including hosting a conference for remedy and support for victims as well as to identify current status of the victims through surveys.

While the NHRCK dismissed the case, citing the provision that “in the case a petition is filed after one or more years have elapsed since the facts causing the petition occurred,” it was only one year before the petition was submitted when the long forgotten case was made public. Moreover, the fact-finding

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<sup>18</sup> [http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/2008\\_November%20SCA%20Report.pdf](http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/2008_November%20SCA%20Report.pdf)

<sup>19</sup> <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/191/02/PDF/G1319102.pdf?OpenElement>

<sup>20</sup> Yonhapnews, Nov. 23, 2013, “Launch of Task Force to investigate the truth about Hyungje Welfare Center”, <http://m.media.daum.net/m/media/societynewsview/20131123085404755>

committee of the case was organized one month before the petition was filed. In addition, the sufferings of the victims who haven't received any remedy or compensation continue today. In this regard, the NHRCK's failing to have a positive interpretation of relevant provisions to effectively address the case should be criticized. As of July 2014, more than six months after the NHRCK said it would review the possibility to issue a policy recommendation on the case, there is no substantial progress except one meeting with the fact-finding committee in February 2014.

### **3.2 The Miryang 765kW Power Transmission Tower case**

The case is about a series of conflicts between Miryang residents and the Korea Electric Power Corporation (hereafter KEPCO) in relation with the construction and location of 765kV power transmission tower in Miryang in southeastern Korea. There have been continuous human rights violations of residents who protested against the construction of the power transmission tower by KEPCO and local police.

Consequently, the Citizen's Committee against the Construction of Miryang Power Transmission Tower requested an emergency remedy from the NHRCK for the Miryang protesters two times on September 30<sup>th</sup> and October 4<sup>th</sup>, 2013. In addition, the committee appealed the NHRCK for an emergency remedy again on November 15<sup>th</sup>, 2013, submitting human rights violations cases committed by KEPCO and police. On December 9<sup>th</sup>, 2013, the committee again submitted an emergency remedy petition to the NHRCK about the incident that the police demolished the memorial altar for You Han-sook, a resident in Miryang who poisoned herself in a protest against the transmission tower construction. Moreover, on December 15<sup>th</sup>, 2013, the late You's husband submitted a petition to the NHRCK, requesting to investigate her death and hold those responsible to account. More complaints continued including the one that the residents near the transmission tower construction site petitioned to the NHRCK that their rights were violated due to the police's restriction of passage in February, 2014.

In response to the emergency remedy request of September 30, 2013, the NHRCK simply informed the petitioner that the case was not subject to emergency remedy or investigation under the NHRCK Act since the alleged violation had not happened yet but rather is a future possibility; and it dispatched a human rights monitoring group to the site from October 1<sup>st</sup> to 2<sup>nd</sup> to monitor and prevent human rights infringements. In response to the emergency remedy request of October 4, 2013, the NHRCK dispatched investigators to the site, to whom the police promised that they would not restrict bringing food, installation of tents or access of medical staff to the site, and the police kept their promise. However, during the National Assembly inspection of the NHRCK in November 2013, it was revealed that the NHRCK didn't bring the emergency remedy request to the attention of the standing committee.<sup>21</sup>

Regarding the restriction of passage, the NHRCK concluded that it was not subject to an emergency remedy case. According to the NHRCK, for a case to fall within the scope of the matters subject to an emergency remedy, there should be a possibility of continuing human rights violation and of irrecoverable damage unless an action is made to address the problem. The NHRCK found the restriction of passage did not meet the two conditions. At that time, the NHRCK announced that "the problem was solved through a verbal promise from the police and KEPCO to prevent any more human rights violations and we found there would be no human rights violations serious enough to be

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<sup>21</sup> Emergency remedy requests are to be discussed and decided by the standing committee, however after the Jinju Medical Center case, in April 2013 the NHRCK established internal rules to provide individual investigators the authority to decide whether an emergency remedy request is brought to the standing committee or not, which is contrary to the NHRCK Act. Pressian, Nov. 27, 2013, <http://www.pressian.com/news/article.html?no=110341>

included in the agenda of the standing committee meeting” but it would “continue to investigate the case as a general petition ... as it is an important issue related with the freedom of movement which is one of the fundamental rights guaranteed in the Constitution.”

The NHRCK dismissed the emergency remedy request on the restriction of passage, although it was not a separate case but related one as it was closely related to the bringing of food. Moreover, it was only on February 10, 2014, more than four months after the submission of the petition when the general petition on the restriction of passage was finally deliberated at the plenary committee. At the deliberation on the case at the plenary committee, the NHRCK concluded that the restriction of passage by the police did not infringe upon freedom of action or freedom of assembly and association.<sup>22</sup> Instead, the NHRCK expressed an opinion to the chief of the Gyeongnam Provincial Police Agency that it is desirable to carefully decide and manage the security area to prevent human rights violation and inconvenience in daily lives and passage of residents, pursuant to Article 25 of the NHRCK Act.

In response to the emergency remedy request of December 9, 2013, related to the memorial altar of a resident who poisoned herself, the NHRCK conducted field investigations on December 9, 10, 12, and 13, 2013. During the investigations, the NHRCK suggested a mediation proposal to establish a memorial altar at a third place. And on December 19, 2013, the standing committee decided not to provide emergency remedy. However, on January 28, 2014, a new complaint with the same content was submitted again, and investigators were dispatched to the site on the day. During the investigation, the complainant accepted the mediation proposal suggested by the NHRCK and as a result, a memorial altar was established at a third place.

As such, the NHRCK failed to provide appropriate prevention, protection, and remedy of human rights violations of Miryang residents, except in mediation for the site of memorial altar and expressing an opinion to the chief of the Gyeongnam Provincial Police Agency. Emergency remedy requests in relation with the restriction of passage were not brought to the standing committee or dismissed. The NHRCK didn't decide on the petitions on the physical and verbal assaults of residents by the police which were submitted on November 15, 2013 and December 8, 2013 even after more than eight months, as of July 2014.

More importantly, the NHRCK issued a recommendation, suggesting the prior restriction of citizens from participating in a demonstration to be excessive in 2010. In this regard, the NHRCK's decision in the Miryang case that the restriction of passage is not an infringement of human rights demonstrates that it has regressed from its previous position and raises concerns as to whether the NHRCK was reluctant to make a critical judgment on the issue as the construction of the Miryang power transmission tower is government policy. On June 11, 2014, serious human rights violations were caused by the police and KEPCO during the administrative execution of action, demolishing Miryang residents' sit-in sites. The NHRCK's human rights monitoring team dispatched to the site were unable to prevent or stop these human rights violations.

### **3.3 The discrimination against people with HIV/AIDS at the Sudong Yonsei Sanitarium Hospital case**

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<sup>22</sup> In deciding, the NHRCK referred to the following reasons: the restriction had a reasonable purpose of preventing crimes such as interfering the construction, and protecting the residents, most of whom are the elderly, at mountainous area; the court has granted an injunction prohibiting some of residents interfering construction by blocking the access or traffic to the construction site; the police can decide on the area for security, considering the lay of land and aspects of anti-construction demonstration; there was no sufficient evidence to suggest that there exist more appropriate area for security other than the existing area; and compared to graveness of the reason or the need to restrict the residents' basic rights, the level of restriction was not great.

In Korea, there is no long-term hospital care facility for people living with HIV/AIDS. Korean medical care system is divided into acute care and long-term care. However, long-term care hospitals refuse admission of AIDS patients. It is mainly because of public fear of and prejudice against people with HIV/AIDS. Moreover, it is also restricted by law.<sup>23</sup> In this regard, the Ministry of Health and Welfare selected the Sudong Yonsei Sanitarium Hospital as the implementing organization of the long-term care project for AIDS patients with severe mental illness and commissioned the project from the hospital in accordance with the Prevention of Acquired Immunodeficiency Syndrome Act from March 2010.

The Sudong Yonsei Sanitarium Hospital shaved the heads of AIDS patients against their will, turned off the lights at 9 pm, forced them to attend worship, monitored their use of telephone, and prohibited them from going out of the premises. ‘AIDS’ was a taboo word at the hospital and people with HIV/AIDS were restricted from having contact with other patients. By the end of 2012, the hospital had no caregivers for AIDS patients and began using other patients whose health condition was better than that of others and had received the relevant training commissioned by Korea Centers for Disease Control and Prevention in this capacity.

The hospital forced these fellow caregivers to monitor other patients, clean AIDS patients’ ward and clothes, and even wash and dress a corpse when a person with AIDS died at the hospital. They had to do suctioning or changing the dressing of bedsores which are duties of medical staff. As AIDS patients and caregivers knew the hospital was the only long-term care facility to accept people with HIV/AIDS, they endured human rights violations and discriminations for years.

In August 2013, an AIDS patient in his 30s died 13 days after he was admitted to the hospital. He had an emergency surgery due to tuberculosis peritonitis at a university hospital. After two months of treatment at the university hospital, he was discharged and introduced to the Sudong Yonsei Sanitarium Hospital. When he was admitted to the Sudong Hospital, he informed the hospital that his doctor at the university hospital ordered him to have intravenous hydration treatment for a while.

However, the Sudong Hospital rejected his request, saying “if you want to have an intravenous drip, go to another hospital.” A few days before his death, he had difficulty in breathing and requested the hospital to transfer him to a university hospital. However, his request was denied again.

On November 15<sup>th</sup>, 2013, KNP+ (Korea Network for People Living With HIV/AIDS) filed a petition to the NHRCK, urging the Sudong Yonsei Sanitarium Hospital and Korea Center for Disease Control and Prevention to be held accountable for the discrimination against AIDS patients and for the negligence of the duty to supervise respectively.

However, the NHRCK rejected the petition, saying “the facts in the petition don’t constitute the conditions necessary for special relief measures” on April 24<sup>th</sup>, 2014. The NHRCK explained that it considered general factors such as “Korea Center for Disease Control and Prevention conducted an investigation on the conditions of the hospital in December 2013, found it unqualified for the project based on the inspection result, suspended the grant project in 2014, has been identifying other facilities to treat the patients, and has commissioned the supervision authority to Namyangju-si Public Health Center (the main center in the northern Gyeonggi district) which governs the area where the Sudong Hospital is located.”

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<sup>23</sup> Article 36 of Enforcement Regulations of the Medical Service Act prescribes that “patients with contagious diseases shall not be hospitalized at the long-term care facility,” providing legal grounds for long-term care facilities to reject people with communicable diseases including AIDS patients.

However, neither fact-finding investigation nor discrimination remedy was accomplished. Moreover, the Ministry of Health & Welfare and Korea Centers for Disease Control & Prevention haven't made any contract with a new sanitarium hospital for AIDS patients even after the commissioning contract with the Sudong Yonsei Hospital was cancelled in January 2014. While five in-patients were transferred to National Medical Center, 41 patients are still in the hospital without any follow-up measures. Besides, at present, many AIDS patients have nowhere to turn, after acute care at a general hospital, for long-term residential care. Unless the NHRCK changes its position and steps up with proactive actions, patients with HIV/AIDS risk of deprivation of the right to life.

### **3.4 Bureaucratization of the NHRCK staff members**

The Chairperson who lacks proper qualification undermines the capacity of the secretariat to defend human rights; while general administrative officials dispatched to its secretariat are making the NHRCK ineffective.

The appointment and reappointment of Hyun Byung-Chul, who has no background in human rights, has continuously aggravated the NHRCK's independence and effectiveness. The rollback accelerated the appointment of commissioners with no human rights-related background without fair and transparent procedures.

The Chairperson being indifferent to human rights also brought a big change into the structural quality of the staff. Since the establishment of the NHRCK in 2001, many of the high positions were comprised of human rights defenders who have experience in civil society organizations and human rights experts with related academic degrees. While some public officials from general administration department of government agencies were transferred to the NHRCK to give administrative support, they were few in number.

Since 2009 when Hyun was appointed as the Chairperson, however, the ratio and the structure of the NHRCK staff changed significantly. Many with expertise in policy development, investigation and relief of human rights violations left the NHRCK, criticizing Hyun's unilateral management. Their positions were filled with former public officials from the area of general administration.

Among the four executives of the NHRCK secretariat, three including the Secretary-General and two Director-Generals are former administrative public officials.

Taking the NHRCK's merely perfunctory investigation and relief activities into consideration, it is doubtful whether the bureaucratic management fosters greater bureaucracy and spreads complacency and an apathetic attitude among the staff members. If such a trend persists for years, the NHRCK will become a byword for an incurable and ineffective institution.

Bureaucratization and lack of awareness of human rights of the NHRCK staff are proven by many cases. One of the examples was when the NHRCK was holding a session for training lecturers of human rights for persons with disabilities. There were disabled people participating in the session, for whom the NHRCK ignored full provision of convenience. Disability rights defenders held a press conference where one activist demanded the NHRCK that "it should give human rights education to its entire staff including the Chairperson in order to prevent recurrence of such a thing and the Chairperson should apologize."<sup>24</sup>

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<sup>24</sup> BeMinor. 2013.6.20 The disabled people not allowed in the NHRCK's human rights education session, <http://beminor.com/news/view.html?section=1&category=4&no=5500>

## 4. Engagement with other stakeholders

### 4.1 Civil Society

In regards to the accessibility of civil society, one of the most important things is opening the entire decision procedure on complaints to the NHRCK to the public. Article 14 of the Human Rights Commission Act stipulates that the proceedings of the commission shall be made public in principle. However, it also has the provision that “provided that they may not be made public if deemed necessary by the commission, standing commissioners committee or subcommittees.” Based on the provision, the NHRCK has run many of its meetings and the minutes of the meetings closed to the public. Human rights defenders criticize the NHRCK for abusing the provision even in case of issues which have no concerns on the privacy of the victims.<sup>25</sup> Therefore, civil society including human rights advocate organizations repeatedly recommend the NHRCK Act should be amended to limit the provisory clause to only when the privacy of petitioners will be at risk of exposure.

Moreover, the names of persons making comments are deleted when the minutes are made public, in particular, even in its submission to the National Assembly. While other public organizations, such as the National Assembly and Korean Communication Standards Commission, make the minutes of their meetings public, disclosing the names of lawmakers or commissioners of speeches, only the NHRCK keeps the minutes hidden from the public, demonstrating there are serious deficits in the transparency of the NHRCK’s operation and discussion.

In 2013, Rep. Jang Ha-na of the Democracy Party, the leading opposition party submitted an amendment bill. The bill has provisions to guarantee the independence of the NHRCK (in managing human resources and budget, and rule-making), the transparency and democratic operation (making the meetings and the minutes public and reduction of reasons for non-disclosure of information), the enhancement of the commission’s functions to provide remedies for human rights violation (the reduction of reasons for dismissal), and establishment of selection and assessment procedures for commissioners (the organization of the candidate recommendation committee participated by civil society).

The NHRCK explains that it is committed to protecting and promoting human rights through exchange and cooperation with individuals, human rights-related domestic and foreign groups, and international human rights organizations, in accordance with Article 19 (8) and (9) of the NHRCK Act.

According to its Annual Report for 2013, the NHRCK held round tables in some areas without regional human rights offices such as Chuncheon, Gangneung, and Sockcho in Gangwon province for the purpose of promoting human rights in regions and invigorating civil societies. It also established its fourth regional office in Daejeon. Moreover, it said, the NHRCK has continuously carried out collaborative projects with other human rights organizations, for cooperation with civil society organizations and selected 14 projects and provided total financial support of KRW115 million for the implementation of the projects. It also claimed that the chairperson visited human rights organizations and group protection facilities to listen to the voices of those involved with human rights issues, and made efforts to reflect their opinions on the commission’s activities.<sup>26</sup>

However, in practice, the NHRCK completely lost the confidence of civil society. It is because the NHRCK has failed to fulfill its mandates stipulated not only in the Paris Principles and the ICC-SCA

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<sup>25</sup> Interview with human rights defender A.

<sup>26</sup> The NHRCK, *Annual Report 2013*, p. 229.

General Observations but also in the NHRCK Act as its independence has been undermined and those who have no experience with human rights matters, even some of whom had been involved in human rights violations have been appointed as its commissioners since 2008. While the ICC-SCA General Observations 1.2 (human rights mandate) prescribes that all national human rights institutions should be mandated with specific functions to both promote and protect human rights and protection functions include monitoring, inquiring, investigating and reporting on human rights violations, and may include individual complaint handling, the NHRCK has frequently ignored urgent human rights violations.

The NHRCK also fails to fulfill its mandate to function as a national preventive or monitoring mechanism, prescribed in the ICC-SCA General Observations 2.9. Moreover, the NHRCK hasn't put effective and sincere efforts to consult and cooperate with civil society organizations on pressing human rights matters. As it lost the confidence of Korean civil society, the civil society became more reluctant or even resisting cooperation or consultation with the NHRCK. The majority of civil society organizations that raised concerns over the NHRCK's unfaithful and perfunctory attitude didn't take part in a meeting with the NHRCK when it proposed the meeting with civil society in June 2014, regarding the ICC-SCA's deferral of the NHRCK's re-accreditation.

The process of organizing and operating a joint committee with civil society to develop a guideline for selection of its commissioners in July 2014 also revealed concerns. While transferring the burden of developing the guideline to the committee, it didn't grant the guarantee of reflecting the committee's opinions in the final guideline to be made by the NHRCK. Such an attitude of the NHRCK on the engagement with civil society raises doubts about whether it sees the cooperation with civil society merely as a one-time alibi to show off to the ICC-SCA.<sup>27</sup>

## **4.2 Parliament**

According to Article 29 of the National Human Rights Commission Act, the commission shall prepare an annual report on its activities for the preceding year, including the human rights situation and any improvement measures, and report thereon to the president of the Republic of Korea and the National Assembly. Moreover, the NHRCK is subjected to parliamentary inspection.

## **4.3 Judiciary**

Article 28 of the National Human Rights Commission Act describes that where a trial, which significantly affects the protection and promotion of human rights, is pending, the commission may, if requested by a court or the Constitutional Court or if deemed necessary by the commission, present its opinions on de jure matters to the competent court or the Constitutional Court.

However, Article 32 of the same Act says that the commission shall reject a petition where it is filed before the commission at the same time as a trial at a court or the Constitutional Court, a criminal investigation by an investigation agency or a procedure for the relief of rights under any other act is in progress or terminated with respect to the facts causing the petition.

According to its Annual Report, from November 2001 when the NHRCK was established to December 2013, the NHRCK submitted only a total of 19 opinions to the court of law or the Constitutional Court, with not a single opinion submitted in 2012 and 2013.

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<sup>27</sup> Korean House for International Solidarity joined the joint committee in the beginning, but soon resigned, frustrated at the NHRCK's unfaithful and irresponsible operation and process.

In addition, the Annual Report 2013 reads that accusations and requests for criminal investigation were recommended for only one out of 360 complaints admitted in 2013 on human rights violations. The result of the case in the prosecution is not identified.

## **5. Thematic Issues**

### **5.1 Shrinking civil society space in terms of freedom of expression/association/peaceful assembly**

Since 2008, Korean civil society has experienced persistent shrinking and infringement on freedom of expression/association/peaceful assembly. Despite repeated concerns expressed by the UN organizations including the UN Special Rapporteurs, international agencies such as the ICC and domestic and international NGOs, the situation hasn't been improved even after the inauguration of the Park Geun-hye administration in 2013. Further, the NHRCK has failed to initiate not only promotion of freedom of expression/association/peaceful assembly, but also protection of human rights defenders.

The NHRCK's silence on the police's excessive crackdown of candlelight vigils and peaceful demonstrations of victims, their families and citizens after the Sewol ferry sinking tragedy of April 2014 is a representative example.

The Sewol ferry sinking incident of April 16<sup>th</sup>, 2014 took about 300 lives. Raged citizens took to the streets, asking the government and the responsible to be held accountable. However, the government mobilized the police to crack down the protests. The police blocked the marching citizens who had only chrysanthemum and placards in their hands, by force. Many were also arbitrarily arrested. Though Article 21 of the Constitution of Korea clearly describes that "licensing of assembly and association shall not be permitted," the government notified the prohibition of assembly and association for 61 places near the Blue House on June 10<sup>th</sup>, 2014.

Between May 17<sup>th</sup> and June 10<sup>th</sup>, more than 300 citizens were arrested and five among them were imprisoned. In addition, many were reported to be wounded during the excessive crackdown of the police. The police restricted the passage of citizens around the National Assembly and the Blue House and even checked up on passers-by who held a yellow ribbon on their chest to commemorate the victims. Moreover, the police was alleged to conduct illegal surveillance of family members of victims of the Sewol tragedy.

In the wake of the Sewol tragedy, the freedom of expression and opinion as well as the freedom of association and assembly has been seriously infringed, however, the NHRCK has not expressed any opinion on the human rights violations, needless to say, not conducting ex-officio investigation.

Today, the citizens' candlelight vigils and the police's suppression in relation with the Sewol tragedy are very similar in the nature with the candlelight vigils of 2008. In 2008, the ICC-SCA encouraged the NHRCK "to consider issuing public statements and reports through the media in a timely manner to address urgent human rights violations" such as the action taken during the candlelight vigils of 2008.

The UN Special Rapporteur on Freedom of Expression in 2010 and the UN Special Rapporteur on Human Rights Defenders in 2014 also recommended the NHRCK to "ensure timely interventions, responsiveness and accessibility of the institution to all citizens and actively engage with all groups of human rights defenders; and remain seized of such situations as those in Miryang and Jeju Island."

Human rights advocate organizations filed petitions to the NHRCK on June 10<sup>th</sup>, 2014. As of June 30<sup>th</sup>, 2014, there has been no action or expression of opinion taken by the NHRCK.

As such, the NHRCK fails to fulfill its human rights mandate prescribed in the ICC-SCA Generation observations 1.2 and 2.9.

## **5.2. Implementation of ACJ References**

In response to the questionnaire on implementation of ACJ References by NHRIs prepared by the ANNI Secretariat, the NHRCK answered that “the NHRCK does not frequently refer to the ACJ References, but believes that the ACJ References are useful in standards establishment, implementation/application of international laws and standards, and provision of information through reviews of each cases.” However, the NHRCK failed to present a specific case where the ACJ References were referred. In fact, among complaints admitted in 2013, no case referred to the ACJ References.

### **5.2.1 ACJ Report: Human rights, sexual orientation and gender identity**

A positive case in which the NHRCK tried to conform with relevant international laws and standards, while not specifically referring to the relevant ACJ recommendations, is in relation to sexual orientation and gender identity.

Compared with other minority issues, the dialogue concerning sexual orientation and gender identity is relatively undeveloped. This can be proven simply by looking at the number of complaints registered to the NHRCK regarding acts of discrimination. Of the 15,560 cases, the total number of the complaints registered from 2001 to 2013, only 56 cases are regarding sexual orientation, which is the 4<sup>th</sup> lowest number after the number of complaints made due to skin color (9 cases), ethnicity (12 cases), and ideology (34 cases).

An underlying reason why the number of complaints that were registered is very low is due to lack of awareness in regards to sexual orientation, not because of the low level of discrimination regarding sexual orientation in Korean society. Considering that sexual orientation and gender identity is one of the most important minority issues in international society, the fact that the awareness level, in regards to the issue of sexual orientation, is so low should be reconsidered. Thus, the effort on awareness building about the issue is very necessary.

Based on the belief that discrimination against persons of diverse sexual orientations and gender identities is significantly severe in many countries in the Asia Pacific region, some Human Rights experts came up with the “Yogyakarta Principles: The Application of International Human Rights Laws in relation to Sexual Orientation and Gender Identity” in 2006.

In addition to this, the Asia-Pacific Forum of National Human Rights Institutions (APF), at its workshop in Indonesia in 2009, discussed the role of National Human Right Institutions in order to promote the implementation of the principles, and it also called on the ACJ to provide advice or recommendations regarding the consistency or inconsistency of some specific laws on sexual orientation and gender identity in the Asia Pacific region in accordance with international human rights laws.

As a response to this, ACJ made recommendations to conduct research regarding Human Rights violations towards persons of diverse sexual orientations and gender identities, to promote dialogue between people and organizations that advocate or are of diverse sexual orientations and gender

identities, and to make sure they enjoy all available human rights, including the right to be free from discrimination.

Regarding the prohibition on the discrimination due to sexual orientation and gender identity and the promotion of the human rights of sexual minorities, the NHRCK, however, did not pay special attention to the review of relative domestic laws if they coincided with international human rights laws, internal capacity building and research, or the promotion on the dialogue among stakeholders. Particularly regarding the issue that the ACJ specifically pointed out where Article 92 (6), of the Military Criminal Law,<sup>28</sup> criminalizes same sex sexual conduct in the armed forces, the NHRCK had neither conducted the review about the issue, nor expressed its stance.

However, regarding the ACJ recommendation that says sexual minorities should enjoy all available human rights including their right to be free from discrimination, the NHRCK made its recommendation and partial acceptance in a complaint regarding a local government disallowing the display of a banner regarding sexual minorities.<sup>29</sup> It also issued recommendation in favor of the complainant in a case concerning not granting permission for use of a public venue for the ‘Coming-Out Cultural Festival’.

In November 2012, the Mapo Rainbow Resident Solidarity wanted to display a banner proclaiming “LGBT, We Live Right Here Right Now – One out of ten passers-by here is a sexual minority” at three different designated spaces. However, the Mapo-gu (district) office did not approve the display of the banner, citing reasons such as “an exaggerated expression that says “one out of ten passers-by” can make people who see the banner become confused about their sexual orientation”, and “LGBT is such a direct expression that it is harmful to teenagers”, etc. Therefore, Mapo Rainbow Resident Solidarity submitted a complaint to NHRCK in December 2012.

On June 21, 2013, six months after the application, the NHRCK concluded that this was a violation of the right to freedom of expression, and was thereby discrimination of sexual orientation, and made a recommendation to not repeat such decisions in the future. The NHRCK expressed that Mapo-gu office “conducted an excessive review on the content of the banner, and further stopped the applicant from displaying the banner, which is considered a violation of Article 21 ‘Freedom of Expression’ in the Constitution”, and it judged that “it is a discriminative approach due to sexual orientation when the content of the banner had to go under exceptional review in regards to its objectivity and propriety, thus this act of the defendant is ‘a discriminative act of the violation to the right to equality’ of Article 2.3 in the NHRCK Act. Therefore the NHRCK made the recommendation to the defendant: 1. To make sure that any outside banner whose content is related to sexual minorities is not excluded when it comes to the display of the outside banner in its jurisdiction; 2. To conduct Human Rights education regarding ‘Prohibition on discrimination to sexual minorities’ to its staff members in the relevant departments.”<sup>30</sup>

The NHRCK announced its investigation result six months after the complaint was made, which was

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<sup>28</sup> Rep. Kim Gwang-jin moved to amend the military criminal law on the account that “the military is currently punishing same sex sexual conducts that are not even regulated in the Criminal Law, and the Human Rights of homosexuals in the military is exceedingly violated especially by the law calling such acts ‘Gye-gan’ which translates as ‘sexual acts between chickens’”. Press release from Kim Gwan-jin’s office, 20<sup>th</sup> March, 2013 <http://bluepaper815.kr/ct0302/1026>

<sup>29</sup> In 2013, the number of the complaints made due to the act of discrimination was eight, and one case received its recommendations whereas the rest got dismissed or rejected.

<sup>30</sup> On December 26, 2012, the NHRCK also made its recommendations to Seocho-gu Office that the disapproval of an application to display a banner that condemned the discrimination of sexual minorities is an act of discrimination without reasonable grounds, and that the office should come up with its countermeasure not to disapprove a display of advertisements whose content is about homosexuality or sexual orientation again.

long past the three month duration of the investigation prescribed in the NHRCK Act; and only after a press conference of human rights organizations, including the Mapo Rainbow Resident Solidarity, in protest against the delay.

However, the fact that the NHRCK had made an actual practical recommendation, such as conducting human rights education to the relevant staff members, which complies with the ACJ recommendations, can be considered as a positive handling of the case. Along with this effort, human rights defenders expect the NHRCK to implement the overall ACJ recommendations, including the legal and systemic review and modification of the Military Criminal Law.

## **6. Conclusion and Recommendations**

The NHRCK was established in 2001 as the fruit of two years of efforts by Korean civil society and was highly recognized as the role model of NHRIs in the Asia Pacific region for protection and promotion of human rights. Since the Lee Myung-bak administration from 2008, however, its independence and effectiveness has only regressed with the Lee administration's efforts to place it under the control of the president. In 2008, the NHRCK was given the ICC-SCA status 'A' but was at the same time issued recommendations regarding the same two concerns. Similar concerns were continuously raised and recommendations for betterment were given by the UN Special Rapporteurs and various international organizations and NGOs. Unfortunately these international and domestic efforts could not bring changes to the NHRCK.

As is evident from the cases of the Brotherhood Welfare Center, Miryang 765kW Power Transmission Tower, the Sudong Yonsei Sanitarium Hospital, and candlelight vigil for Sewol ferry victims discussed above, the NHRCK is still not independent nor effective even in the new Park administration. In March 2014, the ICC-SCA pointed out that the NHRCK had not implemented the recommendations made in 2008, and deferred its reaccreditation.

The civil society organizations lost confidence in the NHRCK after it failed to fulfill its mandates of promoting and protecting human rights including monitoring, inquiring, investigating and reporting on human rights violations, and to function as a national preventive or monitoring mechanism. Korean human rights advocate organizations established a network, 'NHRCK Watch', during the struggle to stem the government's attempt to reduce the NHRCK's human resources in 2009. Since then, the NHRCK Watch has regularly monitored the NHRCK proceedings and decisions and raised questions over the lack of transparency of its management and independence in its activities.

In November 2013, Rep. Jang Ha-na of the Democratic Party, the leading opposition party submitted an amendment bill of the NHRCK Act on behalf of the concerned civil society. The bill has provisions to guarantee the independence of the NHRCK, establish a fair and transparent appointment process of commissioners, limit reasons to dismiss petitions, and enhance transparency in its management. The concerned bill, however, is still pending as of July 2014 and the NHRCK has only ignored civil society's demands or given excuses.

The NHRCK even tried to shirk its responsibility on the ICC-SCA's deferral of the NHRCK's reaccreditation. It was only after the civil society found out about the deferral and both domestic and international criticisms were heightened, that the NHRCK requested civil society's participation in preparing a guideline for selection of its commissioners. Even after the joint committee to develop the guideline was launched, the NHRCK set a limit on the contribution of the committee, saying that its opinions might not be fully reflected in the final guideline to be made by the NHRCK. Such attitude cast doubt on the NHRCK's intention that the joint committee is only a perfunctory measure to show to the ICC-SCA rather than actual cooperation with the civil society. Korean civil society,

disappointed by the NHRCK's non-cooperative attitude, even suggested that the NHRCK be downgraded as a warning message to urge its practical improvement in their joint submission to the ICC-SCA.

In order for the NHRCK to become an institution that effectively protects and promotes human rights and fulfills its mandates as stated in the Paris Principles, the ICC-SCA General Observations, and the NHRCK Act, substantial measures are to be made urgently to practically improve its independence and effectiveness.

## **6.1 Recommendations**

### **To the Government:**

- The Korean government should stop undermining the independence of the NHRCK. The NHRCK should be the body that the socially disadvantaged can turn to and be a practical body to promote human rights in Korean society. To that end, the NHRCK should be an independent body to prevent and monitor human rights violations committed by the authorities.

### **To the National Assembly:**

- As the ICC-SCA reiterated in its recommendations of 2008 and 2014, due to the fact that the NHRCK is not an independent constitutional body and that it is considered as a central government institution under the National Fiscal Act, the government has effective power over the NHRCK, undermining the independence of the NHRCK. Therefore, the National Assembly should include the provision to ensure its independence in the NHRCK Act, list the NHRCK as an independent body in the National Fiscal Act, and revise the relevant provisions of the State Public Officials Act.
- As Article 18 of the NHRCK Act prescribes "matters necessary for the organization of the Commission shall be prescribed by Presidential Decree," the NHRCK cannot be free from the government. Therefore, the NHRCK should have the authority to make regulations like the Court of Law and the Board of Audit and Inspection. In addition, human rights groups suggested revising Article 16 of the NHRCK to ensure the NHRCK has the authority to appoint its own staff, so that the NHRCK members will no longer be afraid of disadvantages, such as dismissal, due to expressing opinions contrary to that of the government.
- The National Assembly should establish appropriate procedures to assess and appoint the NHRCK commissioners such as a candidate recommendation committee where civil society can be fully engaged to guarantee independence and diversity of the commissioners.
- In recent years, the NHRCK has mainly referred to the rejection of petition provision or the provisory clauses, in avoiding urgent human rights matters or providing impunity. Therefore, it is recommended that the National Assembly revise Article 32 (1) 4 of the NHRCK Act "in the case a petition is filed after one or more years have elapsed since the facts causing the petition occurred..." to "in the case a petition is filed after three or more years have elapsed since the facts causing the petition occurred..." and delete the provisory clause of Article 32 (1) 7 "in the case the Commission deems it inappropriate to investigate a petition."

### **To the NHRCK**

- Without transparency, the NHRCK cannot help but be estranged from civil society. As a public institution, the NHRCK should guarantee the accessibility of citizens by making its meetings, the results, and the minutes of the meetings public.
- The NHRCK should investigate and express its opinion immediately on urgent and important human rights issues. The NHRCK should proactively deliver international standards or recommendations on important human rights-related issues such as the National Security Act; the freedom of association and assembly; and defamation to the legislative, administrative, and judiciary bodies. The NHRCK should maintain a consistent and active attitude toward addressing human rights violations against citizens during diverse assemblies and protests. Moreover, the NHRCK should comply with international standards on the freedom of expression when handling petitions or expressing opinions on governmental policies related to significant human rights violations against the freedom of expression and in the process of citizens' protest against major national development projects.
- The surveillance on its staff members and abuse of its authority over personnel affairs inevitably hinders its staff members from independently fulfilling their mandate as a human rights defender. Therefore, in accordance with the ICC-SCA's recommendations, the NHRCK should stop punishing its staff members simply because they have different opinions on human rights-related issues. The surveillance on its staff members and abuse of its authority over personnel affairs should be stopped. As the NHRCK staff members are the ones who actually investigate human rights-related sites and meets victims firsthand, they should be equipped with human rights-sensitivity. Therefore, regular education or a training session on international human rights standards and human rights sensitivity should be provided.
- The NHRCK's internal rules on the procedures and standards to handle emergency remedy requests should be revised in accordance with the NHRCK Act. The rules provide individual investigators the authority to decide whether an emergency remedy request is brought to the standing committee or not. This provision is contrary to the NHRCK Act which prescribes that emergency remedy requests are to be discussed and decided either by the standing committee or plenary committee due to their urgency. Emergency remedy requests should be decided by the standing committee or plenary committee, not by an individual investigator.

# TAIWAN: YEAR OF TURBULENCE

## Taiwan Association for Human Rights<sup>1</sup>

### 1. Overview

2014 is the year of turbulence in Taiwan civil society. The Taiwanese government conducted a black-box' (secretive) operation in its negotiation of a Cross-Strait Service Trade Agreement between Taiwan and the People's Republic of China, which affects the Taiwanese significantly, but with no appropriate consultation with stakeholders who may confront tough competition from mainland Chinese capital and labor. Also the ruling party refused to accept the will of people to halt the construction of the fourth nuclear power plant which causes serious safety concerns to the public. When more and more people took to the streets in protest, they faced deliberate impediments, vicious dispersal, or violence from the government.

Facing its poor support rate, the government of Taiwan attempted to reverse the situation by conducting capital punishment. The government ignored procedural justice and fair trial, which reveals its tendency to violate human rights.

Due to the failure to make the administrative authority accountable, the dereliction of duty of the legislature, and the submission of the judiciary, the Taiwanese people have started to question the current political system and discuss the possibility of direct democracy, deliberative democracy, and constitutional reform.

In this trend of citizen awakening, constructing a mechanism, which will protect peoples' rights and ensure the rights of the minorities in cases of reactionary populism – in the form of an independent national human rights institution – can improve the deficiencies of Taiwan's current political system. Human rights defenders are urging the people and the government of Taiwan to protect human rights and complete the social and political reforms of democratization.

### 2. Government Initiatives

To follow-up the concluding observations of Taiwan's initial human rights reports for the two international covenants,<sup>2</sup> the Presidential Office Human Rights Consultative Committee (POHRCC)

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<sup>2</sup> See 2013 ANNI Report, pp. 277-281, <http://www.forum-asia.org/?p=16848>.

constituted four working groups; and one of which is on the establishment of a National Human Rights Institution and comprises five committee members.

This five member working group aims at responding to the 81 points mentioned in the concluding observations and recommendations by 10 international human rights experts. The experts urged the government of Taiwan to establish an independent national institution that promotes and protects human rights.

#### (1) The government of Taiwan and the Presidential Office Human Rights Consultative Committee

Before the end of 2013, the POHRCC mainly completed two tasks. The first one was organizing four meetings with foreign ambassadors, official representatives from the five Yuans,<sup>3</sup> NGOs, and experts respectively, and collecting their opinions and ideas on an NHRI. The second one was a visit to United States of America and Canada to understand the circumstances of national institutions for human rights there.

The working group will submit its proposal for the establishment of a National Human Rights Institution in July 2014, which is now being prepared by the staff of the Department of Legal System, Ministry of Justice. After the approval of the government of Taiwan and the POHRCC, the Executive Yuan will submit its version of the NHRI bill and start the legislative process.

So far, the draft bill of the NHRI in the POHRCC's proposal has no significant difference from the civil society version. The content of both drafts will be explained below. The government offers two options for the NHRI's institutionalization: one is under the Presidential Office, and the other is under the Executive Yuan. So far, we have no idea which one is picked in their final proposal and NGOs have decide not to argue with the issue of institutionalization at this time, in the interests of early establishment of the national human rights institution.

#### (2) Challenges from other government branch, the Control Yuan

Meanwhile, the Control Yuan (CY – the constitutional body with oversight of administrative violations, similar to the Office of the Ombudsman in some countries), also expresses its ambition to become a fully-fledged national institution for the promotion and protection of human rights, which is

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<sup>3</sup> In the constitution of the Republic Of China (Taiwan), there are two additional branches of government in addition to the three branches familiar in Western systems of government. The five branches or Yuan are: Executive Yuan (Administrative Branch), Legislative Yuan (Law-making Branch), Judicial Yuan (Judicial Branch), Control Yuan (Ombudsman) and Examination Yuan (Public Service).

in compliance with the Paris Principles. In March 2014, the CY proposed three options for its transformation into an NHRI.

From the viewpoint of NHRI advocates from civil society, this response reflects CY's concerns to safeguard its own existence and is an obstacle to the establishment of a Paris Principles compliant NHRI in the future. The CY's performance in the protection of human rights is poor, and the words and deeds of the CY President are unbelievably absurd, which includes the shielding of several criminal incidents, which involve figures of the ruling political party.<sup>4</sup> The CY's impeachment of these political cases failed and shows that the Control Yuan cannot function independently.<sup>5</sup> Even the outgoing CY President Wang Chien-Hsien has said publicly that "The nation would benefit greatly from the abolishment of the CY" and that "the CY is an organization encouraging political reward and wasting public money."

The 29 candidates of the CY's fifth Council (term of service: 2014-2020) have been highly criticized as the worst ever nomination for President Ma Ying-Jeou's political gains and not beneficial to the nation. At the end of July, more than one thirds of nominees were rejected by the Legislative Yuan.<sup>6</sup> Although the CY can continue with 17 members, the outcome will undoubtedly have a major impact on its future operations and crumbling credibility.

### **3. Civil Society Responses**

In response to the official time frame, TAHR and other NGOs have also been working on the civil society version of a draft bill for establishment of a national human rights institution in Taiwan. We believe that the components on pluralism, transparency and diversity of the appointed members should be improved in the POHRCC draft. In the section below, the two drafts by the MOJ and NGOs are discussed.

#### **3.1 Independence and Effectiveness**

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<sup>4</sup> For example, in a typical political case last November, the Control Yuan failed to impeach the prosecutor-general, Huang Shih-Ming, who was found guilty by the Taipei district court for leaking confidential information to President Ma Ying-jeou <http://www.taipeitimes.com/News/front/archives/2013/11/29/2003577904>. For background, please see Section F "Rule of Laws" in Freedom House 2014 Taiwan report, <http://freedomhouse.org/report/freedom-world/2014/taiwan-0#.U7Swm5SSyUY>.

<sup>5</sup> Again, Control Yuan fails to impeach Keelung mayor, a local politician from the ruling party, <http://www.taipeitimes.com/News/taiwan/archives/2013/08/14/2003569666>.

<sup>6</sup> <http://www.taipeitimes.com/News/front/archives/2014/07/30/2003596232>.

To ensure the Commission's independence, the Executive Yuan will have no power to reduce the Commission's annual budget. This means that the Legislative Yuan is the only branch that deals with the Commission's finances (Article 10). Second, no Commissioner can be removed from office unless he or she is found guilty of a criminal offence or has been indicted (Article 5). Third, the Commission will have the power to enact rules for its meetings and procedures. Both drafts have the similar regulations to protect the independence of NHRI in financial and its individual commissioner.

In both drafts, Article 2 illustrates the core functions of the NHRC. It includes proposing national human rights policies (Item 1); reviewing the laws and regulations, and to propose amendments to these and legislative bills in accordance with international human rights standards (Item2); issuing independent national human rights reports, both annual and thematic (Item 3); and undertaking and promoting research and education in the field of human rights (Item 4).

However, item 3 of the civil society bill additionally requests the proposed NHRI to act as the secretariat for review of international human rights treaties, since Taiwan is not able to deposit its ratifications with the UN as a non-member. This task is not listed in the MOJ's draft.

The new bills expressly stipulate that the national institution must cooperate with civil society, international organizations, other national human rights institutions (NHRIs) and NGOs in promoting and protecting human rights (Item 6). This recognizes that the efforts and important roles from civil groups, including INGOs in the progress of human rights.

In the matter of investigations of complaints, it proposes independent powers of enquiry and the right to obtain documents from the government. To prevent overlapping jurisdiction with the judicial branch, the bill states that the Commission would not be able to accept complaints that are under judicial review or are the subject to litigation. The Commission needs to prepare reports on complaints taken up and investigated, and ask the relevant institution to deal with it.

### **3.2 Selection Process of Members**

The MOJ's draft proposes 11 Commissioners, nominated by the president and then endorsed by the Legislative Yuan. The president would also directly appoint the chief commissioner. The chairperson's role is to lead meetings and represent the Commission (Article 3).

In the NGO bill, the recommended selection procedure is the establishment of a selection committee in the Legislative Yuan and public hearings on the candidates during the screening process. The NGO bill stipulates that the qualifications for nomination must include: (a) individuals who have participated in civil society activities and made a special effort for, or contributions to, the protection

and promotion of human rights or minority rights in particular; and, (b) those who have demonstrated expertise on human rights, or who have made special contributions to related research or education. It is also explicitly required that the appointment of Commissioners must give consideration to representation of the diversity in society (Article 4).

The NGO bill defines the chairperson as an officer of ‘special appointment’ rank, while the other commissioners are defined as officers of the highest civil servant rank. Their term is for four years. However, in the first commission, four Commissioners will only serve for a two-year term to limit political influence from one nominator. The mix of new and old commissioners may help to endow the experience and ensure continuity as much as possible. Commissioners may be re-elected or re-appointed only once; and they may not serve in other governmental bodies or engage in professional practice to minimize potential conflicts of interest (Article 5).

To reduce on bureaucracy and enhance the energy of the proposed institution, the civil society draft authorizes the commissioners to appoint professional researchers and investigators, on the strength of its powers to act independently (Article 10). In the government’s version the staff of NHRI must be from the public service, which narrows its pluralism and vision.

#### **4. Conclusion and Recommendations**

During the 7th Regional Consultation of the Asian NGOs Network on National Human Rights Institutions (ANNI) in Taipei in April 2014, a meeting between foreign and domestic NGOs and Vice-President Wu Den-Yih (the Convener of the Presidential Office Human Rights Consultative Committee) enabled the Vice President to understand international concerns about Taiwan’s slow progress in establishing a National Human Rights Institution.

During the near four-year history of the POHRCC, this body had no authority to investigate or review human rights violations, and has been criticized for its poor performance. The ruling party, KMT, has to show political will to demonstrate its determination to reform. A new national human rights institution would be the best way to show the ambition of administrative branch to protect and promote human rights.

Until now, the Control Yuan still sees itself as the only human rights protection institution even though it only deals with human rights violations in the public sector. It nevertheless cannot fulfill the Paris Principles – for the simple reason that it is unable to protect human rights in both the public and private sectors, as well as exercising the broad range of functions of a national human rights institution including promoting human rights through education, public awareness activities, and influencing policy.

Taiwanese civil society has been disappointed with the performance of the fourth council and the nomination of the fifth council to the Control Yuan. Unsurprisingly, there is no confidence that the 28 members of the council are appropriate candidates for a national institution for the promotion and protection of human rights.

Consequently, Taiwanese civil society does not support the transformation or the reinvention of the Control Yuan as an NHRI. In fact, some of the NGOs have already discussed the abolition of the Control Yuan as they do not believe it is possible to cooperate with it to establish a National Human Rights Institution, as it is not fulfilling its own limited mandate; and only wishes to protect its own institution which would be displaced by an independent NHRI that is in full compliance with the Paris Principles.

Based on the fact that all proposed laws drafted by the executive department will be sent to the Legislative Yuan, civil society organizations will cooperate with the parliamentary members. At the press conference organized by Taiwanese civil society organizations in association with the Asian NGOs Network on National Human Rights Institutions (ANNI) in the Legislative Yuan on 24 April 2014, members of the Legislative Yuan learned that international civil society is concerned about the progress in establishing a National Human Rights Institution.

As mentioned earlier, civil society organizations will submit their proposals on the structure, functions and composition of the NHRI in response to the versions submitted by the Ministry of Justice on behalf of the POHRCC.

NGOs will hold public hearings or seminars and discuss with the members of the Legislative Yuan to stimulate their deliberations on the establishment of National Human Rights Institution. The intention is that before the end of the 2015, when the term in office of the current parliament ends, the bill concerning the establishment of National Human Rights Institution ought to become law.

Another strategy is to use public hearings based on the principles of deliberative democracy, waken people on human rights and collective action for national mechanisms on human rights to include an NHRI. Deliberative democracy is an effective and transparent mechanism for the citizen. During their participation, they will learn from the experts and actively absorb the background knowledge; as a result, the citizens will understand the background of National Human Rights Institutions and the Paris Principles. We will also hold workshops and build an effective network to enable more civil society activists to actively learn and discuss with our regional and international partners.

## INDIA: A BIG LEAP FORWARD

### All India Network of NGOs and Individuals working with National/State Human Rights Institutions (AiNNI)<sup>1</sup>

#### 1. Overview

The year 2013 has been a period of several revelations for the human rights situation in India. Following the brutal and horrific gang rape of a 23-year-old medical student in the Indian capital New Delhi in December 2012, there were mass-scale street protests demanding for the enactment of stricter laws to deal with violence against women. The Indian government was forced to constitute an empowered committee headed by Justice J.S. Verma, the former Chief Justice of the Supreme Court and former Chairperson of the NHRC, to propose amendments in the Indian criminal law for fast trial and punishment in cases of sexual assault against women. The Justice Verma Committee in its report in January 2013 made several recommendations related to rape, sexual assault, sexual harassment in the workplace, trafficking of women and children, adequate safety measures for women, and the medico-legal examination of the victim. The Indian Parliament also subsequently passed the Criminal Law Amendment Act 2013 as part of civil society demands for legal reforms. The new law, for the first time, created many new offences for protection of woman against acid attacks (Sec. 326A and 326B), sexual harassment (Sec. 345A), voyeurism (Sec. 345C) and stalking (Sec. 345D) and *inter alia*, broadened the definition of rape (Sec. 375) in the Indian Penal Code.

In the year 2013, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 came into force, providing legislative backing to the guidelines provided by the Supreme Court in 1977. In the Act, the definition of the workplace has been expanded to bring under its ambit client-principal relationships (including domestic workers), agriculture labour and both the organised and unorganised sectors. A codified law on prohibition of sexual harassment at the workplace was the need of the hour to increase awareness among women on their legal rights, especially the employer's obligation to provide them with a harassment-free working environment.

Despite the new legislation as well as many progressive reforms and changes, violence against women continued and incidents of brutal gang rapes and murder were reported from various parts of the country in 2013. The brutal gang rape and murder of two teenaged girls in June 2014 in Uttar Pradesh's Badaun district clearly indicate that women and girls across India continue to be the targets of violence. Violence against women remained the most serious human rights issue in India. According to National Crime Record Bureau of India, in 2012 First Information Report (FIR) filed for rape rose by 2.9%. Out of the total reported rape cases, 63.9% were investigated and 95% of the cases investigated resulted in the issuance of charge sheets. 24.2% of rape trials resulted in a conviction in 2012.<sup>2</sup> The number of rapes in the country rose by 35.2% to 33,707 in 2013, with Delhi reporting 1,441 rapes in 2013, making it the city with the highest number of rapes and confirming its reputation as India's "rape capital".<sup>3</sup>

The UN Special Rapporteur on violence against women, Ms. Rashida Manjoo, after her official visit to India from 22 April to 1 May 2013 made the following remarks in her report to the UN Human Rights Council:

“Violence against women in India is systematic and occurs in the public and private spheres. It is underpinned by the persistence of patriarchal social norms and inter- and intra-gender hierarchies. Women are discriminated against and subordinated not only on the basis of sex, but on other grounds, such as caste, class, ability, sexual orientation, tradition and other realities. That exposes many to a continuum of violence throughout the life cycle, commonly

<sup>1</sup> Henri Tiphagne, Honorary National Working Secretary <henri@pwtm.org>

<sup>2</sup> Available at <http://www.oxfamindia.org/blog/violence-against-women-india-behind-data>

<sup>3</sup> See Reuters dated 8<sup>th</sup> July 2013, ‘Delhi records most rapes as crimes against women rise in India.’

referred to as existing “from the womb to the tomb”. The manifestations of violence against women are a reflection of the structural and institutional inequality that is a reality for most women in India”.<sup>4</sup>

However, the Government of India in its response in the 26<sup>th</sup> session of the Human Rights Council stated, “The report displays high proclivity for making unsubstantiated, yet sweeping generalizations... In the absence of specific details, there is no way the Government can verify and take necessary action.”<sup>5</sup>

The year 2013 also witnessed a renewed discourse on the fairness of the Indian criminal justice system in the administration of death penalty especially after the case of Afzal Guru, an Indian Kashmiri who was executed in February 2013 in New Delhi. The issue of miscarriage of justice in the history of crime and punishment in independent India was again highlighted by two historical Supreme Court judgments. In January 2014, a three-judge bench of the Indian Supreme Court, presided by Chief Justice P Sathasivam, commuted the death sentence of 15 murder convicts on the grounds of delays in carrying out the executions. The judgment read: "We are of the cogent view that undue, inordinate and unreasonable delay in execution of death sentence does certainly attribute to torture which indeed is in violation of Article 21 (Right to life and liberty) and thereby entails as the ground for commutation of sentence."

In the second case on February 2014, the Supreme Court commuted the death sentence of three men convicted of killing former Prime Minister Rajiv Gandhi to life in prison, rejecting the government's view that a 11-year delay in deciding their mercy petition was not agony for them. The court ruled that the convicts, Santhan, Murugan and Perarivalan, could also walk out of jail if the government grants them remission. All three accused were convicted in 1998 for Mr. Gandhi's assassination during a rally in 1991. Their mercy petition was sent to the President in 2000. The appeal was rejected 11 years later. Their hanging was stayed in 2011 on the orders of the Madras High Court.

Meanwhile, the crackdown on non-governmental organisations (NGOs) continued. India has tightened the law to receive foreign funds by NGOs over the past three years. The move is viewed as the beginning of a process to block the flow of foreign assistance to NGOs. The Indian government believes that foreign funded organisations are engaged in preventing developmental activities across the country, according to a leaked Intelligence Bureau report in June 2014.<sup>6</sup>

#### **Appointments to the NHRC in 2013-2014**

ANNI reports from 2008 to 2013 have carried voluminous materials on the issue of appointment and selection process of the members of the NHRC. While awarding ‘A’-status accreditation to the Indian NHRC, the ICC-SCA made 5 crucial recommendations to India, in which the appointment process to the NHRC was categorically mentioned. Despite this, the appointment process to the NHRC in India has not seen any substantial changes in the past years. This reflects more on the Government than the NHRC itself. This needs to be attended to seriously by the Government and Parliament. The responsibility of running an effective NHRC should also be that of the Parliament as well as the Government, and not only that of the NHRC. In this regard, the role of the Government and Parliament in India is almost non-existent.

Sl	Vacancy caused by	Date of meeting of	Applications considered by the	Person selected by
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<sup>4</sup> “Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo”, Human Rights Council, Twenty-sixth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Available at [http://humanrightsmanipur.files.wordpress.com/2014/04/rashida-manjoo\\_srvaw-report\\_india-mission.pdf](http://humanrightsmanipur.files.wordpress.com/2014/04/rashida-manjoo_srvaw-report_india-mission.pdf)

<sup>5</sup> 26<sup>th</sup> HRC : India's Statement as the concerned country on Agenda Item 3: Interactive Dialogue with the Special Rapporteur on Violence against Women.

<sup>6</sup> <http://www.scribd.com/doc/229493571/IB-Report-NGO>

No	/ Position / Date of retirement	the Appt Com / Members of the Appt Com present	Appt Com	the Appt Com for Appt / Date of Joining / Delay in filling up vacancy
1	Mr. P.C. Sharma [Retd IPS]  Person with knowledge in human rights.  Date of retirement: 27 June 2014	Meetings on 29 March 2013 <sup>7</sup> All members present.  Dissenting note by Ms. Sushma Swaraj and Mr. Arun Jaitley.  See below for dissenting note from Mr. Arun Jaitley.	The following names were considered: 1. Shri S.C. Sinha IPS 2. Shri S.P.S. Yadav IPS 3. Dr.R.Perumalsamy, SIC, Govt of TN 4. Prof Dr. C.M. Tom Manohar, Educationist & Social Development Expert.	Shri Sharad Chandra Sinha IPS. 8 April 2013 Vacancy of 284 days
2	Shri Justice Govind Prasad Mathur  Retd Supreme Court Judge  Date of retirement: 18 January 2013	Meetings on 29 March 2013 & 15 May 2013 <sup>8</sup>  All members present. All supported the candidature of Jus Cyriac, except the two Opposition Members, Ms. Sushma Swaraj & Arun Jaitley.  Both of them gave a dissenting note. One of the dissenting notes is found below this table.  The note of Ms. Sushma in English reads:  “Integrity and competence are essential for a public office. The proposed name lacks both. Therefore I disagree.”  The dissenting note of Arun Jaitley can be found below.	In the Meeting held on 29 March 2013, the following names, were discussed : 1. Jus (Retd) Shri Cyriac Joseph; 2. Jus (Retd) Shri B. Sudershan Reddy; and 3. Jus (Retd) Shri V.S. Sirpurkar.  In addition, Leaders of Opposition (Smt. Sushrna Swaraj & Shri Arun Jaitley ) also suggested the following names : 1. Jus (Retd ) Shr R.V. Raveendran; 2. Jus (Retd ) Shri Harjit Singh Bedi; and 3. Jus (Retd) Shri Deepak Verma.	Jus. Cyriac Joseph 27 May 2013 Vacancy of 128 days
3	Shri Justice Babulal Chandulal Patel  Retd Chief Justice of High Court  Date of retirement:	11 Sept 2013. All members present excepting Mr. Arun Jaitley	The following names were proposed at the meeting: Jus. D. Murugesan Jus. Mukul Mudgal Jus. Bilal Nazki	Justice Shri D. Murugesan 21 Sept 2013 Vacancy of 60 days

<sup>7</sup> From the Appt Com meeting minutes dt 29.3.2013 & 15.5.2013 obtained through RTI

<sup>8</sup> From the Appt Com meeting minutes dt 29.3.2013 & 15.5.2013 obtained through RTI

	22 July 2013			
5	Shri Satyabrata Pal [Retd IFS] Person with knowledge in human rights.  Date of retirement: 1 March 2014	Appt Com not met	Not applicable	Still vacant Vacancy of 168 days

Dissenting Note of Mr. Arun Jaitley, Member of the Selection Committee dated 29 March.2013 and 16 May 2013 respectively:

1. [29.03.2013] In recent years there has been an impression that the investigative agencies are not functioning independently. Government control of investigative agencies is primarily responsible for compromising their independence and autonomy. Additionally, it has been felt that heads of investigative agencies discharge a function which should be completely independent of the Executive. They must function without fear or favour, While in service they must have security of tenure and full authority to independently investigate. Similarly there must be no temptation of a future favour by the government . It is this temptation of a future favour which is seriously compromising the functioning of heads of investigative agencies. Ever since the UPA Government came to power, it has appointed four CBI Directors, three of whom have since retired. Shri Vijay Shankar Tiwari after retirement was made a member of the Justice MM Pubchhi Committee on Centre – State Relations. Shri Amar Pratap Singh has been appointed the Member of the UPSC and now Shri W. Ashwani Kumar has been appointed the Governor of Nagaland. If this pattern were to continue every retiring CBI director would expect to continue in government assignment even post retirement.

Now there is a proposal to appoint the Head of NIA, Shri SC Sinha IPS as a Member of the NHRC. That is in the chain of post retirement appointments given to heads of investigative agencies by the UPA Government. It has been done in all cases of retiring CBI Directors. There is not a single exception. I am completely opposed to this compromise with the autonomy and independence of the CBI and NIA. I therefore am unable to agree with the appointment of Shri SC Sinha as a member of the NHRC.

Additionally, there would be several persons from the civil service as also from civil society who would be committed to the cause of those who suffer the maximum deprivation of human rights. It would be advisable if a panel of such names is prepared and the most suitable amongst them is selected for the post.

Sd. (ARUN JAITLEY)  
Leader of Opposition (Rajya Sabha)

2. [16.5.2013] The Government has proposed three names for appointment of a Judicial Member from amongst the sitting or retired judges of the Supreme Court. The names of three retired judges, namely, Justice Cyriac Joseph, Justice B. Sudershan Reddy and Justice V.S. Sripurkar have been proposed. I am of the considered opinion that Justice Cyriac Joseph, retired judge of the Supreme Court is completely unsuitable for being appointed as a Member of the National Human Rights Commission. He has been a judge of the Kerala High Court and Delhi High Court, the Chief Justice of Karnataka High Court and a judge of the Supreme Court. As a judge he was known for not writing judgements. As against a few hundred judgements authored by every judge of the Supreme Court, during his tenure Justice Cyriac Joseph is believed to have written only six judgements. He has been, even during his tenure as a judge, perceived to be close to certain political and religious organizations. His close proximity to religious organisations is evident from the fact that media reports have indicated that when certain Nuns

were sexually assaulted, as a sitting Judge of the Supreme Court he chose to visit the institutions where Narco analysis of the accused were being carried out in Karnataka. This was strongly objected to by Members of the Bar Association in Kerala who protested against the same. He was quoted in the media as having stated that for him his religious affinity was more important than his commitment as a Judge. When there are other eminent names of retired judges eligible for appointment available, which include Justice B. Sudershan Reddy, Justice V.S. Sirpurkar, suggested by the Government and Justice Ravinderan, Justice H.S. Bedi, Justice Deepak Verma as suggested by some of us, I am unable to persuade myself to concur to the appointment of Justice Cyriac Joseph as a Member of the National Human Rights Commission.

Sd. (ARUN JAITLEY)  
Leader of Opposition (Rajya Sabha)

Therefore, in the present report, special emphasis would be given to other existing specialized thematic national institutions relating to human rights in India, such as the National Commission for Scheduled Castes, the National Commission for Scheduled Tribes, the National Commission for Women, the National Commission for Minorities, the National Commission for Safai Karmacharis, the Central Information Commission, the National Commissioner for Persons with Disabilities and the National Commission for the Protection of Child Rights. India presently has 8 specialised/thematic institutions relating to human rights, in addition to its National Human Rights Commission. Surprisingly, some of the matters relating to appointment and powers of these institutions have been a subject matter of court litigation during this period. For example, in the case of *Association for Development v. Union of India*, the appointment of two members of the National Commission for the Protection of Child Rights (NCPCR) was challenged before the Delhi High Court on the grounds that they did not possess the requisite qualifications specified under Section 3 of the Commission on Protection of Children Act, 2005.<sup>9</sup> The controversial case went to the Supreme Court of India after the Delhi High Court quashed the appointment of Mr. Yogesh Dube as a NCPCR member, on petitions by NGOs, the Association for Development and HAQ: Centre for Child Rights. Coming down heavily on the Centre for making appointments to various rights panels, the Supreme Court prohibited the government from issuing notification for appointment of members for the NCPCR, after noting there were no norms and guidelines in place for selecting such members, who were being paid out of the public money. The court underlined neither any advertisement had been issued for inviting applications from people at large nor any criteria with respect to a candidates' eligibility and suitability was laid down.<sup>10</sup> The Delhi High Court provided certain guidelines for future appointments. It recommended a broad-based Selection Committee which could include independent experts in the field, the Chairperson of the Union Public Service Commission (UPSC) and/or the Leader of the Opposition.<sup>11</sup>

It is important to mention here that the interpretation of Sections in the parent act, the Protection of Human Rights Act, 1993 dealing with appointments of members of the NHRC has created sufficient confusion in the functioning of other human rights institutions as well. The discrepancies are generally found not only at the national level institutions but are also clearly marked in institutions operating at the state levels.

In this context, the case of Smt. Runumi Gogoi deserves a special mention. Smt. Runumi Gogoi was holding the charge of the office of Chairperson of the Assam State Commission for Protection of Child Rights since April 2013. Meanwhile, the Commissioner and Secretary to the state government of Assam's Social Welfare Department issued a notification on August 2013 appointing Smt. Juriti

<sup>9</sup> Judicial Decisions Relevant to Human Rights Institutions (Digest 1), Centre for Child and the Law National Law School of India University, Bangalore. Available at <https://www.nls.ac.in/ccl/justicetochildren/decisions.pdf>

<sup>10</sup> Utkarsh Anand, "SC stays appointment of NCPCR members", The Indian Express, February 27, 2014, New Delhi. SC: CIVIL APPEAL NO(s). 10960 OF 2013 YOGESH DUBE vs AFD& others

<sup>11</sup> Swagata Raha & Archana Mehendale, "When rights panels become retirement parks", The Hindu, June 1, 2013.

Borgohain, a Lecturer of Guwahati College as Chairperson of the State Commission. Smti. Runumi Gogoi challenged the legality and validity of the Government notification in the Guwahati High Court on the ground that appointment of a new Chairperson of the State Commission is de hors Section 18 of the Act which requires that the Chairperson is selected on the recommendation of a three member Selection Committee constituted by the State Government under the chairmanship of the Minister-in-Charge of the concerned Department. In this case the new appointment was made without any recommendation by the Selection Committee. Smti. Runumi Gogoi, being an eminently qualified person was never considered for the post. Therefore, the appointment is arbitrary and in violation of the statutory requirement. The court declared the appointment Chairperson of the State commission is clearly vitiated for violation of the mandatory provisions of Section s 17 and 18 of the Act and therefore cannot be sustained and therefore quashed.<sup>12</sup>

The pattern of appointing former and serving officers from the Indian Police Service (IPS) in the NHRC and officers from the Indian Administrative Service (IAS) as members of the state human rights commissions (SHRCs) has set a dangerous precedence which has negatively affected the neutrality of these human rights institutions. Experts point out that it does not envisage the Commissions to be reduced to a hub for retired bureaucrats. By appointing a retired bureaucrat, the government can potentially undermine the independence of a statutory institution that is vested with the responsibility of monitoring the protection and promotion of human rights.<sup>13</sup> The prevailing scenario in India is such that almost many of the SHRCs have at least one, sometimes two, members from the IPS or IAS as members. Many of them also land up being “Acting Chairpersons” of their respective institutions in the absence of appointment of the Chairpersons. A case in point here is that of the Tamil Nadu State Human Rights Commission, where even when a serving District Judge Mr.K. Baskaran was serving as an acting Chairperson for more than one year before he was replaced by Ms. Jayanthi IAS, a retired IAS officer. While the State of Tamil Nadu does not appoint a Chairperson to its SHRC even after 3 years of assuming office, it is yet willing to even change an Acting Chairperson from a serving judge to that of a retired IAS officer.

The next case is from West Bengal. Justice A.K. Ganguly resigned as Chairperson of the West Bengal State Human Rights Commission (WBSHRC) which was also referred in an earlier ANNI report. Critics are of the opinion that it was part of a design by the state government to remove Justice Ganguly from the WBSHRC. In his place, the immediate former DGP of the State, Mr. Naparajit Mukherjee IPDS [Retd], was appointed the Acting Chairperson.<sup>14</sup> Known as an upright judge during his tenure with various high courts and then the Supreme Court, Justice Ganguly had given a number of landmark verdicts even in the SHRC that nailed the high and the mighty. It is clear that the pattern set by the selection and appointments to the NHRC are being followed by the SHRCs across the country. There are several SHRCs without a Chairperson such as Tamilnadu, West Bengal, Karnataka, Rajasthan, Madhya Pradesh, Manipur, etc. If this trend is not corrected, it is most likely to continue in future and attack at the root of the Paris Principles in the functional independence and effectiveness of these institutions.

In a similar development Smt. Maneka Gandhi, the new Minister of Women and Child Development of the Government of India in Modi’s Government proposed amendments to the National Commission for Women Act of 1990. The stated intention is to make it on par with the NHRC in terms of powers. One of the most shocking changes proposed is that the Member Secretary of the NCW who is a serving bureaucrat will henceforth also be a member of the NCW if the proposed amendments are passed.<sup>15</sup> But this has been critiqued and alternative proposals based on Paris

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<sup>12</sup> Writ Petition (C) NO.4555/2013, In the The Gauhati High Court , available at <http://ghconline.gov.in/Judgment/WPC45552013.pdf>

<sup>13</sup> Op Cit, Swagata Raha & Archana Mehendale, June 1, 2013.

<sup>14</sup> Debasis Konar, “Is Justice Ganguly a victim of conspiracy?”, Times of India, Jan 7, 2014.

<sup>15</sup> Abantika Ghosh, “NCW to get civil court status”, Indian Express, New Delhi, June 25, 2014. Also see [www.wcd.nic.in](http://www.wcd.nic.in) F No 2-1/2014 – NCW(A) GOI – MWCD – NVCW Adm dt 01.07.2014.

Principles submitted to the Hon'ble Minister by women's organizations across the country<sup>16</sup> including AiNNI.<sup>17</sup> It has also been observed that the status or rank of the Chairpersons and members of the different national institutions relating to human rights in the country differ from one another. In some institutions, the chairpersons enjoy the rank of Cabinet Secretary, while the members hold the rank equivalent to that of a Secretary. However, in the case of the NCPCR, a recent order of the Joint Secretary in the Ministry of WCD has reduced the position of the Chairperson of the NCPCR from that of a Cabinet Secretary to that of a Secretary, while the members from that of a Secretary to that of an Additional Secretary.<sup>18</sup> This is just one example. This variation in status and ranks seems to suggest a hierarchy of institutions rather than a complementary set of institutions established for the protection and promotion of human rights. Therefore there is a need to ensure the functional independence of all NHRIs in India by strictly complying with standards set by the Paris Principles, 1993.

### **Guarantee of Tenure of Members**

The reporting period witnessed an interesting litigation in relation to the guarantee of tenure of the members or chairpersons of national institutions, when the present Chairperson of the National Commission for Protection of Child Rights (NCPCR), Ms. Kushal Singh IAS [Retd] approached the High Court of Delhi to seek its direction in restraining the Ministry of Women and Child Development, which had allegedly been putting pressure on her to resign from the post. Ms. Kushal Singh has, in her plea, sought directions to the Ministry not to remove her without following the procedure laid down in the Commission for Protection of Child Right Act 2005.<sup>19</sup> NCPCR was set up in 2007 under the Commission for Protection of Child Rights Act, 2005.<sup>20</sup> The Supreme Court of India in its direction issued on February 2014 provided to make guidelines or norms for the selection of the members of NCPCR. Based on this, the Ministry of Women and Child Development carried out certain amendments in the Commission for Protection of Child Rights Rules 2006 which are contained in the Gazette Notification of March 2014. According to Haq: Centre for Child Rights, "Striking is this amendment made in Rule 7(1) by which now the status of Chairperson-NCPCR has been reduced from 'Cabinet Secretary' to 'Secretary' and status of Member-NCPCR has been reduced from 'Secretary' to 'Additional Secretary'. This has not come from the Supreme Court Directions at all".<sup>21</sup>

### **Staffing and Recruitment**

In all its past reports, ANNI has dealt extensively with the subject related to staffing and recruitment procedures in the NHRC. The ICC-SCA in its recommendations to India has not only spoken about the need for increased staffing in the NHRC but also mentioned that the positions of Secretary General and Director General of Investigations of the NHRC India should not be filled up from bureaucratic cadres such as the IPS and IAS alone. It should be pointed out here that in this year in the NHRC, both the post of Secretary General and Joint Secretary of administration, coordination, research and projects were held by the Additional Secretary Mr. J. S. Koccher as additional in charge for several months. This situation has arisen due to the NHRC's over-dependence on the officers of the IAS ranks. The NHRC loses its independence (under Paris Principles) when it is appointed a Secretary General by the government to serve on it and is deprived of the opportunity of selecting / recruiting its own Secretary General even if it has to be done from a pool of serving senior IAS

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<sup>16</sup> The initiative was taken by Partners in Law and Development in July 2014 with a memorandum submitted and signed by several other organizations including the WGHR.

<sup>17</sup> The All India Network of Individuals and NGOs working with National / State Human Rights Institutions.

<sup>18</sup> The Gazette of India Part II Sec 3 Sub Sec (1) No: 150 dt 24.03.2014 Also:

<http://www.haqrc.org/blogs/national-commission-protection-child-rights-amendment-rules-2014>

<sup>19</sup> "NCPCR head to HC: Being forced to quit", TNN, June 10, 2014.

<sup>20</sup> Ibid

<sup>21</sup> The National Commission for Protection of Child Rights (Amendment) Rules, 2014. Available at <http://www.haqrc.org/blogs/national-commission-protection-child-rights-amendment-rules-2014>

officers who express their desire to serve on the NHR. The same is also the case with all the NHRIs in India. This also raises a pertinent point that NHRIs should not always look at government officials to fill up the posts but should avail the services of persons from different relevant areas with the prescribed managerial abilities if these NHRIs in the country need to be independent from the Government.

### **Effectiveness**

The year 2013 also marked the completion of 20 years of the formation of National Human Rights Commission of India (NHRC). It was also the occasion of the 20<sup>th</sup> anniversaries of the Paris Principles (1993), the Protection of Human Rights Act (1993) and the World Conference on Human Rights in Vienna (1993).

To mark the occasion, an Independent Peoples' Tribunal was jointly organised by the Human Rights Law Network, AiNNI, ANNI and several other CSOs in the country on the functioning of the NHRC in December, 2013 in New Delhi. The Tribunal deliberated on a range of issues, including the relations of civil society with the NHRC. The occasion was an opportune time to review the Protection of Human Rights Act 1993 because Indian society and polity has witnessed overriding changes during these years in the field of human rights governance. The sessions covered the following: NHRC's compliance to UN standards; police encounter, custodial torture, custodial death; killings and torture by armed forces; attack on human rights defenders; communalism; violation of women's rights; dalit issues; tribal rights; environment, housing and displacement; on health rights; child rights and disability.

Unfortunately, the exercise was confined to Indian civil society groups alone without the involvement of the NHRC. In order to take this effort forward, it is strongly recommended that there is a joint exercise between the NHRC and civil society organizations who organized the People's Tribunal along with some former Chairpersons, Secretary Generals, senior staff Special Rapporteurs of the NHRC and experts from civil society to draft a new legislation for the NHRC to ensure that it is relevant to the present challenges and keeping in tune with the new deliverables being insisted at the international level from NHRIs.

However, it is important to also point out that in the reporting year 2013 there has been significant changes in the engagement of NHRC with the human rights issues across the country and if this is continued there is a possibility for the institution to gradually regain the confidence of the people of the country.

- NHRC's visit to Manipur in 2013 has been one of the most significant moves on its part. The team, headed by the NHRC Chairperson Justice K.G. Balakrishnan, held a camp sitting in Imphal in October 2013 to assess human rights violations committed by the armed forces and rebels on innocent civilians.<sup>22</sup> During its visit the NHRC team handled several cases of extra judicial killings in the state. The NHRC team also met popular human rights defender and Manipur's iron lady Irom Chanu Sharmila at JNIMS hospital ward who has been on indefinite strike for nearly 13 years in Manipur, demanding the withdrawal of the Armed Forces (Special Powers) Act, 1958, widely known as AFSPA, from the state. The NHRC, which had in the past "refused" to visit Sharmila,<sup>23</sup> issued a notice to the Manipur Government seeking immediate removal of the "arbitrary restrictions" imposed on visitors wanting to meet activist Irom Sharmila, who has been on an indefinite fast since November 2000. The Commission also recommended that the Government of Manipur immediately remove them as these are in breach of India's obligations under international human rights standards and principles, and a

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<sup>22</sup> "Human Rights team to visit Manipur", IANS – Imphal, 19th October 2013

<sup>23</sup> Refer earlier ANNI reports on this

grave violation of human rights.<sup>24</sup> It is pertinent to also mention that easy access to Sharmila has now been restored by the NHRC with its *suo moto* initiative. AiNNI's claims in the past in this matter have now been vindicated by the NHRC's own *suo moto* action.

- The year under review also saw an increase in the number of *suo moto* cases of human rights violations. 175 cases have been taken up between January 2013 and June 2014 relating to human rights violations reported in the daily national dailies. A complaint lodged with the NHRC by any individual victim with their mobile numbers or email address is informed in a short period of time (within one or two days even) about the registration of their complaints. This marked improvement in the system of handling of cases on the part of the NHRC clearly indicates its gradual effectiveness from the past.
- It can be argued that the most difficult part for NHRC to proceed further in tackling human rights violation cases is the burden of increased numbers of complaints it receives on a daily basis. This burden, in spite of the existence of over 23 state-level human rights commissions, is caused largely due to the ineffectiveness of the SHRCs when compared to the NHRC. From January 2013 to June 2014, the period covered in this report, the NHRC has received 150 777 complaints.<sup>25</sup> The most effective means now used by the NHRC is to hold public hearings/camp sittings in different parts of the country to dispose of its cases. Although in previous reports AiNNI has been critical of this approach, the fact is that holding public hearings calls for long distance travels for the Chairperson members and senior staff of the NHRC, hundreds of cases are taken up in each of these hearings. These have also turned out to be opportunities for the NHRC to meet with local CSOs engaged in these states.
- During the period of this report (Jan 2013-June 2014) the NHRC has in its Full Commission sittings and sittings of the Division Benches taken up for consideration a total number of 2,270 cases, and in 491 cases recommended a total compensation of Rs. 125 989 000. During the same period, the NHRC has also received information about 332 cases in which a total compensation of Rs 80 100 000 has been actually realised. We strongly recommend that from the next year onwards the NHRC considers reporting in and through its newsletters not only its cases of compensations ordered but also cases wherein its recommendations for prosecutions of the perpetrators of human rights violations are carried. It is such exemplary prosecutions initiated on the recommendations of the NHRC and closely monitored by it that will result in a greater respect for the institution and make the justice delivered to the victim wholesome in nature. As already recommended in the ANNI Report (2013), we repeat that such assistance of prosecutions are carried out by senior and experienced lawyers on the criminal side on behalf of the State / District / Taluk Legal Services Authority /Committee, and further that they also take up the responsibility on periodically reporting to the NHRC to update it on the progress made in each criminal case. The NHRC may also consider providing recommendations that such prosecutions initiated on its recommendations should be taken up on a day to day basis – this will ensure speedy disposal of these cases. A close collaboration between then NHRC and the National Legal Services Authority in this direction will result in this being made a reality.
- But the real task before the NHRC is to find a way out to reduce its case burden if it is to continue to be an effective body in both protection and promotional work. The burden of cases cannot be handled only by resorting to transferring complaints from the NHRC to SHRCs alone. A creative mechanism has to be developed by which effective remedial measures can be provided at the state and district levels to the complaints of gross human

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<sup>24</sup> [http://nhrc.nic.in/Documents/NewsLetter/2013\\_11\\_eng.pdf](http://nhrc.nic.in/Documents/NewsLetter/2013_11_eng.pdf) Also : Allow visitors to meet Irom Sharmila: NHRC tells Manipur govt. Oct 30, 2013 PTI, New Delhi

<sup>25</sup> Collated from the NHRC's monthly news letters for the said period with data contained therein. See: <http://nhrc.nic.in/>

rights violations arising largely out of police excesses. This may also help in reducing the case burden at the state level for the SHRCs.

- It is therefore important that within the ambit of the present legislation [PHRA], the NHRC works towards the strengthening the State / District Police Complaints Authority which every state is mandated to establish by the Supreme Court of India in *Prakash Singh & Ors vs Union Of India And Ors* on 22 September, 2006. Directive Six of the Supreme court reads:

“Set up a Police Complaints Authority (PCA) at state level to inquire into public complaints against police officers of and above the rank of Deputy Superintendent of Police in cases of serious misconduct, including custodial death, grievous hurt, or rape in police custody and at district levels to inquire into public complaints against the police personnel below the rank of Deputy Superintendent of Police in cases of serious misconduct.”<sup>26</sup>

Despite the teething troubles that PCA have in different states, 14 Indian states have passed police acts after 2006 which established the Police Complaint Authorities. However, using its powers of intervention in courts the NHRC would do well to ensure that this mechanism is realized as a truly effective one. It is a challenging task but with the assistance of CSOs already engaged in such issues of police reforms like the Commonwealth Human Rights Initiative, this would really be achievable.<sup>27</sup> The NHRC India cannot continue to spend its entire energy and time only on thousands of individual cases of human rights violations arising out of police excesses which can be better handled at the district and state levels. Such a lessening of the burden on the NHRC will gradually provide the NHRC more time to concentrate on issues of collective rights of peoples involving their social economic and cultural rights violations as well as in ensuring that rights to association, assembly, speech and expression with their new international standards being established as well as matters related the rights of women, children, dalits, adivasis, the displaced, sexual minorities etc are better catered to in the country and wholly monitored by the NHRC.

- The NHRC has undertaken 49 spot enquiries in the 18 months under review (see table below). While this is to be appreciated, this is insufficient to bring actors to take the NHRC seriously. But given the present staff strength at the NHRC this is what it can do. But if the NHRC were to follow the example set in this direction by the NCPCR under the Chairpersonship of Dr. Shantha Sinha<sup>28</sup>, the task could be easier. In this case the NCPCR appointed about 2 or in some cases 3 and even 4 State / Special Representatives (SRs) initially only to monitor the RTE 2009 act in each of the states. Gradually the services of the SRs were also solicited by the NCPCR with their full approval to even verify the versions being put forth by the governments in complaints that were pending before the NCPCR. If this is followed, the NHRC would be able to consider appointing such SRs for all the 671 districts in the country in order that it turns into a very effective human rights protection mechanism that has its eyes and ears on the ground through its effective SRs in all the districts of the country.

### **National Human Rights Commission New Delhi, India**

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<sup>26</sup> “Seven Steps to Police Reforms”, Commonwealth Human Rights Initiative (CHRI), New Delhi, September 2010, PP-3. Available at

[http://www.humanrightsinitiative.org/programs/aj/police/india/initiatives/seven\\_steps\\_to\\_police\\_reform.pdf](http://www.humanrightsinitiative.org/programs/aj/police/india/initiatives/seven_steps_to_police_reform.pdf)

<sup>27</sup> Sec 12 (b) of the PHRA: “intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court.”

<sup>28</sup> NCPCR : Dr. Shantha Sinha was the Chair of the NCPCR for two terms and ended her tenure in the year 2013. She appointed persons with experience in child rights engagement especially with working on RTE and appointed them as State Representatives of the NCPCR. As days progressed these SRs were also requested to monitor and investigate complaints on child rights violations received by the NCPCR from that state or region.

	Month of News Letter	Month /Year	Suo motu	Spot Enquiry	Recommendations of relief		Compliance		Complaint received		
			Total Cases	Total Cases	Cases	Amount (Lakhs)	Cases	Amount (Lakhs)	Received	Disposed	Consideration
<b>NHRC-India Newsletters 2014</b>											
01	June -2014	May -2014	15	5	66(10)	26.5	09	20.45	8914	6094	37556
02	May -2014	April -2014	8	1	70(41)	99.5	14	19.7	8282	5950	34736
03	April - 2014	March - 2014	09	3	42(24)	36	23	44.7	7401	6557	32404
04	March - 2014	February - 2014	08	1	129(23)	99	12	15.7	9002	7703	31560
05	February - 2014	January- 2014	16	3	231(47)	180.9	14	45.3	8478	7056	30261
06	January- 2014	December - 2013	6	4	148(33)	108.3	12	26.6	8199	7360	28839
<b>NHRC-India Newsletters 2013</b>											
01	December - 2013	November - 2013	5	5	116(19)	37	9	14.9	7325	6495	29759
02	November -2013	October- 2013	2	5	84(20)	84.2	15	42.7	7806	6679	28929
03	October- 2013	September- 2013	4	0	67(16)	29	08	51.35	6531	7208	27125
04	September- 2013	August - 2013	5	4	96(32)	59.80	17	37.23	9103	8025	27802
05	August - 2013	July -2013	10	3	171(32)	119.6	30	131.5	9130	8242	26227
06	July -2013	June -2013	11	2	200(30)	69.7	32	34.95	7857	6472	26724
07	June -2013	May -2013	6	4	164(37)	94.1	37	65.85	10190	10967	25339
08	May -2013	April-2013	17	4	107(29)	97.8	22	87	7076	4013	29179
09	April-2013	March-2013	6	0	143(19)	45,80,000	15	32,40,000	10872	10186	26116
10	March- 2013	February 2013	14	3	198(36)	67,25,000	24	42,45,000	7538	6542	25430
11	February 2013	January- 2013	11	1	148(14)	21,85,000	29	80,95,000	8477	6300	24434
12	January- 2013	December- 2012	22	1	90(29)	83,00,000	10	7,95,000	8596	6895	23559

- The efforts recently taken in the past year for greater visibility of the NHRC also needs greater mention. It is such efforts of finding more news about the NHRC in the public domain that allows greater visibility and hence accessibility to the organization and it is also observed that when there is more media coverage, the performance of the NHRC itself has also spread in terms of its own areas of functioning. For the period between 1 August 2013 and 31 July 2014 it is seen that in this year alone there have been 1695 instances of coverage in the print media alone.<sup>29</sup> Such visibility for the NHRC in effect leads to a larger section of the country being aware of the work and effectiveness and therefore approaching the commission for assistance.
- The NHRC has also moved during this period into a publicly speaking organization through its statements that are made also on occasions when it does not handle complaints. One such very good recent example is the statement on rising sexual assault against women of June 2014. We do expect that in the future the NHRC will continue to speak more – both against state and non-state actors as a true independent voice so that violations of human rights are condemned by it periodically.<sup>30</sup>

## Judiciary

NHRC India perhaps failed to play a proactive role in the death penalty cases that were pending before the Supreme Court of India and thus missed a vital opportunity. While one of the NHRC

<sup>29</sup> Data collected from a careful scanning of details of coverage made available in the NHRC-India In News

<sup>30</sup> NHRC: <http://nhrc.nic.in/disparchive.asp?fno=13220>. STATEMENT: NHRC deplors rising incidents of sexual assault against women (06.6.2014)

members, Mr. Satyabrata Pal, IFS [Retd] wrote an article in his personal capacity,<sup>31</sup> Titled “*Why Capital Punishment Must Go*”, the article did not carry any reference to the reference of Advisory Council of Jurists of the APF on death penalty. The NHRC on its part also lost the opportunity to bring that reference to the attention of the Supreme Court of India by using its power of intervention under section 12 of the Protection of Human Rights Act, 1993. In fairness, civil society organizations, on their part, also did not call on the NHRC to do so. Similarly in the case of the transgender, the NHRC again lost another opportunity to bring to the notice of the Supreme Court the international human rights standards in relation to human rights of persons of diverse sexual orientations or gender identities (SOGI) and references in this regard of ACJ of APF. NHRC can thus utilize vast opportunities related to human rights matters in the Supreme Court of India provided it is lessened of its day to day burden of handling individual cases of human rights violations.

### **International Human Rights mechanisms**

As far as the International Human Rights Mechanism is concerned, previous ANNI reports have already indicated the positive role played by the NHRC during the second UPR cycle of India in 2012 as compared to the 1<sup>st</sup> UPR cycle in 2008. What is most important is that in the follow-up to the second cycle of India’s UPR, the NHRC has developed its own framework to monitor the implementation by the government of India of the recommendations it accepted. The framework was approved by the Commission on February 2014.<sup>32</sup> This framework is the joint initiative of the NHRC along with all other national institutions relating to human rights in the country, including the Planning Commission of India that was commenced several months ago, and followed along with the participation of a few selected civil society organizations. The outcome is particularly noteworthy given the large number of active national institutions relating to human rights in India that were involved in this joint initiative.

NATIONAL HUMAN RIGHTS COMMISSION  
New Delhi

Framework to Monitor the Implementation by the GoI  
of the Recommendations it Accepted  
at the Second Universal Periodic Review

(As approved by the Commission on 4 February 2014)

Sl. No	Recommendations	Action Required	Indicators /Monitorable Outcomes	Responsibility for implementation
1	2	3	4	5
<b>Convention Against Torture :</b>				
UPR II 21	The Prevention of Torture Bill as amended by the Parliamentary Select Committee to be adopted by Parliament during its present term.	The Prevention of Torture Bill as amended by the Parliamentary Select Committee to be adopted by Parliament during its present term.	Enactment of law in 2014.	Ministry of Home Affairs Members of Parliament
		GoI to ensure the passage of a Bill,	Issue of notification in the Gazette in 2014.	Min of Law & Justice &

<sup>31</sup> See The Hindu : <http://www.thehindu.com/opinion/lead/why-capital-punishment-must-go/article5193670.ece>

<sup>32</sup> See NHRC :

[http://nhrc.nic.in/Documents/Reports/Final%20Framework%20for%20UPR%20Process%2021\\_10\\_2013.pdf](http://nhrc.nic.in/Documents/Reports/Final%20Framework%20for%20UPR%20Process%2021_10_2013.pdf)

		which is fully compliant with CAT		Min of Home Affairs.
		The Act to be implemented immediately	• Promulgation of Rules in 2014.	Min of Home Affairs
		The process of ratification of CAT.	Ratification of CAT by early 2015.	Min of Home Affairs
			The Instrument of Ratification to be deposited with UN Secretary General as soon as Cabinet ratifies it.	Ministry of External Affairs
			First country report to be submitted to the Committee against Torture in 2016	Ministry of External Affairs Min of Home Affairs.

Yet another unique contribution of the NHRC this year in July 2014 has been its submission of a shadow report<sup>33</sup> on its own, independent of the Government's, to the CEDAW Committee that was taken up for scrutiny in early July 2014, followed by an oral statement<sup>34</sup> made at the CEDAW meetings, and finally the participation of the Hon'ble NHRC Chairperson along with the Acting Secretary General of the NHRC in the CEDAW Meeting in Geneva. This has been an area of concern expressed in several previous ANNI reports. As such, such developments are welcomed, although the same commendable effort was not made at the CRC Periodic consideration of India's reports earlier in June 2014. In any case, consistent with our earlier stands and that of the ICC /SCA, it is our recommendation that the Chairperson of the National Commission for Women, who incidentally is a deemed Member of the NHRC could have represented the NHRC in the CEDAW meeting. In the alternative, at least a senior women staff member of the NHRC could have also been there along with the Chairperson, Justice K.G Balakrishnan. This is a good beginning for the Indian NHRC and one hopes that this will be carried in the case of all Treaty Bodies and that other NHRIs in the country also follow the good example set by the NHRC.

### Human Rights Defenders

In May 2010, the NHRC appointed its National Focal Point on Human Rights Defenders (NFP-HRDs). This is something many other NHRIs have yet to follow in the Asia Pacific region. The experience of working with the NFP-HRDs has been extremely beneficial to the larger HRD community in the country. The accessibility of the focal point (including on the social media in his individual capacity) even on his mobile at nights when HRDs approach him from the different parts of the country is a service that is not yet formally recorded anywhere by the NHRC, but which is extremely beneficial.

<sup>33</sup> NHRC: Combined 4<sup>th</sup> & 5<sup>th</sup> Periodic Reports of India : Submission to the CEDAW on the Implementation of CEDAW in India - <http://nhrc.nic.in/documents/Final-NHRIs%20Participation-4th%20and%205th%20Periodic%20India%20Report.pdf>

<sup>34</sup> NHRC: [http://nhrc.nic.in/documents/Final%20Oral%20Statement%20by%20CP%20on%2030\\_6.pdf](http://nhrc.nic.in/documents/Final%20Oral%20Statement%20by%20CP%20on%2030_6.pdf). Oral Statement by Justice Shri K.G. Balakrishnan, Chairperson, NHRC, , India at the Informal Meeting of the CEDAW with NHRIs on 30<sup>th</sup> June, 2014.

The year under review also saw the Secretary General of the NHRC addressing all Chief Secretaries of the state Governments<sup>35</sup> about the problems faced by NGOs and HRDs, appealing to the state governments to treat them as partners in bringing about a positive changes in human rights. This, being the first such communication from a senior functionary of the NHRC after 1998 when the UN Declaration on HRDs came into being, is to be greatly appreciated and encouraged.

It is thus time that 9 December is observed as the National Day for HRDs, and that the NHRC constitutes a committee comprising experts from civil society as well as representatives of all the national institutions relating to human rights to draft a national law to protect HRDs in India. This year has also seen the first dedicated publication of the NHRC on HRDs titled: “*The NHRC and Human Rights Defenders: The growing synergy*”.<sup>36</sup> It is also important that in all cases dealing with HRDs the NHRC takes recourse to ensure that prosecutions initiated as false cases, as claimed by the HRDs, are closely monitored on behalf of the NHRC by senior lawyers from the State / District / Taluk Legal Services Authority / Committees so as to report to the NHRC and ensure that in case the cases end up in an acquittal further steps to compensate the NHRCs are undertaken by the NHRC.

It is also time that the NHRC takes up seriously the restrictions of the right to association and assembly in the country particularly in the context of the FCRA and its abuses across the country. In view of the fact that several cases are pending before the Supreme Court and the different High Courts on similar issues it is recommended that urgent steps are undertaken for the NHRC to intervene in each of these cases after making a careful study since each of them are also violations of the right to association by the Ministry of Home Affairs of the government of India. This is the role that HRDs across the country strongly expect from an institutional human rights defender such as the NHRC.

### **PHRA finally challenged**

The Supreme Court is now seized of a challenge made to it in Write Petition No. 164 of 2014 in *R. Manohar and another Vs Union of India and another*. It is in the nature of a Public Interest Litigation bringing to the fore the structure and functioning of the NHRC, the procedure adopted in appointing members to the Commission, the inherent lacunae in such appointments and mechanisms to ensure fair and transparent composition of the Commission.

The requests made in the Writ Petition contain the following:

- A. Directions to the Union of India/NHRC to:
  - a. forthwith abide by all the observations and recommendations made by the ICC of NHRIs as set out in the 2011 report of the ICC regarding India;
  - b. to correct the deficiencies in the functioning of the NHRC as set out in different civil society fact finding reports;
- B. For an order:
  - a. quashing and setting aside section 3(2)(a), (b) and (c) of the PHRA as being arbitrary and unduly restrictive in as much as by this section 3, three out of the five members of the NHRC are required to be former judges which section irrationally eliminates from consideration a spectrum of qualified human rights persons including academics and others and also because restricting the number of members to 5 has now become obsolete and arbitrary in view of the exponential increase of the work of the NHRC; .
  - b. restraining the Union of India/NHRC from mechanically appointing high ranking police officers and bureaucrats to the NHRC and for a direction to the Union of India that if at all a police officer or a bureaucrat is to be appointed, it shall be done in a transparent process and an officer is chosen who has a credible record of defending human rights of individuals;

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<sup>35</sup> NHRC: [http://nhrc.nic.in/Documents/SG\\_Letter\\_Chief\\_Secy\\_State\\_UT.pdf](http://nhrc.nic.in/Documents/SG_Letter_Chief_Secy_State_UT.pdf)

<sup>36</sup> NHRC; See web site and sub section on publications :

[http://nhrc.nic.in/Documents/Publications/NHRC\\_HRD\\_The\\_Growing\\_Synergy.pdf](http://nhrc.nic.in/Documents/Publications/NHRC_HRD_The_Growing_Synergy.pdf)

- c. declaring that the phrase “having knowledge of or practical experience in matters relating to human rights” in PHRA means that the persons so selected must have out of the ordinary and national level history of defending human rights and have national credibility as a human rights defender;
- d. prohibiting the Union of India/NHRC from making appointments in a secretive and arbitrary manner and for guidelines requiring full transparency including advertisements and interviews while selecting the best human rights talent available in the country;
- e. directing the Union of India/NHRC to abide by the “UN Guidelines on National Human Rights Institutions” otherwise known as the “Paris Principles, 1993”;
- f. restraining the NHRC from treating the deemed members of the NHRC as an empty formality and for a direction to the NHRC to involve all such members in all the deliberations and other proceedings of the NHRC;
- g. prohibiting the Union of India/NHRC from appointing its Secretary General and the Director (Investigations) in a mechanical and non transparent manner and for a direction to the Union of India / NHRC to appoint such individuals who have an outstanding records of defending human rights;
- h. directing the Union of India/NHRC to abide by the ICC recommendations regarding the appointment of government servants appointed on deputation particularly that senior level posts should not be filled with secondees and should not exceed 25% of the total work force of the NHRC;
- i. directing the Union of India/NHRC to forthwith carry out an assessment of the overall staff requirement of the NHRC in view of the explosion of complaints being received;
- j. directing the Union of India/NHRC to expand its investigative wing by 5 times over its present strength comprising personnel from different professions than only from the police;
- k. directing the NHRC/Union of India to forthwith appoint as NHRC Members prominent persons with knowledge and practical experience from NGOs, trade unions, social and professional organizations such as lawyers, doctors, journalists, eminent scientists, academics and others.

We do hope that this litigation will be seen as an opportunity to adhere better to Paris Principles, and not be fought by the NHRC in an adversarial manner but as an opportunity to revamp and improve the NHRC.

ANNI is a network of human rights organizations and defenders engaged with national human rights institutions in Asia to ensure the accountability of these bodies for the promotion and protection of human rights.

The ANNI members are:

- ADVAR – Iran;
- Ain o Salish Kendra (ASK) – Bangladesh;
- All India Network of NGOs and Individuals Working With National and State Human Rights Institutions (AiNNI) – India;
- Asian Forum for Human Rights and Development (FORUM-ASIA);
- Burma Partnership - Burma
- Cambodian League for Promotion and Defence of Human Rights (LICADHO) – Cambodia;
- Cambodian Working Group for the Establishment of an NHRI (CWG) – Cambodia;
- Centre for Human Rights and Development (CHRD) – Mongolia;
- Commission for Disappearances and Victims of Violence (KontraS) – Indonesia;
- Defenders of Human Rights Centre – Iran;
- Education and Research Association for Consumer Education (ERA Consumer) – Malaysia;
- Hong Kong Human Rights Monitor (HKHRM) – Hong Kong;
- Human Rights Forum (HRF) – Bangladesh
- Human Rights Organization of Kurdistan;
- Indonesian Human Rights Monitor (IMPARSIAL) – Indonesia;
- Indonesian NGO Coalition for International Human Rights Advocacy (HRWG) – Indonesia;
- Informal Sector Service Centre (INSEC) – Nepal;
- Institute for Policy Research and Advocacy (ELSAM) – Indonesia;
- International Campaign for Human Rights in Iran – Iran;
- Joint Movement for NHRI and Optional Protocols – Japan;
- Judicial System Monitoring Program (JSMP) – Timor Leste;
- Justice for Peace Foundation (JPF) – Thailand;
- Korean House for International Solidarity (KHIS) – South Korea;
- Law and Society Trust (LST) – Sri Lanka;
- Lawyers’ League for Liberty (LIBERTAS) – Philippines;
- Maldivian Democracy Network (MDN) – Maldives;
- Odhikar – Bangladesh;
- People’s Watch (PW) – India;
- Philippine Alliance of Human Rights Advocates (PAHRA) – Philippines;
- Suara Rakyat Malaysia (SUARAM) – Malaysia;
- Taiwan Association for Human Rights (TAHR) – Taiwan;

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