

ANNI
2016

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

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Asian NGO
Network on National
Human Rights Institutions



2016 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

We are pleased to present the Report on the Performance and Establishment of National Human Rights Institutions in Asia in 2016. At the outset, we would like to record our sincere appreciation to all 36 member-organizations of the Asian NGO Network on National Human Rights Institutions (ANNI). Their continued advocacy towards the establishment and strengthening of national human rights institutions (NHRIs) in Asia has made this publication possible. We would also like to extend our sincere thanks to the NHRIs that have contributed in various ways to the publication.

As in the last years, the 2016 ANNI Report is based on country reports with analysis of national developments throughout 2015 in each of the countries included in the publication. Significant developments of the first quarter of 2016 have also been discussed in the country reports, which have been structured in accordance with ANNI Reporting Guidelines that were collectively discussed and formulated by the ANNI members present at the 9th Regional Consultation of ANNI held in Jakarta, Indonesia in May 2016.

The 2016 ANNI Report primarily focuses on issues of independence and effectiveness of the NHRIs. The trend and level of engagement of the NHRIs with other stakeholders, such as civil society and parliament, has also been discussed analytically.

We hope this publication will continue to serve as a reference and advocacy tool for all stakeholders engaged in enhancing the role and functioning of NHRIs as public defenders and protectors of human rights on the ground.

We 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 (Bangladesh), Eun-ji Kang and Hyun-pil Na (South Korea), Shahindha Ismail and Yoosuf Ziyaan (Maldives), Sabra Zahid and K. Aingkaran (Sri Lanka), Enkhtsetseg Baljinnyam and Urantsooj Gombosuren (Mongolia), Jose Pereira, Cyntia Silva and Jose Moniz (Timor-Leste), Mathew Jacob (India), Claudia Yip (Hong Kong), Chew Chuan Yang (Malaysia), Bijay Raj Gautam (Nepal), E-ling Chiu, Song-lih Huang and Yibee Huang (Taiwan), and ChalidaTajaroensuk (Thailand).

Our sincere thanks are also due to the Country Programme of FORUM-ASIA for coordinating the entire process by providing inputs as well as administrative support. We would also like to thank Balasingham Skanthakumar for editing the Report for a fourth successive year. Finally, we would like to acknowledge the financial support from the European Union in the publication of this Report.



Mukunda Raj Kattel

Director

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

Regional Overview

ANNI Secretariat¹

INTRODUCTION

In Asia where regional human rights system has not been developed as how it has in other regions, National Human Rights Institutions (NHRIs) hold and continue to play significant role in the promotion and protection of human rights. The United Nations (UN) addressed the importance of NHRIs since 1946 when the Economic and Social Council (ECOSOC) encouraged States to form local human rights committees to further the work of the UN Commission on Human Rights.

In 1991, the first International Workshop on National Institutions for the Promotion and Protection of Human Rights led to the drafting of Paris Principles. It was thereafter in 1993, during World Conference on Human Rights that for the first time NHRIs compliant with the Paris Principles were formally recognized as important and constructive actors in the promotion and protection of human rights. To date, 70 years after abovementioned ECOSOC's Statement; although with key international recognitions on NHRIs' role, NHRIs still face various challenges in undertaking their mandates.

During the last session of the United Nations Human Rights Council on 28 September 2016, a Resolution on NHRIs was adopted without a vote,² reaffirming the importance of establishing and strengthening independent as well as pluralistic NHRIs in accordance with the Paris Principles. While Paris Principles has been widely recognized by the international community as the standard which frame and guide the work of NHRIs, significant efforts to push for NHRIs' full compliance with the principles provided therein are still much needed in order to ensure effective promotion and protection of human rights.

The Global Alliance of NHRIs (GANHRI, formerly known as the International Coordinating Committee of NHRIs or ICC), through its Sub-Committee on Accreditation (SCA), has been playing key task in international level of not only providing guidance beyond the Paris Principles, but also reviewing performance of NHRIs. While GANHRI's position in promoting and strengthening NHRIs in global level is significant, local civil society actors also continue to provide balance assessments as they closely work towards the same pursuit of greater human rights protection in their own region.

It is in this view of bringing human rights into national implementation and greater protection, that human rights defenders (HRDs) and civil society continue their efforts in strengthening NHRIs through various advocacy efforts. ANNI Report 2016 presents assessments by HRDs in the ground who deal with day to day

¹ Prepared by Agantaranansa Juanda

² See Resolution A/HRC/33/L.17/Rev.1 on national institutions for the promotion and protection of human rights, http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/33/L.17/Rev.1

operation of NHRIs, and also highlights opportunities for NHRIs to advocate for full compliance with the Paris Principles. HRDs involved in the writing of the Report also elaborate the extent to which NHRIs are able or unable to protect HRDs in doing their legitimate works.

DIVERSE CONTEXTS IN THE GROUND FOR NHRIs

When international human rights norms are brought to national level implementation, it also means they need to be able to step into varying cultural, political, social and religious contexts. This makes the level of difficulty to operate by NHRIs also vary one another. However, even in the most difficult environments, there is more expectation for NHRIs in their capacities to really protect the rights of the people, added with the fact that there is no effective regional human rights mechanism to go to.

In Maldives, Human Rights Commission (HRCM) was set up with the main objective to protect, promote and sustain human rights in accordance with *Shari'a* (Islamic law) and the Constitution of the country. However, HRCM is deemed failing to consider or implement the recommendations aimed at improving the Commission's effectiveness and independence. While recognising that HRCM operates under heavy political environment, it can also be shown by the report that the Commission has not made sufficient efforts to counter or contest pressure against them. An 11-point Supreme Court guideline in 2015 even imposed excessive and arbitrary restrictions particularly in relation to engagement of HRCM with international human rights mechanisms. International community has been made further alarmed that this year the new Vice Chair of HRCM defended these guidelines.

The relatively similar difficult political environment can also be seen in Thailand, which rooted from even before the coup d'état in 2014. In its November 2015 Accreditation Report, GANHRI-SCA recommended the National Human Rights Commission of Thailand (NHRCT) to be downgraded to "B" Status. This happened after a one-year period during which the NHRCT could have addressed concerns that GANHRI raised in 2014. The NHRCT was strongly criticised for its delays in investigating and issuing reports on the political violence in 2010 and 2013. In the situation of a coup d'état or a state emergency, NHRIs are expected to conduct itself with a heightened level of vigilance and independence.

In post-disaster situation, an initiative taken by the National Human Rights Commission of Nepal (NHRCN) during humanitarian crisis caused by devastating earthquake in April 2015 may serve as an example of the role of NHRI in situations alike. The National Reconstruction Authority (NRA) was formed in response to the earthquake after the tremendous pressure exerted by NHRCN to the government to give final shape to the draft bill of NRA. The NHRCN reserves an authority to monitor the work progress of NRA, condition of quake victims and can exert pressure on government. In 11 earthquake-affected districts, NHRCN formed mobile camps with the Nepal Bar Association, NGO Federation and Federation of Nepalese Journalists to monitor and receive complaints.

Within transitional justice context, NHRCN may also give example of an NHRI's role in peace process. The transitional justice Act in Nepal has given NHRCN the role to monitor the implementation of the recommendations made by Truth and Reconciliation Commission (TRC) and a Commission to Investigate Enforced Disappearances (CIED). In case of complaint registered at the NHRCN regarding the conflict-era, NHRCN can provide all information to the commissions save for statements of the victims and witnesses. Prior to the formation of transitional justice commissions, many victims had registered complaints at the NHRCN which has therefore documented the conflict related cases in the past. In such situation, TRC and CIED (transitional or temporary mechanisms) cannot perform their roles without assistance from the permanent constitutional NHRCN.

On the same context of transitional justice, the Government of Sri Lanka announced a four-pillar reconciliation mechanism in September 2015: namely the Office of Missing Persons; the Truth, Justice, Reconciliation and Non-Recurrence Commission; the Judicial Mechanism with a Special Counsel; and the Office of Reparations. The government has created a number of institutions, as well as two Ministries, all of whom are working with no coordination with each other. The Consultation Task Force assisted by fifteen Zonal Task Forces (ZTFs), is currently conducting district-wide consultations on the design of the aforementioned bodies and will submit a report that reflects the full range of public views expressed. However so far, the Human Rights Commission (HRCSL) has been entirely left out of the process.

In Indonesia, civil society is also putting high hopes on the performance of Indonesian National Human Rights Commission (Komnas HAM) in dealing with past human rights violations and fighting impunity. One example of the past cases is regarding the 1965 tragedy, where civil society relies on Komnas HAM's mandate to ensure that the *pro-justicia* investigation report to be brought to the Attorney General, and thereafter to be investigated and prosecuted at Indonesian Human Rights *Ad-Hoc* Court. No significant action about this has really been brought into reality.

While the Paris Principles already recognized that lacks of adequate resources by NHRIs to recruit its own staff constitutes an action that undermines the principle of institutional independence, it was found that HRCSL in Sri Lanka is struggling with being understaffed for undertaking its mandates. Inadequate resources are also a problem faced by the Human Rights Commission of Malaysia (SUHAKAM), where it has been forced to severely restrict its operational capacity as a result of the drastic budget cuts. In Mongolia, despite previous ANNI recommendations on adequate funding to the National Human Rights Commission, we can still find the case where the Government is cutting budget of its NHRI.

To move to other context in one of the newest independent States in international community, the chapter on Timor-Leste will also give an idea of the role and performance of NHRIs, as well as room for improvement of its performance based

on civil society perspectives. The Timor-Leste's Ombudsman for Human Rights and Justice (PDHJ) mentioned that vulnerable people are protected against human rights abuses and can have good access to public services. This is reiterated as one of the four priorities in its 2011-2020 Strategic Plan. However, it is found that there are many citizens who still do not have access to clean water, good health and sanitation facilities, good education facilities, and various ranges of fundamental rights. Aside from Civil and Political rights, PDHJ is expected to also investigate and recommend to the Government on wide range of issues under social, economic and cultural rights.

In Republic of Korea, for the first time ever that there are three deferrals of reaccreditation process by GANHRI-SCA of an NHRI. The National Human Rights Commission of Korea (NHRCK) was finally re-accredited with "A" Status in 2016, following the amendment of NHRCK Act. However not a single commissioner was appointed in compliance with this Act or with SCA recommendations regarding their selection and appointment process. A process that promotes merit-based selection and ensures pluralism is necessary to ensure the independence of NHRIs in undertaking their mandates to fully promote and protect human rights. This also serves as reminder for GANHRI-SCA to design effective mechanism in following up their recommendations beyond merely granting status to NHRIs.

In India, the trend of NHRIs as "alibi institution" is still relatively adamant, where they are considered as being allied with the State. NHRIs need to operate fearlessly and follow their mandate of upholding human rights. It is argued that despite the fact that they are dependent on the State for finances, independence can be ensured through a transparent appointment process, ensuring plurality in appointments, establishment of an independent investigation, involvement of learned and reputed human rights activists in various capacities, and various other means.

PUTTING HOPES TO NHRIs TO PROTECT HRDs

Taking into account the mutual relationship between HRDs and NHRIs in the promotion and protection of human rights, as well as the internationally recognized mandates of NHRIs to protect HRDs, ANNI Report this year presents one common thematic focus on the subject. Worrying trend of governments in Asia, irrespective of their political orientation, in taking action against HRDs is emerging. This leads to the shrinking space for HRDs to conduct their legitimate works. It is at this critical point that NHRIs must be able to perform its core mandates including in protection of HRDs.

Many Asian NHRIs are vested with protection mandates as well as mechanisms to monitor, document, as well as receive complaints and investigate cases. Although it has been acknowledged that some limitations persist, for example inadequate human or financial resources, but NHRIs are still expected and mandated to conduct its protection works, especially for their main constituencies such as HRDs and civil society.

The chapter on India will be able to highlight about the reality that international community should be aware of. Although the existence of focal point for HRDs at the Commission is commendable, but it has never exercised its powers in Section 12 to intervene on behalf of HRDs on the instances of false cases being filed to HRDs. Human Rights Defenders Alert – India (HRDA) a national level network of HRDs, in the year 2015 filed 104 cases with the NHRC; all cases pertaining to threat, attack and harassment of HRDs. Out of 104 cases filed with the NHRC, it registered only 81 cases (74 with HRDA as complainant and 7 with others as complainants) and 23 cases were not registered. In no case was relief provided by the NHRC to the HRDs.

Creation of focal points can also be seen in Indonesia, where its Komnas HAM has also designated various Special Rapporteurs at the Commission, including Special Rapporteur on HRDs. However, limitation of the mandate such as submitting request without ability to enforce such request to other institutions remains an obstacle in protection of HRDs.

Aside from the issue of limited mandates, we can learn that in Republic Korea other issues such as lengthy process of relief may hinder protection of HRDs. Although NHRCK may recommend urgent relief in accordance with Article 48 of the NHRCK Act, in practice the process takes a lengthy amount of time after the request is filed. Such relief request may also be not granted in some cases. In the case of KIA motors' workers, NHRCK action of dismissing four urgent relief requests by the workers is deemed inappropriate.

In some other national contexts, the situations of HRDs are also still viewed with severe criticism and concern, especially for women HRDs. For example in Maldives, opinions that are oppressive of women and girls are being spread in the country. With women being particularly outspoken and courageous in addressing issues of fundamental rights in Maldives, HRCM has not used its unique opportunity to protect these groups of people, who are basically assisting protection mandates that are mainly tasked to the Commission. There is no legal recognition of HRDs at the national level; and neither has the HRCM been known to make any proposals to the government or the parliament for such law.

Among all these, we can still see rather positive initiatives taken by the NHRCN in Nepal. NHRCN has published its '*Guidelines for human rights defenders*' and is serious about the safety and security of the HRDs including women HRDs. The Commission has shown it has alerted the government on many occasions through press releases. The NHRCN has been motivating and felicitating human rights defenders yearly and also working for the capacity enhancement of HRDs and journalists on the theme of Human Rights. Civil society also commends on the action taken by NHRCN spokesperson Mohna Ansari at the 31st session of the Human Rights Council in Geneva on 16 March 2016, who stated that the Nepali government should investigate excessive use of security forces to suppress the Madesh unrest.

The same positive development can be observed in Malaysia too, although without formal legal recognition on protection of HRDs. SUHAKAM has in the past worked closely with HRDs and the issue of recognition has not been a matter of contention. SUHAKAM also grants shortlisted NGOs and individuals, who have made substantive contribution to the human rights discourse in Malaysia, awards on an annual basis. While the work in this regard has certainly been fruitful for human rights defenders, much more can be done for example to develop mechanisms to actively engage with human rights defenders who have been summoned for police questioning or arrested as part of their activism.

In Thailand, we are also remote from seeing positive development on protection of HRDs, both by the State or by the NHRCT. A number of HRDs are being subject to persecution, including women HRDs. Many of them have been killed, or disappeared, faced harassment and intimidation including sexual harassment in the past several years. Many also face criminal charges filed against them either by state agencies or private companies, particularly those working on land rights and natural resource extraction, as well as rights activists in Southern Thailand.

In the absence of mechanisms of protection of HRDs, it can be found that usually HRDs need to design by themselves protective measures needed in undertaking their legitimate works. In Timor-Leste, several members of civil society have established a secretariat and selected a coordinator for HRDs. The role of the coordinator is to monitor the activities of HRDs and to inform and share information in national and international level when there is any violation against any HRDs. There is however good sign of development where PDHJ has appreciated the steps taken by civil society organisations and declared its willingness to cooperate and collaborate with CSOs on violations of the rights of HRDs.

In Mongolia, such formal and legal recognition of HRDs does not exist as well. In wider society within Mongolia, even HRDs and women HRDs still constitute new terms including amongst civil society organizations. In this case, it is expected that Mongolian NHRC can fully undertake its mandates, both on promotional aspects of human rights through education, as well as on protection measures.

Also in this year's ANNI Report, chapter on Sri Lanka might help to discern that there is an opportunity of HRCSL to improve its protection of HRDs. Within HRCSL there is no separate or special mechanism for the protection of HRDs. There is no designated help desk or focal point to deal with issues faced by HRDs. Under the previous Commission a set of guidelines for the protection of HRDs was drafted and several consultations were held at the national and regional level to promote the guidelines and seek amendments before finalising the draft. This latest development must be followed up and HRCSL should seize this opportunity to fully undertake its core mandates including on protection of HRDs.

ESTABLISHMENT OF NHRIs

The latest document adopted in International community, during the last Human Rights Council session, reiterated encouragement for the establishment of effective, independent and pluralistic NHRIs. However, it is also worthy of note, based on the lessons from various existing NHRIs, that NHRIs that are to be established should really be independent in order to effectively address human rights violations. The 9th ANNI Regional Consultation Meeting in Jakarta this year already highlighted this point; that the works should not halt at the establishment process per se, but NHRIs are also to be equipped with the appropriate legislation/constitutional document based on consultation with wide stakeholders including civil society.

In Taiwan, since a wave of efforts to establish the NHRI in early 2000s, we can finally expect a positive development towards establishment of an NHRI. With the joint efforts of the member organisations of Covenants Watch, President TSAI Ing-wen (the then presidential candidate of the Democratic Progressive Party) publicly announced on 9 December 2015 that she would promote the establishment of an NHRI if elected in the 16 January 2016 national polls. On 23rd July 2016, under the renewed leadership of Vice President Chen Chien-Ren, the the Presidential Office Human Rights Consultative Committee (POHRCC) for the first time adopted a resolution to urge the President's Office to submit one draft of establishment of NHRI among the four POHRCC proposals to the Legislature for deliberation as soon as possible.

Strategies to move forward with an NHRI that complies with the Paris Principles are needed at this stage of development in Taiwan. This year's ANNI Report on Taiwan chapter will try to describe these strategies that are relevant with local contexts of Taiwan. Attention also needs to be given to avoid any party to construct attacks on the idea of an independent NHRI and the international human rights system in general.

While Taiwan chapter can contribute to meaningful lessons learned on establishment of NHRI, in contrast we are shown with worrying resistance by the Government in Hong Kong to establish an NHRI. This is also destabilizing the already fragile situation in the region, added with heightened public mistrust of the Hong Kong Special Autonomous Region (HKSAR) government. Although international community including UN Treaty Bodies repeated recommendations that Hong Kong should consider establishing an NHRI with a broad mandate covering all international human rights standards, HKSAR Government insists on claiming that that the existing mechanism works well. Unfortunately, the latter claim is still proven unsound.

CONCLUSION

Current trends in Asia show that there remains to be a myriad of challenges for NHRIs to be able to effectively promote and protect human rights. Political landscape continues to be a key aspect both in ensuring the establishment of

NHRIs and in strengthening existing NHRIs to take on their mandates. Other challenges that persist also include structural problems, functional deficiencies as well as lack of adequate mechanisms for enforcement of human rights recommendations.

In thinking about the interplay between international nature of human rights law and domestic protection of human rights by the States, it is pertinent to put NHRIs as one of the key actors in bringing international norms into local reality. The action of establishing an NHRI might be seen as willingness of States, as the duty bearers of human rights protection, to be monitored closely by the public through an independent institution. However, in reality, assessment on such willingness by States must not stop merely at the establishment stage. It is the performance of NHRIs to comply with Paris Principles that determine whether human rights protection can really be put as local reality.

Within this context of bringing human rights protection into reality in national level, international human rights norms will indeed face challenges from the diverse cultural, political, social and religious contexts. This makes the level of difficulty to operate by NHRIs also vary one another. Notwithstanding the level of pressure against them, which is mostly political, NHRIs must still need to conduct itself with a heightened level of vigilance and independence and in strict accordance with the real purposes of its establishment.

It has been recognized that NHRIs should develop, formalize and maintain working relationships with HRDs and civil society for the promotion and protection of human rights. However, current emerging trend of the shrinking space for HRDs and civil society in Asian countries should instruct NHRIs to start protecting its ally in all circumstances. After all, HRDs and NHRIs are sharing the same goal towards greater promotion and protection of human rights.

While there have already been various recommendations in international community on establishment of independent NHRIs to countries where they are not currently in place, other aspect that needs attention is to ensure enabling environment for such NHRIs to operate once they are established. Positive development on establishment of an NHRI in Taiwan needs to continue moving forward with transparency in the process. Therefore, advocacy for establishment in other countries without NHRIs, mentioned 70 years ago through ECOSOC statement, shall continue.

MALAYSIA: UNDERMINING NHRI THROUGH BUDGET CUT *Suara Rakyat Malaysia (SUARAM)¹*

1. Context

2016 has been an eventful year for the Human Rights Commission of Malaysia (SUHAKAM). The successful programmes by SUHAKAM in 2015 and the ‘retaliation’ by the Federal Government of Malaysia in late 2015 placed SUHAKAM in rather curious circumstances over 2015/2016. On one hand, SUHAKAM now enjoys an increased support and recognition by civil society; on the other, SUHAKAM suffered from the ire of the Federal Government and has been forced to severely restrict its operational capacity as a result of the drastic budget cut imposed upon it.

On top of the sanctions imposed by the Government of Malaysia, SUHAKAM was also restricted in its contribution to the developments of laws that hold dire consequences for Malaysia. As a case in point, the government claimed that SUHAKAM was consulted in the drafting of the Prevention of Terrorism Act 2015². The claim was swiftly rebutted by the former chairperson of SUHAKAM, Tan Sri Hasmy Agam who stated that the government merely informed SUHAKAM of their intention³. In a closed door conference in early 2016, a government official mentioned that SUHAKAM was not consulted in the drafting of the law as SUHAKAM was not seen as expert on the matter and thus consultation was deemed unnecessary. The decision to exclude SUHAKAM from the drafting of laws that holds substantial human rights concerns clearly prevents SUHAKAM from executing its duties under Section 4(1)(b) of SUHAKAM’s governing act⁴.

Despite the operational restriction that resulted from the budget cut and general uncooperative stance adopted by the Government of Malaysia, SUHAKAM managed to retain its accreditation of ‘A’ status during its review in late 2015. In brief, the accreditation was made with concerns on the appointment process in which the Prime Minister of Malaysia has discretion in the appointment of new commissioners; the

¹ *Chew Chuan Yang, Documentation & Monitoring Coordinator, monitoring@suaram.net. Our deepest gratitude to all individuals and organisations that made the preparation of this report possible. Special thanks to SUARAM Executive Director Sevan Doraisamy for the guidance and inspiration.*

² A law which grants police power to detain individuals without trial for upward of 60 days and grants the terrorism board power to sentence an individual to imprisonment for upward to 2 years (and renewal as necessary).

³ Christine Cheah and Victoria Brown, “Suhakam: We were not consulted”, *The Star*, 16 April 2015, <http://www.thestar.com.my/news/nation/2015/04/16/suhakam-we-were-not-consulted-hasmy-no-consultation-on-pota/>.

⁴ “...to advise and assist the Government in formulating legislation and administrative directives and procedures and recommend the necessary measures to be taken...”.

absence of 'full-time' position for commissioners; inadequate funding; security of tenure; and emphasis on the need for state recognition of the NHRI report⁵. It is noted that the concerns raised by the Sub-Committee of Accreditation should be attributed to the Government of Malaysia as many of the issues raised had been raised by SUHAKAM in their proposed amendments to SUHAKAM's enabling act⁶.

The key highlights of ANNI's recommendations in ANNI's 2015 report outlined the need for SUHAKAM to increase engagement with civil society in Malaysia; to ensure timely response to developing human rights situation; and for SUHAKAM to utilise its unique position and act as a bridge to help facilitate discussion between government agencies and civil society on human rights. On this note, most of the recommendations made to SUHAKAM have been adopted and some of the changes made have come to fruition.

As for the recommendation made to the Government of Malaysia in regards to SUHAKAM in the ANNI report, none of the recommendations have been adopted. To make the matter worse, the recommendation for SUHAKAM's budget to be increased to ensure the effectiveness of SUHAKAM's operation was disregarded completely. In November 2015, SUHAKAM's budget was officially slashed by close to 50% for the year 2016. Despite SUHAKAM's representations to the Minister as well as Ministry of Finance, the commission's budget cut remains inadequate. The Minister in charge was found to be misrepresenting the comments and feedback⁷ by SUHAKAM's commissioners on the matter.

This report shall reflect on the general progress and development experienced by SUHAKAM and shall evaluate the endeavours by SUHAKAM in regards to the issues and state harassment against human rights defenders (HRD) in Malaysia and the efforts to protect and promote civil and political rights in Malaysia by SUHAKAM. This report would evaluate SUHAKAM based on several complaints of human rights violations put forward by SUARAM on behalf of the family of victim of human rights violations with several cases relating to the status of human rights defenders.

⁵ International Coordinating Committee of National Institution for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)', 16-20 November 2015, <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20FINAL%20REPORT%20-%20NOVEMBER%202015-English.pdf>.

⁶ Act 597, *Human Rights Commission of Malaysia Act 1999*.

⁷ Nawar Firdaws, "Reduced budget sees Suhakam confined to Klang Valley", 17 May 2016, *Free Malaysia Today*, <http://www.freemalaysiatoday.com/category/nation/2016/05/17/reduced-budget-sees-suhakam-confined-to-klang-valley/>. SUARAM is given to understand that SUHAKAM explained that the current budget allocated would restrict SUHAKAM's operation and limit its operation to the Klang Valley area (that is Kuala Lumpur and surrounding areas in Selangor state). The Minister in charge, Paul Low answered the Parliament suggesting that SUHAKAM had voluntarily confined its activities to one small part of the country.

2. Mandate to Protect and Promote Human Rights

2.1 General

In general, SUHAKAM is endowed with the power to look into complaints received by it or to initiate its independent inquiry into human rights violations. Unfortunately, restriction on resources and operational structures renders the practice of independent inquiry uncommon. As for lodging complaints, individuals or groups who believe that their rights have been infringed can approach SUHAKAM by visiting its office or through other means of communication.

In addition to these powers, SUHAKAM has the discretion to act upon complaints and visit victims of human rights violations who are detained. However, in some cases, this power has been curtailed by the need for notification to the relevant government agencies. While the need for notice can be justified, the current practice requiring substantial pre-notice makes it not viable for surprise visit to be conducted. The requirement for pre-notice also allows room for enforcement agencies to 'clean-up' their act before SUHAKAM's visit or investigations.

This report will seek to evaluate SUHAKAM's performance through the following case studies as a starting point for evaluation.

Case Study 1: Arrest and Detention of Khalid Ismath

Khalid Ismath, a well-known activist was arrested in October 2015 for allegedly insulting the royal family of Johor (southern state in Malaysia)⁸. He was later charged on three counts under the Sedition Act 1948 and 11 counts under the Communications and Multimedia Act 1998. After his arrest in Kuala Lumpur, he was subsequently brought to Johor and was remanded there. When he was charged, the court denied his bail which resulted in his detention in solitary confinement for three weeks. During his detention, he was reportedly ill-treated and subjected to mental torture and other inhumane treatment, including being forced to sleep on the floor of a 'dark' cell with no bedding, toilet and light. After his release in late October, Khalid Ismath lodged a complaint to SUHAKAM in regard to his detention and the inhumane treatment and conditions to which he was subjected.

⁸ Amnesty International Malaysia, 'Release Khalid Ismath (UA238/15)', 21 October 2015, <http://www.amnestyusa.org/get-involved/take-action-now/malaysia-release-khalid-ismath-ua-23815>.

Case Study 2: Arrest and Detention of Datuk' R. Sri Sanjeevan

Datuk R. Sri Sanjeevan was first detained on 22 June 2016 for allegedly extorting money from operators of illegal gambling dens in Malaysia. He was arrested and subsequently remanded for investigation. After the conclusion of his first remand, he was subjected to a series of chain remand⁹ (Sanjeevan was subjected to eight arrests in total). His 6th, 7th and 8th remand application by the police was summarily rejected by the court. Following the end of his 8th arrest, he was placed under detention under the Prevention of Crime Act 1959¹⁰ (POCA). A complaint to SUHAKAM was made by the family on 29 June. SUARAM followed up with a memorandum on 1 July 2016. Subsequently, after Sanjeevan's court appearance and signs of physical violence, SUARAM and family members of Sanjeevan paid SUHAKAM another visit on 19 July 2016.

Case Study 3: Arrest and Detention of an Asylum Seeker¹¹

An asylum seeker who entered Malaysia without suitable travel documents was arrested for violating the immigration conditions imposed on him and was subsequently detained under immigration law for more than a month. Due to difficulties in physically locating and verifying the security of the person, SUARAM on behalf of his next of kin contacted SUHAKAM to assist with the efforts to locate the said individual. Official request for assistance and complaint was put to SUHAKAM on 2 June 2016.

Case Study 4: Arrests and Chain Remand for 'Lese Majeste'¹²

In May 2016, six individuals were arrested and subjected to chain remand in Johor for online comments that allegedly insulted a member of the Royal Family. When the first chain remand started, SUARAM on behalf of the victims and their next-of-kin submitted a complaint with SUHAKAM calling for active monitoring and intervention when necessary. The request for further monitoring was made on 2 June 2016.

2.2 Addressing human rights violations in a comprehensive and timely manner

In *case study 1*, the complaint was lodged following the release of Khalid Ismath. According to the complainant, SUHAKAM has communicated via written letters

⁹ Locally known as 'Tukargari', chain remand occurs when an individual is arrested immediately upon release from remand. Victims of this practice are rearrested for a 'different' police report for the same crime or in some cases a different matter.

¹⁰ The Prevention of Crime Act 1959 grants police power to detain someone without trial for upwards of 60 days.

¹¹ Name withheld due to security and safety concerns.

¹² Strictly speaking, there is no law for *lese majeste*. The Sedition Act 1948 and the Communications and Multimedia Act 1998 is the usual law used to prosecute those who insult members of the royalty.

detailing the status of the investigations. Thus far, the letter has detailed the inquiries put forward to the Royal Malaysian Police and the lacklustre replies given by the police.

In *case study 2*, the initial complaint to SUHAKAM by family was lodged on 29 June 2016. Soon after, a commissioner from SUHAKAM visited Sanjeevan in detention. On 30 June, Sanjeevan was produced in court to be charged for extortion. During the preliminary hearing, Sanjeevan informed the court that he was physically beaten and tortured after the visit by the SUHAKAM commissioner.

In *case study 3*, following the complaint and request for assistance lodged with SUHAKAM on 2 June 2016, SUHAKAM's complaint and monitoring division successfully located the 'missing' asylum seeker and reverted back to SUARAM on 3 June 2016.

In *case study 4*, after SUARAM put forward the request for active monitoring and intervention, no further updates were received from SUHAKAM on the matter. Those detained were subjected to chain remand for upwards of 12 days. SUARAM was given to understand that there were no additional follow up thus far. It is noted that no official complaints have been lodged by those detained as there is a substantive threat to their safety at this juncture.

3. HRDs and WHRDs

Despite the volatile work environment that is prevalent in civil society in Malaysia, the protection afforded to human rights defenders is still relatively scarce in Malaysia. With Malaysia's support for the United Nations General Assembly resolution in 2015¹³, preliminary steps have yet to be initiated by civil society and the NHRI to adopt the concepts advocated by the resolution.

As of July 2016, the legal recognition and protection for human rights defenders is still largely an aspiration. However, SUHAKAM has in the past worked closely with human rights defenders¹⁴ and civil society organisations and the issue of recognition has not been a matter of contention. On a more positive note, SUHAKAM grants a shortlisted NGO and individual who has made a substantive contribution to the human rights discourse in Malaysia, an award on an annual basis¹⁵.

¹³ FIDH, 'United Nations General Assembly adopts resolution on the protection of human rights defenders by increased majority', 18 December 2015, <https://www.fidh.org/en/issues/human-rights-defenders/united-nations-general-assembly-adopts-resolution-on-the-protection>.

¹⁴ In the past there was an officer to oversee matters relating to human rights defenders.

¹⁵ SUHAKAM, 'Human Rights Award 2016', <http://www.suhakam.org.my/berita-peristiwa/human-rights-award-2014/>.

Between 2015 and 2016 (up to July), SUHAKAM has issued a total of 63 statements of which two statements had direct or substantive mention of issues relating to human rights defenders. The issues raised in this statement includes the restriction on freedom of movement of human rights defender¹⁶ and the arrest of human rights defenders during a protest against the implementation of new tax policies¹⁷.

Between 2015 and 2016 (up to July) SUARAM has lodged three complaints relating to human rights defenders operating in Malaysia. The complaints related to case study 1; the arrest and detention of Mr. Khairul Nizam; and case study 3.

In case study 1, SUHAKAM informed the complainant Khalid Ismath that it had contacted the Royal Malaysian Police inquiring about the detention conditions and that the police denied any wrong-doing in the case; In the case of Khairul Nizam, no further information was given to the complainant or his family member on the matter. As for case study 3, the complaint was submitted by the family of the detained and the detained was visited by a SUHAKAM commissioner within a week.

A cursory examination of the three cases specifically pertaining to human rights defenders would suggest that SUHAKAM has not performed to its best in addressing the threat against human rights defenders. However, if we look at the specifics, in the cases involving Khalid Ismath and KhairulNizam, where SUHAKAM were performed under the expected standard, this could be the result of the distance between SUHAKAM headquarters in Kuala Lumpur and the detention centre in Johor Bahru. Further, it should be noted that no complaint was lodged with SUHAKAM immediately after their arrest. However, this should not justify the lack of proactive intervention as both cases were well documented and reported in the media.

As for preventive measures, SUHAKAM has not engaged with human rights defenders and civil society in establishing preventive practice to provide additional protection to human rights defenders. Considering the context and scope of powers available to SUHAKAM in Malaysia, effective preventive measures protecting human rights defenders is unlikely to be viable.

¹⁶ SUHAKAM, 'SUHAKAM Deplores the Curtailment of Fundamental Rights of Malaysians', 27 July 2015, <http://www.suhakam.org.my/suhakam-deplores-the-curtailment-of-fundamental-rights-of-malaysians/>.

¹⁷ SUHAKAM, 'The Human Rights Commission of Malaysia Expresses Deep Concerns over the Continued Violation of the Right to Freedom of Peaceful Assembly', 3 May 2015, <http://www.suhakam.org.my/the-human-rights-commission-of-malaysia-expresses-deep-concern-over-the-continued-violation-of-the-right-to-freedom-of-peaceful-assembly/>.

However, this does not exclude the possibility of a robust mechanism to proactively monitor and intervene in cases involving human rights defenders. Thus far, SUHAKAM has issued statements relating to the persecution of human rights defenders and begun investigating the complaints lodged by human rights defenders. While the work in this regard has certainly been fruitful for human rights defenders, much more can be done. As an example, SUHAKAM can and should develop mechanisms to actively engage with human rights defenders who have been summoned for police questioning or arrested as part of their activism. This mechanism could potentially include notice of concerns to the police station in question or physical presence of commissioners or designated officers at the police station during inquiries.

In addition to implementing plans and procedure to better facilitate SUHAKAM's capacity for protection and intervention, SUHAKAM should explore possible avenues of strengthening human rights advocacy in Malaysia. Traditionally, SUHAKAM has been tasked with human rights education in Malaysia. This unique role grants SUHAKAM an opportunity to reach out to public education institute of suitable level to deliver human rights education and training. Recognising SUHAKAM's initiative and contribution in organising talk sessions in education institutes and the *Amalan Terbaik Hak Asasi Manusia* (ATHAM)¹⁸ programme in several schools, this report proposes a more robust and sustained training programme could train and build cadre of young human rights defenders from all walks of life.

The training programme could materialise in the form of a 'camp' during semester breaks for students of secondary or tertiary level. The camp could focus on empowering students and youths on knowledge of human rights and how to participate in the human rights discourse in their position. The programme could also include participation of civil society organisations and relevant government agencies who are equipped to address and educate students and youths on human rights related topics.

4. Torture and Illegal Detention

The use of torture is one of the key human rights violations that plague Malaysia on a daily basis. With no clear regulations or legal provisions criminalising the use of torture¹⁹, those who are accused of torture are often charged for lesser offences of causing

¹⁸ 'Best Practices for Human Rights': a programme in conjunction with the Ministry of Education.

¹⁹ The only known regulation against the use of torture is a special order from the Inspector-General of Police, which was revealed in the report on the investigation into the death of N. Dharmendran by the Enforcement Agency Integrity Commission.

hurt or subject to civil suits. With such weak protection in place, enforcement officers can and have inflicted torture against detainees²⁰ with varying degrees of impunity.

Another key reason why torture is so prevalent in Malaysia can be attributed to the lack of access to the detainee by family members and lawyers during prolonged detention. In Malaysia, there is the practice of chain remand where an individual is re-arrested immediately after release for a similar crime. More often than not, this allows police unobstructed access to detainees for prolonged period that can extend indefinitely (with detention of 80 days recorded in recent years)²¹. While legal counsel is still available to detainees in theory, those detained in such conditions are often beaten by police officers and threatened with the use of further physical violence if they request for lawyers or reveal the treatment they received in court.

Similar circumstances are also found in situations involving alleged criminals and terror suspects as the legal provisions developed to counter terrorism and organised crime utilise provisions that permit detention without trial with police discretion in detention period for upward of 60 days²². During these periods, detainees often report that they are forced to confess to crimes that they may or may not have committed under duress. With these two factors in mind, it is perhaps not surprising that cases of custodial death with signs of physical violence, such as those of N. Dharmendran²³, A. Kugan²⁴, Teoh Beng Hock²⁵ and many others, surface at regular intervals.

In light of the conditions that give rise to the use of torture in Malaysia, it is of paramount importance for lawyers and family members of detainees to be given adequate access in a timely manner. In the event that lawyers or family member is restricted or prevented from meeting with the detainees²⁶, it becomes crucial for SUHAKAM to exercise its power to

²⁰ Fahirul N. Ramli, "Malaysia: Police Tortured Detainee, Government Commission Finds", *BenarNews*, 24 April 2016, <http://www.benarnews.org/english/news/malaysian/torture-report-04282016142715.html>.

²¹ "Six men allege torture during 80-day remand", *Free Malaysia Today*, 15 March 2016, <http://www.freemalaysiatoday.com/category/nation/2016/03/15/six-men-allege-torture-while-in-80-day-remand/>.

²² Security Offences (Special Measures) Act 2012 permits effective police detention upward of 29 days; Prevention of Crime Act 1959 and Prevention of Terrorism Act 2015 allows police detention of upward to 60 days.

²³ Mayuri Mei Lin, "EAIC: Police Officers beat Dharmendran to death during violent interrogation", *Malay Mail*, 28 April 2016, <http://www.themalaymailonline.com/malaysia/article/eaic-police-officers-beat-dharmendran-to-death-during-violent-interrogation>.

²⁴ "Ex-cop in Kugan custodial death jailed three years", *Malay Mail*, 23 May 2015, <http://www.themalaymailonline.com/malaysia/article/ex-cop-in-kugan-custodial-death-jailed-three-years>.

²⁵ "Six years on, Teoh Beng Hock probe still ongoing", *MalaysiaKini*, 22 October 2015, <https://www.malaysiakini.com/news/316672>.

²⁶ Provisions in Security Offences (Special Measures) Act 2012 allows police to prevent detainee from meeting family and lawyers for a maximum of 48 hours.

visit detainees and ensure that detainees under security laws or chain remand are not subject to torture or other forms of ill-treatment.

Acknowledging the fact that SUHAKAM does conduct visits and initiate investigations on a case by case basis, it is noted that it may not be feasible for SUHAKAM to address each and every violation that arises on a case by case basis. In order to drive a change of policy and practice, frequent and consistent visits to key detention centre and police lock-ups would need to be common practice in order to mitigate and prevent possible abuses by enforcement agencies. In addition, SUHAKAM ought to establish procedures and practices on conducting surprise visits.

Traditionally, SUHAKAM lacked the power to conduct surprise visits or spot checks as SUHAKAM is required to give due notice before any visit. Fortunately, this restriction is not imposed on the Enforcement Agency Integrity Commission (EAIC)²⁷. SUHAKAM and EAIC have made it known that they had collaborated on this matter and that they were successful in coordinating a joint surprise visit with no challenges posed by the enforcement agency in question²⁸. The ability to conduct such visits would play a significant role in prevention of torture in the Malaysian context as this could enable immediate intervention whenever any individual cases of report is lodged with SUHAKAM and allows the collection of physical evidence of torture from detainees.

Further, rather than spearheading an investigation on their own, SUHAKAM can and should increase cooperation with other statutory bodies such as EAIC when it is appropriate. The recent collaboration between SUHAKAM and EAIC in conducting investigations into the allegation of torture by detained terror suspects shows great promise and potential. Such initiatives are highly welcome as it allows both agencies with interest in the matter to pool resource and expertise and would undoubtedly contribute to a more comprehensive investigation, and subsequent report on the matter.

In the absence of political will by the legislature to implement laws that would prevent and reduce the occurrence of torture, SUHAKAM should also look into developing 'best practices' for enforcement agencies and have memorandum of understanding with enforcement agencies in regards to developing operating procedures that would mitigate and minimise human rights violations and abuses.

²⁷ A statutory body that was established to investigate and report on any wrong doings committed by enforcement agencies.

²⁸ SUHAKAM, 'Annual Report 2015', <http://www.suhakam.org.my/pusat-media/sumber/laporan-tahunan/>.

5. NHRI engagement with Civil Society

In the ANNI 2015 report, one of the key recommendations put forward is that SUHAKAM should look to expand further its role and capacity to be an intermediary and mediator between civil society and government agencies. In 2015 and 2016, SUHAKAM took further steps to fulfil this recommendation. In 2015, SUHAKAM organised a round table discussion between civil society and the government agency involved with the negotiation on the Trans-Pacific Partnership Agreement. SUHAKAM also organised a round table session between all government agencies and civil society organisations on the implementation of the Universal Periodic Review which was attended by most government agencies and well received by CSOs.

While it remains questionable whether the meeting facilitated a change of approach by the relevant government agencies, the space for further discussion and exchange of ideas facilitated by SUHAKAM is helpful and provides a neutral platform for engagement. Unfortunately, the reduction in SUHAKAM budget for 2016 may significantly alter the status quo and affect SUHAKAM's current initiatives. However, it should be noted that resources for such programmes need not only come from SUHAKAM, as civil society organisations and other interest groups could be engaged as partners when necessary. As SUHAKAM may not have established extensive procedures and/or regulations on the matter, SUHAKAM should look to develop these procedures as soon as possible in order for such meetings to continue unabated.

On a more positive note, SUHAKAM has worked on the recommendation for more consultation and engagement with civil society. To this end, SUHAKAM has collaborated with statutory bodies and CSOs for the ratification of international conventions. As an example, SUHAKAM is collaborating with the Malaysian Bar, Lawyers for Liberty, Amnesty International Malaysia, SUARAM and other civil society organisations on the campaign for Malaysia's accession to the United Nations Convention Against Torture (CAT). While the joint campaign has met various challenges along the way, the resilience and capacity to adapt to cooperation and collaboration with civil society is greatly welcomed and would undoubtedly strengthen SUHAKAM's standing as an 'A' status accredited NHRI.

In line with these positive developments, the 2016 ANNI report welcomes the initiative shown by SUHAKAM in this regard and recommends additional programmes that could further consolidate SUHAKAM's role as a mediator and partner of collaboration in the advocacy effort for better human rights protection and mechanisms in Malaysia.

6. Conclusion and Recommendations

SUHAKAM has undertaken initiatives to address some of the recommendations put forward in the *2015 ANNI Report*. The areas of key progress include: the appointment and selection process for commissioners; timely and comprehensive response to human rights violations especially on crackdown against freedom of expression; maximise involvement with civil society; and fully utilise its unique position as interlocutor.

It should be noted that despite the positive developments, some areas such as active advocacy for the implementation of its recommendations and communications in terms of timely status updates on SUHAKAM's investigation can be improved still further.

Contrary to the positive development undergone by SUHAKAM, the government's callous treatment of SUHAKAM in the recent years left more to be wanted by many. Between the startling budget cut imposed on SUHAKAM, and the delay in the appointment of new commissioners for SUHAKAM, the government has failed in the legal obligations imposed by SUHAKAM's enabling act.

Further, the consistent manner in which the Parliament of Malaysia led by the ruling coalition, *Barisan Nasional* has failed to table and debate the annual SUHAKAM reports can be seen as a lack of political will to empower SUHAKAM and include human rights as part of the law making process. The lack of political will to empower SUHAKAM and adopt human rights as a new dimension in Malaysia legislature is also reflected in Government of Malaysia's one directional engagement with SUHAKAM in the drafting of the Prevention of Terrorism Act 2015.

6.1 Recommendations to the Government of Malaysia:

- 6.1.1. Cease the intended or unintended sabotage of SUHAKAM's functions caused by dereliction of the legal obligations imposed by the SUHAKAM enabling act;
- 6.1.2. Accept and adopt the amendments proposed by SUHAKAM in regard to its enabling act;
- 6.1.3. Provide full cooperation to SUHAKAM in roundtable discussions and other engagements;
- 6.1.4. Acknowledge and accept SUHAKAM's expertise and capacity to advise on the drafting of laws that has human rights ramifications;
- 6.1.5. Ensure SUHAKAM receives adequate funding for its operations and campaigns.

6.2 Recommendations to SUHAKAM:

- 6.2.1. Implement policy and operating procedure on managing individual complaints with clear timeline and deadlines for response and feedback;
- 6.2.2. Further develop capacity to conduct surprise visits in conjunction with EAIC;
- 6.2.3. Further develop or establish clear principles and procedures for joint investigations with EAIC and other related agencies or statutory bodies;
- 6.2.4. Further strengthen collaboration and cooperation with civil society;
- 6.2.5. Develop measures to proactively engage with known cases of human rights violations without need for complaints from victims or civil society.

THAILAND: FAILING IN TESTING TIMES

People's Empowerment Foundation¹

1. Context

This report reviews the end of the second and beginning of the third term of the National Human Rights Commission from August 2015 to August 2016. During the second term of the National Human Rights Commission, the Commissioners had to weather at least two major crises. The tumultuous situation has split people into two main factions (the 'Yellow Shirts' and the 'Red Shirts') and such highly polarised situation has led to protracted political demonstrations fraught with violence and human rights violations.

During the transitional period from the second batch to the third batch of the National Human Rights Commission, there was a military coup and an attempt to merge the National Human Rights Commission with the Office of the Ombudsman. Due to the written submission made by the incumbent National Human Rights Commission, the National Human Rights Institution has been preserved.² The third batch of the National Human Rights Commission has been in office for under a year, and this is a limitation of the 2016 ANNI assessment of the performance of the National Human Rights Commission of Thailand.

The National Council for Peace and Order (NCPO), which is the military junta governing Thailand since the *coup d'etat* of 22 May 2014, has promulgated Announcement No.11/2557 on 22 May 2014 repealing the Constitution of the Kingdom of Thailand B. E. 2550, save for its Chapter II (on the Monarchy), and allowing state organisations and other bodies established by the virtue of the 2007 Constitution to continue performing their duties. As a result of the annulment of the 2007 Constitution, the NHRC's powers and duties to propose matters and opinions to the Constitutional Court and the Administrative Court, as well as to bring a case to the Court of Justice on behalf of the injured parties has also been terminated.

¹ *Chalida Tajaroensuk, Director of People's Empowerment, Thailand, chalida@peoplesempowerment.org. Our sincere gratitude to all individuals and organisations that assisted in the preparation of this report, including the Thai Coalition on NHRC Thailand.*

² Press Release: "Recommendations for the Drafting Committee 4/02/2558 to consider"
(a) Consideration regarding the impact on people as a result of their advocacy for the promotion and protection of human rights;
(b) Consideration regarding organisational status according to the Paris Principles;
(c) Consideration regarding impacts on the role of Thailand in human rights among the international community;
(d) Consideration regarding measures to ensure efficient and effective implementation of the National Human Rights Commission.

The National Human Rights Commission's remaining powers and duties per Section 15 of the National Human Rights Commission B. E. 2542 (1999) are as follows:

- (1) To promote respect for and compliance in practice with human rights principles at domestic and international levels;
- (2) To examine and report the commission or omission of acts which violate human rights or which do not comply with obligations under international treaties relating to human rights to which Thailand is a party, and propose appropriate remedial measures to the person or agency committing or omitting such acts for taking action. In the case where it appears that no action has been taken as proposed, the Commission shall report the same to the National Assembly for further action;
- (3) To propose to the National Assembly and the Council of Ministers policies and recommendations with regard to the revision of laws, rules or regulations for the purpose of promoting and protecting human rights;
- (4) To promote education, research and the dissemination of knowledge on human rights;
- (5) To promote cooperation and coordination among Government agencies, private organisations, and other organisations in the field of human rights;
- (6) To prepare an annual report for the appraisal of the situation in the sphere of human rights in the country and submit it to the National Assembly and the Council of Ministers, and disclose the same to the public;
- (7) To assess and prepare an annual report of the performance of the Commission and submit it to the National Assembly;
- (8) To propose opinions to the Council of Ministers and the National Assembly in the case where Thailand is to be a party to a treaty concerning the promotion and protection of human rights;
- (9) To appoint subcommittees to perform the tasks as entrusted by the Commission;
- (10) To perform other acts under the provisions of this Act or as the law prescribed to be the powers and duties of the Commission.

The incumbent National Human Rights Commission was appointed following the military take-over of government. The royal assent was handed down for the appointment of the current members on 20 November 2015; and the seven are:

- Mr. What Tingsamitr (Chairperson) – former Supreme Court Justice;
- Mrs. Chatsuda Chandeeying – former Associate Judge of the Juvenile Court;
- Mrs. Prakairatana Thontiravong – former Associate Judge;
- Mr. Surachet Satitniramai – former Permanent Secretary of Ministry of Public Health;
- Ms. Angkhana Neelapaijit – woman human rights defender and wife of Mr. Somchai Neelapaijit, human rights lawyer and victim of enforced disappearance;

- Mrs. Tuenjai Deetes – former member of the National Legislative Assembly (NLA);
- Mr. Chartchai Suthiklom – former Secretary-General of the National Human Rights Commission.

The ICC Sub-Committee on Accreditation (SCA) downgraded the Thai National Human Rights Commission from 'A' to 'B' in November 2015, due to its non-compliance with the Paris Principles: including lack of independent selection of the commissioners which has yielded incompetent members; lack of immunity of members for acts in an official capacity done in good faith; and delay and partiality in monitoring and investigating human rights violations.³

Mechanisms for the protection of human rights defenders (HRDs) are still not available. After the coup, a number of HRDs were apprehended and prosecuted unfairly. According to the non-governmental Thai Lawyers for Human Rights (TLHR), since the 2014 coup: 1,546 individuals were held in custody invoking the NCPO Announcements nos. 37, 38 and 50/ 2557; and the military court has been used to try dissenting civilians.

The military junta has failed to implement the recommendations made by the previous batch of the National Human Rights Commission; nor the recommendations of the *2015 ANNI Report*.⁴ They have also ignored recommendations for enhancing domestic human rights made during the Universal Periodic Review (UPR) process and have little understanding of universal human rights principles.

The development of democracy and human rights in the country thus rests chiefly on the ideological framework of military security aiming to ensure peace and order according to the military *modus operandi*, i.e. obedience to the leaders. This clearly steers away from democratic and human rights principles and the security of the people. Thailand is therefore in a fragile situation where democracy and human rights hang in the balance.

Even though the Third Master Plan on Human Rights has been developed, it has never been implemented in full, given the "lack of understanding about human rights among the authorities", according to a senior official of the Human Rights Protection department of the Ministry of Justice. A number of government officials hold negative attitudes toward civil society and *vice versa*. The development of human rights in Thailand still needs more understanding, time, determination and serious cooperation from all sectors.

³ "Downgrading of Thai human rights body a wake-up call", *The Nation*, 4 February 2016, <http://www.nationmultimedia.com/opinion/Downgrading-of-Thai-human-rights-body-a-wake-up-ca-30278458.html>.

⁴ 'Thailand: Human Rights Crisis' in *2015 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, FORUM-ASIA: Bangkok, <https://www.forum-asia.org/uploads/wp/2015/09/4-Thailand-FINAL150809.pdf>.

2. Mandate of NHRI

The powers and duties of the National Human Rights Commission are laid out in the Third National Master Plan on Human Rights. Among government officials, it is understood that their role is to enforce legal provisions and operate by the Rule of Law, not Rule by Law. According to one former NHRC Commissioner, “Though the state has not broken the law, it has failed to prevent violations of community rights and the rule of law; and as a result the people have been distraught with livelihood problems”.

By reviewing the few public statements issued by the incumbent National Human Rights Commission, it can be concluded that the NHRC has failed to operate independently and lacked competence in performance of its duties. It has tended to protect interests of the state rather than the people: excuses have been made by it in defence of the state instead of human rights principles. Most public statements issued are short, and express concern, rather than reiterate a firm human rights stance. Among the Human Rights Commissioners, some conflicting views have been aired, for example, on the use of restraint on student activists while being brought to the Court;⁵ and on human rights movements meeting the NHRC during public consultations.

During the public consultation in the South of Thailand between 24-25 August 2016 at Buri Sri Phu Hotel, 32 civil society organisations led by Mr. Somboon Kamhaeng, Secretary-General of the Southern NGOs Coordinating Committee on Development (NGO-COD) have issued a statement demanding the removal of the current Chairperson of the National Human Rights Commission and expressed their disappointment with the incumbent National Human Rights Commission.⁶ The written reply from the Chairperson of the National Human Rights Commission⁷ has indicated his aloofness and has widened the conflict escalating the tension. He did not attempt to meet and talk with them in person. This reflects the attitude of the Chairperson and the working method of the NHRC which tends to disregard opinions from the public.

Given the diversity of the National Human Rights Commission, each National Human Rights Commissioner may have different opinions as they come from different backgrounds. This is attested to in the incongruent views expressed in the public statements released by the National Human Rights Commission: they are a

⁵ Press Release by the Chairperson of the National Human Rights Commission asserting that the restraints put on the seven students held up for disobeying the NCPO Order were leg-cuffs, not shackles. This view was in contrast to an earlier opinion expressed by National Human Rights Commissioner Ms. Angkhana Neelapaijit, who deemed that the application of shackles on both legs of the students was a human rights violation and a degrading practice.

⁶ Public Statement expressing disappointment with the incumbent National Human Rights Commission, 25 August 2016.

⁷ National Human Rights Commission Press Release regarding the proposal of civil society organisations in the South demanding the change of the Chairperson of the National Human Rights Commission, 27 August 2016.

compromise among the members, rather than an assertion of human rights fundamentals. Occasionally, some conflicting views have been made public. All this has affected the NHRC’s credibility.

Their public statements may not have brought any positive change to the situation in local areas. Their work depends upon cooperation from all sectors of society. The public consultations should not be organised merely as propaganda for the National Human Rights Commission. It should be a chance to listen to the problems from the people, their news, and to educate the public on human rights. It should be a chance to collectively explore possible solutions. The National Human Rights Commission must function as a platform to bring together people and various authorities to help them listen to each other and to resolve human rights problems.

The initial draft of the third Five-Year Strategy of the National Human Rights Commission for 2017-2022 was made by the Thailand Development Research Institute (TDRI). There have been a number of workshops held to enhance the strategic plan. Who were the participants? What kind of experience did they bring? What was their work on rights issues? How much do they relate to the national human rights institution in their normal activities? There are some ‘blacklisted’ organisations and individuals that were not invited for the strategic workshop. Based upon the SWOT analysis, there are a number of inaccuracies in assessment of the NHRC.⁸

For example, it is written that the National Human Rights Commission is independent, and receives good cooperation from domestic and international networks; manages itself independently; and that the government has paid importance to rights issues. In reality, since the National Human Rights Commission has been downgraded from ‘A’ to ‘B’, it indicates a lack of independence and a lack of professionalism, which was recognised in the demotion of its status by international mechanisms.

Meanwhile, the NHRC has garnered very meagre acceptance from the people and most people are unimpressed with the performance of the incumbent National Human Rights Commission. It has failed the test. Based on the inaccuracies in the SWOT analysis, the drafting of the vision, mission and strategies has been distorted. Only a fraction of the Five-Year Plan is useful; and it has failed to provide for an institution with competence in implementation of its mandate.

Thailand’s 20th Constitution was approved by referendum on 7 August 2016 by 61 percent of valid votes cast (but on a turnout of 59 percent). The new Constitution provides for the retention of the National Human Rights Commission but with restricted powers and no independence. Its powers will be limited to issuing reports and making recommendations to state authorities. Also, appointments to the

⁸ Results from the third workshop to develop strategies for the National Human Rights Commission 2017-2022, Friday 1 July 2016, Centara Hotel, the Government Complex and Convention Centre, Chaeng Wattana, Bangkok.

Commission will be by the King acting on the advice of the Senate. According to the new Constitution, the Senate will be appointed by the NCPO for a transitional period of five years.⁹

Last year, the past Chairperson of the second batch of the NHRC, Prof. Amara Pongsapich, expressed her concern over the selection process for the third batch as follows: “The appointment of the Commissioners must be based on an official process conducted within a clear time frame. Since the Draft Constitution fails to specify clearly as to the term of the new batch of the NHRC, will they serve the six-year-term as provided for by the National Human Rights Commission B. E. 2542, or not?”. She went on, “It should be reiterated here the need to review the composition of the Selection Committee to ensure that they represent people from all walks of life, different professions and sectors in society, particularly the civil society. It should ensure appropriate vetting process of the candidates, specify the rules and methods of selection, qualifications of the National Human Rights Commissioners regarding their work on human rights, and all these should be incorporated into the new Constitution to make it comply with the Paris Principles. The Constitutional Drafting Committee, the National Legislative Assembly (NLA), the Head of the National Council for Peace and Order are urged to express their view about the proposals”¹⁰. Prof. Amara suggested further that the NHRC must hold to account and advise the state, but not defend or make excuses for it. The people are watching us, she warned.

The concerns expressed by the Chairperson of the second batch of the National Human Rights Commission were clearly spelled out, but the NCPO and the Constitutional Drafting Committee failed to embrace and understand the Paris Principles. As a result, the composition of the Selection Committee was the same as before. The third batch of the National Human Rights Commission is even worse than its predecessors. The Chairpersons of the first and second batches of the NHRC were at least academics with some involvement and understanding of human rights.

The Chairperson of the third batch of the NHRC is a former judge and law enforcement official. The NHRC’s performance has thus been influenced by this kind of leadership which has turned the national human rights institution into a law enforcement body; instead of being an institution for the protection and promotion of human rights. How much has the Chairperson influenced the performance of the NHRC? This could be seen from the public statements issued by the incumbent NHRC, and their few outreach activities to meet with local people during which they have failed to listen to the voices of local people especially from the Northeast and the South of Thailand. People in the South have even campaigned to have the current Chairperson of the NHRC removed.

⁹ Human Rights Now (2016), ‘Thailand: Grave Concern over the Referendum Process and Draft Constitution in Thailand’, 5 August 2016, <http://hrn.or.jp/eng/news/2016/08/05/human-rights-now-released-a-statement-thailand-grave-concern-over-the-referendum-process-and-draft-constitution-in-thailand/>.

¹⁰ Press Release: “Concerns about the selection of the new National Human Rights Commissioners”, 10 June 2015.

As civil society organisations have no faith in the current Commission, they have proposed the revision of the National Human Rights Commission Act for its full compliance with the Paris Principles. Following the entry into force of the new Constitution, the current batch of members should be dismissed and a new batch appointed. The selection process for the new batch has to be in accordance with the Paris Principles.

Regarding the complaints process, it should be provided that the NHRC can intervene (*suo moto* or ‘on its own motion’) without having to first receive a complaint. The National Human Rights Commission must be able to carry out an investigation without waiting for the submission of the complaint (see NHRC Act, Section 25, Regulation No. 26).

The complaints received from the people should be the instrument that helps the NHRC to carry out its responsibilities: to reveal the truth and to protect the people according to its powers and duties.

The investigation process of the NHRC is as follows: The complaints received are sent to the screening sub-committee to consider whether they should be investigated or not. The cases will end if the officers report to the commissioner that the problem was resolved: for example, the case was brought to the court. In the case of an emergency, the commissioner can go directly to the investigation stage of the case. The investigation is carried out by the sub-committee and its staff, where the findings and information is confidential, and cannot be accessed due to internal regulations. This is not right. Such information should be made public. The investigating organisation must hold a press conference to keep society informed of the truth.

In case of human rights abuse by the business sector: instead of finding an escape clause for them to evade their responsibilities, such business operators must be held to account for their human rights violations and brought to justice by the NHRC. They must be held liable for their impacts on society and the environment.

The NHRC is empowered to mediate disputes during investigation and inquiry; or designate the Subcommittee, the Office, or persons deemed fit, to carry out such mediation (NHRC Act, Section 27, Regulations No. 38-40). While mediation by the commissioner or person appointed by the commissioner can happen, what is important is that the investigation must be conducted before any such negotiation.

Unfortunately, there are some commissioners who think that the first step is to negotiate; and only if that fails to move onto investigation. There are four serious human rights violations that must not be subject to mediation under any circumstances: that are, Violence against Women, Violence against Children; Torture; and Enforced Disappearance.

In addition, the Office of the NHRC may address the suffering of the complainant by coordinating with concerned persons or organisations to ensure the protection of human rights of the complainant (NHRC Act, Section 18, Regulations No. 21-24).

The National Human Rights Commission may also appoint a person as a competent official to help them in the investigation of human rights violation (NHRC Act, Section 28, Regulations no. 52-56).

Key to the work of the NHRC is investigation. It has to be cautious to prevent political partiality which may affect the human rights of the people. But the incumbent NHRC dares not carry out investigation on human rights violations related to the political clampdown. They have left this duty to civil society organisations such as the Thai Lawyers for Human Rights.

An investigation must be made based on listening to information from all parties, exposing the issues, exploring the conclusion, and it must be a public inquiry. After the completion of the investigation, a report must be prepared to propose a series of recommendations. Local people have learned from their struggles. When they face prosecutions, the NHRC must provide them with help. In the course of their work, the NHRC must take the side of the people. But now, its staff members tend to hold an adversarial view towards the people, and treat them as if they were committing a threat to national peace and order.

A former Secretary-General stated that the NHRC could not take sides with the people, since it would make it a biased organisation. The attitude of the NHRC concerning people's politics and the exercise of their power to protect human rights is perverted: that is, they have proposed to separate civil and political rights, from each other.

The strength of the National Human Rights Institution can be attributed to its components including the Office of the NHRC. The seven National Human Rights Commissioners themselves cannot change the whole country. The Office, the Sub-committees and advisors are the major organs that help the National Human Rights Commission accomplish its tasks. So the NHRI should include CSOs more in its sub-committees to help in its work.

Regarding the investigation of human rights violations, there has been some development. During the first batch of the NHRC, the Committee and sub-committees did their own investigation. During the second batch, its staff members were increasingly assigned to do the job. During the third and incumbent batch, more work has been transferred to the staff members. There has been some change made to the recruitment of the staff members: that is, by limiting the transfer of officials from other authorities. Two staff members per year are given the chance to enrol in educational institutions to study human rights. Universities have been encouraged by the NHRC to produce more graduates in human rights study and of better quality. The staff members are also encouraged to participate in international and regional human

rights conferences, though the organisational innovation may take at least 5-10 more years to bear fruit.

There is poor communication and information-sharing within the NHRC and between its staff and members (the commissioners). For instance, information sent directly to the Chairperson is not uniformly shared with other Commissioners. The International Department of the NHRC does not appear to be updating its regional and international partners with information on the new Commissioners and their contact details; and not sharing information on regional and international meetings with all Commissioners.

2.2. Concerns about human rights violations in Thailand

Regarding reports No. 819-830/2558 on civil rights, political rights, the right to life and property, children's rights, and women's rights, against the Rohingya asylum seekers in Thailand.

The BBC reported more than 200 Rohingyas refugees were being held in captivity on Sai Daeng Beach, Muang District, Ramong by armed military officials. Some boats had been pushed away from the shore and capsized outside Thai waters causing many deaths. Those who were held in custody were subject to sexual exploitation, and held in a crowded place. Some became victims of human trafficking with the complicity of certain officials. They had been subject to inhuman and degrading treatment during their detention as well.

After reviewing the case, the National Human Rights Commission deemed that such irregular migration had given rise to pervasive human rights violations and that the issue was complicated and concerned various factors including race, religion, economy, society, culture, human rights and national security. The discovery of places where a number of Rohingyas were held in custody along the Thailand-Malaysia border has led to the arrests of trafficking rings and human traffickers who had held these people for ransom, and forced them to work in a neighbouring country with the co-operation of state officials, local politicians and even the Rohingyas themselves. Based on the investigations and complaints from all sectors inside and outside Thailand, a call has been made for Thailand to treat the refugees based on human rights and humanitarian principles as equal human fellows and accorded the protection they are due from the international covenants and conventions to which Thailand is a state party.

The National Human Rights Commission, following consultation and inputs from civil society organisations, has proposed the following measures including policy and legal improvement to deal with such human rights violations to the government:

Those efforts must be integrated among various authorities including the Ministry of Social Development and Human Security to register the immigrants in collaboration with the United Nations Children's Fund (UNICEF) to prevent their loss, separation, and to ensure they enter the screening process.

The screening should be done by an interdisciplinary team and they should be divided into three groups including asylum seekers, irregular migrants and victims of human trafficking. The nationality verification must be done at the same time. There shall be no *refoulement* which subjects the person into a dangerous situation. The persons left stranded in the sea must be provided with more effort to look for them and rescue them based on the humanitarian principle. They should be allowed to stay in the kingdom temporarily based on collaboration from the private sector. All these can be done as per the Anti-Trafficking in Persons Act B. E 2551 (2008) Section 33. A manual should be produced, and training conducted, to help concerned officials understand their roles and to perform their duties strictly to the code of the law.

Given that Thailand's trafficking in persons situation has been closely monitored (TIP Report), the Thai government should not treat the persons rescued after the screening process as illegal migrants. Instead, they should be treated as victims of trafficking in persons. Policies and practices must be well established to address the issues of the Rohingya systematically. The trafficking rings must be dealt with strictly using the legal measures. The government must embrace both national security and human rights issues and promote a stronger role of the AICHR for the protection and promotion of human rights in the region. Proactive work is needed to suppress trafficking in persons. Asylum must be provided to pave the way for safe resettlement. Job opportunities should be provided for the asylum seekers. The Immigration Act B.E. 2522 (1979) should be revised to include the principle of non-*refoulement*. Thailand should consider becoming a state party to the 1951 Refugees Convention, and domestic laws on refugees should be promulgated to provide for clear guidelines on how to deal with refugees according to human rights principles.

A resolution was made by the Thai cabinet on 20 October 2015 to acknowledge the report on the investigation of human rights violation and the report on the review of complaints. The Ministry of Social Development and Human Security was asked to take the lead in co-operation with the Ministry of Defence, Ministry of Interior, Ministry of Labour, Ministry of Justice, the Royal Thai Police, and the National Security Council, to explore appropriate solutions. Later, the Ministry of Social Development and Human Security has reported the conclusion and recommendations of the National Human Rights Commission. The Ministry of Foreign Affairs agreed with the proposal to have the 1979 Immigration Act amended. However, there is still no action taken.

3 Human Rights Defenders and Women Human Rights Defenders

According to the Declaration on Human Rights Defenders, HRDs mean everyone working on human rights for the promotion and protection of rights, individually, or organisationally, or coalition-based, and where their actions are carried out peacefully. They work in tandem with CSOs and state agencies. The state should provide them protection and care. Many HRDs have themselves been victims of human rights violation. At present, Thailand has no mechanism to protect the HRDs.

The state must first accept the role of people in political participation and their right to hold the state to account. The government should endeavour to develop measures to protect HRDs. Until now, the government taskforce has only come out with a 'white list' based on the UN definition of HRDs; and the HRDs are encouraged to enlist themselves voluntarily. It has been argued whether such a method would be useful or harmful to the activists since information about them would be on public record.

By conducting fact-finding trips, the NHRC could reach out and network with HRDs more strongly and concretely. There should be laws to protect the HRDs. It is not clear if in the event of an emergency, where HRDs need immediate protection, if they can call the Governor or the Police Superintendent in person, or simply file a report before the police.

In UPR Recommendations No. 119-123 from five countries, it is proposed that Thailand come up with appropriate measures for the protection of HRDs and to ensure that their rights are duly respected. However, no concrete measures can be put in place as long as the state still holds the wrong attitude toward the HRDs.

A number of HRDs are being subject to persecution, including women HRDs. Many of them have been killed, or disappeared, faced harassment and intimidation including sexual harassment in the past several years. Many also face criminal charges filed against them either by state agencies or private companies, particularly those working on land rights and natural resource extraction, as well as rights activists in the deep South. Of late, the Internal Security Operations Command (ISOC) Region 4 Forward Command has taken legal action against three HRDs who have written and published a report on torture in the Southern Border Provinces, including Mr. Somchai Homlaor, Ms. Pornpen Khongkachonkiet and Ms. Anchana Heemmina.

Commissioner Ms. Angkhana Neelapaijit has disagreed with the attempted prosecution.¹¹ Such legal action against HRDs will not bring about positive change, she argues. It will simply instil more fear, and scare victims of rights abuse, making them reluctant to file a case; particularly in the deep South where there have been a number of complaints relating to torture during people's detention. All parties should collectively look for ways to ensure transparent and fair investigations, is her view.

4. Conclusion and Recommendations

There are a number of human rights issues which have to be prioritised. Given the undemocratic situation, many human rights have been violated including the right to public assembly, the right to information, the right to participate in political affairs, media rights, the right to natural resource management, etc. Given such a volatile situation, a strong national human rights institution is needed to speak for the people. Instead Thailand's NHRI has been downgraded to 'B' status, given its lack of compliance with the Paris Principles.

¹¹ Press Release of the National Human Rights Commission by Ms. Angkhana Neelapaijit urging the state to come up with measures for the protection of HRDs, 6 June 2016.

Recommendations made during the UPR urged Thailand to follow the Paris Principles and be re-accredited as 'A' status. Nevertheless, during the roadmap of the National Council for Peace and Order (NCPO) and the drafting of the new Constitution plus its referendum and the drafting of the new National Human Rights Commission Act by the Office of the NHRC, people have been deprived of their right to information and have not been part of the drafting of the laws. People are kept in the dark as to the content of the Draft Act, and whether it is in greater compliance with the Paris Principles, or not.

According to the Paris Principles, the National Human Rights Commissioners must have competence and expertise in the protection and upholding of human rights given their various powers and duties; and their being able to submit their opinions to various authorities. They should be able to intervene in human rights violations without having to wait for a written complaint. Domestic laws should be amended to make them compatible with international laws and standards. The state should be urged by the NHRI to sign international covenants and conventions, and to produce treaty reports on progress and fulfilment of those obligations, as well as to coordinate its efforts with UN agencies. The composition of the National Human Rights Commission must be diverse, independent, and professional and provided with sufficient resources for its operation.

The incumbent NHRC was appointed by virtue of the Interim Constitution imposed by the National Council for Peace and Order (NCPO), and therefore it fails to comply with the Paris Principles. Should there not be any improvement, it will definitely be downgraded to 'C' status. This would destroy the national human rights institution that was pushed forward by the people and established in Thailand as urged by the Paris Principles and the Vienna Declaration and Programme of Action of the World Conference on Human Rights.

It should be noted that most public statements by the NHRC tend to heap praise on the government and take sides with the state authorities. It reflects how the institution lacks independence, is weak and not professional, and fails to sufficiently trumpet human rights concerns. Given the current political situation, it is crucial that the NHRI be strong and independent to act as the frontline for safeguarding human rights in Thailand

4.1 Recommendations to the Government of Thailand:

- 4.1.1. The new Constitution must ensure the National Human Rights Commission is an independent institution capable of promoting and protecting human rights;
- 4.1.2. The NHRC Act must be amended such that the selection process is based on the appointment of persons with knowledge and ability in human rights;

- 4.1.3. The state must stop intervening and dominating the affairs of the NHRC;
- 4.1.4. The performance of the NHRC and its reports must be scrutinised in the national legislature;
- 4.1.5. The government must open the political space to listen to dissenting opinions, and be tolerant in order to resolve political conflicts.
- 4.1.6. The drafting committee on the Constitution of Thailand should open up drafting of the NHRI law to the public.

4.2 Recommendations to the National Human Rights Commission of Thailand:

- 4.2.1. The NHRC must be made a movement for investigation of human rights violations and concerns which is independent, transparent and inclusive;
- 4.2.2. Human rights education must be promoted to ensure people have the knowledge, and awareness of their rights and remedies;
- 4.2.3. The Office of the NHRC should be revamped to ensure that its staff members have the skills to work on human rights;
- 4.2.4. After the new Constitution is in force, the current batch of Commissioners should step down, and a new selection process in compliance with the Paris Principles be followed.

TIMOR-LESTE: PRO-ACTIVE RESPONSE NEEDED

Judicial System Monitoring Programme (JSMP)¹

1. Introduction

The Timor-Leste's Ombudsman for Human Rights and Justice (PDHJ) hereafter called the Provedoria was established in 2004 with constitutional and legal bases. The Provedoria is a newly established institution with very limited human resources to perform its duties. It has established mechanisms for the protection and promotion of human rights, but there are still criticisms on its proactive response and information on the statute of cases of complainants.

The state institutions that commit most human rights violations are the Timor-Leste's National Police (PNTL) and military forces (F-FDTL). The Provedoria conducted investigations and provided reports on human rights violations with recommendations to the relevant state institutions, as well as providing training on human rights. But the number of cases of human rights violations committed by these institutions still remains high: around 70% are committed by PNTL and 50% of cases concern inhuman and degrading treatment². In its 2015 annual report, the Provedoria provided detailed information on a number of recommendations implemented and not implemented by relevant state institutions as recommended in previous ANNI reports. Around 80% of recommendations have been implemented according the Provedoria³.

In 2015, during a joint military-police operation, lots of human rights violations occurred. The types of human rights violations were mostly deprivation of freedom of movement, torture and arbitrary detention. The Provedoria monitored the operation and produced urgent reports⁴ on human rights violations with very detailed description of cases and specific recommendations to relevant state organs and institutions. However, these reports were neither launched in public; nor were further investigations on cases of

¹ Jose Pereira, Legal Researcher; joseprei@jsmp.minihub.org; Cynthia Silva, International volunteer; cynthia.silva91@gmail.com; Jose Moniz, Advocacy Officer; moniz@jsmp.minihub.org. The research team appreciate the collaboration and assistance of the PDHJ, the HAK Association and Mahein Foundation in sharing information; and of Dr. Horacio de Almeida, Deputy Ombudsman for Human Right and Justice, Evangelino Gusmão, Coordinator of Human Rights Defenders, Manuel Monteiro, Executive Director of HAK Association, João de Almeida Fernandes, Deputy Director of Mahein Foundation and Caetano Alves, Research Coordinator of Mahein Foundation in granting interviews.

² Provedoria's annual report 2015, available in Tetun: <http://pdhj.tl/wp-content/uploads/2014/06/RELATORIU-ANUAL-2015.pdf>.

³ *Ibid.*

⁴ Provedoria's annual report 2014, available in Tetun: <http://pdhj.tl/wp-content/uploads/2014/06/RA-2014.pdf>.

serious human rights violation conducted; and nor was there follow-up on the recommendations made⁵.

The Provedoria has been twice accredited by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) with "A" status in April 2008 and November 2013 which classification means full compliance with the Paris Principles⁶. Even though, the Provedoria has been so accredited, civil society has questioned the lack of pluralistic representation and gender equality in its composition.

The Provedoria having considered previous ANNI recommendations for pluralistic representation in the structure of the institution⁷, ensured that the new elected Ombudsman⁸ in 2014 involved civil society in the process of nomination of his deputies through establishing a selection panel which constituted of five members, three representatives from NGOs, one from the National University of Timor Lorosa'e (UNTL) and one from the office of the PDHJ. The panel has selected one woman⁹ for the role of Deputy Ombudsman for Good Governance and one man¹⁰ for the role of the Deputy Ombudsman for Human Rights and Justice.

The United Nations Declaration on Human Rights Defenders (General Assembly Resolution A/RES/53/144) has provided the rights and obligation of individuals, groups and organs of society to promote and protect the basic and recognised fundamental human rights that are enshrined in the Charter of the United Nations and the Universal Declaration of Human Rights¹¹.

The Timor-Leste's Constitution has adopted all of these basic and fundamental human rights¹², and has established the Provedoria for the promotion of human rights, but the Government has not yet established mechanisms or policies to support and protect human rights defenders as put forward by the European Union¹³ or African Union guidelines for

⁵ Manuel Monteiro, Executive Director of HAK Association, interviewed on 11 July 2016.

⁶ See full list of countries' accreditation here: http://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf.

⁷ See point 6 of the 2014 ANNI Report recommendations on Timor-Leste, <http://jsmp.tl/wp-content/uploads/2014/10/ANNI-Annual-Report-20141.pdf>.

⁸ Dr. Silveiro Pinto Baptista, <http://pdhj.tl/about/meet-the-ombudsman-and-deputies/?lang=en>.

⁹ Jesuina Maria Ferreira Gomes, MPA, Deputy Ombudsman for Good Governance, <http://pdhj.tl/about/meet-the-ombudsman-and-deputies/?lang=en>.

¹⁰ Dr. Horacio de Almeida, Deputy Ombudsman for Human Rights and Justice, <http://pdhj.tl/about/meet-the-ombudsman-and-deputies/?lang=en>.

¹¹ UN Resolution no. 53/144, http://protectionline.org/files/2013/05/UN_Resolution_53144.pdf.

¹² Timor-Leste's Constitution, http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution_RDTL_ENG.pdf.

¹³ European human rights defenders' guidelines, http://ceas.europa.eu/human_rights/guidelines/defenders/docs/16332-re02_08_en.pdf.

human rights defenders¹⁴. The Provedoria itself has not yet taken any action to ensure that the Government is complying with international principles and standards on promoting as well as protecting basic human rights of its citizens or either development any mechanism or guidelines for the protection of human rights defenders¹⁵.

2. Ombudsman for Human Rights and Justice (PDHJ)

2.1. Inception and Mandate

The Provedoria received constitutional status in March 2002¹⁶ and was institutionally established in 2004 with the statute that approved the office of the Provedoria¹⁷. In March 2005, Parliament elected the first Provedor who was sworn into office in June of the same year. The Provedoria was officially functioning in March 2006. In 2010 the Ombudsman was re-instated for a second term by Parliament¹⁸. The Parliament elected a new or second Ombudsman in 2014 for a four year term¹⁹.

The Provedoria is an independent national body with both constitutional and legal competences, powers and duties. The constitutional competences are provided in Article 27 on Ombudsman, paragraph f) of the Article 150 on Abstract Review of Constitutionality and the Article 151 on Unconstitutionality by Omission²⁰. The legal competences, powers and duties are provided in Chapter IV of Law No. 7/2004 with some articles being amended and revoked by Article 30 of Law No. 8/2009 on the Statute of the Anti-Corruption Commission (CAC)²¹. Article 26 of Law No. 7/2004 on the mandate to investigate cases of corruption has been revoked and the mandate was transferred to the Anti-Corruption Commission (CAC) through Law No. 8/2009 and the CAC was established in 2010²². Some of the articles of Chapter IV of Law No. 7/2004 that have been amended are Article 23 on Investigation, Article 24 on Inspection and Recommendation, and Article 25 on the Promotion of Human Rights and Good Governance.

¹⁴ Principles and guidelines on human and people rights in Africa, http://www.achpr.org/files/special-mechanisms/human-rights-defenders/principles_and_guidelines_on_human_and_peoples_rights_while_countering_terrorism_in_africa.pdf.

¹⁵ Manuel Monteiro, Executive Director of HAK Association, interviewed on 11 July 2016.

¹⁶ See Articles 27, 150 & 151 of Timor-Leste's Constitution, http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution_RDTL_ENG.pdf.

¹⁷ See Law No. 7/2004 on Approving the Statute of the Office of the PDHJ, <http://mj.gov.tl/jornal/laws/TL/RDTL-Law/RDTL-Laws/Law-2004-7.pdf>.

¹⁸ See p. 4 of PDHJ's Strategic Plan 2011-2020 on 'Recognition of the Provedoria in 13 districts in Timor-Leste', <http://pdhj.tl/wp-content/uploads/2013/11/SP-PDHJ-2011-2020-e.pdf>.

¹⁹ See paragraph (1) of Article 19 of Law No. 7/2004, <http://mj.gov.tl/jornal/laws/TL/RDTL-Law/RDTL-Laws/Law-2004-7.pdf>.

²⁰ Timor-Leste's Constitution, http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution_RDTL_ENG.pdf.

²¹ Law No. 8/2009, <http://cac.tl/wp-content/uploads/2011/11/Law-8-2009-CAC1.pdf>.

²² Official website of CAC, <http://cac.tl/>.

In order to achieve its goals, the Council of Ministers through Decree-Law No. 25/2011 on Organic Structure of the Office of the Provedoria²³ established its approved structure, staff and regulations.

2.2. Mechanisms

The Provedoria has established its own mechanisms to address the complaints and issues of human rights violations as the following:

2.2.1. Branch offices

The Provedoria has established five branch offices of which two of them are located in the eastern part of the country: one is in Baukau District and the other in Viqueque District. One office is located in central part of the country in Manufahi District and the other office is located in the western part in Bobonaro District. The other one is located in the enclave of Oe-cusse.

The overall objective is to bring its services closer to the community so that people can easily present their complaints; as well as to introduce or socialise the role of the Provedoria itself to the community.

2.2.2. Temporary Focal Points or Human Rights Monitoring Network²⁴

The Provedoria established temporary focal points in each district to support monitoring and reporting cases of human rights violations and to support members of community who want to present their complaints. These focal points are temporary because they are not paid by government: they are volunteers²⁵.

2.2.3. Complaint Box

Complaint boxes have been located in all offices of the sub-district administration. These complaints boxes are one of the mechanisms to bring the services closer to the people, especially for those who have no means to reach regional or central offices. These complaints are collected from the boxes for further action according to Article 28 of the Law No. 7/2004 on the mandate of the Provedoria and Chapter V of the Law No. 7/2004 on the complaint handling process.

²³ Decree-Law No. 8/2009, <http://pdhj.tl/wp-content/uploads/2013/11/Decree-Law-25-2011-Organic-PDHJ.pdf>.

²⁴ See p. 7 of PDHJ's strategic plan 2011-2020 on Recognition of the Provedoria in 13 districts in Timor-Leste, <http://pdhj.tl/wp-content/uploads/2013/11/SP-PDHJ-2011-2020-e.pdf>.

²⁵ Dr. Horacio de Almeida, Deputy Ombudsman for Human Rights and Justice in an interview with JSMP on 14 July 2016.

2.2.4. Free Landline

There is also a free landline provided by the Provedoria for the public to make their complaints²⁶. If the complainants do not know the landline number, they can directly contact the private number of Provedoria's personnel, including the Provedor and his deputies, then the Provedoria will return their call. This free landline service was one of the recommendations of the 2013 ANNI Report²⁷.

2.2.5. Media personnel or Journalists

Media personnel or journalists also report cases of human rights violations to the Provedoria, when they encounter them in the field. There have been several cases of human rights violations that journalists reported to the Provedoria²⁸.

2.2.6. Civil Society

Civil society organisations (CSOs) that are advocating for human rights and justice, often receive complaints from public. As CSOs do not have the mandate to address the issue of human rights violations, so these cases are referred to the Provedoria.

2.2.7. Direct intervention or immediate response

The Provedoria also has many times taken immediate responses to cases of human rights violations as and when it receives such information²⁹. The objective is to prevent further human rights violations and to protect and defend people from being violated.

2.2.8. Direct monitoring

The Provedoria also conducts direct monitoring in the field for any specific issues or events in which human rights violations are likely to occur, such as military and police joint operations or public demonstrations. The objective is to ensure that within these activities, human rights can be protected or to prevent the occurrence of human rights violations.

2.2.9. Annual and Specific Reports

Pursuant to Article 34 of the Law No. 7/2004, the Provedoria should provide an annual report on its activities, as well as thematic report if there is any specific issue of human rights violations to be addressed³⁰. The Provedoria also pursuant to Article 46 of the Law No. 7/2004 is obliged to submit a complete and detailed annual report to the National Parliament no later than 30 June each year on the activities that have been undertaken

²⁶ The number for the Central Office in Dili is (+670) 3331184.

²⁷ See recommendation no. 2 the Provedoria in 2013 ANNI Report, <http://jsmp.tl/wp-content/uploads/2014/10/ANNI-annual-report-2013.pdf>.

²⁸ Dr. Horacio de Almeida, Deputy Ombudsman for Human Rights and Justice in an interview with JSMP on 14 July 2016.

²⁹ *Ibid.*

³⁰ Paragraph 4 of the Article 46 on the Progress Report of the Law No. 7/2004, <http://mj.gov.tl/jornal/lawsTL/RDTL-Law/RDTL-Laws/Law-2004-7.pdf>

during the calendar year ending on the preceding 30 December³¹. The report shall make recommendations concerning reforms and other measures, whether legal, political or administrative, which could be taken to achieve the objectives of the Office, prevent or redress human rights violations and promote fairness, integrity, transparency, responsibility and accountability in public administration³².

2.2.10. Online complaint

Online complaints can be made through the official website of the Provedoria³³, particularly for those with internet access. Due to technical problems with the website, there is information missed or not updated³⁴, particularly on its annual and thematic reports³⁵ and also reporting complaints³⁶.

2.2.11. Recommendation Follow-up

The Provedoria pursuant to number (2) of the Article 5 of the Law. No. 7/2004 has the competence to provide recommendations to relevant and competent state organs that are deemed appropriate to prevent or redress illegality or injustice³⁷ and also provide advisory opinions or recommendations to state organs or institutions regarding the protection and promotion of human rights³⁸.

2.2.11.1. High Level Meeting

The Provedoria uses its high level meetings with officials of relevant ministries and state institutions or organs which recommendations are being addressed to, to follow-up on the status of the implementation as when within the sixty (60) day time-limit there is no information from the relevant organs on action taken³⁹.

2.2.11.2. Department for Follow-up of Recommendations

In order to ensure the implementation and to know the status of the implementation of the recommendations, the Provedoria has established a department for follow-up of

³¹ See paragraph 1 of Article 46 on the Progress Report of the Law No. 7/2004.

³² See paragraph 1 of the Article 46 on the Progress Report of the Law No. 7/2004.

³³ See <http://pdhj.tl/case-handling/make-a-complaint-online/?lang=en>.

³⁴ Interview with Deputy Ombudsman for Human Rights and Justice, Dr. Horacio de Almeida on 14 July 2016.

³⁵ See <http://pdhj.tl/media-publications/annual-reports-budgets/?lang=en>.

³⁶ See <http://pdhj.tl/case-handling/reporting-on-complaints/?lang=en>.

³⁷ See <http://mj.gov.tl/jornal/lawsTL/RDTL-Law/RDTL-Laws/Law-2004-7.pdf>, and the version as amended by Article 30 of the Law No. 8/2009 at <http://cac.tl/wp-content/uploads/2011/11/Law-8-2009-CAC1.pdf>.

³⁸ See paragraph (b) of Article 24 of Law No. 7/2004.

³⁹ See paragraph 3 of Article 46 of Law No. 7/2004, <http://mj.gov.tl/jornal/lawsTL/RDTL-Law/RDTL-Laws/Law-2004-7.pdf>.

recommendations. The establishment of the mechanism has been included in its strategic plan⁴⁰ and is one of the recommendations made in several *ANNI Reports*⁴¹.

2.2.12. Electronic Case Management System (ECMS)

The ECMS is included in the Provedoria's strategic plan for 2011-2020⁴². This mechanism is considered useful and supportive in term of case recording. The central office in Dili can immediately access cases as soon as they are recorded in the regional offices⁴³.

2.2.13. Consultative Council

The Provedoria after its establishment has created a consultative council which members included civil society organisations. This council is to provide advices to the Provedoria on the performance of its duties. The mechanism has not functioned for many years. It is important to reactivate this council in order to strengthen cooperation and consultation between the Provedoria and civil society⁴⁴.

2.2.14. Private Lawyer and Public Defender

The Provedoria is thinking of establishing link with private lawyers and public defenders for the protection and promotion of human rights⁴⁵. The objective can be both reporting and referring cases related to human rights violations to Provedoria by lawyers or defenders; and requests for defence of victim's rights when their cases go to court.

2.3. Civil Society Perspective

2.3.1. Complaint's response

Even though, the Provedoria has established and used several useful mechanisms as mentioned above to perform its duties, there is still disappointment from civil society. In January 2016, during the visit of the Indonesian President, Mr. Joko Widodo to Timor-

⁴⁰ See p. 10 of Provedoria's Strategic Plan for 2011-2020 on 'Increasing State compliance with the principles of human rights and good governance', <http://pdhj.tl/wp-content/uploads/2013/11/SP-PDHJ-2011-2020-e.pdf>.

⁴¹ See point 6 of recommendation to Provedoria in 2013 *ANNI Report*, <http://jsmp.tl/wp-content/uploads/2014/10/ANNI-annual-report-2013.pdf>; see point 5 of recommendation to Provedoria in 2014 *ANNI Report*, <http://jsmp.tl/wp-content/uploads/2014/10/ANNI-Annual-Report-20141.pdf>; and see point 6 of recommendation to Provedoria in 2015 *ANNI Report*, <https://www.forum-asia.org/uploads/wp/2015/09/5-Timor-Leste-FINAL-03-Aug-2015.pdf>.

⁴² See p. 11 of Provedoria's Strategic Plan for 2011-2020, <http://pdhj.tl/wp-content/uploads/2013/11/SP-PDHJ-2011-2020-e.pdf>.

⁴³ Deputy Ombudsman for Human Rights and Justice, Dr. Horacio de Almeida interviewed on 14 July 2016.

⁴⁴ Deputy Director of Fundasaun Mahein, João de Almeida interviewed on 12 July 2016.

⁴⁵ See official website of public defender, <http://defensoria.gov.tl/>.

Leste⁴⁶, police harassed the Executive Director of human rights NGO HAK Association via telephone because of his role in organising and participating in a peaceful demonstration to demand the government of Timor-Leste and Indonesia address the issue of past human rights violations. On the day of the demonstration, two Timor-Leste armed forces (F-FDRTL) personnel visited the office of the HAK Association to instruct a staff member wearing a t-shirt with the slogan *Free West Papua* to remove it; and to request the use of its compound for security operations, but HAK refused⁴⁷. At that time, HAK contacted the Provedor for his intervention, but there was no immediate response or action taken⁴⁸.

In the case of Rohingya refugees who had arrived in Lospalos, in Lautem when the HAK Association went on a monitoring visit, it found among the group a woman who was in the process of giving birth even as the police were forcibly removing them from the territory of Timor-Leste. The police attempted to remove the camera of HAK used for documentation. The HAK Association contacted the Provedor, informed the situation and asked for his intervention but the Provedor refused to intervene by saying that it is outside the mandate of the Provedoria to intervene⁴⁹.

2.3.2. Information on complaint's process

The Provedoria shall, within forty-five (45) days of a complaint being lodged with his or her Office, notify the complainant, in writing, of his or her decision to investigate or not to take further action on the complaint or to dismiss the complaint⁵⁰. The Provedoria is obliged to inform the parties or complainants on the process of their case⁵¹.

The Provedoria does not fully fulfil its duties as provided by law. There have been many people who made their complaints to human rights NGOs such as HAK Association and others⁵² and these complaints were referred to the Provedoria. However, the complainants claimed that there was no or poor communication from the Provedoria on

⁴⁶ See media release of Timor-Leste's Government on President Joko Widodo visit to Timor-Leste: <http://timor-leste.gov.tl/?p=14364&lang=en>.

⁴⁷ See Weekly Update Human Rights in Indonesia, p. 8 on Timor-Leste: http://stopimpunity.org/content/stopimpunity/weekly_update_01-02-2016.pdf

⁴⁸ Manuel Monteiro, Executive Director of HAK Association, interviewed on 12 July 2016.

⁴⁹ Manuel Monteiro, Executive Director of HAK Association, interviewed on 12 July 2016.

⁵⁰ See paragraph 4 of Article No. 37 of Law No. 7/2004 on Preliminary Assessment; <http://mj.gov.tl/jornal/lawsTL/RDTL-Law/RDTL-Laws/Law-2004-7.pdf>

⁵¹ The duty of the Provedoria to keep the parties informed is provided in Article 32 of the Law No. 7/2004: <http://mj.gov.tl/jornal/lawsTL/RDTL-Law/RDTL-Laws/Law-2004-7.pdf>

⁵² Other NGOs that are working also on various issues of human rights are such La'oHamutuk (LH); www.laohamutuk.org, JSMP; www.jsmp.tl, RedebaRai; <http://redebarai.org>, Forum Tau Matan (FTM), ACBIT; <http://chegabaita.org>, Asian Justice and Right (AJAR); <http://asia-ajar.org/timor-leste>, etc.

the processing of their complaints. So, the complainants return to the human rights NGOs to ask for that information⁵³.

2.3.3. *Regular Human Rights Meeting (RHRM)*

The RHRM has been initiated by the United Nations Human Rights Advice Unit in Timor-Leste to bring together the Provedoria and civil society organisations that work on human rights to update each other on human rights developments in the country. The mechanism has been functioning in term of sharing information. But on the other hand, some members of civil society disagree and consider that the mechanism should be the responsibility of the Provedoria, because Timor-Leste is no longer a state in transition from colonial and post-colonial occupation and under the mandate of the United Nations. The Provedoria should take this role and do this activity⁵⁴. The Provedoria should lead the human rights coordinating meeting in term of sharing information on human rights developments and collaborating with civil society⁵⁵.

2.3.4. *Social, Economic and Cultural Rights*

In the Provedoria's strategic plan 2011-2020, one of the four priorities is that vulnerable people are protected against human rights abuses and can have good access to public services⁵⁶. In reality, the Provedoria has been doing very little on this priority. The protection and promotion of human rights is not limited to prevent the excessive use of powers or forces by public authority towards its citizens but there are other human rights such as social, economical and cultural rights that should be protected and promoted by state or government. There are lots of people who do not have access to clean water, good health and sanitation facilities, good education facilities, etc. It is the responsibility of the Provedoria to study, investigate and provide report and recommendations to government in order to promote these human rights in term of access to public services⁵⁷. Also, the Provedoria needs to look at other human rights of citizens, such as access to land⁵⁸.

2.3.5. *Access to PDHJ's Reports and Information*

The Provedoria is obliged to keep the public informed on the performance of its mandate and activities⁵⁹ and also the duty to report on its performance in specific cases of human

⁵³ Manuel Monteiro, Executive Director of HAK Association interviewed on 12 July 2016.

⁵⁴ João de Almeida, Deputy Director of Mahein Foundation interviewed on 12 July 2016 and also Manuel Monteiro, Executive Director of HAK Association interviewed on 12 July 2016.

⁵⁵ Caetano Alves, Research Coordinator of Mahein Foundation interviewed on 12 July 2016.

⁵⁶ See p. 12 of Provedoria strategic plan 2011-2020 on strategic priorities, <http://pdhj.tl/wp-content/uploads/2013/11/SP-PDHJ-2011-2020-e.pdf>.

⁵⁷ See paragraph a) of Article 24 of Law No. 7/2004 as amended by Article 30 of the Law No. 8/2009: <http://cac.tl/wp-content/uploads/2011/11/Law-8-2009-CAC1.pdf>.

⁵⁸ Caetano Alves, Research Coordinator of Mahein Foundation, interviewed on 12 July 2016.

⁵⁹ See Article 30 of the Law No. 7/2004.

rights violations⁶⁰. However, it was really difficult to access information from the Provedoria on human rights violations during the joint military-police counter-insurgency operation said the Director of HAK⁶¹. The Provedoria only shares its reports in public when officially launched said the Deputy Provedor⁶².

In term of providing information to public and protecting the privacy of persons, the Provedoria has duty to maintain confidentiality, particularly for cases that are under investigation and those that are required to protect the privacy of persons, specifically for the minors⁶³ but not for all other information.

3. **Human Rights Defenders (HRDs) and Women Human Rights Defenders (WHRDs)**

All over the world there are laws and public policies that criminalise human rights defenders and NGOs for their peaceful activities in protecting and promoting human rights and some have been subjected to intimidation, deprivation of freedom of movement, arbitrary detention and torture.

The 1999 UN Declaration on Human Rights Defenders is the basis for most regional systems and mechanisms for promotion and protection of Human Right Defenders (HRDs). This document stipulates the international recognition of HRDs, distinguishing between legitimate and illegitimate forms of struggle for human rights and highlights the necessity to create structures for their protection. In 2008, the Special Rapporteur mandate was created with the aim to promote respect for protection of HRDs.

In Timor-Leste the only basis for protection of HRDs is the Constitution. Timor-Leste has yet to be visited by the UN Special Rapporteur. Though there have been no serious human violations against Timor-Leste's human rights defenders at this time, there should be mechanisms for their protection.

There are signs of insecurity for human rights defenders in the future as some leaders of state institutions have made threatening statements. So in anticipation, several members of civil society have established a secretariat and selected a coordinator for human rights defenders. The role of the coordinator is to monitor the activities of human rights defenders and to inform and share information in national and international level when there is any violation against any human rights defenders⁶⁴.

⁶⁰ See Article 34 of the Law No. 7/2004.

⁶¹ Manuel Monteiro, Executive Director of HAK Association, interviewed on 12 July 2016.

⁶² Dr. Horacio de Almeida in an interview with JSMP on 14 July 2016.

⁶³ See paragraph 1 and 2 of Article 31 of Law No. 7/2004.

⁶⁴ Manuel Monteiro, Executive Director of HAK Association, interviewed on 12 July 2016.

The Provedoria as the national human rights institution should have taken this initiative⁶⁵. In term of training provided to HRDs, the Provedoria has provided training to staff (HRDs) of Fundasaun Mahein on human rights, but not to other HRDs working with human rights NGOs⁶⁶. In response to this criticism, the Provedoria has appreciated the steps taken by civil society organisations. It has also declared its willingness to cooperate and collaborate with CSOs on violations of the rights of HRDs.⁶⁷

4. Deprivation of freedom of movement, arbitrary detention and torture

The right to life, to personal freedom, integrity and security and the right to freedom of movement are provided in Timor-Leste's Constitution⁶⁸. The Timor-Leste government also has ratified several international instruments on human rights such as the International Covenant on Civil and Political Rights, and the law on national security has provisions on human rights protection⁶⁹. These principles and basic human rights have been tested during "*operasaun konjunta*" or joint operations from 2014 to 2015.

Since the restoration of independence on 20 May 2002, there have been many police and military operations as previously described. The operations with most serious human rights violations took place in 2014 and 2015. The operations were conducted based on Government Resolution No. 8/2014 and No. 9/2014⁷⁰ and Parliament Resolution No. 4/2014⁷¹ to disband groups that were considered illegal by these resolutions; and to capture all of its members that are dispersed in the territory.

The prominent groups were CPD-RDTL or Popular Council for the Defence of Democratic Republic of Timor-Leste and the Revolutionary Council of Maubere (KRM) that are led by some of the liberation war veterans such as Antonio Aitahan Matak and Paulino Gama alias Mauk Moruk⁷². These groups were more nationalist and demanded Constitutional reform; election of a new government; and wanted to exclude those who had supported the Indonesian occupation from the transitional process. These groups also felt unhappy with government programmes and its progress in meeting the minimum living standards of Timorese citizens⁷³.

⁶⁵ *Ibid.*

⁶⁶ João de Almeida, deputy Director of Fundasaun Mahein interviewed on 12 July 2016.

⁶⁷ Dr. Horacio de Almeida, Deputy Ombudsman for Human Rights and Justice interviewed on 14 July 2016.

⁶⁸ Article 29, 30 and 44 of the Constitution, http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution_RDTL_ENG.pdf

⁶⁹ See paragraph 4) of Article 4 & 7 of Law No. 2/2010 on National Security: <http://mj.gov.tl/jornal/lawsTL/RDTL-Law/RDTL-Laws/Law%202-2010.pdf>.

⁷⁰ See http://www.mj.gov.tl/jornal/public/docs/2014/serie_1/SERIE1_NO_13A.pdf (in Portuguese).

⁷¹ *Ibid.*

⁷² See <https://www.youtube.com/watch?v=r7XOvThh4GI>.

⁷³ See <http://www.timorhauniandoben.com/2014/03/cpd-rdtl-la-aseita-legalidadi.html>.

The civil society made a joint declaration to express concerns on the actions taken by the Government and Parliament to address the issues⁷⁴. The Provedoria also conducted monitoring and produced very detailed and good reports with recommendations and held a press conference on the operations⁷⁵.

In 2015, the government again produced two resolutions, Government Resolution No. 11/2015⁷⁶ and Resolution No. 12/2015⁷⁷ to authorise joint military and police operations to stop the actions of these armed groups in opposition to it. These resolutions were promulgated in Presidential Decree No. 41/2015⁷⁸.

Based on these resolutions, the 'Hanita Command Joint Operation' was conducted to capture Mauk Moruk and his followers. Human rights violations committed by police and military forces during the operations were deprivation of freedom of movement, arbitrary detention and torture⁷⁹. The Fundasaun Mahein as the only local NGO monitoring the defence and security forces, considered the joint operation to violate human rights⁸⁰. For instance, there is a video showing the brutality of Timor-Leste military forces in the capture of an elderly man⁸¹.

The Provedoria together with civil society subsequently conducted monitoring and produced reports with specific recommendations on the operation. Unfortunately, these reports of the Provedoria are unavailable on its official website⁸². There have been a number of important recommendations directed to relevant state organs and institutions such the National Parliament, Government (Ministry of Internal Affairs and Ministry of Defence), PNTL and F-FDTL. The only recommendation that the security forces command has considered for implementation is the training for military and policy forces on human rights. Other recommendations that were not being implemented will be

⁷⁴ See <http://www.laohamutuk.org/Justice/DeklarasaunCSOPNTLFFDTL22Abr2014en.pdf>.

⁷⁵ See <http://198.211.102.247/timor-leste-ombudsman-report-on-state-actions-against-anti-government-groups>.

⁷⁶ See http://www.mj.gov.tl/jornal/public/docs/2015/serie_1/SERIE_I_NO_9.pdf

⁷⁷ See http://www.mj.gov.tl/jornal/public/docs/2015/serie_1/SERIE_I_NO_10.pdf

⁷⁸ See http://mj.gov.tl/jornal/public/docs/2015/serie_1/SERIE_I_NO_10.pdf

⁷⁹ See urgent action here, <https://webcache.googleusercontent.com/search?q=cache:H3CxOmk7xygJ:https://www.amnesty.org/download/Documents/Submitted%2520after%25202015-05-11T11%252024%252035/ASA5716302015ENGLISH.pdf+&cd=2&hl=pt-PT&ct=clnk&gl=tl>.

⁸⁰ See https://timordata.info/media/publications/E_FM_MNL_99.pdf.

⁸¹ See <https://www.youtube.com/watch?v=qYQXBJZnt3o>.

⁸² See www.pdhj.tl.

included in the Provedoria's annual report for 2015, and submitted to the National Parliament⁸³.

Some very important recommendations that are not yet implemented such as the recommendation to the Ministry of Internal Affairs on its inspection and audit to conduct internal review and provide public report on the compliance with laws and rules, conduct inquiries and provide report on use of force and arms during the joint operation and give disciplinary sanctions to members of police who have violated the rules. It is almost the same recommendations directed to the Ministry of Defence and F-FDTL. The recommendations on inquiry on human rights violations during the joint operation are directed to the Committee A and B of the National Parliament and also to the Government on the killing of Mauk Moruk⁸⁴.

There were restrictions imposed to the Provedoria by the operations command on access to certain locations due to "security reasons"⁸⁵. Based on the results of a survey conducted by the Provedoria in its monitoring starting from March to May 2015 (first phase) and July to August 2015 (second phase), 66% of respondents claimed to have been deprived of freedom of movement in the course of the operation⁸⁶. One of the recommendations of the urgent report of the Provedoria addressed to the National Parliament has requested to include the mandate of the Provedoria pursuant to Law No. 7/2004 in any resolution regarding any future joint operation to avoid restrictions on access of the Provedoria to any place.

The Provedoria in its report on the operation has categorised human rights violations recorded during its monitoring, particularly in Baukau District. The Provedoria has listed 136 cases of violations where 29.4% or 40 cases were deprivation of freedom of movement, 18.45 or 25 cases were torture and cruel inhuman or degrading treatment and 12.5% or 17 cases were arbitrary detention.

According to data from HAK Association on the joint operation (KOK) between 19-22 January 2016 in Baukau, there were 35 community members arbitrarily captured and brought to court. As there was no evidence against them, all of them were unconditionally freed. When the operation continued between 24 March 24 to 10 April 2016 to capture the leader of KRM, the number of community members arbitrarily

⁸³ Dr. Horacio de Almeida, Deputy Ombudsman for Human Rights and Justice interviewed on 14 July 2016 & Provedoria annual report 2015, <http://pdhj.tl/wp-content/uploads/2014/06/RELATORIU-ANUAL-2015.pdf>.

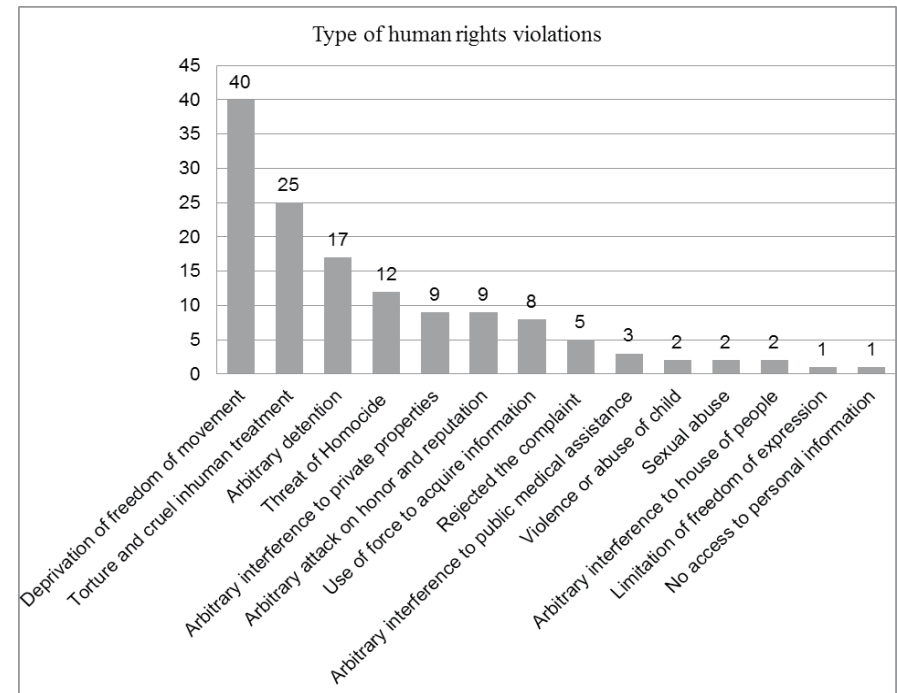
⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ The result of the first phase monitoring of the Provedoria in Baukau District in March to May 2015, p. 49 in Tetun version (not yet available online) and the second phase in Baukau District in July to August 2015, p. 37, in Tetun version (not yet available online).

captured and produced before court was 232; of whom 229 were later unconditionally freed⁸⁷. A community member, Luis Ramos was innocently killed by members of the command of joint on 16 June 2016 when he was ordered to guide them to capture Mauk Moruk.

Besides deprivation of freedom, arbitrary detention and torture, the HAK Association has received complaints from around 105 victims. They had been beaten, and detained forcibly in cell, and their properties have been destroyed⁸⁸ such as their houses, doors, windows, chairs, beds, utensils, etc.⁸⁹. These people are innocents and financially weak, the Provedoria should ensure that the Government should compensate them monetarily as well as holding those responsible for the acts to be accountable by following up on their cases⁹⁰.



⁸⁷ See HAK Association's Annual report 2015, p. 7 & 8 (in Tetun), http://www.haktl.org/wp-content/uploads/2016/02/Relatoriu_anual_2015_3.pdf.

⁸⁸ See submission, point 14, <http://www.laohamutuk.org/Justice/UPR/2016/NGOUPRMar2016en.pdf>.

⁸⁹ See monitoring report of HAK Association from April to September 2015 (not yet available online).

⁹⁰ Manuel Monteiro, Executive Director of HAK Association interviewed on 12 July 2016.

The joint military operations are considered as a bad practice in Timor-Leste's military sector⁹¹. They violated human rights principles enshrined in the international covenants that Timor-Leste has ratified, Timor-Leste's Constitution and laws. The military and police forces need to be sensitised to respect human rights. Since the restoration of independence in 2002, the military and police forces have undergone lots of workshops on human rights organised by the UN agencies and the Provedoria⁹², but it seems that there has been no improvement at all in practice⁹³.

5. Conclusion and Recommendations

The office of the Ombudsman has been marked by many improvements in terms of its monitoring operations. However, the contact with civil society was less satisfactory.

The effectiveness of the Provedoria was put into question, as most of its reports and recommendation were not given due attention by the PNTL and the FFDTL. One good initiative was to create a follow-up department to make sure that all the recommendations are implemented. Also the Provedoria reported non-compliance to the Parliament through its annual report as a means of changing the conduct of state institutions and agencies.

The Provedoria has been independent of government structures; although it also understands that cooperation and participation with all stakeholders is important in improving its effectiveness⁹⁴. Much progress has been made since its establishment, though some gaps and structural problems remain. Along with the legacies of the colonialism, and the ineffectiveness of the judicial system, its path ahead remains risky.

5.1 Recommendations to the National Parliament

- 5.1.1. Political decisions should not be against the Constitution nor lead to human rights violations;
- 5.1.2. Consider and discuss the urgent reports of the Provedoria on the violations of human rights during the command joint operation and make those

⁹¹See the report of Fundasaun Mahein 2015, https://timordata.info/media/publications/E_FM_MNL_99.pdf.

⁹²See annual reports of the Provedoria on human rights training to PNTL, <http://pdhj.tl/media-publications/annual-reports-budgets/?lang=en>.

⁹³ See annual reports of the Provedoria on the records of human rights violations committed by PNTL, <http://pdhj.tl/media-publications/annual-reports-budgets/?lang=en> and see also the submission of Civil Society on Timor-Leste Second Periodic Review (UPR) on March 2016, point 13, <http://www.laohamutuk.org/Justice/UPR/2016/NGOUPRMar2016en.pdf>.

⁹⁴ Asia-Pacific Human Rights Information Center (2007) Volume 47, "Ombudsman for Human Rights: The Case of Timor-Leste", <http://www.hurights.or.jp/archives/focus/section2/2007/03/ombudsman-for-human-rights-the-case-of-timor-leste.html>.

institutions accountable for their actions and improve the performance of their duties in line with the Constitution and international obligations;

- 5.1.3. Consider and discuss the annual report of the Provedoria, particular the recommendations addressed to state institutions that have committed human rights violations but did not implement the recommendations and make these state institutions accountable for their inaction;
- 5.1.4. Consider, allocate and approve sufficient state budget to the Provedoria in order to implement its strategic plan for 2011-2020.

5.2 Recommendations to General Command of F-FDTL and PNTL

- 5.2.1. Do not limit the movement of the personnel of the Provedoria when monitoring military or police operations;
- 5.2.2. Respect principles and values of human rights in international covenants that Timor-Leste has ratified, in Timor-Leste's Constitution and laws during the performances of their duties;
- 5.2.3. Consider and implement all recommendations provided by the Provedoria in order to improve their professionalism.

5.3 Recommendations to the Provedoria (PDHJ)

- 5.3.1. Be more proactive in protecting and promoting of human rights not only through monitoring and publishing reports, but also by making public statements or declarations against any action of state institutions or organs contrary to the Constitution and laws, and that violate human rights;
- 5.3.2. Intervene in any and every situation where human rights violations occur regardless of citizenship, race, colour, religion, and ethnicity of victim;
- 5.3.3. Ensure the rights of the victims of human rights violations to access health services, to be compensated for damage to their properties, and for speedy processing of their cases;
- 5.3.4. Actively follow-up and inform complainants on the processing of their cases;
- 5.3.5. Make available its information and reports on human rights violations for public access;

- 5.3.6. Establish a network or coordinating mechanism on human rights with civil society and convene the coordination meeting;
- 5.3.7. Reactivate the Consultative Council to enhance cooperation and collaboration with civil society organisations;
- 5.3.8. Provide training or capacity building to human rights defenders to improve their capacities in protection and promotion of human rights;
- 5.3.9. Focus also on other human rights such as social, economic and cultural rights to ensure that the government guarantee the rights of people to clean water, access to land, to good sanitation, education, etc.

BANGLADESH: CHANGE OF DIRECTION NEEDED

Independent Researcher¹

1. Introduction

The year 2016 is very significant for the National Human Rights Commission (NHRC), Bangladesh as the appointment of its new Chairman and members took place. The leadership of the Commission was vacant, after the completion of the tenure of previous Chairman and members on 22 June 2016. No new appointments took place until the end of July 2016. On 2 August 2016, the appointment of new members of NHRC was approved by the president² and took effect through announcement in the government gazette.

Unfortunately, neither the founding law has a specific provision to include civil society members in the selection committee, nor has the selection committee practiced any formal process of consultation with civil society on previous occasions. This time around was no different.

The Sub-Committee on Accreditation (SCA) of the former International Coordinating Committee of National Human Rights Institutions (now Global Alliance of National Human Rights Institutions) has highlighted the importance of a clear, transparent and participatory selection process that promotes the independence of, and public confidence in, the senior leadership of the Commission, and has called upon the NHRC to advocate for formalisation of the selection process in relevant legislation, regulations or binding administrative guidelines.

Civil society members have urged over and over again to start the selection process well ahead of the known date of vacancies; and to initiate an open and transparent means for selection. The delay and process followed in appointing the new chairperson and members can certainly be seen as the government's lack of willingness to make the NHRC an effective and functional institution.

This report is a critical assessment of the performance of the National Human Rights Commission, Bangladesh in the protection and promotion of human rights, mainly between January to December 2015, as well as part of 2016. It is structured according to

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² "Kazi Reazul Hoque new NHRC Chief", *Dhaka Tribune*, 2 August 2016, <http://www.dhakatribune.com/bangladesh/2016/08/02/kazi-rezaul-hoque-new-nhrc-chief/>.

the guidelines of the 2016 ANNI regional report. The first part of the report looks at the NHRC's situation to date and the general human rights situation of the country. The second part is an assessment of the NHRC's independence and effectiveness in the context of its performance in promoting and protecting human rights during the reporting period.

2. Overview

In 2015, the overall human rights situation in Bangladesh was worrisome despite some notable signs of faster economic development. For example, the UN Food and Agriculture Organisation recognised Bangladesh's progress towards the Millennium Development Goals.³ The World Bank promoted Bangladesh to the category of lower-middle income country,⁴ because of its rising per capita income. Meanwhile Bangladesh and neighbouring India exchanged 162 territorial enclaves along their shared land boundary, which has been a source of inter-state conflict.⁵

The political turmoil triggered by the government's move to resist the opposition Bangladesh Nationalist Party's rally on the first anniversary of the disputed tenth general election, extrajudicial killings and mass arrest by security forces, custodial torture and deaths, human trafficking, oppression of religious minorities, religious extremism, repression of women, violence against children, attack and killing of free-thinking writers and publishers, suppression of dissenting views, use of force to prevent peaceful protests, and border killings, were some serious causes for concern in 2015.

Laws and Policies in 2015: Although far short of expectations, there were still a few achievements. For instance, the cabinet approved the Formalin Control Act 2015, Bangladesh Energy and Power Research Council Bill 2015, Bangladesh Public-Private Partnership Act 2015, Domestic Worker Protection and Welfare Policy, and Labour Rules 2015 etc. Also, the International Crimes Tribunal has so far pronounced 22 verdicts on crimes against humanity,⁶ while the Supreme Court's Appellate Division disposed of five cases. Of them, three sentences [of execution by death—ed.] were implemented in 2015.

³ Food and Agriculture Organisation, *The State of Food Insecurity in the World 2015*, p. 15, <http://www.fao.org/3/a-i4646e.pdf>.

⁴ "Bangladesh is now lower-middle income country, says World Bank", *bdnews24.com*, 2 July 2015, <http://bdnews24.com/economy/2015/07/02/bangladesh-is-now-lower-middle-income-country-says-world-bank>.

⁵ "The signing of land boundary agreement: 'Neighbour first' back on track", *Daily Star*, 8 May 2015, <http://www.thedailystar.net/op-ed/politics/the-signing-land-boundary-agreement-neighbour-first-back-track-81018>; "India nears land swap deal with Bangladesh", *New Age*, 7 May 2015, <http://newagebd.net/117677/india-nears-land-swap-deal-with-bangladesh/>.

⁶ "Probe into 35 cases on", *The Independent*, 17 October 2016, <http://www.theindependentbd.com/arcprint/details/40140/2016-04-10>.

Political violence in 2015: There were a total of 865 incidents of political violence, including clashes between law enforcement officials and political party activists, clashes between activists of the ruling party and the opposition, and in-fighting within parties. The violence left 153 people killed and another 6,318 injured.⁷

The opposition parties called a rally for 5 January 2015 to demand fresh national elections by cancelling the previous year's polls that were boycotted by the main opposition. The government was adamant not to permit the Bangladesh Nationalist Party (BNP) to hold the rally, while the BNP chairperson was confined to her office. The government's claim for not allowing the BNP to hold the rally, and also prevent the BNP Chief from addressing it, was to avert possible acts of subversion. The indefinite blockade called by the opposition came into force across the country the following day and it was characterised by unprecedented violence for 66 consecutive days. 70 people died of bomb attacks during this period. No one, even women, children and older people, were spared from the attacks. Almost all who died and were injured were commoners, mostly poor bus drivers, truckers, helpers and others, with no direct involvement in politics.

Extrajudicial killings: 2015 saw an increase in extrajudicial killings by law enforcement agencies in the name of crossfire, gunfights, exchange of gunfire and encounters, and also custodial deaths due to torture. Extrajudicial killings and custodial deaths totalled 192,⁸ up from 128 a year before. Also, a total of 68 people died in custody. On different occasions throughout the year, law enforcement officials had been accused of shooting detainees in the leg, causing them permanent disability.

Enforced disappearance: Incidents of enforced disappearance or death after enforced disappearance amounted to 55 in 2015,⁹ according to media reports. Of them, eight were found dead after they disappeared, seven were shown arrested, five returned to their families, while others still remain unaccounted for. Involvement of law enforcement officials, especially Rapid Action Battalion (RAB) and Detective Branch members, in such incidents was claimed by families of the victims, but the government neither acknowledged those nor took any legal measure to prevent a recurrence.

⁷ Ain o Salish Kendra, *Press Statement on Human Rights Situation Overview 2015* (in Bangla), 1 January 2016, <http://www.askbd.org/ask/2016/01/01/human-rights-situation-overview-2015/>.

⁸ Ain o Salish Kendra, *Human Rights Situation Overview 2015*, 1 January 2016, <http://www.askbd.org/ask/2016/01/01/human-rights-situation-overview-2015/>.

⁹ *Ibid.*

Mob beatings: In 2015, 135 people died of mob beatings¹⁰ while the number was 123 in 2014.

Human trafficking: In 2015, numerous mass graves of Bangladeshis and Myanmar's Rohingya people were discovered in Thailand and Malaysia; deaths of migrants caused by torture of traffickers at detention camps to collect ransom; throwing migrants overboard at sea; and the loss of more than a hundred lives ea near Indonesia's Aceh coast. Figures released by UNHCR in April showed at least 25,000 people were trafficked in the first three months of 2015, and at least 540 of them died.¹¹

Right to freedom of expression: Not only were writers promoting free-thinking, and publishers of such works, killed in heinous attacks, but there were also attempts to silence dissenting voices through legal, administrative, and judicial means. There have been no measures to discourage intense intolerance towards dissenting opinions. Rather, such intolerance has been allowed to grow. Besides, progressive politicians, eminent writers, intellectuals, journalists and rights bodies, secular voices have been attacked and threatened on different occasions throughout 2015.

Attacks on religious minorities: According to media reports, 104 houses of Hindu communities were vandalised and torched in different parts of the country; and there were 213 incidents of vandalism of temples, places of worship and Hindu idols.¹² Christians, Bahais, Shias and Ahmadiyyas were also attacked, but police did not act responsibly in these incidents.

Border killings and torture: According to media reports and ASK's documentation, there were 209 incidents of border killing and torture in 2015. Of them, 32 were killed, 14 died of physical torture, and 73 were injured. Besides, 59 Bangladeshi nationals were abducted from border areas.

Harassment and sexual harassment of women: Sexual harassment cases in the country increased in 2015, with a total of 224 women being subjected to such form of harassment. 10 of the victims later committed suicide. The most talked-about incident of 2015 was the sexual harassment of women at the TSC area of Dhaka University during the Bengali New Year celebrations.

Rape: A total of 846 women and children were raped in 2015¹³, and 60 of them were killed after rape. Two of the victims committed suicide after rape.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

Village arbitration and fatwa: The number of women oppressed by village arbitration and fatwa was 12 in 2015, according to ASK. Three cases were filed over the incidents.

Child-killing and torture: Incidents of torture and killing of children rose in mid-2015. From July 8 to August 4, seven children were killed in seven days. Children were also victims of political violence early in the year. During blockades and general strikes during the first one and a half months of the year, 11 children were killed, and 12 sustained injuries. According to ASK's account, 133 children were killed in 2015, up from 90 in the previous year.

Torture of journalists: Three journalists were killed and 18 were tortured by law enforcement agencies in the country in 2015, according to ASK's account. A total of 244 journalists were also subjected to different forms of harassment.

Rights of workers: The rights of workers have been constantly violated. According to a survey conducted by Safety and Rights Society, a private organisation, a total of 373 workers died of 282 workplace accidents in 2015. 10 workers died at ship-breaking yards. The families of the Rana Plaza disaster victims were not properly compensated, but they have been provided with aid from Rana Plaza Donors Trust Fund in line with the international standards. The trial of the Rana Plaza case has been slow but the charge sheet was submitted.

Rights of Indigenous People: Despite the ruling government's promise, the Chittagong Hill Tracts (CHT) Peace Accord has not been fully implemented. The CHT Land Commission's progress has also stalled. Many attacks on the houses of the *Adivasi* communities and their eviction, in the hill tracts as well as plain lands, have been alleged.

Human Rights Situation in 2016: Trends of various human rights violations including enforced disappearances, extrajudicial killings, torture in the custody of law enforcement agencies, shooting by law enforcers, attacks on journalists, political violence, freedom of expression, bans on meetings and assemblies, violence against women and children, and attacks on citizens belonging to minority communities, have not slowed down but rather accelerated in 2016.

The rights of freedom of speech, expression, assembly and association of the peoples' organisations and NGOs are restricted under repressive laws, which contravene the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; and the UN Declaration of Human Rights Defenders. Bloggers expressing different views have been attacked and killed by alleged 'extremist groups'; but in 2016

even people who are following other religions and have progressive thoughts have become the victims of this kind of brutal attacks. According to the Minister of Home Affairs, “a vested quarter is trying to hatch conspiracy in the name of [Islamic State] militants to destabilize the country by killing people”.¹⁴ This same senior member of government had earlier described the killings of a Rajshahi University teacher and a prison guard, as “stray incidents”¹⁵.

In June 2016, the government initiated a special drive to arrest “extremists” and criminals which has created a chaotic situation and human rights violations due to mass arrests. Almost 12,000 people were detained by the law enforcement agencies during the special drive across the country.¹⁶ The majority of the detainees are either members or supporters of the mainstream opposition political parties.

3. Mandate to Protect and Promote Human Rights

The Commission was vocal on human rights violations by Law Enforcing Agencies through its comments to media in 2015. But the NHRC also expressed opinions such as: “We have no jurisdiction over the human rights violations committed by members of security forces. The government should empower the NHRC so that it can investigate such human rights violation”.¹⁷ Though Section 16 and 17 of NHRC Act, 2009 give the NHRC powers relating to inquiries and investigation into complaint, Section 18 limits the power in case of law enforcement agencies to some extent. Nevertheless it was disappointing that the NHRC could find no creative way of expanding its mandate.

According to media reports, incidents of enforced disappearance or death after enforced disappearance amounted to 55 in 2015.¹⁸ It has been reported by the media that the National Human Rights Commission (NHRC) wants the State to play a more responsible role in reducing the incidents of political violence, extrajudicial killing and enforced disappearance.¹⁹ The Commission also expressed that the matters related to its human resources, financial management, exclusion of allegations of human rights violations by law-enforcement agencies, are not in compliance with the Paris Principles. But the Commission did not act or investigate cases of enforced disappearances as it is mandated

¹⁴ “Terrorism-militancy dealt with iron hand: Home Minister”, *The Daily Samakal*, 7 May 2015, <http://www.samakal.net/2016/05/07/5519>.

¹⁵ Gay-rights activist Xulhaz Mannan and his friend and theatre artist Mahbub Rabbi Tonoy, were hacked to death at Xulhaz’s Kalabagan residence within hours of his statement.

¹⁶ “Another drive if needed, says home minister”, *The Independent*, 19 June 2016, <http://www.theindependentbd.com/arcprint/details/48169/2016-06-19>.

¹⁷ “NHRC chief seeks authority to probe”, *The Independent*, 3 September, 2015, <http://www.theindependentbd.com/printversion/details/14201>.

¹⁸ Ain o Salish Kendra, *op. cit.*

¹⁹ “NHRC wants State to reduce extrajudicial killings”, *Daily Sun*, 2 October 2015, <http://www.daily-sun.com/post/79983/NHRC-wants-State-to-reduce-extrajudicial-killings>.

to do by law. The Commission could go to places of violations and bring these to the attention of authorities case-by-case and systematically follow-up on violations based on its findings.

The figure of extra judicial killings slightly decreased from 133 in 2010 to 100 in 2011, and 91 in 2012, but it sharply increased to 208 in 2013. In 2014, it was 154 and increased to 192 in 2015. Simply from the statistics, the question arises as to what role, if any, the NHRC has played to stop extra-judicial killings that are identified as one of its highest priorities?

The Paris Principles set out six main criteria that national human rights institutions are required to meet: Mandate and competence, Autonomy from the Government, Independence guaranteed by Statute or Constitution, Pluralism, Adequate Resources and Adequate powers of Investigation, etc. The Sub-Committee on Accreditation (SCA) of the International Coordinating Committee for National Human Rights Institutions (ICC), which accredits national human rights institutions ranked the National Human Rights Commission, Bangladesh as a ‘B’ category institution in 2010. It observed at the time that the NHRC could not be conferred ‘A’ status, as the government’s control over the selection committee was obvious, and there was no representation of civil society.

After five years, the ICC-SCA did another review in March 2015 to decide whether NHRC, Bangladesh could be upgraded to an ‘A’ category institution. The NHRC, Bangladesh then informed the SCA that it had sent a proposal to the government to bring changes to the selection committee, including raising the number of committee members from seven to eleven. Obviously, the NHRC of Bangladesh still hasn’t satisfied the criteria for full compliance with the Paris Principles and its proposal on expanding the selection committee is not of consequence unless the enabling law is amended to that effect. Once again, the ICC-SCA accredited the NHRC as a ‘B’ category institution.

The composition of the selection committee clearly reveals that the government can easily choose candidates for the post of NHRC chairman and members, as per their interest. Concerns have been raised earlier from different quarters regarding the composition of the selection committee, while rights organisations have always raised strong objections in this regard. Surprisingly, the National Human Rights Commission claims that there was a formal and informal dialogue with civil society before selecting the previous commissioners,²⁰ and that broad consultations were conducted CSOs, academia, media and other professional groups towards transparency in the selection

²⁰ The previous cohort of Commissioners were appointed on 22 June 2010 for their first term. After completion of a three year term, they were re-appointed on 23 June 2013 for another term of three years, with the exception of Niru Kumar Chakma, who already served as a member for two terms.

process. However, human rights NGOs are not aware of such consultations during the selection process.

The NHRC's strategic plan is critical as evidence of its commitment for promotion and protection of human rights. In 2010, the NHRC drafted its first five year strategic plan and subsequently revised it in 2011 based on stakeholders feedback gathered through several workshops conducted in different parts of the country. In the first strategic plan, the NHRC identified 10 pressing human rights issues. Among them, two issues were identified as being of "highest priority". Firstly, enforced disappearance, torture and extrajudicial killings (termed as violence by state mechanisms); and secondly, violations of economic, social and cultural rights, including health rights, and discrimination against people with disabilities.

The NHRC Act 2009 prescribes the mandate of the Commission and it also defines human rights as follows: "Right to life, Right to liberty, Right to equality and Right to dignity of a person guaranteed by the constitution of the People's Republic of Bangladesh and such other human rights that are declared under different international human rights instruments ratified by the People's Republic of Bangladesh and are enforceable by the existing laws of Bangladesh (Section 2-f)". While this has specified some rights that are civil and political in nature, and widens the NHRC's mandate to international human rights ratified by the government of Bangladesh, these are still subject to enforcement in the national legal system. As most economic, social and cultural rights like right to food, clothing, education, healthcare, housing, etc. are not recognised as fundamental rights in the Constitution of Bangladesh, and are thus not enforceable through the court of law. Under such circumstances, it is difficult to understand how much the Commission could do to protect these rights within its mandate.

3.1 Initiatives to address the human rights situation

The National Human Rights Commission has taken positive initiatives in 2015 through press statements, events, seminars and spot visits, etc. On 16 August 2015, the NHRC Chair urged the government to take steps to make the Commission fully independent,²¹ at the inaugural session of a consultation meeting on the National Human Rights Commission's second Draft Strategic Plan (2016-2020). The NHRC has initiated a move to persuade the government to establish an independent National Commission to ensure the rights of the children.²² The Commission adopted a draft of the National Commission for Rights of the Child Bill, 2016 by Save the Children and Ain o Salish Kendra. The

²¹ "NHRC chief seeks authority to probe", *The Independent*, 3 September 2015, <http://www.theindependentbd.com/printversion/details/14201>.

²² "NHRC for formation of independent Children Commission", *The Independent*, 29 June 2016, <http://www.theindependentbd.com/post/49673>.

Commission expressed that it will send the draft to the Ministry of Women and Children's Affairs as per its mandate to recommend the government to formulate various laws.

There were other areas where the performance of the Commission was less than satisfactory. For example: The Human Trafficking Deterrence and Suppression Act was enacted in 2012 but proceedings of cases filed under the Act progressed at a snail's pace. The government formulated a three-year action plan to prevent human trafficking, but it has not yet been implemented. Part of the plan was to form special tribunals in seven divisions, but it is yet to be done. The Overseas Employment and Migrants Act, 2013 was enacted, but it is hardly enforced. The Commission could have made recommendation to the government for the effective implementation of these laws. However, the NHRC Chair could only come up with the remark, "The State must take responsibility for those victims of human trafficking who have been cheated by registered travel agencies of the country", while addressing a public hearing on Migration and Human Trafficking.

The ICC-SCA acknowledged that the NHRC is operating in particularly difficult circumstances and commended its ongoing efforts to promote and protect human rights in Bangladesh. However, that does not justify the Commission's interventions and actions on a positive note which were not in compliance with Paris Principles in certain cases. It is disappointing to see the NHRC silent during the Kalyanpur slum clearance²³ by police and ministry officials on 21 January 2016 when 40,000 dwellers were forcibly evicted. The Commission visits jails and hospitals. It has raised its concern several times over the inhumane conditions and quality of care respectively in those places. However, there is no systematic monitoring of these facilities by the Commission.

As regards the complaints handling function of the Commission, it is encouraging to see an increasing rate of complaints recorded in its annual report and through its statements. The online complaint mechanism does not provide any special or immediate attention towards human rights defenders.

4. Human Rights Defenders (HRDs)/Women Human Rights Defenders (WHRDs)

There is a reality of non-recognition of the work of HRDs, which is more present in case of WHRDs. Women human rights defenders have been working not only for realising women's rights, but are also very much involved with mainstream human rights issues

²³ "Tension mounts over Kalyanpur slum eviction drive", *Dhaka Tribune*, 21 January 2016, <http://archive.dhakatribune.com/bangladesh/2016/jan/21/chaos-erupts-over-kalyanpur-slum-eviction-drive>; "Violence during Kalyanpur slum eviction", *Daily Star*, 21 January 2016, <http://www.thedailystar.net/city/slum-eviction-turns-violent-kalyanpur-205057>.

with different organisations. However, while carrying out their work or because of their work, women human rights defenders are targeted with gender-specific risks and vulnerabilities, in terms of their safety and mobility. There are numerous instances of such abuses, threat and violations faced by WHRDs. In such cases, the culture of blaming the victim herself has become a key factor for non-reporting of the violations.

The National Human Rights Commission made no focused or dedicated efforts to receive complaints related to rights violations of HRDs and WHRDs in 2015. It did not undertake any specific documentation or even press statement in this regard. There were no events or specialised trainings organised by the NHRC in 2015 exclusively for human rights defenders, or to publicise the concept of human rights defenders in society, nor to promote awareness on the safeguards for HRDs and WHRDs, especially at grassroots level.

In Bangladesh, Part III of the Constitution protects fundamental rights. Of particular relevance are Article 37 on freedom of assembly, Article 38 on freedom of association, and Article 39 on freedom of expression. Article 16 guarantees all citizens the protection of the law. However, no specific legal framework is in place to facilitate or protect the activities of human rights defenders. On the contrary, a number of restrictive pieces of legislation detrimental to the defence of fundamental freedoms are aimed to directly or indirectly hinder the work of human rights defenders.

There were no steps by the National Human Rights Commission to advocate for the enactment of specific national legislation to provide protection to HRDs. There is no dedicated complaints receiving desk for human rights defenders, women or persons with disability or any other vulnerable group. There is very limited assistance provided for persons unable to write, to record their complaint in writing. The staff who receive the complaints severely lack knowledge of human rights and the mandate of the NHRC. The complaints received are not segregated according to gender, ethnicity, religion or age, which makes it difficult to draw any analysis of trends.

4.1.1 Case Study: Attacks on Free-thinkers and Targeted Killings

Free-thinkers have been repeatedly targeted by extremist groups throughout Bangladesh since 2013. Religious extremist groups have emerged as an increasing threat to the safety of bloggers, writers, publishers, teachers, Hindu priests, Muslim Muezzin,²⁴ and online activists. The handling of such issues by law enforcement agencies and the government is really discouraging. The killing of secular individuals is part of an alarming trend of

²⁴ Muezzin killed inside Old Dhaka mosque, *Daily Star*, 4 April 2016, <http://www.thedailystar.net/city/muezzin-killed-inside-old-dhaka-mosque-1204033>.

violent intolerance in Bangladesh. Such killings also have a chilling effect on freedom of opinion, speech and expression, as some of the victims were “atheist” bloggers, writers and online activists.

The Chairman of the National Human Rights Commission questioned the role of law enforcers on 8 August 2015: “The bloggers are getting killed one after another as the law enforcers are still asleep, it’s not yet stopped...the murder of free thinkers has not stopped for lack of effective actions”²⁵. He also stated that the Commission immediately expressed its concern and demanded that the State take effective and quick action to bring the perpetrators to justice. According to the Commission, it was not satisfied with the way the State responded to these killings.²⁶

However, there was not even a public statement by the NHRC after some of those murders; and its action was limited to the expression of concern in a few cases. What the Commission failed to do is to denounce those killings in a timely fashion; to publicise its point of view on freedom of expression and opinion; and to provide concrete support in terms of assistance to find safe shelter for those at risk within the country or relocation abroad.

4.1.2 Case Study: Human Rights Violations by Law Enforcing Agencies

According to documentation (based on different newspaper reports and own documentation) by ASK in 2016, 150 people were killed in crossfire and law enforcement agencies custody in the last nine months (January to September 2016). Sixty-one of them were killed in crossfire involving police; 34 involving Rapid Action Battalion; 11 involving Detective Branch (DB) of police; one involving Police-Border Guard Bangladesh; and 3 were killed in a SWAT operation (Hit Strong 27).²⁷ Seven people died after torture by police, and one each after torture by the DB and the railway police. Nine people were killed in police shooting, one in BGB shooting, six in joint force shooting (Thunder Bolt Operation) and nine in Swat operation (Storm 26).

Their families and witnesses allege that plainclothes men identifying themselves as law enforcers picked up 75 people. However, the law enforcement agencies have denied the allegation. Of the 75, eight were found dead, three returned, and 18 were produced as

²⁵ “Law enforcers’ role questioned in blogger killings”, *Prothom Alo*, 8 August 2015, <http://en.prothom-alo.com/bangladesh/news/74763/Law-enforcers%E2%80%99-role-questioned-in-blogger-killings>.

²⁶ “NHRC chief not so happy with the state”, *Daily Star*, 20 June 2016, <http://www.thedailystar.net/frontpage/not-so-happy-the-state-1242427>.

²⁷ “150 killed in ‘crossfire’, custody in 9 months”, *The Bangladesh Chronicle*, 30 September 2016, <http://bangladeshchronicle.net/2016/09/150-killed-in-crossfire-custody-in-9-months/>.

under arrest. A total of 57 people died in jail custody in nine months from January to September 2016; 23 of whom were convicted prisoners.

According to ASK Documentation 2015, 191 people were killed in shootouts with law enforcement agencies and in custody in 2015 while 183 people died in crossfire. A total of 55 people were detained by individuals identifying themselves as law enforcement agency members in 2015. Of them, eight were found dead, five returned home and seven were found to have been arrested.²⁸

With regard to extra-judicial killings, enforced disappearances, death in shootout and custody in 2015 as well as 2016, the National Human Rights Commission was vocal and expressed its strong position against these violations. “The Commission considered extrajudicial killing or crossfire as a threat to the rule of law. It believes that no one is above law, and all stakeholders must have respect for human rights, and it has recommended the government to punish the people involved in the extrajudicial killings through investigations”.²⁹ On 4 February 2016, the NHRC Chair criticised police over the death of tea-seller Babul Mattabbar, who received 95 percent burns after he caught fire from his kerosene stove, which was knocked over by a police officer, after he refused to pay a bribe. He asked the Inspector General of Police (IGP), the Dhaka Metropolitan Police (DMP) commissioner, and also the home minister, to restrain the unruly police personnel from getting involved in such heinous incidents.

Earlier, the NHRC had made two recommendations to the government to stop extrajudicial killings and ‘enforced disappearances’ in the country: (1) To stop anti-crime drives by law enforcers in plainclothes; and (2) To keep at least two persons to witness under what circumstances the raid and arrests are being made.

The National Human Rights Commission has drafted a 14-point guideline on procedures to be followed after death in the custody of law enforcement agencies or in crossfire, including recommending an independent investigation into any such incidents, and a judicial inquiry on the family’s demand. In the draft guidelines, the Commission states that currently the failure of the law enforcers to register and investigate such deaths undermines the protection of the right to life and personal liberty guaranteed by the Constitution.³⁰

²⁸ “Bangladesh human rights situation worsened in 2015”, *Daily Star*, 1 January 2016, <http://archive.dhakatribune.com/bangladesh/2016/jan/01/bangladesh-human-rights-situation-worsened-2015>.

²⁹ “Extrajudicial killing a threat to rule of law: NHRC”, *The Independent*, 3 October 2015, <http://www.theindependentbd.com/printversion/details/17747>.

³⁰ “Investigation and Trial in Custodial Death, Crossfire: NHRC drafts guidelines”, *The New Age*, 29 January 2016 <http://newagebd.net/197764/investigation-and-trial-in-custodial-death-crossfire-nhrc-drafts-guidelines/>.

4.2 NHRC as Voice against Repression

The present situation seems like the worst of all times. In June 2016, the government initiated a special drive to arrest “extremists” and criminals which has created a chaotic situation and human rights violations due to mass arrests. Thousands of people were detained by the law enforcement agencies³¹ during the special drive across the country; and the majority of the detainees are either members or supporters of the mainstream opposition political parties.

There is also a tendency to stop pro-opposition political programmes or meetings in the name of public safety by imposing Section 144 of the Code of Criminal Procedure (1898) on the pretext of mitigating violence. The government is barring meetings and assemblies of the opposition and groups with alternative beliefs by using the law enforcement agencies. The situation of the country has already become catastrophic and human rights defenders are on the frontline of repression.

While asked about the recent mass arrests of around 1,300 people, the NHRC Chairman expressed, “We don’t need any erudition to understand the abuse of human rights violation when such a huge number of people are arrested without any allegation against them”. Even though the Chairman makes comments on human rights issues and violations, the NHRC has seldom issued any statement regarding the obstruction of exercise of the rights to peaceful assembly or intolerant behaviour during rallies and assemblies. The NHRC website gives the sense that most of the press statements issued by NHRC are on events organised by the NHRC, and does not express its position on vital human rights issues.

Another sign of the government’s growing intolerance towards dissent and oppositional views is the enactment of laws with repressive provisions. Below is an overview of some repressive laws:

SL. No.	Laws	Status	Reactions
1.	The Information and Communication Technology Act 2006 (amended	Enacted and the right to freedom of opinion and expression is sternly curtailed due to the random application of it (amended 2009 and 2013). Section 57 is rampantly used by the law enforcing	Draconian Law affecting FoE on the Internet. Empowering law enforcers

³¹ “Bangladesh arrests more than 11,000 after wave of killings”, *CNN.com*, 15 June 2016, <http://edition.cnn.com/2016/06/15/asia/bangladesh-nationwide-raids/>.

	2009 and 2013)	agencies.	to arrest anyone accused of violating the law without a warrant, by invoking section 54 of the Code of Criminal Procedure.
2.	The Anti-Terrorism (Amendment) Act, 2013	This law undermines the essence of the personal liberty of the citizens, FoE and the freedom of the media and allows court to accept videos, still photographs and audio clips, chats and conversation used on the social media such as Facebook, Skype and Twitter.	The Anti-Terrorism (Amendment) Act, 2013 is viewed as highly suppressive as it may be abused to detain oppositionists and dissenters simply for their beliefs.

3.	The Foreign Donations (Voluntary Activities) Regulation Act 2014	Parliament passed the bill. National and international NGOs have urged the president not to give his consent to the legislation, saying the law would pave the way to violate freedom of expression and thought. ³²	According to civil society, in the name of transparency and accountability, the government mainly wanted to demoralise voluntary work and regulate NGO activities, especially to violate freedom of expression. They also urged the government to bring necessary amendments to the law through discussions with stakeholders.
4.	Draft 'Cyber Security Law' 2015	Contains some existing ICT Act sections that criminalise defamatory and anti-state writing, but the offences are defined on a wider scale and carry a maximum punishment of 20 years and the accused can be arrested without any warrant.	Civil society said the draft replicates existing provisions, apart from increasing the

³² "NGO reps urge president to block restrictive law", *Dhaka Tribune*, 9 October 2016, <http://www.dhakatribune.com/bangladesh/law-rights/2016/10/09/ngo-reps-call-donations-act-amendments/>.

			punishment for cyber crime ³³
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Section 12 (1) (g) of the NHRC Act, 2009 provides that the Commission shall examine 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. There is no information on any action taken by the NHRC with regard to the above restrictive laws and policies, such as public statements and initiation of dialogue with state authorities. The Commission has failed to take any visible measure to critically analyse these laws and for their amendment in line with human rights standards.

The state of press freedom in Bangladesh is also going through the most repressive time. The unusual imposition of restrictions upon freedom of the press and online journalism has become a common scenario. Under the current regime, three opposition TV channels were shut down and two opposition newspapers were closed. The fact is that journalists and media houses are operating under fear, constant watch and censorship by the government. Due to fear of reprisal, journalists and media houses have self-censored their criticisms of the government.³⁴ The indiscriminate abuse of sedition law and section 57 of the ICT Act, and treating defamation as a criminal offence, threatens the existence of the free press, which would also destroy the rule of law, human rights and democracy. However, the NHRC is perceived as very weak in raising its voice for freedom of expression, as well as press freedom.

5. Conclusion and Recommendations

The NHRC has maintained its collaboration with civil society and has been open to cooperation in protecting human rights. The previous Commission completed two full terms and a new Commission has been constituted. The time is opportune for the NHRC to make the changes that are necessary for its credibility and effectiveness in human rights promotion and protection. There have been signs in the past that the NHRC's members were unable to work collectively in furtherance of its mandate. The new Commission must address this issue and develop coordination and collective working practices among its members and between members and the staff. Only then can the Commission hope to play its role in strengthening the human rights machinery in Bangladesh, and thereby fulfilling the expectations of the people.

³³ "Experts decry draft Cyber Security Act 2015", *The Independent*, 28 June 2015, <http://www.theindependentbd.com/printversion/details/5501>.

³⁴ "Govt sometimes failed to protect press freedom", *Daily Star*, 16 April 2016, <http://www.thedailystar.net/frontpage/govt-failed-protect-press-freedom-1209565>.

5.1 Recommendations to the Government of Bangladesh (GoB)

- 5.1.1. Reform the enabling law of the NHRC and abolish current ambiguities;
- 5.1.2. Respect the recommendations of the NHRC, and take its statements and representations with utmost importance;
- 5.1.3. Resource the NHRC's budget adequately and improve its financial autonomy.

5.2 Recommendations to the National Human Rights Commission (NHRC)

- 5.2.1. Initiate proper documentation system on human rights violations and ensure effective handling of complaints;
- 5.2.2. Set-up a specific desk for human rights defenders, an emergency help line for immediate and continuous support, and training or events exclusively for human rights defenders;
- 5.2.3. Move to an accessible location and set-up branch offices so that people can access and seek assistance in a timely manner;
- 5.2.4. Develop mechanisms to help human rights defenders at risk such as safe houses, minimum support through communication with this community, relocation, etc.
- 5.2.5. Continue commendable initiatives such as the follow-up of the implementation of the UPR Recommendations and preparing a stakeholders report for the UPR.

INDIA: A SPECTATOR WHEN FUNDAMENTAL FREEDOMS ARE UNDER ATTACK

*All-India Network of NGOs and Individuals working with National and State
Human Rights Institutions (AiNNI)¹*

1. Context

Since the early 1990s, India witnessed a change in socio-economic policies. It was mandatory for the Indian State to adhere to common international norms of development and human rights. The establishment of the National Human Rights Commission (NHRC) through the Protection of Human Rights Act, 1993 (PHRA) was one such step to demonstrate to the world, India's commitment to protect and promote human rights. The NHRC was supposed to be an independent body that will oversee and monitor the human rights situation; and contribute towards new policies for upholding the same.

National Human Rights Institutions (NHRIs) need to operate fearlessly and follow their mandate of upholding human rights. Despite the fact that they are dependent on the State for finances, independence can be ensured through a transparent appointment process, ensuring plurality in appointments, establishment of an independent investigation wing, involvement of learned and reputed human rights activists in various capacities, etc.

Despite the creation of a National Human Rights Commission, a National Commission for Minorities, a National Commission for Scheduled Castes, a National Commission for Scheduled Tribes, a National Commission for Women, a National Commission for Protection of Child Rights, a National Commission for Safai Karamcharis [oppressed caste of manual scavengers or sanitation workers—ed.], a Central Information Commission and an Office of the Chief Commissioner for Persons with Disabilities and their state counterparts, totalling 172 in number with presence across India, the human rights record of the State has actually worsened. However, India has attained a high level of legitimacy and acceptance through the establishment of these institutions.

The thematic focus of this report is on human rights defenders (HRDs). India does not yet have a national law on the protection of HRDs, although civil society and human rights groups in India have long demanded that the NHRC should work closely with civil society groups and HRD networks to initiate the development of a national law on the protection of HRDs. Human Rights Defenders Alert – India (HRDA) a national level network of HRDs, in the year 2015 filed 104 cases with the NHRC; all cases pertaining to threat, attack and harassment of HRDs. Out of 104 cases filed with the NHRC, it registered only 81 cases (74 with HRDA as complainant and 7 with others

¹Mathew Jacob, National Coordinator, mj@pwtm.org. Acknowledgements: Mr. Raja Velu, Dr. Harsh Dobhal, and Mr. Henri Tiphagne.

as complainants) and 23 cases were not registered. In no case was relief provided by the NHRC to the HRDs.

2. Critical Review Post 2011 ICC-SCA Recommendations

The Indian NHRC's mandates, powers and functions continue to remain the same, as reported in earlier years and also in 2015², with no amendments in the legislature. The NHRC of India will be up for its periodic review at the GA-NHRI's Sub Committee on Accreditation (SCA) in November 2016. The All India Network of NGOs and Individuals working with National and State Human Rights Institutions (AiNNI) has made a submission based on the SCA recommendations in 2011, to critically analyse the progress made since then, as extracted below.

2.1 Composition and Pluralism

The SCA in 2011 noted that *"the provisions in the Protection of Human Rights Act (Amendment) 2006 dealing with the composition of the Commission are unduly narrow and restrict the diversity and plurality of the board. The requirement for the appointment for the Chair to be a former Chief Justice of the Supreme Court severely restricts the potential pool of candidates. Similarly, the requirement that the majority of members are recruited from the senior judiciary further restricts diversity and plurality. While the SCA understands that the justification for these restrictions is based on the NHRCI's quasi-judicial function, it notes that this is but one of 10 functions enumerated in section 12 of its enabling legislation. The SCA is of the view that determining the composition of the NHRCI's senior membership in this way limits the capacity of the NHRCI to fulfil effectively all its mandated activities."*

- The same provisions in the PHRA continue to be in place and hence severely restricting diversity and plurality in the composition of the NHRC. For example, even after over six decades of independence, there have been only six women as judges in Supreme Court, and no woman as the Chief Justice of India, and therefore no woman as the chairperson of the NHRC. At present, there is only one woman judge in the Supreme Court. Therefore, as per the current provisions of the Act, there is little possibility for a woman to be the chairperson of the Commission. There is an urgent need for the appointment criteria to be changed towards compliance with Paris Principles.
- There has been no woman member in the Commission since 2004 after the retirement of Justice Sujata Manohar. There has been no Muslim member in the Commission since 1997 after the retirement of Justice Fathima Beevi. Muslims are the largest minority in India with a total population share of 14.23% (172 million)³. There has never been a Muslim chairperson of the

² "India: Immediate Reforms Needed", 2015 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia, FORUM-ASIA: Bangkok, <https://www.forum-asia.org/uploads/wp/2015/09/8-India-Draft-3-26-July-20151.pdf>.

³ Census 2011, <http://www.census2011.co.in/religion.php>.

Commission. Never has there been any representation of the Tribal community, which constitutes 8.6% (104 million) of the total population⁴. The existing provisions on appointment contradict the Paris Principles and significantly restrict pluralism and diversity in the composition of the Commission.

- The appointment committee had an opportunity to appoint a Muslim as Chairperson of the Commission when the vacancy arose after the retirement of Justice (retd.) K. G. Balakrishnan on 11 May 2015. However, as in previous years, the appointment process was not transparent. The new Chairperson Justice (retd.) H. L. Dattu was appointed on 29 February 2016; after keeping the post vacant for 294 days, even when as per current provisions of the Act, the appointment committee could have selected any one of four other retired chief justices of the Supreme Court of India⁵.
- One member of the Commission, Mr. Satyabrata Pal, retired on 1 March 2014 and his position continues to remain vacant⁶. Another member of the Commission, Mr. P. C. Sharma (a former police officer), retired on 27 June 2012; and he was replaced by Mr. S. C. Sinha (also a retired police officer) only on 8 April 2014 (after a delay of 1 year, 9 months and 11 days). At time of appointment to the Commission, Mr. S. C. Sinha was the chief of India's National Investigation Agency [for counter-terrorism—ed.]. It is pertinent to mention here that as per the existing provisions of the Act, this position has to be filled by "those having experience and knowledge of human rights". However, since inception of the NHRC, this category has only been filled by former members of the India Police Service, the Indian Foreign Service and once a Rajya Sabha (Upper House of Parliament) Secretary General. Never has there been a civil society representative appointed in this position.
- Given the current state of appointments to the Commission and also given that the appointments don't follow transparent procedures, the appointing committee should take into consideration the contributions to human rights made by each of the eligible candidate being considered for the post of member of the Commission. It would be desirable that the allotment for this vacancy is fulfilled through a public announcement that calls for applications/nominations in a fair and transparent manner. There is also the need for definite criteria/indicators to be put in place to evaluate each of these eligible candidates which then forms the basis of selection by the appointing committee.
- It is urgently required in the interest of protecting and promotion of human rights in India, that the Commission has broader expertise on board rather than those with judicial, bureaucratic and administrative background. Nine out of ten functions according to Section 12 of the Act, require expertise of,

engagement with, and knowledge of, human rights. Despite India being a country with a vibrant civil society and long history of human rights movements, the posts of members to the Commission are kept vacant for a long time.

Further, the SCA noted, "*the presence of 'deemed members' from the National Commissions addressing caste, women's rights, minorities, and scheduled tribes on the full statutory commission. While this is a welcome initiative, there are concerns that they are not adequately involved in discussions on the focus, priorities and core business of the NHRC non-judicial functions*".

- The meetings of the full commission and their minutes suggest clearly that they continue not to be adequately involved in discussions on the focus, priorities and core business of the NHRC's non-judicial functions. It is learnt from the minutes of the full commission meetings that interlinking complaint management of the Commission and deemed member commissions was initiated. However, this also refers to the complaint-handling function of the Commission, and not the nine other functions.
- Full commission meetings were held once in 2011 (July 14, 2011), twice in 2012 (February 7, 2012 and December 7, 2012), no sittings in 2013, once in 2014 (February 4, 2014) and once in 2015 (February 3, 2015).
- Members of the full commission are the chairpersons (ex-officio) of other commissions. In the meeting held on July 14, 2011, the Chairperson of the National Commission for Women was absent. In the meeting held on February 7, 2012, the Chairpersons of the National Commission for Women; the National Commission for Scheduled Castes; and the National Commission for Scheduled Tribes, were absent. In the meeting held on December 7, 2012, all chairpersons (deemed members) were absent. In the meeting held on February 4, 2014, all chairpersons of all other commissions were absent. In the meeting held on February 3, 2015, chairpersons of the National Commission for Women and the National Commission for Scheduled Tribes were absent. From the above information, only five full commission meetings were held between the period 2011-15, with stark absenteeism pattern.
- Thematic NHRIs is a unique global contribution made by India. However, for the purpose of the full Commission to be fully diverse, it is important that the Act be amended and other national Commissions⁷ that were established later are also included. Also, information on the Commission's recommendation to amend the Act, and include the newer Commissions, is not in the public domain.

⁴ Census 2011, <http://tribal.nic.in/WriteReadData/userfiles/file/Demographic.pdf>

⁵ AiNNI submitted a memorandum to the President of India and to all the members of appointing committee, to this effect, on 28 November 2015.

⁶ *Ibid.*

⁷ National Commission for Protection of Child Rights; Central Information Commission; Chief Commissioner for Persons With Disabilities; and National Commission for Safai Karamcharis.

2.2 Appointment of the Secretary General and the Director General Investigation

As stated in 2006 and repeated again in 2011 by SCA, “the SCA is not satisfied that the NHRCI has sufficiently addressed the recommendation it made in 2006. The SCA recommends that the NHRCI advocate to amend the PHRA 2006 to remove the requirement that the Secretary General and Director of Investigations be seconded from the Government, and to provide for an open, merit-based selection process. The SCA also remains concerned about the practice of having police officers and former police officers involved in the investigation of human rights violations, particularly in circumstances where the alleged perpetrators are the police. This practice has adverse implications for the actual and perceived independence of the NHRCI”.

- The situation continues to be the same and the Secretary General and Director of Investigations continue to be seconded from the government instead of having an independent merit based appointment. It is not known as to what the Commission has advocated for the amendment of the Act in this regard.
- Since 2011, five persons have been appointed as Secretary General for very short terms and all of them were seconded from the government. They have been from the Indian Administrative Service, Indian Economic Service and Indian Revenue Service. It is also pertinent to mention here that while five persons were appointed to the same post during five years, the post of Secretary General remained vacant cumulatively for over a year during this period.
- The last Director General (Investigation) resigned in September 2014, and to date the vacancy has not been filled in a Commission that claims it receives over 440 complaints a day.

2.3 Relationship with Civil Society

The SCA in its recommendations in 2011 regarding NGO Core Groups had noted that “these mechanisms are not functioning effectively as a means of engagement and cooperation between the NHRCI and civil society defenders”.

- The situation has not changed in terms of the Commission’s relationship with civil society.
- The Core group on NGO’s was reconstituted on 16 September 2011. Thereafter two meetings were conducted respectively on 10 February 2012 and 22 March 2013, after which no meeting has been organised until 30 June 2016. It is important to mention here the Commission doesn’t consider civil society organisations (CSOs) as partners in conceptualising and implementing initiatives but merely as participants in programmes organised by the Commission.

- The Commission did not make any interventions or public statements regarding the suspension and cancellation of FCRA (Foreign Contributions Regulations Act) registrations of human rights defender Ms. Teesta Setalvad’s organisation ‘Sabrang Trust’, and also that of the ‘Lawyers Collective’, an organisation whose trustees are Ms. Indira Jaising, former member of the UN Committee on the Elimination of all forms of Discrimination Against Women (CEDAW) and Mr. Anand Grover, former UN Special Rapporteur on the Right to Health. In Teesta Setalvad’s case, civil society organisations appealed to the Commission to intervene in the Supreme Court using its powers under Section 12 of the Act, but the Commission didn’t respond.
- The UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association has presented a legal analysis in April 2016 arguing that India’s FCRA which regulates foreign funding to organisations, is not in conformity with international law, principles and standards. The Commission has not used its powers under Section 12 which enables the Commission to review laws; and never undertook any analysis of its own pertaining to FCRA which affects thousands of organisations. It is important to note this, as FCRA registrations of around 30,000 organisations are currently being reviewed for renewal this year.

2.4 Complaints-Handling

The SCA in 2011 stated that, “on the information available, the SCA is unable to determine the veracity of the allegations raised above, however it is clear that there is at least a perception that there are significant delays, as well as ongoing concerns about the use of former police to investigate complaints, including those against the police. The SCA encourages the NHRCI to address these concerns”.

- The situation continues to remain the same. There are significant delays, and police officers are constantly used to investigate complaints, including those against the police. As submitted in 2011 by AiNNI, the same methodology of complaints-handling is being followed and the police continue not to respond to the Commission in timely manner.
- The complaints regarding the violations of rights of human rights defenders are also handled in the same way as other complaints sent to the Commission; even though there is a National Focal Point for Human Rights Defenders at the Commission. On the instances of false cases being filed on HRDs, the Commission has never exercised its powers in Section 12 and intervened on behalf of the HRDs. Human Rights Defenders Alert – India, a national platform of HRDs and for HRDs, has repeatedly urged the Commission to engage senior competent lawyers through the Legal Service Authority to intervene on behalf of the HRDs.

- The Commission has repeatedly mentioned the large number of cases with which it has to deal. It is useful to mention here that every single petition with regard to a specific case of human rights violation is numbered separately, but heard only after clubbing many similar complaints together. Since the Commission accepts complaints from multiple sources, and later considers them together, the number of complaints dealt by the Commission is not a true reflection of the instances in which it has intervened. A closer look at these cases will also reveal that a large number of these cases are either dismissed *in limine* [at preliminary stage—ed.]; or transferred to state human rights commissions after closing the case on the NHRI's end.
- The cases heard by the full Commission were 46 in 2011; 45 in 2012; 46 in 2013; 50 in 2014; and 31 in 2015. An average of 7 cases are taken per sitting. This by no means is voluminous: given that the existing composition of the Commission (with 3 members out of 5 from judiciary) is tilted in favour of the quasi-judicial functions of the Commission.
- A recent case of torture and extra-judicial killing of 20 Tamils in Andhra Pradesh on 7 April, 2015, is an exemplary intervention by the Commission. The Commission passed landmark recommendations on 30 May 2015; only to be stayed by a High Court on 4 June 2015. It has been a little over a year now; and the Commission hasn't been able to vacate that stay. The Commission doesn't have a panel of senior lawyers, and in most cases, less competent lawyers appear on its behalf.

2.5 Annual Report

The SCA in 2011 had highlighted the importance of annual reports that “*serve to highlight key developments in the human rights situation in a country and provide public account, and therefore public scrutiny, of the effectiveness of a NHRI*”.

- There is no progress made with regard to this observation. The last annual report made public by the Commission was for the year 2011-2012. Despite the categorical recommendations made by the SCA, annual reports by the Commission have not been published for the past four years.

NHRC 2015 at a Glance⁸

Month	Suo Moto Cases	Important Interventions	Recommendations for relief			Compliance with NHRC Recommendation	
			Cases for relief	Cases recommended	Amount of relief (in hundreds of thousands of rupees/lakhs)	Received compliance	Amount recommended (in lakhs)
January	4	2	100	11	21.5	13	15.45
February	7	4	124	28	91	35	125.4
March	6	1	82	37	60.95	20	30.15
April	4	3	136	24	51.05	18	41
May	3	2	119	26	56.20	20	28.75
June	7	8	98	30	45.75	16	51.25
July	17	3	107	36	62.05	34	64.45
August	8	6	69	16	15.85	18	29.15
September	7	3	110	17	20.35	46	169.15
October	9	2	42	19	21.15	7	10.75
November	6	1	95	29	54.1	8	14
December	3	3	36	15	34	6	12.6
TOTAL	81	35	1118	288	533.95	241	592.1

⁸ Collated from NHRC monthly newsletters for February 2015-January 2016 in the absence of annual reports.

3. Human Rights Defenders and Women Human Rights Defenders

3.1 Overview

Following the recommendations of a National Seminar on HRDs held in October 2009, the NHRC set-up a Focal Point for Human Rights Defenders – to deal with complaints alleging harassment of HRDs by or at the instance of public and authorities – in May 2010.

The October 2009 workshop deliberated on the issue of roles, functions and obligations of the State and the HRDs in promotion and protection of human rights and fundamental freedoms, especially with reference to international standards.

In one of the recommendations, the NHRC approved a support and protection programme for people defending human rights as included in the Universal Declaration on Human Rights and those who are in danger. *“Individuals, groups or associations who work for promotion and protection of human rights, commonly referred to as Human Rights Defenders, should also be provided protection by the State against any violence, threats, retaliation, adverse discrimination, pressure or any arbitrary action as a consequence of their activities for promotion & protection of human rights & fundamental freedom”*.⁹

The important functions to be performed by the NHRC for protection of HRDs are:

- Send a strong message to the State not to victimise HRDs.
- Sensitise the state functionaries about the valuable role played by HRDs.
- Take proactive steps to protect the cause of the HRDs by recommending prosecution of violators of rights of HRDs and compensation to the HRDs, etc.
- Organise workshops on HRDs attended by higher State functionaries.
- Hold consultations and dialogue with HRDs on important issues concerning HRD protection.
- Review laws restricting legitimate peaceful work of HRDs.
- Advocate with state governments to establish focal point on HRDs in respective states.

The post of focal point on HRD till April 2016 was held by an officer of the rank of Joint Secretary (Law) of the NHRC. This was an additional responsibility undertaken by this Joint Secretary. After his retirement: from May 2016 onwards, a Deputy Secretary (Law) has been given the additional charge of focal point.

Former UN Special Rapporteur on HRDs Ms. Margaret Sekaggya, after her visit to

⁹ Recommendations made at the workshop on human rights defenders held on 12 October 2009, nhrc.nic.in/Documents/FINALRECHRD.doc.

India in January 2011, submitted in her report that *“This focal point should be a member of the Commission, and have a human rights defender background to fully understand the challenges faced by defenders. A fast-track procedure for defenders within the National Human Rights Commission and State Human Rights Commissions should be considered”*.

In the current scenario, given that the Focal Point on HRD at the NHRC is a staff of the law division, any complaint of the HRD which comes to this focal point, has to be placed before the Commission members and/or Chairperson for necessary action. The focal point has no power to act on a complaint; and at most can bring it to the urgent notice of the Commission.

However, it is important to mention here that over the period of time, the focal point on HRDs has successfully intervened through strategic telephone communications, in cases where HRDs were under threat and needed immediate protection. On the instances of these telephone calls, especially HRDs who are falsely arrested and fear for their lives, State agencies have retracted. These are rare incidents and only at times of crisis, but it proves the power held by the Indian NHRC. If the focal point had been given more power and independence to intervene, HRDs in India would be able to undertake their legitimate peaceful activities.

The focal point has a designated mobile number, fax number and an email address. Complaints with regard to HRDs can be directly submitted to the focal point by email and fax. The focal point also accepts complaints over mobile messages in cases where the life of HRDs is at risk. With no specific power vested in the focal point, it has been the proactive approach of the individual in this post which has brought immediate assistance to HRDs under threat. Once the matter is brought to the notice of the Commission’s Chairperson and Members, the normal complaints-handling method is followed, as explained above.

With regard to the function of the focal point on HRD, Ms. Margaret Sekaggya also recommended that *“the supportive role of the Commissions for human rights defenders should be strengthened by inter alia, conducting regular regional visits; meeting human rights defenders in difficulty or at risk; undertaking trial observations of cases of human rights defenders wherever appropriate; denouncing publicly on a regular basis violations against defenders and impunity. The defenders focal point should play a leading role in that regard”*. To much disappointment, five years later, all these functions are yet to be included in the mandate of the focal point on HRD.

The NHRC in February 2015, organised a workshop for HRDs. This was the only workshop organised by the NHRC with regard to HRDs in that year; and from records on the NHRC’s website, this was the first such workshop since October 2009. The resolutions of the February 2015 workshop have no mention for the need for defender protection law in India. Ms. Margaret Sekaggya recommended that *“A law on the*

protection of human rights defenders, with an emphasis on defenders facing greater risks, developed in full and meaningful consultation with civil society and on the basis of technical advice from relevant United Nations entities, should be enacted".The resolution also doesn't recommend amending the PHRA to give more powers to the focal point on HRD, as recommended by the UN Special Rapporteur on HRDs during her visit in 2011.

The resolutions also fail to capture this recommendation of Ms. Margaret Sekaggya: "A comprehensive, adequately resourced protection programme for human rights defenders and witnesses at the central and state levels and in conjunction with the National and State Human Rights Commissions should be devised. This programme could be funded by the State, but should not be closely controlled by the State apparatus. In particular, it should not be associated with State agencies, such as the police, security agencies and the military. The process for applying for protective measures provided under such a programme should be cost-free, simple and fast, and immediate protection should be granted while the risk situation of the person is being assessed. When assessing the risk situation of a defender or witness, the specificities of his/her profile pertaining to caste, gender and ethnic, indigenous and/or religious affiliation, inter alia, should be systematically taken into account. Finally, the personnel assigned to the protection of defenders or witnesses should not gather information for intelligence purposes".

The NHRC is also yet to conduct a survey of all other existing National and State Human Rights Institutions to find out if any of them has followed its lead in establishing a focal point on HRDs.

3.2 2015 Case Analysis

HRDA, a national platform with more than 1,200 members, filed 104 cases with NHRC in 2015, all cases pertaining to threat, attack and harassment of HRDs, violation of freedoms of protest, dissent, expression, assembly and association. The data related to overall complaints received by NHRC with regard to HRDs is not available in the absence of non-publication of annual reports. The HRD section on NHRC's website has no mention of cases of HRDs for the year 2015.

Only 74 cases out of 104 cases filed by HRDA were registered by the NHRC. All these cases were directly filed with the Focal Point on HRD at the NHRC. 7 more cases were registered out of these 104 cases, not with HRDA as complainant but by HRDA members who have also filed the same complaint circulated by HRDA. 23 cases were not registered by the NHRC. In no case, there has been any compensation or prosecution recommended by the NHRC to date. The status of 74 cases (as on 31 July 2016) submitted by HRDA is mentioned below:

Action taken report sought	24
Additional information sought	22
Dismissed <i>in limine</i>	11
Disposed	5
Closed	5
Transferred to SHRC	7
TOTAL	74

In the above table, out of 74 cases, action taken report is sought in 24 cases. Out of 24 cases, response is awaited from concerned authorities and in two cases action taken report is being considered by the Commission. Additional information is sought by the commission in 22 cases and in most instances, it is the delay of the State agencies in not filing the notice reply in the stipulated time. Taking a charitable view and assuming that all these complaints are from December 2015, it is still seven months since these cases are still pending and waiting for information from concerned authorities. This supports the argument above that the NHRC more often than not relies on the State agencies for investigation, who mostly are the perpetrators of human rights violations.

Out of 74 cases, 28 cases have been closed by the NHRC without any action. This along with the cases not registered constitute 49% of cases sent by HRDA with no action by the NHRC and 51% of cases still being heard by the NHRC with an average wait time per case already over a year. For the 11 cases dismissed *in limine*, in three cases the reason given was "no specific human rights violation"; in 4 cases as the complaint was "*sub-judice*" [under judicial consideration and therefore prohibited from public discussion—ed.]; and another four cases as "not involving public servants".

Below are selected cases dismissed *in limine* by the NHRC:

Name	Case brief	Order
1. Mr. Huchangi Prasad	Brutal attack and threats to cut off fingers of a young Dalit writer and activist of Bahujan Vidyarthi Sanghatane in Karnataka.	On perusal of the complaint, it is seen that the allegations made in the complaint does not involve any public servant , hence the complaint is not entertainable by the Commission, as per Regulation 9(vi) of the NHRC (Procedure) Regulations, 1997. The complaint is filed and the case is closed, http://nhrc.nic.in/Documents/NewsLetter/2015_06_eng.pdf HRDA's comment: Even if there is no direct involvement of a public

		servant in this case on the face of the complaint, a letter to the District Collector and the District Superintendent of Police asking her/him to intervene would have gone a long way to protect the HRD.
2. Mr. Sunil Totavar and 8 other <i>Adivasi</i> [indigenous peoples—ed.] students.	False cases filed against <i>Adivasi</i> students who were seeking basic services in tribal hostel through peaceful protests in Panvel, Maharashtra.	On perusal of the complaint, it is seen that the allegation is about false implication in a criminal case . That is a matter, to be gone into by the Court of the competent jurisdiction, the complainant, if so desired may plead his innocence before the Court . Hence, no intervention by the Commission in the matter is called for. The complaint is filed and the case is closed. HRDA's comment: The NHRC could have verified from the police what the case was about. The NHRC could have asked the District Legal Services Authority to provide a senior lawyer of experience to appear free of cost for the defence of the HRD in question. If, upon its enquiry, it found that this was in fact a false case, then the NHRC could have intervened in this case using its power under section 12(b) of the PHRA.
3. Mr. Jose Bismarque Dias	Former priest, social activist and founder of Musical Warriors, Jose Bismarque Dias went missing on 5 November 2015 and on 7 November, 2015 his body was found. He was allegedly killed for	On perusal of the complaint, it is seen that the allegations made in the complaint does not involve any public servant , hence the complaint is not entertainable by the Commission, as per Regulation 9(vi) of the NHRC (Procedure) Regulations, 1997. The complaint is filed and the case is closed. HRDA's comment: Even on seeing that the complaint alleges the HRD has been killed for opposing illegal land acquisition, the NHRC has not cared to investigate the case on merits; despite the global human rights community being aware of how HRDs opposed to land grabs are falsely charged and murdered.

	opposing large scale illegal land acquisition in Goa.	
4. Mr. Bangalore Raju Venkatesh Prasanna	Karnataka Information Commission recommended prohibition on the cases of RTI activist after declaring him abuser for using RTI Act to expose administrative corruption.	On perusal of the complaint, it is seen that the allegations do not make out any specific violation of human rights , hence the complaint is not entertainable by the Commission, as per Regulation 9(x) of the NHRC (Procedure) Regulations, 1997. The complaint is filed and the case is closed. HRDA's comment: The NHRC could have addressed a letter to the State Information Commission, Karnataka to know the actual state of affairs, at the very least.
5. Mr. Babloo Loitongbam	HRD faces threat of arrest for alleged breach of privilege and contempt of legislative assembly in Manipur.	On perusal of the complaint, it is seen that the allegations do not make out any specific violation of human rights , hence the complaint is not entertainable by the Commission, as per Regulation 9(x) of the NHRC (Procedure) Regulations, 1997. The complaint is filed and the case is closed. HRDA's comment: The matter deals with a well-known HRD from the state of Manipur. The NHRC could have enquired what had actually taken place, and ensured physical protection to the HRD, at the very least.
6. Prof. K. S. Bhagavan	Death threat issued to a retired professor from Mysore University; who is a well-known	On perusal of the complaint, it is seen that the allegations made in the complaint does not involve any public servant , hence the complaint is not entertainable by the Commission, as per Regulation 9(vi) of the NHRC (Procedure) Regulations, 1997. The complaint is filed and the case is closed.

	rationalist, writer and translator in Karnataka, by a right-wing Hindu fundamentalist group.	HRDA's comment: Had the NHRC undertaken an enquiry on the basis of this complaint it would have come to know more facts, that would have allowed it to address letters necessary for the protection of the HRD in question, to the relevant state/district authorities.
7. Ms. Teesta Setalvad and Mr. Javed Anand	Continuous prosecution and harassment of HRDs, Teesta Setalvad and Javed Anand of Citizens for Justice and Peace. The organisation's FCRA also cancelled in Mumbai and Maharashtra.	On perusal of the complaint, it is seen that the allegation is about false implication in a criminal case . That is a matter, to be gone into by the Court of the competent jurisdiction, the complainant, if so desired may plead his innocence before the Court. Hence, no intervention by the Commission in the matter is called for. The complaint is filed and the case is closed. HRDA's comment: Teesta Setalvad is a very well-known HRD of international repute. The NHRC could have asked the District Legal Services Authority to provide a senior lawyer of experience to appear free of cost for the defence of the HRD in question. If, upon its enquiry, it found that this was in fact a false case, then the NHRC could have intervened in this case using its power under section 12(b) of the PHRA.

In five cases, complaints were transferred to the concerned authorities and the cases were closed by the NHRC. Two of these cases are highlighted below:

Name	Case brief	Order
8. Dr. M. M. Basheer	Threats and hate calls to a reputed literary critic and retired Calicut University professor of Malayalam in Kozhikode District of Kerala, by a right-wing Hindu fundamentalist	The complaint be transmitted to the concerned authority for such action as deemed appropriate. The authority concerned is directed to take appropriate action within eight weeks and to inform the complainant of the action taken in the matter. HRDA's comment: The NHRC should know the appropriate course of action in law and equity to safeguard the rights of an HRD, rather than pass the buck to another authority.

Name	Case brief	Order
9. Ms. Vidya Dinker	Targeted online with abusive comments, rape threats and other "dire consequences" by Hindu right-wing forces, after she complained against Bajrang Dal activists for allegedly intimidating cinema halls by forcibly stopping the screening of a movie in Mangaluru.	The complaint be transmitted to the concerned authority for such action as deemed appropriate. The authority concerned is directed to take appropriate action within eight weeks and to inform the complainant of the action taken in the matter. HRDA's comment: The NHRC should know the appropriate course of action in law and equity to safeguard the rights of an HRD, rather than pass the buck to another authority.

Below are selected cases closed by the NHRC, stating them to be *sub-judice* and linked to some other case:

Name	Case brief	Order
10. Swami Agnivesh	Death threats issued to Swami Agnivesh from Hindu Mahasabha.	The Commission directs DGP, Haryana to take appropriate steps for assessment of security threat to the life of Swami Agnivesh and ensure his safety as per law. With these observations, the case stands closed. HRDA's comment: NHRC should have at least informed its action to Swami Agnivesh and also ensured that its orders are followed in spirit. If this is how a high profile social activist is treated, one can only imagine the plight of a little known HRD.
11. Mr. Sajje Chandravanshi	Brutal assault with the intention to kill a farmer activist and block	The allegations of the petitioner have been denied in the police report. The Commission has

	<p>president of a farmers struggle committee in Chindwara, Madhya Pradesh.</p>	<p>considered the matter. Lawful action has already been taken by the police in the matter and the case is pending trial in the court. In these circumstances, no further intervention on the part of the Commission is called for and the case is closed.</p> <p>HRDA's comment: NHRC closed the matter on the basis of the police report only. NHRC should have undertaken an independent investigation in the matter and come to independent conclusions. Since the matter is before the court, NHRC should have exercised its power and intervened in judicial proceedings.</p>
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The cases mentioned above are just a glimpse into the complete state of apathy in the manner in which the NHRC deals with the cases of HRDs. However, this is a norm behind the large volume of cases that arrive at the Commission. The NHRC in all the cases mentioned above, including those still pending and being investigated, has relied upon the State agencies against whom in many cases complaints were filed. The PHRA provides the NHRC with sufficient powers to intervene in the cases pending before the courts. However, the NHRC has chosen to dismiss or close those cases. Serious cases of attacks, intimidations and threats to HRDs are not responded by the NHRC.

To give examples specific to the year 2015, the HRDA more than three times made written complaints¹⁰ to the NHRC with regard to renowned professor of Delhi University, Professor G. N. Saibaba. He is a well-known intellectual who has been at the forefront of the democratic movement in the country and is known for his sincerity and devotion to public causes. He suffers from 90 percent disability, and is wheelchair-bound. He has calculi [stones-ed.] in his gall bladder and atrophy of his shoulder muscles. There is also degeneration of his cervical spine, and his rib cage is bending inwards. He has been accused of having Maoist links and imprisoned on 9 May 2014. He was lodged in the 'Anda cell', which means egg-shaped prison. Dr.

¹⁰ "Police Raid on Residence of Delhi University Teacher", 18 September 2013, <http://hrdaindia.org/wp-content/uploads/2013/09/132-hrda-ua-delhi-dr-saibaba-delhi-university-18-09-13.pdf> and "Differently abled HRD Dr. GN Saibaba had to go on hunger strike for medical & other facilities in prison until court ordered it", 19 June 2015, <http://hrdaindia.org/wp-content/uploads/2015/07/2015-06-19-HRDA-UA-South-Maharashtra-Dr.-Saibaba.pdf>.

Saibaba was not allowed to use the toilet for the next 72 hours. The harassment took a heavy toll on his health. He embarked on an indefinite hunger strike from 11 April 2015, demanding proper medical treatment and food, both of which were being denied to him by the authorities of the Nagpur Central Prison. His health condition completely deteriorated.

The NHRC despite repeated appeals from the HRDA and other organisations never bothered to intervene in the case in any manner; except on the first instance where they closed the report on the basis of the information in the police report¹¹. They directed the prison authorities to provide adequate medical aid¹² which was never complied with, and his health further deteriorated. If there was any order by the NHRC, it is not known to the HRDA. This would have been an opportunity for the NHRC to also intervene with regard to the inhumane conditions in the prisons. Professor Saibaba has been recently granted bail by the Mumbai High Court due to serious concerns about his health¹³. The inaction on the part of the NHRC has necessitated successful action before the Mumbai High Court to release Professor Saibaba. In spite of this matter having been covered extensively in the media there has also been no *suo moto* action either by the SHRC Maharashtra or the NHRC. The NHRC headed by the former Chief Justice of India and containing judges of the Supreme Court on its bench need to substantiate their silence in this matter.

It is also imperative to mention here, the NHRC's complete silence on the issue of the right to peaceful association, which includes the right to receive resources. The Government of India to date has cancelled the foreign grants receiving license of more than 12,000 organisations. There has not been a single statement of concern issued by the NHRC since the year 2012 when this commenced; and the NHRC's intervention now looks a distant possibility. Throughout the entire Greenpeace¹⁴ row, where the organisation's foreign license was suspended; called an anti-national organisation; its staff off-loaded at the New Delhi airport while she was on her way to address British Parliamentarians; and foreign staff deported, the NHRC has chosen to

¹¹ Case Details File Number: 6101/30/4/2013, 19 January, 2015, <http://nhrc.nic.in/display.asp>.

¹² Press Release: "NHRC asks Maharashtra prison authorities to provide adequate medical treatment to Dr. G. N. Saibaba", 27 May, 2014, <http://nhrc.nic.in/dispatcharchive.asp?fno=13212>.

¹³ "The best way to stop me was to throw me in jail, says Saibaba", *The Hindu*, 6 July, 2015, <http://www.thehindu.com/news/national/professor-gn-saibaba-the-best-way-to-stop-me-was-to-throw-me-in-jail/article7389421.ece>.

¹⁴ "On 'blacklist', Greenpeace activist sent back to Australia", *Times of India*, 9 June, 2015, <http://timesofindia.indiatimes.com/india/On-blacklist-Greenpeace-activist-sent-back-to-Australia/articleshow/47595004.cms>; "Greenpeace India issued show-cause notice by Tamil Nadu Government", *news18.com*, 19 June, 2015, <http://www.news18.com/news/india/greenpeace-india-issued-show-cause-notice-by-tamil-nadu-government-1008857.html>; "Suppressing Dissent – Why Greenpeace is first on the Indian government's chopping block", *The Indian Panorama*, 18 May, 2015, <http://www.theindianpanorama.com/featured/suppressing-dissent-why-greenpeace-is-first-on-the-indian-governments-chopping-block-35683.html>; and "Greenpeace campaigner Priya Pillai 'offloaded' at Delhi from flight headed to London", *The Indian Express*, 12 January, 2015, <http://indianexpress.com/article/india/india-others/greenpeace-campaigner-offloaded-at-delhi-from-flight-headed-to-london/>.

remain silent. The NHRC also had the opportunity to intervene before the Delhi High Court when Priya Pillai and Greenpeace approached the court. But it did not.

4. Conclusion and Recommendations

Unfortunately, NHRIs in India are clearly allied with the State. They have effectively become an instrument of the State, and are largely viewed as its puppets. In 1992, K. G. Kannabiran, a prominent human rights activist and lawyer, argued that the creation of such institutions was due to international pressure on India¹⁵. India is constantly criticised for its human rights record, and therefore needs an institution that legitimises the exploitative orders of the inhumane state agencies. India has therefore created bodies which guard and supervise the political system, whilst having no intention of reducing human rights violations. These are bodies with a mandate to protect and promote human rights, but which will actually act like a shield for the State by giving the appearance of setting its human rights record straight in front of the international community. What Kannabiran argued almost 25 years ago, is still valid today.

4.1 Recommendations to the Government of India:

- 4.1.1. The Appointing Committee of the NHRC should be guided by defined criteria, especially the contribution to human rights made by each of the eligible former Chief Justices of the Supreme Court of India, when selecting the Chairperson of the NHRC.
- 4.1.2. The Appointing Committee should take into consideration the contributions to human rights made by each of the eligible candidates being considered for the post of Member of the NHRC, along with other defined criteria. The vacancy should be filled through a public announcement and call for applications. For the present vacancy, a woman with substantial knowledge and experience in the field of human rights should be selected.
- 4.1.3. There should be no delay in filling vacancies; and prospective members should be identified in good time to ensure that no vacancy arises.
- 4.1.4. The total number of members of the NHRC should be increased by at least 5 more, with experience and expertise in human rights, and drawn from different competencies including the plurality of civil society.
- 4.1.5. The NHRC should intervene in the Supreme Court of India with regard to the petition filed seeking reforms in the NHRC [W. P. No 162/2014] and advocate for compliance to the Paris Principles.
- 4.1.6. NHRC should also intervene in the Supreme Court of India with regard

¹⁵ K. G. Kannabiran (1992), "Why a Human Rights Commission?", *Economic and Political Weekly* (Mumbai, India), Vol. 27, No. 39, (26 September, 1992), 2092-2094.

to the petition filed with regard to extra-judicial killings in Manipur [W.P. No 129/2012]¹⁶.

- 4.1.7. Amend the PHRA to ensure that other National Commissions established subsequent to 1993 are also included as deemed members of NHRC. The deemed members should co-implement nine of ten designated functions of the NHRC and should meet at least once a month.
- 4.1.8. State Human Rights Commissions should have deemed members from state-level human rights institutions such as the Commission for Women; the Commission for Minorities; the Commissioner on Rights of Children; the State Information Commission; the Commissioner for Persons with Disabilities, etc.

4.2 Recommendations to the National Human Rights Commission of India:

- 4.2.1. The NHRC should strongly advocate amendment to the PHRA to remove the requirement that the Secretary General and Director of Investigations be seconded from the government, and to provide for an open, merit-based selection process.
- 4.2.2. The practice of having police officers and former police officers involved in the investigation of human rights violations, particularly in circumstances where the alleged perpetrators are the police should stop. Special investigation teams and Special Rapporteurs need to be designated to look into cases of human rights violations and shouldn't depend on the State agencies or only former staff members of the NHRC for the same.
- 4.2.3. The Core Group on NGO's of the NHRC should meet a minimum of twice in a year. The NHRC should consider CSOs as partners in conceptualising and implementing initiatives as contained in the Paris Principles and as outlined in the Kandy Programme of Action of the Asia Pacific Forum of NHRIs.
- 4.2.4. The NHRC's annual reports need to be periodically published. The pending annual reports need to be published immediately and the NHRC should make sure that the following annual report is available within a fixed time after completion of the calendar year.
- 4.2.5. The NHRC should start with daily cause-list for cases that the Full Commission, Benches and individual members hear. In the present context, there is no way that a complainant or victim can access information about the stage of hearing of a particular complaint. In addition to the cause-list, complainants and victims should be given the space to depose and record their statements rather than relying on State

¹⁶ It is in this petition that the Supreme Court has taken note of the NHRC's submission of the latter being a "toothless tiger".

agencies for 'investigation'.

- 4.2.6.** The NHRC should take care that the notice period to respondents is reduced from the present six to eight weeks to one or two weeks. This is possible through different forms of speedy communication. In addition, most complainants are also available on mobiles, and hence recourse to sms, whatsapp, etc. can be seriously and urgently considered for urgent complaints-related communications.
- 4.2.7.** The NHRC should also ensure that in addition to compensation it should recommend criminal prosecution of those found responsible for the human rights violation and also ensure that rights contained in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985 are meticulously respected and adhered; and thus that assurance of non-repetition of the violation by the perpetrator, and delivering an apology to the victim, are also incorporated in the recommendations of the NHRC.
- 4.2.8.** The NHRC should ensure that whenever complaints filed before it have to be transferred to the SHRC for disposal under section 13(6) of the PHRA, before such order the NHRC should ensure that the SHRC has a full commission with a full time Chairperson (not acting) and two Members as assigned under the Act. In cases where such transfer of complaints for disposal are made, it should be ensured that the NHRC and the concerned SHRC informs the complainant of the said transfer, disposes of the complaint referred speedily, and reports the final recommendation passed to the NHRC within a specified time limit.
- 4.2.9.** The NHRC should always instruct the respondents to whom complaints are referred for their versions, to make sure that the complainant is not called to the police station or any other office of the respondent, and ridiculed before the respondent for having approached the NHRC with the complaint. Such versions should be provided without summoning the complainants/victims directly or indirectly, and communicating to them in any manner, while the complaint is under the consideration of the NHRC.
- 4.2.10.** In all complaints submitted to the Focal Point on HRDs at the NHRC dealing with special reference to W/HRDs, the NHRC should undertake independent investigation using the services of its Special Rapporteurs, members of NHRC NGO Core Group and Special Investigation teams appointed from time to time. HRDs stand to face reprisals if the same State agencies are asked to investigate the complaint who more often than not are the actual perpetrators of the human rights violence in the complaint.
- 4.2.11.** The NHRC should evolve principles and guidelines of case work in matters relating to HRDs in the country, and twine its engagement with HRDs with the National/State/District /*Taluk* Legal Services Authority

so that the most competent of senior criminal lawyers with experience can be made available to serve the interests of HRDs in all alleged false cases registered against HRDs.

- 4.2.12.** The NHRC should ensure that its Focal Point on HRDs should be a member of the Commission, and have a HRD background to fully understand the challenges faced by defenders as recommended by the UNSR on human rights defenders in her report of March 2012. A fast-track procedure for complaints from defenders within the National Human Rights Commission and State Human Rights Commissions should be developed; and not allow the cases from HRDs to follow the usual route of other complaints.
- 4.2.13.** The Focal Point on HRDs should have a dedicated team of fellow HRDs, having expertise and knowledge in the field of human rights and should conduct regular regional visits, meetings with HRDs in difficulty or at risk, undertake trial observations of cases of HRDs wherever appropriate personally or by engaging others to do so, denouncing publicly on a regular basis violations against HRDs and impunity, taking active steps to encourage state governments and its officials to start recognising the UN Declaration on HRDs and taking active steps to respect the rights of HRDs and their own roles as directed under the said Declaration.
- 4.2.14.** The NHRC should lead the national process of advocating for a law on the protection of HRDs, with an emphasis on W/HRDs facing greater risks, developed in full and meaningful consultation with civil society and on the basis of technical advice from relevant United Nations entities, and also review existing HRD laws in other countries.
- 4.2.15.** The NHRC should lead the process of developing a comprehensive, adequately resourced, well-advertised national and state protection programme for HRDs at the central and state levels and in conjunction with the SHRC and other N/SHRIs.
- 4.2.16.** The NHRC should use its powers under Section 12 which enables the NHRC to review laws and undertake a detailed analysis pertaining to the FCRA which affects thousands of organisations. The legal analysis of the Indian FCRA offered by the UN Special Rapporteur on the Right to Peaceful Assembly and Association can also be utilised in this regard. The NHRC should then seriously consider placing its analysis before the Supreme Court of India where FCRA is being challenged by civil society groups.
- 4.2.17.** The NHRC should intervene in courts using its powers under Section 12(b) of the PHRA in cases of fabricated cases against HRDs. The NHRC should undertake independent investigations and based on its investigations should intervene in these courts through competent senior lawyers.
- 4.2.18.** The NHRC should follow up with all the N/SHRIs with regard to the

appointment of Focal Point on HRDs in each state. To date no state has appointed a focal point.

4.2.19. In all cases of HRDs, the NHRC along with compensation, should develop the practice of ordering prosecution of the perpetrator of violation and also obtaining an assurance of non-recurrence from the person(s) responsible and rendering apology to the HRD(s) by the perpetrator.

MALDIVES: RETRACING STEPS FOR A BETTER JOURNEY AHEAD

Maldivian Democracy Network¹

1. Context

The first National Human Rights Institution (NHRI) in the Maldives was established and its members appointed in 2003 by presidential decree. The Human Rights Commission Act² was passed in 2005, creating an independent NHRI; whose members are voted in by the parliament. The Act was amended in 2006 and is the current enabling law for the Commission. It is also noteworthy that the new and democratic Constitution was ratified in 2008, paving the way for the first democratic transition in Maldivian history.

However, the NHRI has constantly been criticised for its lack of pro-activeness and timidity in invoking the authority and powers vested in it by the HRCM Act. This report will review how recommendations by the ANNI over the past five years have been addressed by the Human Rights Commission of the Maldives (HRCM). The ANNI found the HRCM to be inconsistent in applying pressure and implementing its mandate. This could be due to the changing political situation; and also to some extent linked to the personalities of commissioners in different tenures of the institution. The ANNI review in 2011 found that the HRCM made strong statements against actions of the executive and other political actors, especially violence related to politics and arbitrary arrests of political actors³.

The 2011 ANNI report also highlighted that the statements were made at a time when the President's Office was about to make recommendations to the parliament for new commissioners. The review in 2012 found the Commission to have taken a strong stand on the arrest of the Chief Judge of the Criminal Court, finding human rights violations to have occurred, and subsequently requesting the Prosecutor General to press charges on the former President of the Republic, Mohamed Nasheed⁴.

What is more interesting is that Mohamed Nasheed was forced to resign and his government ousted by a *coup d'etat* amidst violence and damage to public property just months after this episode. However, the HRCM refused to conduct an investigation into the incidents claiming that the Commission was not allowed to conduct criminal investigations. This raised questions over political bias. The ANNI

¹ *Shahindha Ismail (shahindha@mdn.mv) and Yoosuf Ziyaan.*

² Law number 6/2006, www.mvlaw.gov.mv

³ 2011 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia, FORUM-ASIA, Bangkok, 2011, <http://forum-asia.org/documents/ANNIReport2011.pdf>.

⁴ 2012 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia, RORUM-ASIA, Bangkok, 2012 http://www.forum-asia.org/uploads/books/2012/nov/05033_ANNI%202012.pdf.

review in 2012 found that the HRCM was conservative in times of turmoil, not having proactively attended to hundreds of victims of police brutality during the violent transition of power⁵.

The review in 2014⁶ found that the HRCM was proactive in invoking its *amicus curiae* mandate in the case of a 12 year old rape victim whom the court sentenced to flogging for fornication, and the intervention proved to save the girl from inhumane and unjust punishment, for which the Juvenile Court came down heavily on the Commission.

However, although the Commission has been known to act positively in protecting children, the report also found that the HRCM did not act appropriately in cases relating to gross violation of freedom of expression and free press and also on the issue of rising radicalism in the country, which leads to the perception that the Commission has taken to address 'safer' or 'softer' rights.

Finally, the review in 2015 found that the Commission had been disappointingly lethargic in addressing the enforced disappearance of journalist Ahmed Rilwan; whose case still remain a mystery. Further, no proactive action was seen on the prevention of torture despite the fact that the Anti-Torture Act was ratified, granting the HRCM its parenthood. The report found that judicial overreach was extremely high in all areas, and especially in the work of the Commission. The Supreme Court's *suo moto* case of treason against all individual Commissioners, following their stakeholder submission to Universal Periodic Review (UPR) human rights obligations of the Maldives held in May 2015,⁷ being an emblematic incident.

Undue influence on the work of the HRCM by political actors, as well as the judiciary, may have contributed to its ineffectiveness over the years, and highlights the need to empower the Commission in future. The contradiction is that the Commission is established as a constitutional and statutory body, with one of the strongest legislation in the country granting extraordinary authority and power to prevent human rights violations and take legal action against those violating rights.

2. NHRI and Its Mandate to Protect Human Rights

2.1 General

The HRCM has in general been an institution much criticised for being unwilling to implement its full mandate. The Maldives has faced numerous crises where fundamental rights have been violated by the State – by the law enforcement agencies

⁵ 2013 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia, FORUM-ASIA, Bangkok, 2013, <http://www.forum-asia.org/uploads/books/2013/ANNI%202013-FINAL.pdf>.

⁶ 2014 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia, FORUM-ASIA, Bangkok, 2014, <http://www.forum-asia.org/uploads/books/2014/ANNI%202014%20FINAL.pdf>.

⁷ 2015 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia, FORUM-ASIA, Bangkok, 2015, https://www.forum-asia.org/uploads/wp/2015/09/ANNI_Report_2015.pdf.

and the judiciary especially. Although the enabling law grants the Commission extraordinary powers and authority, the Commission time and again has chosen to bask in its shade, interpreting it in the narrowest manner at times.

The main objective of the Human Rights Commission of the Maldives (HRCM) is to protect, promote and sustain human rights in the Maldives in accordance with *Shari'a* (Islamic law) and the Constitution of the country. Some of the most significant moves by the parliament over the year 2015 were two amendments to the Constitution: the first was to lower the age limit for presidential candidates and the second allowing foreign investors to own land, which was proposed, passed, and ratified amidst high controversy, in just 48 hours with no public consultation⁸. The HRCM remained silent in both cases.

The most recent formal restriction on the Commission is the 11-point guideline for practice ruled by the Supreme Court as part of the sentence following a *suo moto* trial for treason against each individual commissioner of the former Commission⁹. The charges were brought against the HRCM following the UPR stakeholder submission by the Commission in 2015 which stated that the Supreme Court had influence over the lower courts and the judiciary in general.

The guidelines require the blessings of the government before the HRCM can share any reports with foreign organisations. After the Commissioners changed in 2016, it is interesting that the new HRCM has defended these same guidelines at a press conference; with the Vice-Chair of the Commission stating that the guidelines, in fact, assist in the work of the Commission¹⁰. The current Vice-Chair of the Commission was a former lawmaker who in his single term in parliament moved from the largest opposition party to the ruling party, and in between that move spent some time as an MP for a minority party as well, creating doubt over his independence and non-partisanship.

While the Commission has the power to compel production of evidence and witnesses, and to visit places of deprivation of liberty¹¹, the HRCM has not made its complaints handling procedures or written guidelines publicly available. The only way to check the status of a complaint is to call the HRCM helpline. Therefore it is impossible to find out what the Commission has been investigating without a series of bureaucratic enquiries. The Commission does not believe it has the authority to protect complainants or witnesses from any form of retaliation. It has informed MDN that the Commission intends on drafting a regulation to include such powers.

⁸ "New land law in Maldives gives India China chills", *Indian Express*, 23 July 2015, <http://indianexpress.com/article/india/india-others/new-land-law-in-maldives-gives-india-china-chills/>.

⁹ "Supreme Court renders human rights watchdog toothless", *Minivan News*, 16 June 2015, <http://minivannewsarchive.com/politics/supreme-court-renders-human-rights-watchdog-toothless-99848>.

¹⁰ "Human rights watchdog defends restrictions imposed by supreme court", *Maldives Independent*, 28 March 2016, <http://maldivesindependent.com/politics/human-rights-watchdog-defends-restrictions-imposed-by-supreme-court-123077>.

¹¹ Law Number 6/2006 (The Human Rights Commission Act).

According to the Commission's website a complaint can be lodged through the submission of a complaints form, a letter, by phone or by personal visit. However, according to information provided by the Commission for this report, complainants may have to wait for up to three months for a response from the relevant authorities against whom the complaints were made. Furthermore, the Commission does not have the power to warrant any type of reparation for the victims.

The HRCM was granted *amicus curiae* at the High Court in 2013 during the case of a 15 year old rape victim whom the Criminal Court had sentenced to flogging by 100 lashes and eight months of house arrest on charges of fornication. The intervention by the HRCM greatly contributed to the overturning of the sentence and this was the first time the HRCM exercised its role as *amicus curiae*¹².

The Commission's enabling law states that if the Commission receives information related to an infringement of a fundamental right of a person in an ongoing trial, the Commission with the permission of the presiding Judge, may submit the information to the court. It also states that unless the Judge permits the information to be shared, the Commission shall not interfere with the proceedings of the trial in any manner¹³.

2.2 Compliance in Practice

The HRCM conducted a national inquiry on child rights in 2014. It is the only such comprehensive action taken by the Commission to address an issue of human rights violation that engaged in open with the general public. Child abuse is a serious human rights issue in the Maldives; and MDN warmly welcomes the efforts by the Commission to address and prevent child abuse. The HRCM did raise issues and recommendations with relevant authorities following the national inquiry into child abuse, but the status of follow up or further action is not known.

In the years following the 2012 transition of power, a large number of police brutality cases surfaced on social media in relation to continued protests. However, the HRCM has not yet conducted a national inquiry into police brutality or torture despite the Anti-Torture Act stating the HRCM as the primary caretaker of the law. The Commission does not publish reports related to follow up on their recommendations to public authorities, and MDN's enquiry into procedure found that almost all preventive and monitoring procedures are unpublished internal procedures, or are in the process of being drafted.

2.3 NHRI and HRDs and WHRDs

The situation of human rights defenders (HRDs) in the Maldives has been viewed with severe criticism and concern around the world, with statements of concern from the United Nations Office of the High Commissioner for Human Rights and other

¹² 2015 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia, FORUM-ASIA, Bangkok, 2015,, https://www.forum-asia.org/uploads/wp/2015/09/ANNI_Report_2015.pdf.

¹³ Human Rights Commission Act, 2006, <http://www.hrcm.org.mv/publications/otherdocuments/HRCMActEnglishTranslation.pdf>.

agencies. These backsliding accelerated following retrogressive actions by the government which has embarked on an authoritarian course for the country.

The situation especially worsened for women human rights defenders; with rising Islamic radicalism in the country spreading opinions that are oppressive of women and girls in particular. Radicalism has come hand in hand with violence. A desperate situation is created with radicalisation of violent gangs, who have also developed links with politicians who are willing to finance their criminal activities in order to use violence against human rights defenders and rival political activists.

Women have been particularly outspoken and courageous in addressing issues of fundamental rights in the Maldives. The turnout of women at rallies and protests, and sub-groups within and outside political parties who assist those who are persecuted is extraordinarily high in the Maldives. HRDs work individually most often and are disconnected from other HRDs or organisations; which proves difficult for organisations with access to international remedies to assist them. There is insufficient financial capacity to create a platform where HRDs can come together and pool resources. The Maldives being an archipelago of 1,190 islands geographically divided by the Indian Ocean requires costly transportation and logistics to access those working outside the capital, and vice-versa.

There is no legal recognition of HRDs at the national level; and neither has the HRCM been known to make any proposals to the government or the parliament for such law. There is no special mechanism at the Commission for the protection of HRDs, despite recommendations to this effect by the ANNI every year. The HRCM has repeatedly explained the lack of a dedicated department or unit for HRDs owing to financial constraints. MDN has recommended that the Commission assign at least one of their employees as a focal point or help desk for HRDs, to no avail. The last response in 2015 to the issue was that the complaints mechanism at the HRCM is also available to HRDs.

The HRCM conducted a national level conference of human rights NGOs in 2014 with support from the UNDP. The conference brought several NGOs together, highlighting their situation and identifying possible partnerships and areas of support to one another. However no follow up has been made to the knowledge of MDN, and no action has been taken as recommended in the conference. The relationship between HRDs and the HRCM has not changed at all, meaning that the Commission has no distinction between HRDs and regular complainants.

Later in the year the HRCM in collaboration with the OHCHR representative in the Maldives conducted a two-day workshop for organisations making stakeholder submissions for the second cycle of the country's Universal Periodic Review in Geneva scheduled for May 2015. The Commission also participated in a two-day workshop conducted by MDN and Forum-Asia to assist organisations in preparing the stakeholder submissions. In this conference the HRCM participated fully by sharing information about areas which the Commission would report on so that other civil

society organisations could cover other areas, presenting a broader picture for the review.

The HRCM seem to have adopted a trend of issuing statements in reaction to gross human rights violations. However, action against perpetrators and efforts to ensure redress or due process for victims of these violations is extremely slow or lacking. This has been the case with the terrorism charges and trials of opposition leaders and also the events related to the May Day rally in 2015 which have been condemned by several local and international organisations.

The family and friends of local journalist Ahmed Rilwan, disappeared since August 2014, organised a rally to mark the first year anniversary of the disappearance. The silent marchers carried placards displaying a question mark on it. Despite the peaceful nature of the walk, the police obstructed the march, pepper-spraying the marchers including the family of Rilwan¹⁴. The HRCM did not take any action to intervene to protect the marchers or to prevent the police from obstructing the march. The family of Rilwan later filed a complaint at the Commission¹⁵; in response to which after several months, the Commission concluded that none of the police had committed an unlawful act.

2.4 NHRI and Freedom of Expression

The Maldivian Constitution states that the people have the right to express themselves without contradicting the principles of Islam. Different drafts of the Freedom of Expression bill have been presented to parliament since 2015 and the Act was passed on 9 August 2016. There have been various laws that violate freedom of expression such as the Freedom of Peaceful Assembly Law, the Religious Unity Act and the Anti-Terrorism Act. The Freedom of Expression and Defamation Law was passed and ratified in August 2016. The law undermines freedom of expression in the name of domesticating the right, by criminalising defamation once again; after defamation was decriminalised in 2009¹⁶.

The current Defamation Law defines the parameters within which freedom of expression can be exercised in the Maldives. The bill gives power to the state media regulatory bodies to take action against the media without conducting an inquiry. They can now force media outlets to remove their content and to make a public apology, suspend media outlets or programmes, and also impose hefty fines in addition to imprisonment. The law also states that a sentence can only be appealed

¹⁴ “Rights NGO condemns police obstruction of memorial walk for missing journalist”, *Maldives Independent*, 9 August 2015, <http://maldivesindependent.com/society/rights-ngo-condemns-police-obstruction-of-memorial-walk-for-missing-journalist-116273>.

¹⁵ “Complaint filed over pepper spray use, obstruction of Moyameehaa walk”, *Maldives Independent*, 19 August 2015, <http://maldivesindependent.com/society/complaint-filed-over-pepper-spray-use-obstruction-of-find-moyameehaa-walk-116573>.

¹⁶ “Maldives commended for decriminalizing defamation”, *Dhivehi Observer*, 4 December 2009, <http://doreview.blogspot.com/2009/12/maldives-commended-for-decriminalizing.html>.

after paying the fines, in addition to several more unconstitutional and illogical prescriptions.

Social media users may also face prosecution for “defamatory” posts on social media¹⁷. Parliamentarian Ali Hussain was summoned to court after police confiscated his phone for tweeting that everyone has the right to defend themselves against unfair use of force by police officers. Shammooon Jaleel, a social media activist was also arrested allegedly for using social media to “foment unrest in society and inciting hatred among the public towards security forces”. The criminal court issued a court order to confiscate his phone and extract all his conversations, text messages and other interactions¹⁸.

There has been no strategic action taken by the HRCM regarding the protection of freedom of expression. However, the HRCM submitted a proposal to the interim committee selected to review the bill, asking it to reduce penalty fines listed in the defamation bill. The memorandum said that freedom of speech and expression are basic tenets in the constitution and as such a defamation bill should balance protection against defamation with protection of the right to free speech. Other than that there have been no interventions from the HRCM on this issue¹⁹.

3. Conclusion

The Human Rights Commission of the Maldives has failed to consider or implement the recommendations made by the ANNI to improve the effectiveness and independence of the Commission. It is also evident, while recognising that the Commission operates under heavy political environment that the Commission has not made sufficient efforts to counter or contest such pressure. Engagement and partnership with the human rights community has been close to none. Such a partnership could prove to be extremely beneficial to both the NHRI and the human rights community consisting of civil society organisations and individual HRDs, as all these actors operate with differential access to resources including networks for solidarity.

One potential area of support from civil society to the NHRI is to counter the political pressure that the NHRI faces in carrying out their mandate. However, it is disappointing that despite having reached out to the HRCM consistently over the past five years with the objective of securing its independence from the government, the NHRI has yet to engage with MDN and other civil society organisations on these issues to find a way forward.

¹⁷ “Defamation bill on Majlis Agenda as free speech campaign gains momentum”, *Maldives Independent*, 31 July 2016, <http://maldivesindependent.com/politics/defamation-bill-on-majlis-agenda-as-free-speech-campaign-gains-momentum-125778>.

¹⁸ “Social media activist arrested for ‘inciting hatred’”, *Maldives Independent*, 30 July 2016, <http://maldivesindependent.com/politics/social-media-activist-arrested-for-inciting-hatred-125764>.

¹⁹ “HRCM proposes to strike off Defamation bill penalty fees”, *Avas Online*, 6 August 2016, <https://avas.mv/en/20926>.

The ideal HRCM that the Constitution designed does not function in the spirit of the Constitution. In the exercise of its constitutional authority, the Commission has yet to gain the confidence of human rights defenders. All queries made regarding the implementation of its mandate were met with the same response: that the Commission has an internal Standard Operating Procedure on the matter; or that the Commission is presently drafting an internal regulation to address a particular mandate. The MDN is of the view that such internal procedures should surely have been developed in the twelve years that the Commission has been in existence.

The Commission conducts very thorough assessments of the situation of human rights in the country, and hence is extremely knowledgeable of the challenges that the country face in the people exercising their fundamental rights. The reports published by the Commission outlining findings of its assessments and some of the monitoring activities are rich in information. MDN is also aware that some recommendations are made to the parliament by the Commission with regard to legislation on occasion; and in critical situations at other times.

However the Commission has not been consistent or transparent in some crucial situations of fundamental rights. The HRCM has always been proactive in addressing children's rights, which is warmly welcomed by MDN. The Commission has not shown such enthusiasm or interest in addressing gross violations of the freedom of assembly as highlighted in the thematic case-study for the 2016 ANNI report. Unfortunately, critical issues such as the implementation of the death penalty highlighted by organisations and individuals fighting to prevent state killings of innocent people have not been taken up by the Commission.

Although there has not been a study undertaken to assess public confidence in the NHRI by an independent organisation, feedback from social media and public rallies show that confidence is extremely low. The MDN has been one of the organisations assisting victims and families to seek redress through the HRCM; and the results have been negative in every instance. The loss of confidence in the HRCM is slowly leading to a culture of civil litigation in human rights cases. This is a huge loss to the HRD community as the criminal aspect of the violations is then forgone; and considering the current judicial culture, it is highly unlikely that a civil case for compensation receives fair consideration.

The ANNI assessments over the years have made constructive recommendations to the HRCM to improve its performance as well as to counter pressure from different actors outside of the Commission. It is imperative that these recommendations be taken on board and an effort made for their implementation; or where the HRCM face difficulty in taking these forwarded to create a healthy dialogue between the Commission and civil society organisations such as the MDN to address these issues.

Recommendations to the Human Rights Commission of Maldives:

1. Create a dedicated help desk or focal point for human rights defenders and develop a special mechanism to address urgent appeals to the Commission in cases of safety and security of HRDs;
2. Develop a Memorandum of Understanding with MDN and other civil society organisation on the implementation of ANNI recommendations;
3. Publish its Standard Operating Procedures and internal regulations to create more transparency in the complaints-handling process;
4. Develop strategies for intervention in situations of gross human rights violations.

Recommendations to the Parliament of Maldives:

1. Consider the findings of the ANNI report in the Special Majlis Committee for the Oversight of Independent Institutions;
2. Consult human rights NGOs regularly in relation to the oversight and accountability of the HRCM;
3. Invite human rights NGOs to observe interactions (those not specified as confidential due to national security) between the Special Majlis Committee for the Oversight of Independent Institutions and the HRCM.

Recommendations to the Global Alliance of National Human Rights Institutions:

1. Include for consideration the practical performance of the NHRI in addition to the feedback from the NHRIs and performance reviews of the NHRIs such as the ANNI report, for the APF evaluation of NHRIs and where necessary review the current grading mechanism to be able to address on the ground performance of NHRIs in terms of effectively carrying out its mandate.

NEPAL: RISING HOPE
Informal Sector Service Center (INSEC)¹

1. Context

The National Human Rights Commission of Nepal (NHRCN) was formed in the year 2000 under the Human Rights Commission Act of 1997 as an independent and autonomous statutory body. It was upgraded as a constitutional body by the Interim Constitution 2007; which has been upheld by the Constitution of Nepal 2015 too. An adequate legal framework is a touchstone for the protection and promotion of human rights. Nepal has over the last one and half decades achieved tremendous success in securing the legal framework for the wider protection and promotion of human rights.

The protection of human rights has been one of the basic structures of the Constitution and thus an absolute commitment of the state. The Constitution of Nepal 2015 has also widely covered the fundamental rights in line with the UN and International Human Rights standards. Article 132 of the Interim Constitution 2007 and Article 249 of the Constitution of Nepal 2015 have delegated responsibility to the Commission to assure the respect, promotion and protection and effective implementation of human rights. However, a few provisions relating to the NHRCN are missing in the Constitution of Nepal 2015, which previously was enshrined in the Interim Constitution of Nepal 2007; but Section 4(1) (F) of the NHRCN Act 2068 has provided those guidelines.

The country achieved a new Constitution in the hope of embracing the sovereign rights of the people. Immediately after the promulgation of the Constitution, neighbouring India imposed an undeclared blockade on landlocked Nepal which seriously curtailed the economic, social and cultural rights of the people. Continued demonstrations by the Madhesi community, which felt discriminated against in the new Constitution, resulted in the violation of civil and political rights, especially of the people of Madhesi Community. The NHRCN which has the mandate to ensure the respect, protection and promotion as well as effective implementation of human rights of the people, was responsible for monitoring this entire situation.

Thus it tried to draw the attention of the government, agitating parties and international community to the humanitarian crisis and human rights situation in the country, through publicising a letter to all parties. The communique by the NHRCN pointed out the humanitarian crisis caused due to the blockade at the Indo-Nepal border, including the infringement of the right to life, child rights, right to health, right to education, social and

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cultural rights, freedom to practice any profession, or to carry on any occupation, right to food and women's rights.

The NHRCN sent the same letter to the Asia Pacific Forum of NHRIs (APF), International Coordinating Committee (ICC) and UN Office of the High Commissioner for Human Rights (OHCHR). Underlining the serious impact left due to the humanitarian crisis on the enjoyment of rights guaranteed by the Constitution of Nepal and international human rights instruments to which Nepal is a party, the NHRCN urged the Government of Nepal, Tarai Madhesh based agitating parties, international communities, and all concerned to address the grave situation².

Even though the NHRC Nepal retained 'A' status in its accreditation review held in October 2014 on the recommendation of the International Coordinating Committee of the NHRI's Sub-Committee on Accreditation (ICC-SCA), these issues brought challenges to its role in improvement of the human rights situation of the country.

The country has not been able to see speedy work in the field of human rights. The government formed two much awaited commissions related to Nepal's peace process. Despite the formation of the Truth and Reconciliation Commission (TRC) and a Commission to Investigate Enforced Disappearances (CIED), a question has arisen: who are these commissions meant to serve if conflict victims have disowned both commissions unless their legislation is amended? The transitional justice act has given NHRCN the role to monitor the implementation of the recommendations made by the TRC and the CIED. In case of complaint registered at the NHRCN regarding the conflict-era, NHRCN can provide all information to the commissions except the statement of the victims and witness.

The country had recently faced a devastating earthquake in April 2015. The National Reconstruction Authority was formed in response to the earthquake after the tremendous pressure exerted by NHRCN to the government to give final shape to the draft bill of NRA. The NHRCN reserves an authority to monitor the work progress of NRA, condition of quake victims and can exert pressure on government. In 11 earthquake-affected districts, NHRCN formed mobile camps in coordination with the Nepal Bar Association, NGO Federation and Federation of Nepalese Journalists to monitor and receive complaints³. The NRA has been formed by the government, however no systematic approach and plan has been launched as yet.

² National Human Rights Commission of Nepal, '*An urgent appeal with regard to the present humanitarian crisis and human rights situation*', 8 November 2015, http://www.nhrcnepal.org/nhrc_new/doc/newsletter/NHRC_Press_Note_Regarding_Appeal_and_Key_Concerns_on_Humanitarian_Crisis_Eng_8Nov2015.pdf.

³ Interview with NHRC team members on 17 August 2016.

Further, Article 249(2)(d) of the Constitution of Nepal makes provision for the NHRCN to work jointly and in a coordinated manner with civil society to enhance awareness of human rights. The NHRCN has the capacity to establish formal relationships with civil society but civil society organisations themselves may have some grievances and dissatisfaction with the NHRCN, and vice-versa. However, NHRCN coordinates and cooperates with non-governmental organisations working on human rights issues in order to ensure respect, protection, promotion and effective implementation of human rights. The NHRCN has been jointly organising and getting feedback from NGOs while preparing its 2015-2020 strategic plan and for preparation of its Universal Periodic Review and Trafficking reports.

The country has several other human rights issues relating to migrant workers, sexual orientation and gender identity (SOGI), caste discrimination, and many more which have to be solved; with the problem of impunity of major importance in general.

2. Mandate to Protect and Promote Human Rights

The Constitution of Nepal 2015 specifically has given mandate to the NHRCN to protect, promote and respect human rights and ensure its effective implementation, as a fundamental duty of the Commission⁴. The quasi-judicial power of the NHRCN has been provided by the Constitution and National Human Rights Commission Act 2012. It has a strong mandate to fulfil its obligation and comply with the Paris Principles in law and performance. Article 287 of the Constitution of Nepal has given special exemption to the NHRCN⁵. But some powers of the Commission have been omitted from the new Constitution, which prevailed in the Interim Constitution. In the case of pluralism in Article 282 of Nepal Constitution 2015, there is provision of the principle of inclusion while forming the Commission; however it may not be sufficiently specific or adequate⁶.

Interim Constitution 2007	The Constitution of Nepal 2015	Consistency with Paris Principles
In the appointment of the Chairperson and the members of the National Human Rights	No such provision in 2015 Constitution	Constitutional provision is not fulfilling the principle of pluralism.

⁴ Article 249 (1) of the Constitution of Nepal 2015.

⁵ Under Article 287 of the Constitution of Nepal 2015, the chief and officials of the constitutional bodies shall be accountable and answerable to federal legislature. The respective committee of the House of Representatives may evaluate and monitor the functioning of the constitutional bodies, other than the National Human Rights Commission, and issue necessary directives and suggestions.

⁶ Interview with NHRC team members on 17 August 2016.

Commission, its composition shall be representative of all sectors including women (Art 131-2)		
To exercise and perform, or cause to be exercised and performed, such other powers and duties as provided by law (Art 132 (3)(e))	No such provision in 2015 Constitution	Omission of this provision limits the mandate of the NHRCN.
Notwithstanding, anything contained elsewhere in this article the NHRC shall have no jurisdiction over any matter falling within the jurisdiction of the Army Act. Provided that nothing shall bar action on any matter on the violation of human rights and humanitarian law (Art 132-4)	No such provision however it reserves rights under its mandates to fulfil its work for the protection and promotion of Human Rights.	Removal of this provision limits the NHRCN's mandate it cannot intervene in issues of the Army even if these concern human rights violations or violations of humanitarian law, which is problematic for the NHRC's effectiveness. The ICC-SCA in its last review of the NHRCN has raised this issue and recommended inclusion of the provision that stated, "nothing shall bar any action or any matters of the violations of human rights and humanitarian law" but that provision has not been enshrined in the 2015 Constitution of Nepal.
	The other functions, duties, rights and procedures of the NHRCN shall be determined by the federal law (Art 249-5).	The Constitutional obligation is to make such law. No effort has been made so far to enact a new federal law in accordance with the Constitution of

		Nepal 2015 and Paris Principles for the NHRCN.
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The Constitution of Nepal 2015 clearly states that the annual report of the NHRCN shall be submitted to the President of Nepal and thereafter transmitted to parliament⁷ for discussion. But since its inception the NHRC annual report has not been discussed in parliament.

The Constitution of Nepal 2015 clearly and progressively mentioned fundamental rights and duties in Part 3 of the Constitution from Articles 16 to 48. These rights are in accordance with the treaties to which Nepal is a state party, and other UN and international human rights standards. Fundamental rights are immediately enforceable, and to exercise fundamental rights requires no further law because constitutional provision is enough to exercise the right. The Constitution of Nepal 2015 has also provided right to constitutional remedy⁸.

In spite of having these fundamental rights, Article 47 of the new Constitution states that, for the implementation of the fundamental rights mentioned in chapter 3 of the Constitution, the state shall enact such law as necessary within three years from the promulgation of the Constitution. This raises the question of how citizens can enjoy their fundamental rights in the absence of other relevant essential laws; and why those additional laws are essential for the implementation of fundamental rights. This is a matter of debate in Nepal. The Constitutional provision with a time limitation of three years to enact laws is a barrier for wider protection of human rights to the NHRCN.

However, it cannot be denied that there has been a positive change in the respect and protection of human rights, including policies and laws instituted for the betterment of the human rights situation. Nepal has recognised the human rights of all citizens in its new Constitution. The 2015 Constitution marks an important milestone: a chance to fix politics; bring dissenters back into the fold; with a focus on economic development of the nation. Its success largely depends on how the political leadership executes it⁹.

⁷ Article 288 of the Constitution of Nepal 2015: the constitutional bodies, formed in accordance with this Constitution, shall submit the annual report about its work to the President, who in turn shall have it presented to the federal legislature, through the Prime Minister.

⁸ Article 46 of Constitution of Nepal 2015.

⁹ "New Constitution Ensuring Human rights", *The Himalayan Times*, 13 October 2015, <https://thehimalayantimes.com/opinion/new-constitution/>.

2.1 General

In cases of violation of human rights or abetment thereof, the victim himself or herself or anyone on behalf of him or her, may lodge a complaint as prescribed by the Commission¹⁰. One of the core functions of the NHRC is to receive complaints. The NHRC maintains an accessible complaints procedures including: (a) in person submission at NHRC offices; (b) 24 hour hotline service; and (c) an online complaint form facility. In case information on human rights violation is received through verbal or any other means, such information shall be entered in the registration book¹¹. Complaints can also be submitted orally or by telephone. Staffed NHRC offices are open from Sunday to Friday¹². But complaints-handling officers will be at office or on call duty during public holidays also.

Likewise, the NHRCN has the right to investigate. Section 4(d) of the NHRC Act 2012 states that the Commission can conduct investigations with the permission of the court concerned in any case currently under judicial consideration (*sub judice*) in which claims involving human rights violation have been made. If there seems to be a situation where human rights of any individual has been or may be violated or abetted, from the preliminary proceedings pursuant to sub-section (1) of Section 11, the Commission may itself appoint an investigation team or investigation officer pursuant to conduct inquiry or investigation as prescribed¹³.

After the completion of the investigation, the investigator has to submit a report to the Commission. Thereafter the Commission may seek services of the expert; collect further evidence; or summon witnesses; or conduct public hearings as prescribed. The NHRCN Act states that the complaints regarding the incidents of human rights violation or its abetment shall be lodged at the Commission within six months from the date on which the incident took place, or within six months from the date on which a person, under control of someone else, got released and became public¹⁴. (This provision of time limitation to lodged complaints within six months has been struck down by the Supreme Court, though no amendment has been made to the Act so far). However, the Act is silent about the time period within which an initial response is required from the authorities against whom the complaints are lodged.

¹⁰ Section 10 of NHRC Act 2012.

¹¹ Section 10(3) of NHRC Act 2012.

¹² NHRC, *Report to the Regional National Human Rights Institutions Project on Inclusion, the Right to Health and Sexual Orientation and Gender Identity*, 5 October 2012, http://www.undp.org/content/dam/rbap/docs/Research%20&%20Publications/hiv_aids/rbap-hhd-2013-nhri-project-on-right-to-health-sogi-nepal.pdf.

¹³ Section 12 of NHRC Act 2012.

¹⁴ Chapter 3, Section 10(5) of NHRC Act 2012.

The NHRC reserves legal rights to protect complainants and witnesses due to possible retaliation from perpetrators for having provided evidence¹⁵. Similarly, if it seems necessary to provide compensation to the victim from the inquiry and investigation launched pursuant to Section 12, the Commission can do so¹⁶.

There is no contradiction between the jurisdiction of the court and the NHRCN. The NHRCN has a different role in protecting human rights from the role of the judiciary. The judiciary is a more formal and stronger organisation to provide remedy for human rights violation having its own jurisdiction fixed by the Constitution and the law. Therefore, the NHRCN generally does not investigate or involve itself in cases pending before any court. There aren't proper guidelines on the NHRC's involvement in judicial proceedings and its *amicus curiae* role; but it may collect evidence from court records with the prior consent of the court.

As regards the jurisdiction of the Truth and Reconciliation Commission and the Commission on Enforced Disappearances, both are transitional or temporary mechanisms, whereas the NHRCN is a permanent Constitutional body. The jurisdiction between three Commissions overlap with one another; and each Commission uses this fact to evade its duty to provide justice to the victim. There is no systematic or strategic relationship between the three Commissions on the discharge of their respective mandates so far. No Memorandum of Understanding (MOU) or position paper on mutual understanding between these Commissions has been drafted. Prior to the formation of transitional justice commissions, many victims had registered complaints at the NHRCN which has therefore documented the conflict related cases in the past. In such situation, TRC and CIED cannot perform their roles without assistance from the NHRCN.

2.2 Addressing Human Rights Violations

As the Paris Principles proposes that national institutions should engage in receiving and investigating human rights complaints, the NHRCN is receiving complaints against abuses and violations of human rights and in the meantime is carrying out different monitoring missions. Though the promotion and protection of human rights goes together, it has been observed many times that the Commission is more focused on protection-related work. The NHRCN has guidelines for collaboration with civil society and HR defenders guidelines to work in cooperation with civil society and for capacity enhancement of HRDs and journalists on the theme of Human Rights. At the same time there is also lack of coordination and collaboration of human rights promotion related work with NGOs and civil society. In the year 2012 the NHRCN published its *Guideline*

¹⁵ Interview with NHRC team members on 17 August 2016.

¹⁶ Section 16 of NHRC Act 2012.

Relating to Collaboration and Partnership with NGOs, but the *Guideline's* procedure makes it difficult for NGOs to work with the NHRCN as it is bound by them¹⁷. Apart from that, the NHRCN has been jointly organising and getting feedback while preparing its strategic plans, and in preparation of the UPR report and reports on trafficking¹⁸.

When it comes to addressing issues of human rights, the NHRCN is not following a particular strategy. Mainly it draws the attention of the concerned authority to solve the matters urgently via press release. The NHRC has issued six press releases since 24 August 2015, the date of the violent incident in Tikapur where 10 people were killed in a clash between police and protesters. Five of these press releases advise protesting political parties and lawmakers to exercise restraint. Similarly, one press release condemns the United Democratic Madhesi Front and National Muslim Struggle Association for issuing public statements to evacuate police stations in Rautahat district¹⁹ as such statement is against the Universal Declaration of Human Rights and humanitarian law.

In the same manner, the National Human Rights Commission (NHRCN) drew attention of the government to the deteriorating health condition of Dr. Govinda KC, who was on a fast-to-death from 10 July 2015 demanding reforms in Nepal's medical sector including medical education reforms, merit-based admission and ceiling on fees etc. The constitutional human rights body urged all concerned authorities to pay serious attention to Dr KC's health conditions after inspecting his hunger strike. The Commission team during the monitoring had communicated with Dr. KC, his supporters and the management of the Tribhuvan University Teaching Hospital (TUTH). The NHRCN also urged the concerned authorities to honour past agreements made between Dr KC and the government²⁰.

Further, the complaints relating to past armed conflict are yet to be finalised due to which the number of backlog cases are increasing. There is no instance of institutional change in the process of addressing the complaints, but NHRCN has undoubtedly played a major role in formation of the TRC to resolve the issue of conflict-era victims. The Law on transitional justice relates to key human rights concerns, and the NHRCN time and again drew the attention of the Government to form the TRC. Section 6 of the NHRC Act 2012 has the provision that the NHRC shall provide advice to the Nepal Government for

¹⁷ See *NHRC Partnership and Collaboration Guidelines* (2012), http://www.nhrcnepal.org/nhrc_new/doc/newsletter/NHRC_Nepal_Collaboration_Guidelines.pdf.

¹⁸ Interview with NHRC team members on 17 August 2016.

¹⁹ 'Government urged to be sensitive towards the treatment of Dr K.C', 15 July 2016, http://www.nhrcnepal.org/nhrc_new/doc/newsletter/Nepal_NHRC_Press_Note_Monitoring_DR_KC_Eng_15Jul2016.pdf.

²⁰ "Save Dr Govinda KC, NHRC tells government", *The Himalayan Times*, 15 July 2016, <https://thehimalayantimes.com/kathmandu/save-dr-govinda-kc-nhrc-tells-govt/>.

making laws concerning human rights²¹. Based on this Act, NHRCN had issued an advisory opinion on formulation of a TRC-related ordinance on 1 April 2013.

The law has clearly stated that conflict-era cases will be handed over to the TRC and the investigations will be carried out based on the stage of investigation of the NHRCN and its records and recommendations. There could be many conflict-era cases filed in other government agencies too, which will automatically come under TRC jurisdiction. Thus the TRC will not encroach or overlap the jurisdiction of other constitutional bodies. The NHRCN has been provided with legislative and constitutional scope to make recommendations on transitional justice as well.

The NHRCN can publicise the information and report it has collected. Chapter 25, section 249 of the NHRC Act 2012 has clearly specified the functions and duties of the NHRCN whereby section 249 (2) (h) clearly states that it can publicise the names of any official, person or bodies not following or implementing the recommendations and directions of the National Human Rights Commission regarding the violations of human rights in accordance with law, and to record them as human rights violators.

Besides that, the NHRCN has published reports on Trafficking and the Earthquake, which describes the human rights situation of the victims. The Fourth Human Rights Action Plan of the Government of Nepal has mandated the NHRCN to monitor the implementation of the Plan; and the Commission is doing so though no result has been seen as yet.

The findings based on truth and facts on the human rights violations are also made available to the Government of Nepal as recommendations. The meetings, presentation and discussion regarding the reports are held to make the government accountable and ensure that relevant public authorities properly consider their recommendations. The data on the implementation status of the recommendations made by the NHRCN to the Government of Nepal sometimes differs. The Commission has stated that the government's response is unsatisfactory. Only 48 percent of its recommendations have been partially implemented since its establishment and 38 percent ignored, out of 737 recommendations made so far, including action against rights violators and policy-level decisions²².

²¹ *NHRC Comments On The Truth and Reconciliation Commission (TRC) related Ordinance – 2069*, 1 April 2013, http://www.nhrcnepal.org/nhrc_new/doc/newsletter/875483268TRC-Press%20Meet-%20NHRC%20Eng%20Apr2013.pdf.

²² "Recommendations of NHRC ignored by government", *Kathmandu Post*, 21 April 2015, <http://kathmandupost.ekantipur.com/printedition/news/2015-04-21/recommendations-of-nhrc-ignored-by-government.html>.

The Commission is conducting closed and open door meetings with government agencies, specially the Office of the Prime Minister and the Council of Ministers. Systematic follow up and discussion with the Government regarding the non-implementation of recommendations is vital because NHRCN do not have rights to prosecute violators, as it is outside the purview of its mandate. In other words, the NHRCN can only recommend and draw attention of the government to implement the recommendations made; however it cannot take action against the violators of Human Rights which is out of its jurisdiction.

3. Human Rights Defenders and Women Human Rights Defenders

During the armed conflict and its aftermath, human rights violations not only scarred and destroyed the victims but had a devastating effect on the lives of human rights defenders. The NHRCN has published its '*Guidelines for human rights defenders*'²³. The Commission is serious about the safety and security of the human rights defenders including women human rights defenders and has shown it has alerted the government on many occasions through press release. The NHRCN has been motivating and felicitating human rights defenders yearly. NHRCN works for the capacity enhancement of HR defenders and journalists on the theme of Human Rights. Every year two Human Rights Defenders are awarded by NHRCN with the Daya Ram Memorial felicitation²⁴. However, apart from this, the Commission has not taken any steps yet to draft legislation relating to safety and security of human rights defenders in Nepal.

Missing each and every opportunity to send strong recommendations to the Government of Nepal for the safety and security of the human rights defenders makes HRDs more vulnerable to risk and danger. INSEC representatives were also under threat and were unable to monitor the human rights situation during the protest by Madhesi community in Terai region, against the promulgation of new constitution demanding more rights, adequate representation and re-demarcation of provincial boundaries.

However, the Human Rights Defenders Bill 2066 (2009)²⁵ in chapter 5 proposes a Protection of Human Rights Defenders' Service. The draft Nepali decree contains good examples of preventive measures under which human rights defenders cannot be detained or prosecuted in the course of their duties (unless they commit a crime). Neither can they be forced to testify or to make statements based on information they have acquired as a result of their work as defenders. Both measures are important to avoid the

²³ January 2013, http://www.nhrcnepal.org/nhrc_plan_details-40.html.

²⁴ Interview with NHRC team members on 17 August 2016.

²⁵ Based on a draft prepared by the Nepalese NGO Informal Sector Service Centre (INSEC, <http://www.insec.org.np>) in September 2009, prior to discussion with the relevant governmental authorities.

criminalisation of defenders²⁶.

In addition, the 'Human Rights Defender Directives, 2013' was issued by INSEC on 20 January 2013 for strengthening and systematising the role of human rights defenders in the protection and promotion of human rights; and also for the protection of human rights defenders²⁷. This directive can also have a long term impact on NHRCN. As part of the consultation process it can play a vital role in helping to draft appropriate legislation, and in helping to draw up national plans and strategies on human rights.

Some NGOs conduct workshops for human rights defenders that focus on identifying everyday psychosocial problems haunting them, and offering ways for their mitigation. However, the NHRCN has not conducted any specialised trainings exclusively for human rights defenders, except for one orientation-cum-training on human rights on 20 November 2015.

Meanwhile on 3 December 2015, cadres of agitating Samyukta Loktantrik Madhesi Morcha (SLMM) attacked NHRCN staffs and vandalised their car while they were on the way to Sarlahi to monitor possible incidents of Human Rights violations during an assault of armed agitators. The staffs were injured in an attack²⁸. Thereafter the Commission said it would stop further monitoring, until and unless a safe environment exists for monitoring the Tarai agitation in the days ahead. After the leaders of the agitating parties, through a press release, promised to cooperate with the Commission in carrying out its constitutional duties, the Commission has resumed its monitoring of on-going protests in Tarai-Madhesh²⁹. No systematic effort has been made thereafter for the safety and security of human rights defenders, including NHRCN staff.

In relation to the matter of human right violations in the Madhes protest against the new constitution demanding their rights and adequate representations, NHRCN spokesperson Mohna Ansari at the 31st session of the Human Rights Council in Geneva in 16 March 2016, stated that the Nepali government should investigate excessive use of security forces to suppress the Madesh unrest. Ansari also raised the issue of discriminatory citizenship provisions, which bars women from passing on citizenship to their children

²⁶ Human Rights Defenders Bill 2066 (2009) [Draft Proposals], Protection International, <http://focus.protectionline.org/files/2012/03/Annex-9.pdf>.

²⁷ 'Human Rights Defender Directive, 2013' in INSEC (2013), *Situation of Human Rights Defender in Nepal 2011-2012*, Kathmandu, pp. 43-44, <http://www.insec.org.np/pics/publication/1386577424.pdf>.

²⁸ "Madhesi Morcha Cadres manhandle NHRC Staff, torch vehicle", *Kathmandu Post*, 3 December 2015, <http://kathmandupost.ekantipur.com/news/2015-12-03/madhesi-morcha-cadres-physically-assault-nhrc-staff-torch-vehicle.html>.

²⁹ "NHRC resumes Monitoring as per the Constitutional Mandate", 8 December 2015, http://www.nhrcnepal.org/nhrc_new/doc/newsletter/NHRC_Nepal_Press_Release_Regarding_Protest_Monitoring_Eng_8Dec2015.pdf.

independently. A child of a Nepali mother and foreign father can only acquire citizenship through naturalisation; while a Nepali father can pass on citizenship to his child by descent. However, the government argued that Nepal has already addressed the issues of Madhes, citizenship and transitional justice. "The Constitutional provisions on acquisition of citizenship are based on the principle of equality and non-discrimination," read Nepal's response³⁰.

Then Prime Minister KP Sharma Oli raised questions with NHRCN Chair Anup Raj Sharma and other Commissioners about Mohna Ansari's submission at the international forum. However, the Chair of the National Human Rights Commission defended NHRC member Mohna Ansari's statement in a press statement.

"The Commission draws the attention of the stakeholders that the statement delivered by NHRC Spokesperson Mohna Ansari at the UPR session was that of the Commission and not her own and the Commission also wants to state that all bodies and office bearers should know that nobody is above the law and impunity has affected the overall promotion and protection of human rights," said Anup Raj Sharma³¹.

The regional non-governmental Asian Human Rights Commission has objected to Prime Minister KP Sharma Oli's "summons" to the office bearers of the National Human Rights Commission and the Hong Kong-based rights organisation argues that the government's attempted interference in the constitutional rights body will raise questions over its independence³².

4. Thematic Issues

The National Human Rights Commission's performance and its efforts in relation to the protection of human rights of various sectors of society are appreciable.

Migrant Workers: In recent times it is estimated 4 million Nepalis live and work abroad. In terms of financial gains, migration has positive effects. However, if it is seen from familial and social perspective, it does have negative outcomes too. The money Nepali migrant workers send home is 40 per cent of the country's Nepal's total foreign exchange

³⁰ "Nepal government should honour its commitment to OHCHR: NHRC", *Kathmandu Post*, 17 March 2016, <http://kathmandupost.ekantipur.com/news/2016-03-17/nepal-govt-should-honour-its-commitment-to-ohchr-nhrc.html>.

³¹ "NHRC chair defends Ansari's statement", *The Himalayan Times*, 11 April 2016, <https://thehimalayantimes.com/kathmandu/nhrc-chair-defends-ansaris-statement/>.

³² Asian Human Rights Commission, 'Nepal: Prime Minister must remain within his jurisdiction', 8 April 2016, <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-043-2016/?searchterm=NHRC%20Nepal>.

earnings, but Nepali workers are paying with their lives. The list of woes of migrant workers in Qatar and Malaysia is endless: breach of contract, forced to work overtime, paid below minimum wage, no sick leave, no insurance and medical benefits, and more.

The NHRCN has been concerned on the matter of migrant workers' rights. It has entered into an MOU with the Qatari national human rights institution aiming to ensure Nepali migrant workers' human rights. With this agreement, migrant workers and their relatives can lodge complaints with the Qatari National Human Rights Committee on the problems faced by Nepali workers in the Gulf state. As per the agreement, the two NHRIs will urge the governments of both countries to prevent labour exploitation, human trafficking and forced labour. They will also work to raise awareness about human rights among workers³³.

Prisoners: Likewise, the situation of prisoners has also been a matter of concern to the NHRCN. Sixteen inmates were found killed and 40 of them were injured due to the devastation of the three-storied prison building at Kathmandu's Central Jail following the massive earthquake that hit the nation on 25 April 2015. The injured inmates were treated at the jail hospital situated within the prison premises.

The NHRCN wrote to the Office of the Prime Minister, Home Ministry and Prison Management Department to draw their attention to the conditions of the jails after monitoring the situation of the Central Jail and prisons in Parsa, Nawalparasi, Palpa, Sunsari, Myagdi, Solukhumbu and Khotang districts. The NHRCN has urged the government to build new facilities and immediately renovate the old buildings and to provide reparations to the families of prisoners who died in the earthquake. The ration and other allowances for prisoners and children dependent on them is also highlighted for increase as the current entitlement for prisoners is Rs45 per day, while their dependent children are eligible for a mere Rs10 per day³⁴.

Natural Disaster: The NHRC reported on the human right situation of the earthquake survivors. It also held discussions with the concerned authorities regarding the rescue and relief distribution in the post-earthquake period. Considering the aftermath of the earthquake as a priority, the Commission issued a press release on 27 April 2015 urging the GoN, international organisations and agencies, civil society, volunteers and rights defenders to effectively step up the rescue, and treatment of the injured including relief work. It also issued directives to the district-based Natural Disaster Rescue Committee (NDRC), the District Child Office, and the chiefs of the security agencies to advance the

³³ "NHRC, Qatar's rights body sign 10-pt deal", *The Kathmandu Post*, 17 November 2015, <http://kathmandupost.ekantipur.com/news/2015-11-17/nhrc-qatars-rights-body-sign-10-pt-deal.html>.

³⁴ "NHRC urges government to improve prison facilities", *My Republica*, 12 July 2015, <http://admin.myrepublica.com/politics/item/24466-nhrc-urges-govt-to-improve-prison-facilities.html>.

rescue work by establishing necessary coordination.

The NHRC has in several press releases following the earthquake drawn the attention of the concerned stakeholders to issues of concern. There are always higher chances of human rights violations during times of natural disaster and in the post-disaster period in the situation of the humanitarian crisis invited by the calamity. In such situations, human rights suffer while state mechanisms including organisations and agencies are engaged in humanitarian service.

The NHRCN also conducted a fact-finding mission and documented claims of distribution of sub-standard food by the World Food Program through the Nepal Red Cross Society. NHRCN had inspected the rice ready to be distributed after children from Kavre suffered from diarrhoea after consuming the rice distributed by Red Cross Society it exerted pressure on government and asked it to intervene in this matter³⁵.

The National Human Rights Commission has expressed concern over the failure to ensure basic human rights to earthquake survivors even one year after the disaster. The NHRCN also requested coordination among bodies providing grant assistance for its easy and smooth disbursement; to carry out a review of those left out in the course of collecting data of quake victims; to make arrangement for local bodies' elections; and to ensure resources to offices established at the local level to make the activities of the National Reconstruction Authority more effective³⁶. The NHRCN has played a vital role in alerting the concerned agency with regard to the protection and promotion of human rights. However, the Nepali government seems to be resistant to following the recommendations of the NHRCN.

5. Conclusion and Recommendations

The 23rd Universal Periodic Review (UPR) session of the Working Committee of the United Nations Human Rights Council (HRC) held between 4-6 November 2015 where some of the statements created controversy, has come up with several recommendations which have been taken positively by the government of Nepal, and the NHRCN as well.

Out of 196 recommendations made by the UN member states during the UPR session, the Nepali government has accepted 148 for immediate implementation, identified 30 recommendations for further consideration, and rejected 18. The National Commission on Human Rights has welcomed the government's pledge to provide financial autonomy

³⁵ "Take Action Against WFP: NHRC to Govt.", *Kathmandu Post*, 27 May 2015, <http://kathmandupost.ekantipur.com/news/2015-05-27/nhrc-to-govt-take-action-against-wfp.html>

³⁶ "Quake victims still in problem: NHRC", *The Rising Nepal*, 19 June 2016, <http://therisingnepal.org.np/news/12255>.

to the Commission as per the Paris Principles.

Though most of the recommendations have been welcomed and accepted by the government, their implementation is not effective.

Likewise, there are several unresolved issues of human rights violations consequent to the various crises which needs to be tackled for the NHRCN to justify its 'A' status. There is much progress to be made in the protection and promotion of human rights especially through lack of a systematic approach and coordination among the governmental bodies dealing with the issues.

The monitoring of the NHRC in the Madesh protest as well as identifying the crisis in the post-earthquake situation was commendable. But the effort of the NHRC must be supported by the government and the coordination between these agencies play a greater role in mitigating the incidents of human right violations.

5.1 Recommendations to the Government of Nepal:

- 5.1.1. Ensure that the research methodology on violation of human rights is conducted properly and by those with sound experience in the subject matter;
- 5.1.2. Follow and implement the recommendations of the NHRCN;
- 5.1.3. Identify the hurdles that obstruct implementing the recommendations and enhancing effectiveness;
- 5.1.4. Formulate sustainable plans and policies in order to deal with the issues;
- 5.1.5. Formulate the new NHRCN Act in line with the Paris Principles and the Constitution of Nepal 2015;
- 5.1.6. Establish a desk at each and every ministry of government for follow-up and implementation of relevant NHRCN recommendations.

5.2 Recommendations to the National Human Rights Commission of Nepal:

- 5.2.1. Ensure that recommendations to government are implemented by constant monitoring and exerting pressure on government;
- 5.2.2. Publicise the names of officials who evade implementing recommendations for unreasonable reasons;
- 5.2.3. Strengthen the physical infrastructure of the Commission with adequate resources;
- 5.2.4. Lobby and advocate with the government to adopt the new NHRC Act in full compliance with the Paris Principles;

- 5.2.5. Publish periodic human right situation reports and make government accountable for implementation of the NHRCN and Treaty Body recommendations and the Five Year National Human Rights Action Plan of the Government.

SRI LANKA: NEW FACES, NEW CHALLENGES

Law & Society Trust (LST)¹

1. Introduction

This annual report is an assessment of the role played by the Human Rights Commission of Sri Lanka (HRCSL) in the promotion and protection of human rights in 2015, with a special focus on the activities of the new Commission appointed in October 2015.² Significant developments in the first two quarters of the year 2016 are also captured herein. Part I is an assessment of the Commission's overall functioning in relation to its broader mandate to protect and promote human rights. Part II considers the work of the Commission in relation to (a) the protection of Human Rights Defenders (HRDs) and (b) transitional justice processes.³

While the two thematic areas far from exhaust the breadth of the Commission's work, they have been chosen bearing in mind the broader context and their historical relevance. Over the past decade and more, silencing, persecution, and intimidation of HRDs emerged as major issues in Sri Lanka but the HRCSL has in the past failed to meaningfully internalise the conception of an HRD within the institution, or engage in sincere dialogue or engagement with issues such as protection, let alone put in place mechanisms to support HRDs. The current political context as well as the reconstituted Commission presents a crucial opening to address this issue. Similarly, the Transitional Justice (TJ) process also offers a context for the deepening of human rights cultures across institutions of state; but also throws up several opportunities and challenges for the Commission in terms of both its possible roles including as a key locus for legal, policy and institutional change to advance human rights and justice in a post-war and post-authoritarian context.

In the course of its annual assessments on the independence and performance of the HRCSL since 2008, the Law and Society Trust (LST) has made various recommendations. There has been minimal effort, if at all, to implement these. The downgrading of the HRCSL's accreditation status to 'B' by the International Coordinating Committee of National Human Rights Institutions (as it then was) in 2007 was a result of many factors: including lack of independence and indifference to grave

¹ Sabra Zahid and Aingkar K. Email: lstadmin@sltnet.lk. The contributions of colleagues at LST are gratefully acknowledged.

² "Chairperson, Commissioners appointed to HRCSL", *News.lk*, 22 October 2015, <http://www.news.lk/news/sri-lanka/item/10411-chairperson-commissioners-appointed-to-hrcsl>.

³ Broadly speaking this refers to the 1 October 2015 UN Human Rights Council Resolution on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka (A/HRC/RES/30/1), http://www.mfa.gov.lk/images/stories/pdfs/docs/FINAL_published_-_thirty_slash_one.pdf.

human rights violations such as torture and disappearances committed under the previous regime.⁴ A crucial step towards strengthening the Commission came with the 19th Amendment to the Constitution in 2015 that restored its independence, especially in terms of the appointment of Commissioners. The new members of the Commission have initiated the overhaul of the organisational and substantive dimensions of the HRCSL's functioning, such as proactive engagement on questions of torture for example, and seeks restoration of its 'A' status accreditation in the course of 2016.⁵

This report draws on interviews conducted with members and staff of the HRCSL, statements made by Commissioners at public meetings and in engagements with HRDs and civil society organisations and information available in the public domain⁶ (especially the HRCSL website, press statements, etc.), reports of international and national human rights organisations, as well as observations of civil society organisations and HRDs. While the number of HRDs and representatives of civil society organisations interviewed for this report were few—seven in number—they bring many years, indeed decades, of experience in human rights work. Almost all of them work across the country in partnership with community based organisations and local NGOs and also continue to assist and work with individuals or groups of victims in making complaints to the HRCSL.

The LST shared two drafts of this report with the HRCSL and has addressed the comments and feedback received from the Commission. Many significant interventions of the new Commission, including the setting up of thematic sub-committees with representatives of HRDs and civil society organisations, a special unit to deal with grave human rights violations, and training programmes for legal officers and investigating officers, will be addressed in the next annual assessment as these do not fall under the period of review. In previous assessments, LST has noted the significant deficit in support and cooperation extended to the Commission by the government, whether in relation to implementing its recommendations or providing adequate financial and human resources. Moreover, like the Commission underlined in its response to an earlier draft, it does suffer from a legacy of neglect of much needed institutional reforms that have affected its functioning and effectiveness—issues also underlined in previous assessments. Constraints of length and focus mean that this report does not permit narration of all of these issues. It is important therefore to also read this year's report as one among a corpus

⁴ "Sri Lanka: HRCSL should defend human rights, not the regime", *Sri Lanka Brief*, 24 December 2013, <http://srilankabrief.org/2013/12/sri-lanka-hrcsl-should-defend-human-rights-not-the-regime/>.

⁵ *Strategic Plan 2016-2019 (Draft)*, Human Rights Commission of Sri Lanka, 8 June 2016, <http://hrcsl.lk/english/wp-content/uploads/2016/07/Draft-Strategic-Plan-2016-2019-of-HRCSL-English.pdf>.

⁶ At time of writing, the *Annual Report* of the HRCSL for 2015 is unavailable.

of annual assessments rather than in isolation; and one whose focus is the HRCSL as an institution rather than each passing Commission *per se*.

2. Mandate to Protect and Promote Human Rights

The HRCSL was established by the Human Rights Commission of Sri Lanka Act, No. 21 of 1996⁷ to give force to Sri Lanka's commitments as a member of the United Nations and fulfil the duties and obligations imposed by various international treaties and maintaining the standards set out under the Paris Principles.⁸ As per the Act, the HRCSL has jurisdiction in relation to all matters relating to fundamental rights⁹ and human rights.¹⁰

Under the Act, the Commission has wide ranging functions including to: promote human rights; inquire into and investigate complaints of violations or imminent violations of fundamental rights;¹¹ and provide relief through conciliation and mediation;¹² advise and assist the government in formulating legislation;¹³ make recommendations to the government to ensure that laws and administrative practices are in accordance with international standards;¹⁴ and on the need to subscribe or accede to international instruments.¹⁵

To carry out these functions Section 11 of the Act provides the Commission with a wide range of powers including those pertaining to investigation;¹⁶ appointing sub-committees at provincial level and delegate its powers to them;¹⁷ intervening before any court with the permission of the court in proceedings related to fundamental rights;¹⁸ monitoring detainees and detention facilities;¹⁹ taking such steps as it may be directed by the Supreme Court in respect to any matter referred to it by court;²⁰ undertaking research into and promoting awareness of human rights and by disseminating and distributing the

⁷ *Human Rights Commission of Sri Lanka Act, No.21 of 1996* (hereafter HRCSL Act).

⁸ *Paris Principles (Principles Relating to the Status of National Institutions)*, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>. Also see 'Establishment', Human Rights Commission of Sri Lanka, http://hrctl.lk/english/?page_id=615.

⁹ Section 10 (a), (b), (c), HRCSL Act.

¹⁰ Section 10 (d), (e), (f), HRCSL Act.

¹¹ Section 10 (a), HRCSL Act.

¹² Section 10 (b), HRCSL Act.

¹³ Section 10 (c), HRCSL Act.

¹⁴ Section 10 (d), HRCSL Act.

¹⁵ Section 10 (e), HRCSL Act.

¹⁶ Section 11 (a), HRCSL Act.

¹⁷ Section 11(b), HRCSL Act.

¹⁸ Section 11 (c), HRCSL Act.

¹⁹ Section 11 (d), HRCSL Act.

²⁰ Section 11 (e), HRCSL Act.

results of such research;²¹ awarding a sum of money to meet the expenses of someone making a complaint to the HRCSL;²² and do all things necessary and conducive to the discharge of its functions.²³

The enabling law does not cover acts or omissions of private sector actors, which is a serious limitation especially since it leaves out corporations and businesses whose actions may impact on the full range of human rights.

Although the enabling Act is in line with the Paris Principles on national human rights institutions, one of the biggest hurdles faced by the Commission is the lack of enforceability of its recommendations. At an initial meeting of the reconstituted Commission with civil society organisations and activists on 16 November 2015,²⁴ the Chairperson stated that from January 2016, recommendations made pursuant to inquiries will be made available online. At time of writing this had not been implemented but the sentiment suggests greater transparency and improved accessibility to the outcomes of inquiries by the HRCSL in the near future. More recently, in the course of another meeting with civil society members on 17 May 2016, the Chairperson indicated that there was an ongoing discussion to release a list of non-compliant parties to the media as a strategy. There is no publicly available information to indicate that the Commission has referred its findings to Parliament or to courts. For instance, the Annual Report for 2015 is yet to be released though this is the primary means by which the Commission shares its findings with Parliament.

2.1 Selection and Composition of the Commission

In keeping with the 19th Amendment to the Constitution²⁵ and the HRCSL Act,²⁶ the President on the recommendation of the Constitutional Council appointed the new Chairperson and members to the Commission on 21 October 2015.²⁷ As stipulated in the

²¹ Section 11 (f), HRCSL Act.

²² Section 11 (g), HRCSL Act.

²³ Section 11 (h), HRCSL Act.

²⁴ "HRCSL consultation with Civil Society", 13 November 2015, <http://hrctl.lk/english/2015/11/13/hrctl-consultation-with-civil-society/>.

²⁵ Article 41 (B) of the 19th Amendment to the Constitution states, "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 recommendation of the Council."

²⁶ Section 3(2), HRCSL Act.

²⁷ Dr. Deepika Udagama (Chairperson), Mr. Hamid Ghazali Hussain, Mr. Saliya Pieris, Ms. Ambika Satkunanathan, Dr. Upananda Vidanapathirana, <http://hrctl.lk/english/about-us/members-of-the-commission/>. The HRCSL website does not provide information on the human rights experience and expertise of the members selected. At time of writing, no response had been received from the HRCSL to a request for short bios of the Commissioners.

19th Amendment, the Constitutional Council²⁸ is a 10 member body, from which three seats are reserved for civil society representatives.²⁹ These civil society representatives have to be persons with eminence and integrity in their public or professional life³⁰ and should reflect the pluralistic character of Sri Lankan society, including professional and social diversity.³¹

Hence it can be argued that though the enabling Act itself does not provide for any kind of consultation with civil society in appointing members to the Commission, the 19th Amendment has opened space for indirect civil society participation in the selection process. This is in stark contrast to the selection process in previous years when the President appointed Commissioners following recommendations made by the Parliamentary Council that comprised only of Parliamentarians.³² Nevertheless, the process can be imbued with greater transparency and the Constitutional Council must take measures to enhance information-sharing in terms of its own process, as well as its recommendations but this is a matter pertinent to all independent commissions and offices coming under the purview of the Constitutional Council.

The swift resignation of Mr. Lionel Fernando³³ as Commissioner, the reason for which is not on public record, was a worrying start; especially in terms of transparency in the appointment process. The Constitutional Council comprising of elected representatives as well as civil society members has the obligation to inform the public about the nominations. Article 41B (3) of the Constitution specifies that in case of Chairpersons of independent commissions, the Council shall recommend three persons for appointment and the President shall appoint one of the persons so recommended as Chairperson. However the names proposed by the Constitutional Council are not disclosed to the public. Nevertheless, the present Chair is herself an eminent human rights advocate, with a record of service both domestically and internationally, which bodes well for the Commission.

²⁸ See Article 41A(1) of the *19th Amendment to the Constitution*. Accordingly, the Constitutional Council comprised of the Prime Minister, the Speaker, the Leader of the Opposition of the Parliament, one parliamentarian nominated by the President, five persons; two parliamentarians and three civil society representatives nominated by the Prime Minister and the leader of the Opposition, and one parliamentarian from political parties other than those represented by the Prime Minister and the Leader of the Opposition.

²⁹ “Parliament approves three non-MP nominees to Constitutional Council”, 22 September 2015, <https://parliament.lk/en/news-en/view/1079?category=6>.

³⁰ Article 41A(5) of the *19th Amendment* states that: “The persons who are not Members of Parliament to be appointed under subparagraph (e) of paragraph (1) shall be persons of eminence and integrity who have distinguished themselves in public or professional life and who are not members of any political party whose nomination shall be approved by Parliament”.

³¹ Article 41A(4) of the *19th Amendment*.

³² This was the procedure between 2010 and 2015 when the controversial *18th Amendment* was in force. See Art 41(A) of the *18th Amendment to the Constitution of Sri Lanka* (as unamended).

³³ “Lionel Fernando resigns from HRCSL”, 26 October 2016, <http://www.adaderana.lk/news/32831/lionel-fernando-resigns-from-hrcsl>.

The HRCSL Act does not stipulate any objective criteria for the selection of members to the Commission. The sole reference to such criteria is made in Section 3(1) which states that five members of the Commission shall be chosen from persons having “knowledge of, or practical experience in, matters relating to human rights”. However, the Act insists on the necessity of minorities being represented on the Commission,³⁴ which is an advantage. Further, the 19th Amendment provides that the recommendations made by the Constitutional Council in appointing members to the Commission should reflect the pluralistic character of the Sri Lankan society including gender.³⁵ The diversity in ethnic, gender and professional representation evident in the new appointments³⁶ is commendable and is in line with the pluralist representation of social forces as expressed by the Paris Principles.³⁷

2.2 Complaints-Handling Procedure

Section 14 of the Act provides that the Commission may investigate an allegation into the infringement or imminent infringement of fundamental rights on its own motion or on a complaint made by an aggrieved person, group of aggrieved persons, or by a person acting on behalf of an aggrieved person or a group of persons. The Inquiries and Investigations (I & I) Division is responsible for handling complaints.³⁸ The Act contains limited provisions as to time-frame in complaints-handling and there is no manual available outlining the HRCSL’s procedures. Section 31 of the Act provides that the Minister may make regulations and Section 31 (2) specifically provides for regulations prescribing the procedure to be followed in the conduct of investigations. In the absence of a designated Ministry, it falls under the purview of the President to make regulations, but to date none have been made in this respect.

While the Commission’s website provides a complaint form in all three languages, the question remains as to how user-friendly these forms are for vulnerable groups. There is also a 24-hour hotline through which the public can report issues by dialling ‘1996’. However, there have been complaints that the hotline does not work during weekends and after office hours. When the issue of malfunctioning hotline was raised at the initial meeting with Civil Society on 16 November 2015, and in an interview with one of the Commissioners, the response was that the HRCSL is working to address the problem.³⁹

³⁴ S. 3(3), HRCSL Act.

³⁵ Art. 41(B)(3) of the *19th Amendment to the Constitution of Sri Lanka*.

³⁶ “New Members to the Human Rights Commission of Sri Lanka”, 22 October 2015, <http://hrcsl.lk/english/2015/10/22/new-members-to-the-human-rights-commission-of-sri-lanka/>.

³⁷ *Paris Principles*, A/RES/48/134, 20 December 1993.

³⁸ ‘Inquiries and Investigations Division’, HRCSL website, <http://hrcsl.lk/english/divisions/inquiries-and-investigations-division/>.

³⁹ Interview with Commissioner Ms. Ambika Satkunanathan, Colombo, 27 July 2016.

Towards late July when multiple calls were made to the hotline during and after work-hours as well as during weekends, more often than not, there no response on the hotline.

2.3 Investigating Complaints

Investigating and inquiring into the complaints regarding infringements or imminent infringement of fundamental rights is the responsibility of the Inquiries and Investigations Division.⁴⁰ The Commission is empowered to summon the relevant parties by issuing written summons signed by the Chairperson.⁴¹ Once summoned by the HRCSL, such persons must appear before the Commission and answer the questions put by the Commission or produce any documents required to be produced.⁴² Any act of commission or omission in relation to the Commission's summons,⁴³ including a failure to appear before the Commission or produce evidence or refusing to be sworn or affirmed constitutes an offence of contempt against the Commission.⁴⁴ The Supreme Court can try every such offence of contempt against the Commission as if it were an offence committed against itself.⁴⁵

However there have been no reported instances of the Commission (current or previous) holding officials for contempt available in the public domain (subsequently confirmed by one member in relation to the current Commission).⁴⁶ The HRCSL in its comments on an earlier draft, explained that due to anticipated delays in court proceedings, it is in the process of devising alternative means to ensure compliance with its recommendations, for e.g., preparing an annual 'black list', reporting to parliament, and compelling disciplinary action against officers who do not implement its rulings.

In addition, the HRCSL is also empowered to visit places of detention, particularly when arrests have been made under the Prevention of Terrorism Act (PTA)⁴⁷ and the Public Security Ordinance.⁴⁸ The Inquiries and Investigations Division that comprise of 18 staff, along with the officers stationed in 10 regional offices, are supposed to conduct visits to custodial institutions, including police stations, detention centres, prisons and registered state-run Homes, including children's homes, elders' homes and homes for the differently-abled across the country on regular basis, which is a challenging task. The Commission is

⁴⁰ S. 11(a), S. 10(a) and S. 10(b) of the HRCSL Act, and HRCSL website, <http://hrctl.lk/english/divisions/inquiries-and-investigations-division/>.

⁴¹ S. 20, HRCSL Act.

⁴² *Ibid.*

⁴³ S. 21 (2), HRCSL Act.

⁴⁴ S. 21(3), HRCSL Act.

⁴⁵ S. 21 (1), HRCSL Act.

⁴⁶ Interview with Commissioner Ms. Ambika Satkunanathan, Colombo, 27 July 2016.

⁴⁷ Prevention of Terrorism Act, No 48 of 1979.

⁴⁸ Public Security Ordinance, Chapter 10.

currently in the process of strengthening the existing system for monitoring visits to make the system more effective.⁴⁹

2.4 *Suo Moto* Powers under Section 14 of the Act

The Commission is empowered to inquire on its own motion (*suo moto*) into infringements of fundamental rights.⁵⁰ The Act provides that the arresting authorities are bound to inform the Commission within 48 hours of an arrest or detention under the PTA or a regulation made under the Public Security Ordinance (Chapter 10).⁵¹ This provides the Commission with critical access to those at risk in an environment where incidents of torture and arbitrary detentions are routine. In an interview, one of the Commissioners stated that while such arrests and detentions under the PTA are regularly communicated to the Commission (by the Terrorism Investigation Division), the Commission has no system in place to monitor arrest and detention under normal criminal law when due procedure is violated or detention is arbitrary.⁵² ⁵³ According to the Director, Inquiries and Investigations, as of mid-2016 eight investigations were carried out *suo moto*, out of which five related to torture.⁵⁴ Given that torture is still a common practice according to the findings of the UN Special Rapporteur on Torture, this number appears inadequate. In his report, Mr. Juan Mendez stated as follows: "...torture is a common practice carried out in relation to regular criminal investigations in large majority by the Criminal Investigation Department (CID) of the police...", going on to state that "... sadly the practice of interrogation under physical and mental coercion still exists and severe forms of torture, albeit probably in less frequent instances, continues to be used..."⁵⁵. The Commission has to make more extensive use of this power, and especially in districts outside of Colombo.

2.5 Victim and Witness Protection

Although the GOSL finally passed victim and witness protection legislation⁵⁶ in early February 2015⁵⁷ the creation and implementation of a protection mechanism has seen

⁴⁹ Interview with Director Inquiries and Investigation, Colombo, 27 July 2016.

⁵⁰ S. 14, HRCSL Act.

⁵¹ S. 28 (1), HRCSL Act.

⁵² Interview with Commissioner Ms. Ambika Satkunanathan, Colombo, 27 July 2016.

⁵³ This is further corroborated in the preliminary observations and recommendations of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, Mr. Juan E. Mendez on his visit to Sri Lanka (29 April – 7 May 2016), 7 May 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19943&LangID=E>.

⁵⁴ Interview with Director Inquiries and Investigation, Colombo, 27 July 2016.

⁵⁵ Preliminary observations and recommendations of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, Mr. Juan E. Mendez, 7 May 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19943&LangID=E>.

⁵⁶ *Assistance to and Protection of Victims of Crime and Witnesses Act*, No 4 of 2015, http://documents.gov.lk/files/act/2015/3/04-2015_E.pdf.

little progress. It is doubtful how the ‘Victims of Crime and Witnesses Assistance Protection Division’⁵⁸ – the body envisaged under the Act mandated to draw up and implement a Victims of Crime and Witness Assistance Programme under the purview of the Inspector General of Police – could effectively provide protection to victims and witnesses and investigate any threats or reprisals in instances where the threat emanates from the State itself. The Act does not establish the Division as an autonomous entity independent of the rest of the police force. With no system of vetting in place, there is no means of ensuring that officers who have been accused of violations, or have connections with those who have, remain out of the system, to ensure programme integrity.

The primary response of the Commission in situations where victims and witnesses require protection, is to request the Inspector General of Police (IGP) to take all necessary steps to safeguard them.⁵⁹ This heavy reliance on the police makes it doubtful whether victims will come forward especially in a context where trust in the police force has waned.⁶⁰ Therefore, the Commission should push for amendments to strengthen the recently passed Victim and Witness Protection Act, and for its speedy implementation.

2.6 Intervening in Court Proceedings

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.⁶¹ Where a question arises in the course of an investigation conducted by the Commission as to the scope or ambit of a fundamental right, the Commission is empowered to refer such question to the Supreme Court under Article 125 of the Constitution.⁶² In addition, the Supreme Court can also refer matters to the HRCSL⁶³ for inquiry and report, where the matter refers to a violation or an imminent violation of a human right.⁶⁴

3. Addressing human rights violations and issues in a comprehensive and timely manner

The appointment of the new Commission brought heightened expectations within civil society. At the initial meeting held on 16 November 2015 with civil society

⁵⁷ Attygalle R., “Victim and witness protection law finally through”, 28 February 2015, http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=120448.

⁵⁸ *Assistance to and Protection of... op. cit.*, s. 19.

⁵⁹ Interview with Commissioner Ms. Ambika Satkunanathan, Colombo, 27 July 2016.

⁶⁰ Camelia Nathaniel, “A Clear indictment on Sri Lanka Police”, *Sunday Leader*, 24 January 2016 <http://www.thesundayleader.lk/2016/01/24/a-clear-indictment-on-sri-lanka-police/>.

⁶¹ S. 11(c), HRCSL Act.

⁶² S. 17, HRCSL Act.

⁶³ S. 11(e), HRCSL Act.

⁶⁴ S.12(1), HRCSL Act.

representatives, Chairperson Dr. Udagama stated that whereas in the past most of the Commission’s resources were utilised for the purposes of investigations and inquiries-just one of its mandates-the Commission would also focus on using its oversight powers towards advising government on policy matters.

To this effect, the Commission has issued important statements and policy recommendations. These include, calling for the abolition of the Death Penalty at a time when the government was considering lifting the moratorium on it;⁶⁵ issuing a letter to the Prime Minister on the proposed amendments to the Penal Code on hate speech, which is almost similar to Section 2 (1) (h) of the Prevention of Terrorism Act (PTA), that in fact restricts free speech;⁶⁶ framing guidelines based on the Directives on Arrest and Detention issued by previous heads of state and binding international human rights law standards for officials when making arrests under the PTA;⁶⁷ submitting proposals for Constitutional reforms;⁶⁸ a statement on the establishment of the Office of Missing Persons;⁶⁹ and most recently, a letter to the Prime Minister raising concerns over a proposed amendment to the Code of Criminal Procedure that would restrict the right of those arrested or detained to have access to lawyers.⁷⁰

At the same meeting the Commissioners also put forth their plans for the Transitional Justice and reconciliation process, stating that they would seek to use the Commission’s oversight powers to ensure that the mechanisms are transparent, participatory, and inclusive particularly where victims are concerned and in ensuring that the processes and mechanisms are in line with international standards.

⁶⁵ “Recommendation to Abolish the Death Penalty in Sri Lanka”, 1 January 2016, <http://hrctl.lk/english/wp-content/uploads/2016/01/RECOMMENDATION-TO-ABOLISH-THE-DEATH-PENALTY-IN-SRI-LANKA-E-1.pdf>.

⁶⁶ “Proposed Amendment to the Penal Code on Hate Speech”, 15 December 2015, <http://hrctl.lk/english/wp-content/uploads/2015/12/Proposed-amendment-to-the-Penal-code-on-Hate-Speech.pdf>.

⁶⁷ “Directives issued by the Human Rights Commission of Sri Lanka on Arrest and Detention under the Prevention of Terrorism (Temporary Provisions) Act No 48 of 1979”, 18 May 2016, <http://hrctl.lk/english/wp-content/uploads/2016/05/Directives-on-Arrest-Detention-by-HRCSL-E-.pdf>.

⁶⁸ “Human Rights Commission of Sri Lanka Proposals for Constitutional Reform – 2016”, March 2016, <http://hrctl.lk/english/wp-content/uploads/2016/06/Proposals-for-Constitutional-Reform-by-HRC-in-English.pdf>.

⁶⁹ “Human Rights Commission of Sri Lanka Recommendations to the Government on the Establishment of the Office of Missing Persons”, 22 August 2016, http://hrctl.lk/english/wp-content/uploads/2016/08/IMG_0011.pdf.

⁷⁰ “Proposed Amendment to the Code of Criminal Procedure Act Depriving Suspects of Access to Lawyers until their Statements are Recorded”, 21 September 2016, <http://hrctl.lk/english/wp-content/uploads/2016/09/Letter-to-PM-on-21.09.2016.pdf>.

3.1 Directives for arrests under the Prevention of Terrorism Act

Despite seven years having passed since the end of the war and amidst calls for its repeal, the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 – the draconian piece of legislation by which state authorities continue to arrest and detain without trial individuals – still remains in force. According to media reports,⁷¹ since April 2016 alone the government has arrested at least 11 persons under the Act. To date the exact number of those held under the PTA are unknown with estimates ranging from between 120 to 160.⁷² For instance, pursuant to an incident in Chavakachcheri, Jaffna on 30 March 2016 a spate of arrests were made and as at 28 June 2016, 24 out of the 28 arrests, were under the PTA.⁷³

In this background the Commission issued a set of guidelines to be followed by designated officials arresting persons under the PTA to ensure the fundamental rights of persons arrested or detained are protected and that they are treated with dignity. The directives also reasserts the Commission's mandate to be promptly informed of all PTA arrests and to access any person arrested or detained under the PTA in any place of detention at any time. Soon after, President Sirisena issued a five-page directive regarding arrests to the Police and the Armed Forces reiterating the HRCSL directives. The directive also noted that the President is of "the opinion that it is necessary to issue the directions to the Heads of Armed Forces and the Police" to enable the HRCSL "to exercise and perform its powers, functions and duties and for the purpose of ensuring the fundamental rights of persons". These are commendable developments as the new Commission has prioritised the issue of detainees since it began its first term in late 2015.⁷⁴

The Special Rapporteur on Torture in his preliminary observations stated, "I asked for specific information on how many persons were prosecuted instead of being rehabilitated, how many were convicted, how many acquitted, and how many are still held in arbitrary detention under the PTA in remand prisons. I have not yet received these figures. The NHRC has also not been able to obtain these statistics to which they should definitely

⁷¹ "Enforce Commission directives on Terror Detainees", *Daily News* 13 June 2016 <http://www.dailynews.lk/?q=2016/06/13/local/84489>

⁷² "Human Rights Watch, "Sri Lanka: Enforce Commission Directives on Terror detainees", 13 June 2016, <https://www.hrw.org/news/2016/06/13/sri-lanka-enforce-commission-directives-terror-detainees>.

⁷³ Marisa de Silva, Swasthika Arulingam and Ruki Fernando, "Continuing abuse under PTA: Abductions, Arbitrary Arrests, Unlawful Detentions and Torture", *Groundviews*, 28 June 2016, <http://groundviews.org/2016/06/28/continuing-abuse-under-pta-abductions-arbitrary-arrests-unlawful-detentions-and-torture/>.

⁷⁴ HRCSL Press Release, 27 November 2015, <http://hrctl.lk/english/wp-content/uploads/2015/11/HRCSL-Press-release-on-27-November-2015.pdf>.

have access".⁷⁵ The Commission, so far as is publicly known, has not explained why this information is unavailable to it.

3.2 Anti-Torture Campaign

The HRCSL recently launched an island-wide anti-torture campaign commemorating the International Day in Support of Victims of Torture falling on 26 June. The national campaign was launched with a public march that was attended by a diverse group, including the President, senior government officials, the Armed Forces and the Police. Addressing the participants, the Chairperson stated that the complaints regarding torture, especially under Police custody, continues to be a challenge, and also stated that the Commission has received 413 complaints regarding torture for the year 2015 and 53 complaints as at June 2016.⁷⁶ At the meeting with civil society organisations on 17 May 2016 to discuss the preparation of the shadow report to UN CAT, the Chairperson stated that the government did not consult the Commission in the preparation of the state report to the CAT committee. She also agreed with the need for a rapid response mechanism in place to deal with torture complaints, which at present are dealt with as routine complaints.

3.3 Making full use of its mandate and powers

It is important that whilst focusing on promoting human rights through public outreach, and advocacy, the Commission should also give equal weight to protecting human rights through proactively monitoring, investigating, and reporting on human rights violations, as well as effective handling of individual complaints.

According to Mr. Jagath Liyanarachchi,⁷⁷ Manager, Advocacy and Legal Advice Centre (ALAC) of Transparency International Sri Lanka (TISL), it is difficult to obtain responses to cases filed by ALAC. For instance ALAC makes complaints on a weekly basis, however it have not received any response to cases filed since the beginning of 2016. Referring to a few of those cases – including a 2015 Complaint (HRC 26/57/15) filed against a number of authorities for failing to take legal action against Coca Cola in relation to a major oil spill in the Kelani River violating the basic human right of access

⁷⁵ *Preliminary observations and recommendations of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, Mr. Juan E. Mendez on the Official joint visit to Sri Lanka – 29 April to 7 May 2016*, Colombo, 7 May 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19943&LangID=E>.

⁷⁶ "President joins Human Rights Commission's Anti-Torture Campaign", *Daily FT*, 2 July 2016, <http://www.ft.lk/article/552290/President-joins-Human-Rights-Commission-s-Anti-Torture-Campaign>.

⁷⁷ Interview with Mr. Jagath Liyanarachchi, Colombo, 3 August 2016.

to safe drinking water of the public⁷⁸ – Mr. Liyanarachchi stated that although two reminders were sent (on 1 September 2015 and 12 February 2016 respectively) no written response has been received to date. In its comments on an earlier draft, the HRCSL stated that an inquiry was held on 9 Oct 2015 and although reports from relevant authorities were called for, the complainants informed the HRCSL they were going to file fundamental rights (FR) petitions and also a case in the District Court for compensation. Once the jurisdiction of the Supreme Court is invoked in an FR petition, or where there is a proceeding on an infringement or imminent infringement of a fundamental right before any court, the HRCSL can only intervene with the permission of such Court under section 11(c) of the Act or where the Supreme Court directs the HRCSL in respect of any matter.⁷⁹

Similarly no response has been received in respect of complaints (HRC 759/16 and HRC 758/16) filed by the National Fisheries Solidarity Movement on 12 February 2016 in relation to inaction by authorities to release land in Panama, despite a Cabinet decision dated 12 February 2015 to that effect, and reminders being sent.⁸⁰ It was also stated that whereas under the previous Commission the system was plagued with delays, under the new Commission in some cases it has been difficult to receive any response to communications sent, be it in the form of complaints or inquiring into status of complaints.

To put this in perspective, it is important to take note that according to the Chairperson (at the meeting held on 17 May 2016), the Commission receives nearly 10,000 complaints every year and due to the investigations unit being heavily understaffed⁸¹ the Commission is not equipped to deal with the caseload. The Chairperson at the same meeting also stated that at present there is a backlog of about 6,000 complaints resulting in one officer having to deal with as many as 350 cases and that the Commission is in the process of recruiting 03 officers to clear the backlog. Training is being carried out at present for national and regional level staff in respect of more effective complaints handling. Where the complaint does not fall into the HRCSL mandate, the relevant officers are required to direct complainants to the relevant institutions such as the National Police Commission, the National Child Protection Authority; and officials from

⁷⁸ “Environmental group to take legal action against Coca Cola company”, *Asian Mirror*, 21 September 2015, <http://www.asianmirror.lk/news/item/11716-environmental-group-to-take-legal-action-against-coca-cola-company>.

⁷⁹ S. 11(e), HRCSL Act.

⁸⁰ Interview with Mr. Jagath Liyanarachchi, Colombo, 3 August 2016.

⁸¹ In an interview with the HRCSL Director, Inquiries and Investigations Division in Colombo on 27 July 2016, LST was informed that the division is heavily understaffed with only around 18 Staff (Director/Lawyer, 5 Legal Assistants and 12 Investigations Assistants).

these institutions are present at HRCSL trainings to brief staff on the mandates of their respective institutions.⁸²

The number of cases and the range of complaints the Commission receives, including complaints that do not fall under its purview, demonstrate the extent of expectation the public has in the Commission in terms of seeking redress. So whilst it seeks to use its advisory powers in relation to providing policy recommendations and propose legislative amendments, it must also strengthen its ability and use of its limited resources to improve its complaints hotline, inquiry and investigation mechanism, as well as follow-up and compliance. A balance needs to be struck towards managing public expectations whilst functioning as the national institution ensuring adherence to international and national human rights law. It cannot be reiterated enough that the two must go hand in hand and one cannot be prioritised over the other.

3 Thematic Issues

3.1 Human Rights Defenders and Women Human Rights Defenders

The regime change following the Presidential elections of January 2015 brought about a welcome improvement in the context for HRDs and WHRDs. The witch-hunt against W/HRDs under the previous regime is no longer the normal practice. There are relatively fewer restrictions on freedoms of expression, assembly, and association. This period has also seen significant breakthrough in relation to high profile cases of human rights violations: for instance arrests have been made with regard to the disappearance of journalist Prageeth Eknaligoda⁸³ and the killing of editor Lasantha Wickrematunga.⁸⁴

However, these improvements aside, there are still complaints that there is surveillance by the Military, especially in the North and the East.⁸⁵ Moreover, the NGO circular (MOD/NGO/mon/4 dated 01 July 2014) issued by the National Secretariat for NGOs directing all the NGOs registered with the Secretariat to “act within their mandate” under the previous administration has yet to be revoked. The placing of arbitrary restrictions on the mandate of such organisations, especially in relation to boosting the freedom of the press, can be seen as unfairly and illegally restricting the constitutional freedoms of such organisations. At a meeting held at the Human Rights Commission of Sri Lanka on 29

⁸² Interview with Commissioner Ms. Ambika Satkunathan, Colombo, 27 July 2016.

⁸³ “Eknaligoda’s disappearance: Four more arrests imminent”, *Sunday Observer*, 7 February 2016, <http://www.sundayobserver.lk/2016/02/07/new05.asp>.

⁸⁴ Vimukthi Yapa, “And then they Came for him”, *Sunday Leader*, 5 August 2016, <http://www.thesundayleader.lk/2016/07/31/and-then-they-came-for-him/>.

⁸⁵ “Voices of Civil Society: Democracy, Human Rights and Justice”, *Sri Lanka Briefing Notes*, Issue No 11, 10 June 2016, <http://srilankabrief.org/wp-content/uploads/2016/06/Briefing-Note-Sri-Lanka-No-11-HRC32.pdf>.

January 2015 the Additional Secretary to the Prime Minister's office had given a verbal assurance to several civil society representatives present that there would not be any restrictions placed on NGOs to conduct their workshops and activities.⁸⁶ However, such verbal assertions are insufficient for NGOs and Civil Society Organisations to work closely with the authorities. It does not appear that the current Commission has taken any follow-up measures to get the authorities to revoke the offending circular.

Within the Commission there is no separate or special mechanism for the protection of HRDs. There is no designated help desk or focal point to deal with issues faced by HRDs. Commenting on an earlier draft, the Commission has observed that it has taken numerous measures and interventions particularly in relation to surveillance and harassment and noted the increasing engagement with civil society groups. However, at the time of writing, we are unaware of measures by the Commission with specific regard to the issue of protection of HRDs be it through proposing protective legislation or directives etc. The fate of the draft guidelines developed under the previous Commission, which had been the subject of a process of consultation at national and regional level, is not clear.

Case Study 1: Sudesh Nandimal de Silva, the Convener of the Committee to Protect Rights of Prisoners and a key witness to the Welikada prison riots in 2012,⁸⁷ has been receiving death threats for seeking justice for the inmates extra-judicially murdered by security personnel who were deployed at the scene. Although on 20 January 2015 Nandimal had lodged a complaint with the HRCSL (HRC/173/15), the investigation was apparently placed "on hold" on the request of the Commissioner-General of Prisons, until the Committee of Inquiry into the Prison Incident 2012 came up with its report.⁸⁸ To date the case is pending. Even though Nandimal has received a number of death threats since 2012, it appears that the HRCSL has not used its powers to take or demand proactive measures to ensure his safety.⁸⁹ In its comments on an earlier draft, the Commission noted that the inquiry has been revived on the initiative of the Chairperson.

Case Study 2: In January 2015, the severed heads of dogs were left outside the homes of two well-known human rights activists, Brito Fernando and Prasanga Fernando.⁹⁰ They had subsequently received death threats from unknown persons in connection with their

⁸⁶ Waruni Karunarathne, "No restrictions on NGOs", *Sunday Leader*, 1 February 2015, <http://www.thesundayleader.lk/2015/02/01/no-restrictions-on-ngos/>.

⁸⁷ Kithsiri Wijesinghe, "Sri Lanka: Prisoners' Activist under Death Threat", *Journalists for Democracy in Sri Lanka*, 11 February 2016, <http://www.jdslanka.org/index.php/news-features/human-rights/590-sri-lanka-prisoners-rights-activist-under-death-threat>.

⁸⁸ "Impunity for killing 27 inmates of the Welikada prison, Colombo in November 2012", *Colombo Telegraph*, 20 June 2016, <https://www.colombotelegraph.com/wp-content/uploads/2016/08/Welikada-Prison-massacre-report-final-20June2016.pdf>.

⁸⁹ Para. 3 (a-g), *Paris Principles relating to the Status of National Institutions*.

⁹⁰ Chathushika Wijeyesinghe, "Severed heads of dogs sent to two human rights activists", *Daily Mirror*, 5 January 2016, <http://www.dailymirror.lk/60409/of-dogs-sent-to-two-human-rights-activists>.

election-related work. Prasanga Fernando was told the two should "make your funeral arrangements at home".⁹¹ The duo had not made a complaint to the HRCSL, although complaints were made to the police. These are clear incidents where the Commission should have intervened through the issuance of a public statement denouncing these acts whilst urging the government to put in place specific mechanisms for the protection of HRDs. The Commission has noted in relation to this incident, that it can make its inquiries upon receipt of a complaint alleging police inaction.

Case Study 3: 21st March 2016 marked two years since restrictions were imposed on the freedom of expression and movement of prominent human rights defender Mr. Ruki Fernando by the Colombo magistrate based on the request of the Terrorist Investigation Department (TID). He was denied access to his lawyer despite repeated requests to the TID at the point of arrest, and later at the TID office in Colombo. The request he made at the time to the previous Commission in 2014, seeking access to a lawyer while he was detained at the TID in Colombo did not yield any results⁹² and neither did the complaint (HRC/1254/14) filed by lawyers regarding the denial of access.⁹³

There is no public evidence to suggest that the previous Commission had taken any action regarding the complaint (HRC/1255/14) filed by Mr. Fernando's parents regarding his arbitrary arrest and detention. It also does not appear that the previous Commission made any recommendations to the TID or other relevant authorities, including the Inspector General of Police (IGP), regarding Mr. Fernando's arrest. If the authorities had ignored the recommendations given by the Commission, the then Commission should have taken up this matter with the then President, under whose authority it was appointed.

It is important that the present Commission takes steps in such cases, both to address previous shortcomings and to set new standards of response that would also enjoy the support of the human rights community, national and international. In its response to this point, the current Commission stated that the it has made numerous interventions in the past 12 months regarding arrests and detention under the PTA, which includes not only the directives but also frequent monitoring visits, enabling family contact, and addressing other issues impacting on the rights of detainees and their families. A better assessment of such practices under the current Commission demands more detailed information which is currently unavailable.

⁹¹ "Sri Lanka: first severed dogs heads now death threats for opposition ahead of tomorrow's elections", *Amnesty International*, 7 January 2015, <https://www.amnesty.org.uk/press-releases/sri-lanka-first-severed-dogs-heads-now-death-threats-opposition-ahead-tomorrows>.

⁹² "Statement condemning arbitrary arrest and detention of human rights defenders Fr. Praveen Mahesan and Ruki Fernando, victims and their families", <http://www.ft.lk/article/270990/Statement-condemning-arbitrary-arrest-and-detention-of-human-rights-defenders--Ruki-Fernando--Fr.-Praveen-Mahesan--victims-and-their-families>, *Daily FT*, 22 March 2014.

⁹³ *Ibid.*

While complaints are made to the Commission regarding threats and hindrances faced by HRDs, it does not appear that the Commission has a distinct mechanism to proactively provide redress. Given the many constraints of capacity faced by the Commission, it is important the Commission explore other options such as issuing statements denouncing threats and harassment of HRDs, publicising its intent and steps taken in support of HRDs, publicising non-compliance with directions and orders in relation to cases involving HRDs, as well as sharing them with relevant UN mechanisms. As of now, the Commission is yet to take any specific actions or measures with respect to addressing issues faced by HRDs.

3.2 Transitional Justice

The Government of Sri Lanka (GoSL) announced a four-pillar reconciliation mechanism in September 2015: namely the Office of Missing Persons; the Truth, Justice, Reconciliation and Non-Recurrence Commission; the Judicial Mechanism with a Special Counsel; and the Office of Reparations.⁹⁴ The government has created a number of institutions,⁹⁵ as well as two Ministries,⁹⁶ all of whom are working with no coordination with each other. The Consultation Task Force⁹⁷ assisted by fifteen Zonal Task Forces (ZTFs),⁹⁸ is currently conducting district-wide consultations on the design of the aforementioned bodies and will submit a report that reflects the full range of public views expressed.

As an institution that serves as a relay mechanism between international human rights norms and the State, the HRCSL must strengthen its advisory role to the government in designing the proposed TJ mechanisms. The approach of the HRCSL is to position itself as a monitoring body. Indeed the Commission also informed that it did not make a submission to the Consultation Task Force on Reconciliation. In this relation, we advocate the position reiterated by the UN Office of the High Commissioner for Human Rights that:

“NHRIs are well placed to contribute to transitional justice processes through information gathering, documenting and archiving human rights

⁹⁴ Statement by Foreign Minister Mangala Samaraweera at the General Debate of the 30th Session of the UN Human Rights Council, 14 September 2015, <http://www.mfa.gov.lk/index.php/en/media/media-releases/6178-slfm-hrc30>.

⁹⁵ The Office for National Unity and Reconciliation (under the President), Secretariat for Coordinating Reconciliation Mechanisms (under the Prime Minister's office), Prime Ministers Action Committee, and the Consultation Task Force (CTF) for Reconciliation (under the Foreign Minister).

⁹⁶ The Ministry of National Co-existence and Official Languages, and the Ministry for National Integration & Reconciliation.

⁹⁷ See Secretariat for Coordinating Reconciliation Mechanisms, <http://www.scrm.gov.lk/#!about/cee5>.

⁹⁸ The ZTF comprises civil society representatives from the relevant districts or provinces.

abuses, conducting investigations, monitoring and reporting, cooperating with national, regional, hybrid or international judicial mechanisms, providing assistance to victims, ensuring respect for international standards, advising on legislative and institutional reforms, and conducting education and training on human rights and national reform efforts”⁹⁹

We urge the Commission therefore to reconsider its domestic mandate, to extend to the wider roles advocated by the OHCHR. However the efficacy of such a role is also subject to a positive engagement from the State. In this regard the Commission's concern over the continued failure of the State to share draft legislation so the Commission can comment on it, is significant. This applies not only in relation to TJ, but across the full spectrum of the Commission's mandate.

In principle, it is important the Commission develops an expansive understanding of its monitoring role including in terms of following up on the outcomes and recommendations of TJ mechanisms and processes. Being uniquely placed as a bridge between state and civil society, the HRCSL can facilitate dialogue and cooperation in these processes. Though the Consultation Task Force and ZTFs are conducting several consultations with various groups, the public lack the knowledge and awareness of the proposed TJ bodies, and the role of the aforementioned Task Forces.

According to rights activist Brito Fernando, although several discussions on TJ have been held in Colombo, it hasn't reached society at large.¹⁰⁰ The Commission, under Section 10(f) of the HRCSL Act, can play an important role in advancing public participation in the TJ process by conducting broader and extended information-sharing initiatives in order to create awareness.

Even though several civil society organisations especially from the North and East have raised concerns over the lack of communication and consultation between civil society organisations in different regions, it is undeniable that there is a significant level of representation of the civil society in TJ initiatives. It is reported that there are more than sixty (60) representatives from civil society in the CTF.¹⁰¹ The heavy involvement of civil society in state-sponsored initiatives has also created a vacuum in monitoring state responsibility. The Commission, as an independent body, has a critical role of acting as a watchdog to ensure that the GoSL fulfils its obligations to the people and the

⁹⁹ UN Office of the High Commissioner for Human Rights, *Guidance Note on National Human Rights Institutions and Transitional Justice*, 27 September 2008, page 4, para 4, http://nhri.ohchr.org/EN/Themes/Portuguese/DocumentsPage/NHRIs_Guidance%20Note%20TJ_Oct%2008.pdf.

¹⁰⁰ *Sri Lanka Briefing Notes*, Issue 11, 10 June 2016, p. 17, <http://sri.lankabrief.org/wp-content/uploads/2014/07/Briefing-Note-Sri-Lanka-No-11-HRC32.pdf>.

¹⁰¹ *Ibid.*, pp. 17 & 18.

international community. In light of the above, the Commission is urged to take a more proactive and public role with respect to the TJ process.

4 Conclusion

The present Commissioners were appointed in October 2015. The new Commission is in the process of significantly overhauling aspects of its work in response to many challenges from years of under-investment in capacities and other institutional constraints. Intensive staff training is being carried out both at the national as well as regional levels.

Among the challenges the Commission faces is that of responsiveness with respect to processes of investigation and inquiries that remains low.¹⁰² For instance, Mr. Liyanarachchi of TiSL noted that he is yet to receive acknowledgment from the HRCSL for complaints filed in 2015. He observed that it is comparatively easier for him to follow-up on complaints, given his long relationship with HRCSL staff members (including as a previous employee of the Commission), in contrast to most others. This issue of delay and non-communication was reiterated by another human rights defender Mr. Prasanga Fernando from Right to Life.¹⁰³ This clearly shows that an effective structure should be put in place for complaints-handling.

The lack of enforceability of its recommendations is a major barrier and the Commission needs to find proactive ways of addressing this problem. It needs to put in place a mechanism to monitor the status of implementation of its recommendations. Planning follow-up activities, and advocating for the implementation of the inquiry recommendations, is vital for national human rights institutions (NHRIs) to fulfil their mandates.¹⁰⁴ While a survey of existing practice across NHRIs is beyond the scope of this report, this is an area where the HRCSL could link with other NHRIs and indeed civil society organisations to find innovative means of overcoming existing constraints.

The hotline is also a cause for concern as well as the fact that there is no rapid response mechanism to deal with incidents like torture or emergency situations. There is also the need to have a mechanism in place to protect or provide safety to victims and witnesses, if the need arises. Sometimes although investigations are carried out, reports are not made available in the public domain, including because of the time that goes into getting the

¹⁰² INFORM, "Human Rights in Sri Lanka: One year after Parliamentary elections" 18 August 2016 <http://www.slguardian.org/2016/08/human-rights-in-sri-lanka-year-after-parliamentary-elections/>

¹⁰³ Interview with Mr. Prasanga Fernando, Colombo, 4 August 2016.

¹⁰⁴ UNDP-OHCHR Toolkit for collaboration with National Human Rights Institutions, December 2010, p. 33, <http://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf>.

reports translated into all three languages (Sinhala, Tamil and English) commonly used in Sri Lanka.

It appears that some of the Commissioners engage in, or take on, tasks assigned to staff owing to issues of capacities and confidence. While their commitment is to be applauded, it is crucial that issues on this front are addressed soon in order to ensure an appropriate balance of responsibilities. While one of the HRDs interviewed claimed that this meant communications were being channelled through Commissioners, the Commission (in its own comments) noted that anyone is free to lodge a complaint with the Commission through the respective division but also stressed that Commissioners are often approached directly by HRDs and civil society organisations with requests for intervention and action.

Most of the HRDs and civil society actors interviewed by LST noted that they had faith in the new Commission to deliver. However, given the demands on, and expectations of, the new Commissioners, the HRCSL's institutional limitations and other systemic weaknesses, this trust may also erode, especially given the possibility of its marginalisation in the context of the transitional justice process. This is a critical moment in Sri Lanka, and the Commission has to carve out a role for itself within the transitional justice process. For instance, at the briefing on the Office of Missing Persons for activists held on 9 May 2016 organised by the Ministry of Foreign Affairs, the Minister when answering a question on the issue of GoSL's engagement with the HRCSL in the proposed transitional justice process, spoke in vague terms indicating that no strategy is in place to involve the Commission.

At its first meeting (on 16 November 2015) with civil society organisations and individuals, the Chairperson of the HRCSL Dr. Udagama stated that the new Commission will use its oversight powers to ensure that the proposed mechanisms are transparent, participatory, and inclusive particularly where victims are concerned and in ensuring that the processes and mechanisms are in line with international standards. This is crucial given the seeming lack of coordination amongst the various mechanisms of the state involved in TJ. For the HRCSL to effectively perform its monitoring role, the nuts and bolts of precisely how it would proceed *vis-a-vis* the different TJ mechanism needs to be made explicit.

4.1 Recommendations to the Government of Sri Lanka

- 4.1.1. Provide adequate resources to the Commission;
- 4.1.2. Implement its recommendations, including consequential penalties for officers who fail to comply;

- 4.1.3. Facilitate missions and investigations by the HRCSL by providing timely information, reports and support personnel, and remove any existing *de facto* barriers to accessing institutions or information;
- 4.1.4. Recognise the role of the HRCSL with regard to judicial and non-judicial mechanisms;
- 4.1.5. Consider how the HRCSL can contribute to the proposed transitional justice mechanism;
- 4.1.6. Entrust a ministry or an office under the aegis of the President or Prime Minister to liaise with the HRCSL, and enhance integration and coordination between the Commission and the government for e.g. through sharing draft legislation with the Commission.

4.2 **Recommendations to the Parliament of Sri Lanka**

- 4.2.1. Undertake constitutional reforms to re-establish and recognise the HRCSL as a Constitutional body;
- 4.2.2. Amend the enabling laws of the HRCSL to enable or include the following:
 - 4.2.2.1. Make use of summary proceedings before the Magistrate and High Court for failure by state authorities to implement its recommendations, including a substantial penalty for non-compliance and for contempt;
 - 4.2.2.2. Permit the HRCSL to move the High Court in contempt proceedings against any person who fails to implement a recommendation or directive of the HRCSL;
 - 4.2.2.3. Expand the HRCSL's jurisdiction to include economic, social and cultural rights and go beyond the fundamental rights jurisdiction set out in the statute as per the Constitution.
- 4.2.3. Actively engage with the HRCSL, and encourage the Commission to file reports in Parliament, and discuss and debate such reports, including its Annual Report;
- 4.2.4. Ratify human rights instruments and treaties, including the Optional Protocol to the Convention Against Torture, Second Optional Protocol to the International Covenant on Civil and Political Rights (abolition of the death penalty), the Rome Statute of the International Criminal Court, and the ILO Convention on Migrant Employment, and domesticate these instruments;
- 4.2.5. Recognise the role of the HRCSL with regard to judicial and non-judicial mechanisms, and consider how the HRCSL can contribute to the proposed transitional justice mechanism.

4.3 **Recommendations to the Human Rights Commission of Sri Lanka**

- 4.3.1. Strengthen review of existing legislation or administrative provisions for compliance with human rights standards, as well as their effectiveness in enhancing access to justice;
- 4.3.2. Recommend and advocate for new legislation where necessary to enhance the protection of human rights, in particular in relation to domesticating international treaties ratified by Sri Lanka;
- 4.3.3. Establish a special unit to respond to grave human rights violations and to protect vulnerable groups including Human Rights Defenders (HRD) and journalists;
- 4.3.4. Operate an uninterrupted 24x7 hotline in all three languages;
- 4.3.5. Respond promptly and efficiently with action, statements and reports on human rights violations by the state or its actors, including transnational corporations and set up a rapid response team/unit to attend to such violations;
- 4.3.6. Finalise the guidelines for the protection of HRDs, and encourage the GoSL to adopt them;
- 4.3.7. Strengthen and expand intensive training programmes for Investigations Officers and Legal Officers recently initiated;
- 4.3.8. Develop an effective and inclusive follow-up mechanism to systematically monitor the implementation of recommendations made by the Commission;
- 4.3.9. Actively engage with the Executive and Legislative branches.

HONG KONG: WATCHDOGS THAT NEITHER BARK NOR BITE

Hong Kong Human Rights Monitor¹

1. General Overview

There is a trend of rapid human rights regression in Hong Kong. In the fourth quarter of 2014, the repeated denials of democracy by the Chinese Central Government (CCG) escalated into a large-scale and prolonged social movement known as the ‘Umbrella Movement’. It lasted 79 days, but the demand for democracy persisted; along with heightened public mistrust of the Hong Kong Special Autonomous Region (HKSAR) government and the CCG. At the same time, human rights in Hong Kong have been facing increasing severe challenges, highlighted by growing unchecked police abuse of powers, manipulation of human rights watchdogs, and the CCG’s blatant refusals to adhere to laws and norms.

1.1 Disillusioned with Democracy

The political system in Hong Kong has been criticised by the UN treaty bodies since 1995.² While the Chief Executive (CE) of the HKSAR holds most of the political and administrative powers in the territory, he/she is ‘elected’ by an election committee of 1200 members, who are ‘elected’ or appointed by the privileged sectors in Hong Kong. While half of the 70 seats in the Legislative Council (LegCo) are returned by geographical constituencies with equal suffrage among all qualified voters in Hong Kong; the other half are ‘elected’ by functional constituencies reserved mainly for the business sector and professionals – the majority of which have small electorates and corporate electors. The pro-democracy political camp gets more number of votes, but fewer seats in LegCo than the pro-establishment camp.

When the LegCo cannot truly channel people’s will into policy making, and the free and fair election of the CE is once again denied, coupled with the poor performance of the current administration under CE Leung Chun-ying (CY Leung), the illusion of a democratic government is busted. Moreover, without a democratic system, there is no means to reconcile the divide in society exposed by the ‘Umbrella Movement’,

¹ Claudia Yip <po4@hkhrm.org.hk>.

² The UN Human Rights Committee has criticised the Hong Kong electoral system for giving undue weight to the views of the business community, thus not meeting the requirements of universal and equal suffrage, equality before the law, and discrimination on the grounds of sex, wealth, class, social and other status. The Human Rights Committee’s calls for compliance with the Covenant have led to little improvement. See UN Human Rights Committee: *Concluding Observations: United Kingdom of Great Britain and Northern Ireland (Hong Kong)*, 9 November 1995 (CCPR/C/79/Add.57), paras.19 and 25.

including Hong Kong’s relationship with Beijing.

With little electoral mandate and legitimacy, the democratic deficit in the HKSAR has led to over reliance on the police force to maintain public order, making it more difficult to keep the abuse of police abuse in check.

1.2 The Umbrella Movement – the demands and responses

Soon after the NPCSC adopted its aforementioned Decision on 31 August 2014, students organised class boycotts to demand the withdrawal of the Decision and genuine universal suffrage.

On 28 September 2014, over 30,000 Hong Kong citizens from all walks of life turned up in the Admiralty area, where the students had been staging a protest outside the Government Headquarters, to show support to the protesting students and demand the release of the arrested students. Soon the sheer size of the crowd made it impossible for the police to contain them on the pavement, and they spilled onto the road, paralysing the traffic in the central business district. The protest remained peaceful, with participants completely unarmed.

However, at around 6pm, the police deployed riot squads and fired a total of 87 canisters of tear gas in the subsequent hours at the crowd to disperse them; some riot police carried shotguns.³ The last time police had fired tear gas was at the 2005 anti-globalisation protests during the World Trade Organisation ministerial conference. At that time, the Hong Kong public largely assumed the spectator stance as officers battled militant South Korean protesters. Enraged by the unnecessary and disproportionate use of force by the police on the order of the Administration to clamp down the protest for democracy, more people joined the protest, and the ‘Occupy Movement’ spread to other areas in Hong Kong, including Mongkok and Causeway Bay.

The government has been hostile towards the ‘Umbrella Movement’, and stressed that it was an unlawful assembly. A dialogue was held between government officials and five student leaders on 22 October 2014, but no consensus or concession was reached. So far, the government has yet to respond to the demand for democracy. Eventually the last ‘Occupy’ site was cleared on 11 December 2014.

³ Footage and photos on TV news and various newspapers showed that the police force brought 12-gauge Remington 870 shotguns, which can be used for firing rubber bullets, and Colt AR-15, which can fire 5.56mm NATO rounds or .223 Remington rounds. Some police even pointed the gun at peaceful protesters. In addition, during the operation, the police displayed banners announcing “DISPERSE OR WE FIRE”. It showed that the police had come prepared to fire at protesters.

1.3 Freedom of Assembly and Expression

The police force often takes a hard-line approach to deal with protests and assemblies of pro-democratic civil society organisations, and sometimes fails to protect their right to protest free from harassment.

During the ‘Umbrella Movement’, the police’s use of force has been criticised to be disproportionate, unnecessary, and plainly abusive. They had widely employed pepper sprays, tear gas (canisters and sprays), and batons against demonstrators. Batons seemed to have become the standard means for dealing with protesters and occasionally even the general public. Contrary to the guideline on the use of batons, which stipulates that a police officer can only hit a target’s limbs, police officers had intentionally or recklessly struck on heads or necks, which can cause permanent disability or even death.⁴ Reports also show that police officers had deliberately beaten up protesters.⁵

Pro-democratic protests continued to be harassed by some opposing groups. For example, during the ‘Umbrella Movement’, an unidentified mob physically assaulted protesters and indecently assaulted female protesters participating in the ‘Occupy movement’ in Mongkok.⁶ The police was accused of failing to defend the protesters against the attackers, thus failing its positive duty to assist the exercise of the right to free expression.⁷

⁴ See the *Submission from NGOs coordinated by the Hong Kong Human Rights Monitor to the Committee Against Torture on the implementation of the CAT in the Hong Kong Special Administration Region, China*, October 2015, para 6.4.2.

⁵ On 15 October, Ken Tsang Kin Chiu, one of the protesters, was handcuffed, kicked and punched by a group of police officers in a dark corner near the protest area after being arrested. Multiple media outlets recorded the scene on video camera, showing that the torture lasted for at least 4 minutes. This is strongly believed to be not an isolated case of deliberate brutality toward defenceless persons by the police. Another case in point is Chan Pak Shan’s ordeal. He was arrested by the police and charged for assaulting a police officer and being unable to present his identity document. While he was found not guilty for both charges, after reviewing evidence, the Magistrate expressed that there is a “reasonable possibility” that Chan had been beaten up by the police, which affected the integrity of the police witness statement. The Magistrates stated that the injury to Chan’s eye is likely caused by a punch. The bruise on Chan’s face and the scratch on his chest were not likely caused by his resistance to the police arrest.

⁶ See Liam Fitzpatrick, “Anti-Occupy Mob Trashes Hong Kong Protest Site”, *Time*, 3 October 2014; Amnesty International, *Hong Kong: Women and girls attacked as police fail to protect peaceful protesters*, 3 October 2014.

⁷ The Police was alleged to have taken unreasonable time to arrive, and only formed a feeble human

During Chinese leaders’ visits, the Police would designate demonstration areas far away, so that visiting mainland Chinese leaders would not be embarrassed by protests.

1.4 Institutional Independence, Academic Freedom, Freedom of Opinion and Expression

An esteemed legal scholar, Professor Johannes M. M. Chan, was recommended by a search committee to be appointed as a Pro-Vice-Chancellor at the University of Hong Kong, but such recommendation was rejected by council members appointed by the CE with some ungrounded reasons. The rejection is believed to be because of Professor Chan’s critical view of Beijing, and the whole saga is believed to be orchestrated by the CCG.⁸

A recent statement issued on 15 October 2015 by the (now retired) Honourable Mr. Justice William Waung of the High Court of Hong Kong states the importance of this case:

“The independent spirit of the Law Faculty of HKU of course contributed to Occupy Central [a.k.a. Umbrella Movement] and this is the cause of Beijing displeasure. But it is the same independent spirit and high standard of the HKU Law Faculty which produced for Hong Kong, our top lawyers, legislators, Judges and professors. Political interference, diminishing of the HKU autonomy and deliberate political curtailing of the free Hong Kong intellectual spirit and academic freedom will cause long term and serious damage. To ensure future university autonomy and academic freedom, we owe it to our next generation that the future governance of the publicly funded universities be free from political interference and be truly

chain to separate the two camps. Journalists recorded instances where the police escorted anti-protesters away without arrests, some perpetrators actually returned to the site and attacked the protesters again, see Tania Branigan, “Hong Kong protesters beaten and bloodied as thugs attack sit-in”, *The Guardian* 4 October 2014. In *Leung Kwok Hung & Others v HKSAR* (CFA, July 2005), the Court of Final Appeal confirmed that the right of peaceful assembly, as protected by the Bill of Rights Ordinance (ratifying the ICCPR) and the Basic Law, involves a positive duty on the part of Government to take reasonable and appropriate measures to enable lawful assemblies to take place peacefully.

⁸ See Kris Cheng, “Explainer: The HKU Council pro-vice-chancellor debacle”, *Hong Kong Free Press* 30 September 2015.

independent”.⁹

The political interference and disrespect of institutional independence and academic freedom by way of the CE’s manipulation of the councils continue to haunt all publicly funded universities. Amendments to universities’ ordinances are called for to remove the CE from being, by law, the Chancellor of all University Grants Committee-funded institutions.

1.5 Malicious or improper arrests and prosecutions

1,003 persons have been arrested in relation to the Umbrella Movement, among which 216 persons have undergone, are undergoing or will undergo judicial proceedings as of January 2016.¹⁰ Certain arrests appear unfair or even malicious, with some prosecutions based on unsafe evidence. During the ‘Umbrella Movement’, it was not uncommon for police officers to falsely incriminate individuals including protesters and passers-by, such as for “assaulting a police officer”. Often the wrongly accused persons sustain injuries from the rough or even brutal handling of police officers.¹¹ The victims included journalists.¹²

⁹ William Waung, *University Autonomy, Academic Freedom & Independent Governance*, 15 October 2015, <https://thestandnews.com/politics/university-autonomy-academic-freedom-independent-governance/>.

¹⁰ Secretary for Security Lai Tung-kiok, *Reply to a question by LegCo member about Arrests and prosecutions in relation to public order events*, 2 March 2016.

¹¹ For instance, on 30 November 2014, a victim was passing by the proximity of the protest site in Mongkok with his friend, when his friend was pushed by some police officers, whom the victim then stepped up to argue with. But he was grabbed from the crowd and pushed to the ground, physically attacked by police officers causing him multiple injuries, and arrested for “assaulting a police officer”. Soon after, a video of the incident went viral on the internet, which shows that the victim had not assaulted any police officers. Only on 21 January 2015, the date of the trial, was he informed that the charge had been dropped. “Worker arrested and injured by police when passing by protest site; with charge dropped, he will claim for damages against Commissioner of Police”, *Apple Daily* (Hong Kong) 22 January 2015, A18.

¹² For example, on 27 November 2014, officers accused an *Apple Daily* photojournalist of repeatedly hitting an officer’s head with his camera, and pinned him on the ground roughly, causing him multiple injuries. Footage taken by fellow journalists showed that it was, in fact, the officer who bumped into the camera by himself. The journalist was detained for more than 24 hours before being released unconditionally. See Hong Kong Journalists Association, *Submission to the United Nations Committee Against Torture on the implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in the Hong Kong Special Administration Region, China*, October 2015, para 20.

These support the suspicion that some police officers harassed and punished protesters with unlawful arrests and arbitrary detentions because they were involved in clashes and/or verbal abuse with such protesters personally; or viewed such protesters and journalists as troublemakers or enemies of the police force. Similar abuses persisted, even escalated, begging the question of whether the authorities, after coming to knowledge of such pattern of abuses, had taken the problem seriously and adopted measures to curb such abuses.¹³

Reports of court hearings of ‘Umbrella Movement’ cases reveal that the police brought some cases with evidence so unsound that it was suspected that some protesters had been framed. In cases relating to at least nine defendants, charges were dropped after video evidence supplied by the defence cast doubt on police testimony.¹⁴ These cases often involve the charge of assaulting police officers, which are easy to raise, but hard to defend.¹⁵ The video evidence produced by the defence often shows that the accusation is fabricated. If the mistakes were genuinely innocent, these cases cast serious doubt on Hong Kong police officers’ competence; but should they have intentionally or recklessly framed citizens, their integrity is trashed.

The police enjoy unchecked discretion and undue advantage in the criminal process. Their control is taken away only when the Prosecutions Division takes over when prosecution begins, which, however, can be delayed by the police. The abuse of powers not only jeopardises justice at an individual level, but also severely damages the system, turning criminal prosecutions into a tool of persecution: a favourite tool among autocratic authorities against their people.

¹³ Not only did the police fail to improve during the ‘Umbrella Movement’, the abuses persisted. For example, in February 2016, there was a major and violent clash between protesters and police, during which at least four reporters were attacked by protesters and police officers. One of them was a *Ming Pao* reporter. He was watching the disturbances from the top deck of an abandoned bus. The police ordered him to come down, and then several policemen approached him, pushed him to the ground with their shield, and kicked and hit him, including on his head. It happened after he showed his press card and shouted he was a journalist. No officers have been charged in connection with the assault. Hong Kong Journalists Association, *One Country, Two Nightmares – Hong Kong media caught in ideological battleground*, pp. 2 and 28.

¹⁴ Karen Cheung, “Legal scholar calls for database of false police testimony after Occupy cases reveal unreliability”, *Hong Kong Free Press*, 26 September 2015.

¹⁵ Per a magistrate in *South China Morning Post*’s report of the verdict in “Hong Kong magistrate slams police officer over wrongful allegation that student punched him”, *South China Morning Post* 15 April 2015.

The blame, however, is not on the police alone. The Department of Justice (DoJ) is responsible for controlling criminal prosecutions;¹⁶ The Secretary of Justice (SoJ) is ultimately responsible for all prosecutorial decisions, in particular to ensure there is no conflict of interest and to uphold criminal justice. However, the DoJ has failed in safeguarding prosecution standards, and may have acquiesced in the police abuse. Further more, the current SoJ, Rimsy Yuen Kwok-keung, together with Chief Secretary Carrie Lam Cheng Yuet-ngor and constitutional affairs chief Raymond Tam Chi-yuen, formed the ‘Constitutional Reform Trio’ in leading the promotion of the Administration’s political reform package, creating a conflict of interest for him to oversee prosecutions of individuals who oppose it. In such circumstances, there should be a mechanism to entrust the responsibility to an independent Director of Public Prosecutions.

However, other than withdrawing charges in several cases once there is strong indication of insufficient evidence, the public has not seen any effort by the DoJ to curb such wrongful conduct by the Police wholly charges on behalf of the Public Prosecutor.¹⁷ It is utterly unacceptable for the DoJ of a jurisdiction where the rule of law is practised to let law enforcement agencies make unchecked and unsound prosecution decisions and to allow culprit officers impunity. A more stringent scrutiny over cases should be adopted, especially for cases brought by the police with an actual, potential, or perceived conflict of interest.

1.6 Attacks against the Media

The media continues to be harassed by law enforcement agents, legal actions and even suffer violent attacks. According to the Hong Kong Journalists Association:

“3. ...There was a sharp rise in physical violence in the past three years partly due to the polarisation caused by the Occupy protests. About 40 incidents of violence targeting both the frontline journalists and the bosses of critical media organisations happened during the period. Among the attackers were law enforcement officers. Only a small percentage of the attackers were apprehended. Police investigations were dotted with extraordinary practices such as allowing the suspects to wear face masks during an identification parade.

4. Abuses of legal action have also been increasing. At least four journalists were arrested or brought to court for doing their job. They were accused of either assaulting a police officer or security guard. One has been

¹⁶ Basic Law Article 63.

¹⁷ Hong Kong Law Cap. 227 Magistrates Ordinance, s.12.

convicted.’¹⁸

Regrettably, the police attacks on journalists persist after the ‘Umbrella Movement’.¹⁹

As for the brutal attack against former *Ming Pao Daily News* Chief Editor Kevin Lau Chun-to in February 2014, two assailants were arrested and convicted in Hong Kong of unlawfully and maliciously wounding with intent to cause grievous bodily harm. The two defendants had pleaded not guilty, claiming that they were paid to carry out the attack ‘to teach Lau a lesson’; but refused to disclose their paymasters. In the trial, no motive has yet been established for the attack, and the mastermind(s) remain at large. In fact, shortly after the attack, the Police Commissioner had already summarily dismissed general suspicion that the attack was related to Mr. Lau’s journalistic work, without explaining whether any investigation had been conducted to reach such a conclusion, reflecting the lack of resolve or sensitivity in protecting the freedom of the press. It is very much doubted that the police is determined to bring the mastermind(s) of Mr. Lau’s attack to justice, and put the series of deliberate and malicious attacks against journalists not aligned with the Chinese Government to a stop.

1.7 Causeway Bay Missing Booksellers’ Case

The case of the Causeway Bay Booksellers involved five booksellers who had gone missing one after another since October 2015, all involved with a publishing house called Mighty Current and its related bookstore Causeway Bay Books. They published and sold books critical of China and the Chinese Communist Party. Among them, it was believed that Gui Minhai was abducted from Pattaya, Thailand, and Lee Bo from Hong Kong to mainland China, without his travel documents;²⁰ the five later turned up in detention in mainland China. Four of the men gave ‘public confessions’ on Phoenix TV in February 2016, giving details of their alleged offences of ‘illegal book trading’.²¹ Under the principle of One Country Two Systems (OCTS), mainland

¹⁸ HKJA’s submission to CAT, *op. cit.*, paras 3-4,

¹⁹ In February 2016, there was a major and violent clash between protesters and police, during which at least four reporters were attacked by protesters and police officers. One of them was a *Ming Pao* reporter. He was watching the disturbances from the top deck of an abandoned bus. The police ordered him to come down, and then several policemen approached him, pushed him to the ground with their shield, and kicked and hit him, including on his head. It happened after he showed his press card and shouted he was a journalist. No officers have been charged in connection with the assault. HKJA’s submission, *op. cit.*, pp 2 and 28.

²⁰ A detailed account of Gui’s disappearance can be found in Oliver Holmes, “Gui Minhai: the strange disappearance of a publisher who riled China’s elite”, *The Guardian*, 8 December 2015.

²¹ They are Lam Wing Kee, Gui Minhai, Lui Bo and Cheung Jiping, see Sneha Shankar, “Hong Kong

laws are not applicable in Hong Kong, and mainland law enforcements shall not exercise their power in Hong Kong. In this case, mainland authorities exerted powers over Hong Kong residents outside of their jurisdiction, and violated the basic rights of the individuals according to Hong Kong law. It is a serious breach of the OCTS principle.

The Hong Kong authorities, including the police and the immigration, were slow and ineffective in investigating the disappearances of these Hong Kong residents. In addition, when one of the victims Lam Wing Kee, decided to blow the whistle when he returned to Hong Kong in June 2016 at risk to his personal security, the assistance and protection he received from the police was allegedly insufficient. He confirmed to the media that the ‘public confessions’ were made under coercion, and he was maltreated and denied access to a lawyer during detention and interrogations.²² Soon after he spoke out, a campaign of character assassination against him began.²³

The saga reveals the inability or unwillingness of the Hong Kong authorities to protect Hong Kong residents against violations of rights by the mainland authority. So far, Hong Kong authorities have failed to denounce mainland authorities for the severe violation of the OCTS principle to reassure Hong Kong residents that mainland laws and mainland law enforcement have no authority in Hong Kong.

1.8 Rise of Xenophobia

Since the beginning of 2016, certain media outlets, political parties and government officials have been exaggerating the asylum seeker/refugee issue, despite the lack of sound official statistics, including proof that crimes perpetrated by persons who are ‘refugees’ have risen in recent years. Nevertheless, some politicians continue to produce sensational figures and make irresponsible statements when describing Hong Kong’s ‘refugee crisis.’ Ethnic minorities also suffer partly due to public confusion between resident ethnic minorities and refugees, and partly because of the heightened discrimination targeting them.

Civil society groups criticised the discussions as blowing a non-issue out of proportion, and overlooking the actual problem of the long processing time of the

Booksellers Confess On Chinese Media That They Illegally Traded Books On Mainland”, *International Business Times*, 29 February 2015.

²² See Lam Wing-kee’s own account of his disappearance from Hong Kong and detention in China at “The Missing Bookseller: Lam Wing-kee’s ordeal, in full and in his own words”, *Hong Kong Free Press*, 11 September 2016.

²³ See for example Stuart Lau, “Character assassination? Accusations fly as bookseller Lam Wing-kee’s lover calls him a liar and ‘not a man’ for tricking her”, *South China Morning Post* 19 June 2016.

Unified Screening Mechanism.²⁴ However, the Government has failed to respond to the rise of xenophobia and racial discrimination, showing a lack of determination to eliminate racism in Hong Kong.

On the other hand, amid deepening China-Hong Kong conflicts, anti-Chinese mainlander xenophobia has been on the rise. Some local residents resent visitors from mainland China who stock up on a large variety of commodities, and immigrants from mainland China for sharing resources such as social welfare in Hong Kong, and nicknamed them as ‘locusts’. Expressions of anger against mainlanders and new immigrants from the Mainland are not uncommon, but appear to have escalated lately. There have been several ‘anti-locusts’ protests, which had mostly ended up in scuffles between protesters and mainlanders or new immigrants.²⁵

2. Establishment of watchdogs

In Hong Kong, there is no national human rights institution, or human rights commission in local terminology, but there are watchdogs in certain 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. These include the Equal Opportunities Commission (EOC), the Privacy Commissioner for Personal Data (PCPD), the Independent Police Complaints Council (IPCC), the Ombudsman, the Independent Commission Against Corruption (ICAC), the Commissioner on Interception of Communications and Surveillance, and the Legal Aid Services Council.

(i) Law related to Watchdogs

Legal Basis

Legal foundation	EOC is established based on the <i>Sex Discrimination Ordinance</i> (Cap. 480), 1996; The Ombudsman is created under the <i>Ombudsman Ordinance</i> (Cap. 397), 1989; PCPD was constituted based on the <i>Personal Data (Privacy) Ordinance</i> (Cap. 486), 1996; IPCC was
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²⁴ See for examples, *Stop Discrimination: Community Calls for Calm on Refugee Debate*, 11th April, 2016, <http://www.justicecentre.org.hk/jointstatement-eng/>; and Hong Kong Unison, “A cynical appeal to xenophobia: Hong Kong’s ‘fake refugee problem’ is fake in itself”, *Hong Kong Free Press*, 15 May 2016.

²⁵ Amie Tsang, “Hong Kong anger at Chinese ‘locust’ shoppers intensifies”, *Financial Times*, 16 February 2015.

reconstituted based on the *Independent Police Complaints Council Ordinance* (Cap. 604), 2009; ICAC was founded based on the *Independent Commission Against Corruption Ordinance* (Cap. 204), 1974; the Commissioner on Interception of Communications and Surveillance was created by the *Interception of Communications and Surveillance Ordinance* (Cap. 589) 2006; the Legal Aid Services Council was founded in 1996 pursuant to the *Legal Aid Services Council Ordinance* (Cap. 489).

Impetus/motivation for establishment of NHRI	Current watchdogs are of limited mandate and most human rights areas are not covered. However, the government insists that the existing mechanism has worked well and that there is no need for establishing an NHRI. ²⁶
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Selection and Appointment

Selection process	Selection processes for members of watchdogs lack transparency and public participation. EOC is governed by a Board which is comprised of a Chairperson and 16 members, all appointed by the CE. The PCPD, IPCC, the Commissioner of the ICAC, the Ombudsman, and the Legal Aid Services Council are also appointed by the CE. There is no specification of the selection process in legislation or regulations. ²⁷
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The Commissioner on Interception of Communications and Surveillance is appointed by the CE on the recommendation of the Chief Justice.

In the selection of EOC Chairpersons and Privacy Commissioners, the government has started a practice of appointing a government dominated Selection Board composed of the heads of the relevant policy bureaus, Executive Councillors (the CE's cabinet members) and, but only for selection of EOC chairperson, a person with NGO background, to recommend the most suitable candidate to the CE for appointment.

²⁶ See Part 2(ii) of this report.

²⁷ Section 5 of the *Legal Aid Services Council Ordinance* requires the CE to consult the two legal professional bodies before appointing those council members specified by the Ordinance to be from their own profession. However, the CE may appoint a person other than those recommended by the bodies in the consultation.

Qualifications for membership	There is no clear indication of membership qualification or criteria of applicant assessment of the watchdogs, except those brief professional background requirements and occupational exclusions in respect of the Legal Aid Services Council and the Commissioner of Interception of Communications and Surveillance.
Any legal provision for a composition that must reflect pluralism, including gender balance and representation of minorities and vulnerable groups	There is no provision in law regarding the pluralism of the composition of the watchdogs. There is however a government policy adopted in 2015 to raise the appointment rate of women to government advisory and statutory bodies to 35%. ²⁸
Any legal provision for a fixed term of office of reasonable duration, and clear process for removal or impeachment	Members of EOC are appointed for a term not exceeding 5 years, with no limitation on number of reappointments; PCPD shall hold office for a period of 5 years and shall be eligible for reappointment for not more than 1 further period of 5 years; for IPCC, the term is not exceeding 3 years, no limitation on number of reappointments; the Commissioner on Interception of Communications and Surveillance is appointed for a period of 3 years, no limitation on number of reappointments; the Ombudsman holds office for a period of 5 years and shall be eligible for reappointment.
Policy on secondees or appointments by government	Appointment policy unknown.
Elements of the state that are beyond the scrutiny of the watchdogs	Although the government is not normally exempted from the scrutiny of the watchdogs (except under the Race Discrimination Ordinance, which does not fully cover government exercise of powers and functions), most government functions are beyond the watchdogs' scrutiny due to their narrow mandates. ²⁹ In certain bodies, there is an exclusion of certain jurisdiction of the relevant watchdogs for reasons like prejudicial to

²⁸ 2015 Policy Address by Chief Executive, para. 149.

²⁹ Response from the EOC: *Government exercise of powers and functions are under the scrutiny of the Sex Discrimination Ordinance, Disability Discrimination Ordinance and the Family Status Discrimination Ordinance. The EOC's application to the court for judicial review of the Secondary School Places Allocation System in 2000 is an example. However, all government functions and powers are not covered under the Race Discrimination Ordinance.*

“security of Hong Kong”,³⁰ or unlawful acts to be monitored by the watchdogs do not cover those related to “done for the purpose of safeguarding the security of Hong Kong”.³¹

(ii) Efforts or initiatives undertaken to establish an NHRI

Despite the repeated calls by UN treaty bodies to establish a fully independent national human rights institution in conformity with the Paris Principles, the government once again insisted that “there is no need for establishing a statutory human rights institution in addition to or to duplicate the existing mechanism” because the existing mechanism has worked well.³²

While the civil society continues to demand for the establishment of a human rights commission, in face of the current unprecedented erosion on human rights condition, and the previous efforts that had availed no success, it is pessimistic on the prospect of success. Therefore there had been no significant concerted effort or initiative undertaken by the civil society for such cause during the report period, except those in lobbying the UN Committee Against Torture for recommending a human rights commission for HK.³³ Nevertheless, civil society continues to employ the Paris Principles and other international standards as yardsticks to criticise the Government and the human rights institutions. They remain crucial reference points, especially during the current rapid human rights regression.

3. Critique of Existing Watchdogs

The risk of not having a human rights commission in compliance with the Paris Principles is that under the regime of fragmented mandate of various statutory bodies,

³⁰ E.g. Section 14, *Ombudsman Ordinance*. Prejudice to defence or international relations of Hong Kong are other exclusions listed in the section. See also section 29, *Independent Police Complaints Council Ordinance*. Prejudice to investigation of any crime is another exclusion listed in the section.

³¹ E.g. Section 59, *Sex Discrimination Ordinance*, and section 57, *Personal Data (Privacy) Ordinance*.

³² “Human rights are fully protected by law in the HKSAR. The legislative safeguards are enshrined in the Basic Law, the Hong Kong Bill of Rights Ordinance (Cap. 383) and other relevant ordinances. These are buttressed by the rule of law and an independent judiciary. There is also an existing institutional framework of statutory organisations which help promote and safeguard various rights, including the EOC, the Privacy Commissioner for Personal Data, The Ombudsman, and legal aid services. The HKSAR Government’s performance in promoting and safeguarding human rights is open to public scrutiny through regular reports to the United Nations and is under the constant scrutiny of the LegCo of the HKSAR, the media and various non-governmental human rights organisations”. Constitutional and Mainland Affairs Bureau *The Hong Kong Special Administrative Region (HKSAR) Government’s Response to the List of Issues adopted by the United Nations Committee against Torture in relation to the sixth periodic report of the People’s Republic of China* Constitutional and Mainland Affairs Bureau Hong Kong 2015, Constitutional and Mainland Affairs Bureau Hong Kong, November 2015, para 2.1.

³³ See e.g. the Joint Submission to CAT, *op. cit.*

human rights enshrined under the Basic Law, the ICCPR and the ICESCR are not offered full-fledged protection.³⁴ Moreover, the powers and independence of these government watchdogs have been called into question. The crippled institutions may be used as ‘alibi institutions’ to legitimise government action or performance.

3.1 Equal Opportunity Commission (EOC)

The EOC’s main function is to implement the Sex Discrimination Ordinance 1995, the Disability Discrimination Ordinance 1995, the Family Status Discrimination Ordinance 1997, and the Race Discrimination Ordinance 2008. The Commission is not an agent or servant of the Government,³⁵ and the law stipulates that the Chairman cannot be a public servant,³⁶ in the interests of independence from the Government.

However, the Commission members and the Chairperson need not have knowledge and expertise in human rights, and the Chairperson’s remuneration and terms and conditions of appointment are decided by the CE.³⁷ It had been criticised that the members do not possess solid track records in anti-discrimination or substantial knowledge in human rights,³⁸ and that the appointment process generally lacks transparency and excludes civil society participation.³⁹

The former Chairperson of the EOC, Dr. York Chow, who has been very outspoken

³⁴ The EOC shares a similar view: *Currently, there are a number of statutory bodies such as the EOC and the Office of the Privacy Commissioner for Personal Data in the HKSAR to investigate and monitor the violations of specific areas of human rights. Such fragmented arrangement fails to provide comprehensive protection of all Covenant rights. The EOC believes that a single statutory platform with a broad mandate covering all international human rights standards accepted by Hong Kong should be established. The EOC has written to International Bodies such as the United Nations Human Rights Committee and the Committee on Economic, Social and Cultural Rights of the United Nations to express this view before.*

³⁵ Sections 63(7) of Sex Discrimination Ordinance.

³⁶ *Ibid.*, section 65(3).

³⁷ *Ibid.*, Schedule 6.

³⁸ Response from EOC: *The new Chairperson however had experience in race relation work in Britain and was working closely with UNESCAP on the promotion of rights of the older persons in the Asia Pacific.*

³⁹ The Selection Board appointed to advise the Chief Executive on the recruitment was chaired by Mrs Laura Cha and comprised Mr Chow Chung-kong, Mr Bernard Chan, Mr Tsang Kin-ping, the Secretary for Labour and Welfare and the Secretary for Constitutional and Mainland Affairs (see Government Press Release, 18 March 2016, <http://www.info.gov.hk/gia/general/201603/18/P201603180314.htm>). Among the members, Mr Tsang Kin-ping is from an NGO.

and active in anti-discrimination causes – especially taking significant steps in pushing for improving the anti-discrimination laws in Hong Kong, in particular discrimination against sexual minorities – was not reappointed for a second term.

The government has no plans to improve the EOC's transparency and independence, or to take any measures to bring it in line with the Paris Principles.

3.1.1 Wide-ranging review of Hong Kong anti-discrimination legislation

The EOC is tasked with the responsibility to keep under review the working of the anti-discrimination ordinances and make recommendations for amendments as appropriate to the Government. In 2013 the Commission began a comprehensive review of Hong Kong's anti-discrimination legislation, entailing a four-month public consultation from July 2014 onwards. In March 2016, the Commission publicly released its submission to the Government on potential reforms to the anti-discrimination legislation, totalling 73 recommendations covering a wide range of equality issues, with 27 issues identified as priority for legislative reforms. It is believed that the recommendations, if implemented, would improve protection for equality.

However, it is uncertain when the administration would follow up on the recommendations,⁴⁰ or whether the EOC under its new leadership of Prof Alfred Chan Cheung-ming would pursue the review result rigorously.⁴¹

3.2. Independent Police Complaints Council (IPCC)

Although the IPCC is an independent statutory body, as reconstituted by the IPCC Ordinance (IPCCO), it continues to lack essential authority of categorising complaints, investigation, and meting out punishments. All complaints against the police are

⁴⁰ In response to one LegCo member's question regarding whether the government will adopt the 73 recommendations put forward by EOC in its Submissions, the Secretary for Constitutional and Mainland Affairs, Raymond Tam said, "[w]e have received the EOC's report on the review of the four anti-discrimination ordinances. We noted that the report covered a wide range of issues and contained a total of 73 recommendations, including 27 which were considered by the EOC to be of higher priority. We also noticed that the report contained some relatively complicated and sensitive issues, and the public have expressed strong and divergent views on these issues. We will carefully study the content of the report and consider how to follow up on the recommendations, and maintain liaison with the EOC" on 11 May 2016, <http://www.info.gov.hk/gia/general/201605/11/P201605110568.htm>.

⁴¹ Response from EOC: *The EOC will definitely continue our discussion with the Government and engagement with our stakeholders to carry our recommendations of the Discrimination Law Review forward, in order to take our anti-discrimination legislation to the next level.*

referred to the Complaints Against Police Office (CAPO) for handling and investigation under the two-tier police complaints system.

CAPO categorises whether a complaint is reportable or only notifiable.⁴² While the CAPO must submit all investigation reports on reportable complaints to IPCC for scrutiny, a complaint categorised as notifiable is outside the purview of IPCC. The IPCC only receives summaries of notifiable complaints from CAPO regularly. It is worried that CAPO could bury complaints by abusing the power of categorising complaints. Also, complaints lodged by a person in his official capacity as a member of the police force are not submitted to the IPCC, and anonymous complaints or complaints made by a third party are all categorised as notifiable complaints. These restrict the IPCC from learning about actual problems that occur from shortcomings in police practices and procedures, thus preventing it from fulfilling one of its functions – to make recommendations to the police to avoid future reportable complaints.

As part of the police force, CAPO has jurisdiction over complaints against its fellow officers, and police commanders above it in the chain of command. The conflict of interests in a police department investigating complaints against the police continues to severely undermine the police regulatory system. It remains true that the CAPO fails to win the trust of many victims of police abuse. To them, CAPO is just a convenient place for the police and the Government to dismiss complaints. It has become another source of grievance and a key target of complaint itself in the police

⁴² According to s.11 of the IPCCO, a complaint received by the Hong Kong Police Force must be categorised as a reportable complaint if the complaint relates to the conduct of a member of the police force while on duty or in the execution or purported execution of his duties, whether or not he identified himself as such a member, and, at the same time, meets other conditions that make it a reportable complaint under the Ordinance in that, for instance, it is made by a complainant directly affected by the police conduct, irrespective of whether the allegation involves any criminal elements. Such a complaint shall be investigated by the CAPO with the investigation report submitted to the IPCC for examination in accordance with the statutory requirements under the Ordinance. Secretary for Security Lai Tung-kiok, Reply to a question by LegCo member about Complaints Against Police system, 29 October 2014, <http://www.info.gov.hk/gia/general/201410/29/P201410290795.htm>.

force.⁴³

The IPCC is dependent on CAPO to conduct the investigation at its own pace and manner. If IPCC disagrees with CAPO's investigation report, it can only repeat the cycle of negotiating with CAPO until one side agrees with the other. Should CAPO and IPCC still fail to come to agreement, the CE may be informed and he may make a final decision over the case, which is expected not to avail much public confidence.

The case of the police commander Franklin Chu King-wai (as he then was) is a case in point. Chu was filmed hitting pedestrians in Mongkok on 26 November 2014, during the period of the 'Umbrella Movement'. After attempting to close the case with excuses, and asking the complainant to withdraw the complaint,⁴⁴ CAPO finally submitted its investigation report to IPCC for scrutiny. The IPCC disagreed with CAPO's finding, and stated that Chu's count of assault should be substantiated. In response, CAPO revised the report finding, stating that the count of assault was 'not fully substantiated' but a count of 'unnecessary use of authority' was substantiated, believed to be an attempt to downplay the severity and criminal nature of the act.⁴⁵ The IPCC again rejected the report.

Eventually the police conceded after consulting the DoJ, and at the same time referred the case to it for a decision of whether to prosecute.⁴⁶ However, despite a substantiated count of assault, to date, Chu has yet to be prosecuted or punished. In December 2015, SoJ Rimsky Yuen told the press that a decision on whether or not to follow up on the case would be made after an assessment was carried out in accordance with the evidence and the prosecution code. However, Yuen said they had not received anything from the police yet, and therefore he could not report on the progress of the case.⁴⁷ The saga reveals the IPCC's limited power in investigating misconduct by the police, and lack of power in pursuing follow-ups and ensuring proper prosecution.

⁴³ Hong Kong Human Rights Monitor, *Submission of the Hong Kong Human Rights Monitor on Independent Police Complaints Council Bill* December 2007.

⁴⁴ "Complainant lodged complaint for 70 times for injury by batons but still got his complaint cancelled", *Apple Daily*, 29 June 2015.

⁴⁵ Ellie Ng, "Police reject watchdog's ruling, ask for revote on superintendent assault case", *Hong Kong Free Press*, 20 July 2015.

⁴⁶ Ellie Ng, "Superintendent assault case does not constitute criminal offence – police report", *Hong Kong Free Press*, 6 August 2015.

⁴⁷ Karen Cheung, "Rimsky Yuen: Department of Justice undecided whether to prosecute former superintendent", *Hong Kong Free Press*, 15 December 2015.

3.2.1. No access to police guidelines and fettered interpretation of mandate

It is understood that the police claim that police guidelines such as on the use of force, public order, making video records etc. are internal documents and that they are inappropriate to disclose, even to the IPCC. It severely hinders the IPCC from discharging its statutory function of "[identifying] any fault or deficiency in police practices or procedures that has led to or might lead to a Reportable Complaint".⁴⁸ While this function clearly mandates the IPCC to review police practices and procedures for any fault or deficiency *before* receiving any actual complaint, both the Security Bureau and the police disagree and hold that the IPCC only has the mandate to review when an actual complaint has been made, disrespecting and undermining the watchdog's statutory function.⁴⁹

On the other hand, the Chairperson of IPCC Larry Kwok failed to make a stand for IPCC's mandate. During the discussion of the planned purchase of three water cannons for crowd control, Helena Wong Pik-wan, an IPCC member, requested the police to submit the water cannon guidelines to the IPCC for review, for concerns of their potential for misuse and causing injuries. The police rejected the request, citing that the guidelines contain police operational details that must not be disclosed to the public. The Chairperson Larry Kwok conceded without protest, demonstrating the IPCC's way of fettering its own mandate.

3.2.2. Controversial Appointment

Amid a plunge in public confidence in the IPCC, the CE CY Leung appointed four members, including a high profile anti-Occupy activist onto the IPCC. A professor of politics, Ma Ngok,⁵⁰ commented that: "[T]he appointment will make the public feel as if the government wants to appoint "police sympathisers" onto the IPCC, and it could lower the public confidence towards the watchdog body. Ma said that this showed the government did not care about its image; rather, "they wanted to ensure they are in control of power and that nothing will go wrong".⁵¹

⁴⁸ IPCCO section 8(1)(c).

⁴⁹ Mr Freddy CHIK, Assistant Secretary (Security), Security Bureau, and Ms Kitty CHIK, Superintendent of Police, Hong Kong Police Force, responses to questions at 28th Meeting of the Human Rights Forum on 12 July 2016.

⁵⁰ Head of the Department of Government and Public Administration at the Chinese University of Hong Kong.

⁵¹ Karen Cheung, "CY Leung appoints pro-Beijing member to police watchdog body IPCC", *Hong Kong Free Press*, 31 December 2015.

On the other hand, there was an enormous shake-up at the IPCC in the 1st quarter of 2016: secretary-general Chu Man-kin and four other senior staff resigned.⁵² They were employed during the term of the previous chairperson, who was more credible than the current chairperson Larry Kwok, whose appointment in 2014 was criticised by civil society for his likely pro-Beijing tendency, because he served as a member of the Chinese People's Political Consultative Committee, and his lack of experience in defending human rights.

By appointing pro-government individuals and with the loss of more liberal members in the IPCC, the IPCC is further losing its credibility as a human rights institution.

3.2.3. Independent Investigation of the Umbrella Movement

The government has ignored the UN Committee Against Torture's recommendation to conduct an independent investigation into the allegations of excessive use of force by the police and anti-demonstrators during the Umbrella Movement.⁵³ It claims that relevant complaints are being processed by the CAPO and the IPCC. It is worried that deficiencies in the police complaint mechanism contributing to the large-scale violations and impunity would not be corrected.

3.3. Independent Commission Against Corruption (ICAC)

ICAC is mandated to combat corruption in public and private sectors. The Commissioner is directly responsible to the CE for his or her major duties in combatting corruption; this is, however, a fundamental defect which gives rise to the question: what if the person connected with or conducive to corrupt practices is the CE himself or herself?

In 2012, allegations against the then CE Donald Tsang Yam-kuen for receiving benefits from tycoons surfaced. His term ended in the same year. ICAC's decision to prosecute came after a drawn-out investigation spanning three years, and the trial is scheduled to be in January 2017. Former Director of Public Prosecutions of Hong Kong Grenville Cross commented that the sluggish pace of the investigation could "make the Guinness Book of World Records", and worried that the stalling in prosecution could damage public confidence in the law enforcement.⁵⁴

In 2014, current CE CY Leung was exposed by an Australian newspaper for receiving

⁵² "More executives leaving, the Secretary-General would not stay, big shake-up at IPCC", *Apple Daily* 17 March 2016.

⁵³ UN Committee Against Torture: Concluding Observations on the fifth periodic report of China with respect to Hong Kong, China, United Kingdom of Great Britain and Northern Ireland (Hong Kong), 3 February 2016 (CAT/C/CHN-HKG/CO/5), para15(a).

⁵⁴ Karen Cheung, "Donald Tsang corruption investigation sluggish progress 'could make Guinness World Records' – former prosecutions director", *Hong Kong Free Press*, 9 September 2015.

a secret US\$7 million payment from Australian engineering company UGL, whose offer to Leung's property firm, DTZ, was trumped by a rival bidder on the same day of the agreement of the said payment. According to a letter outlining the agreement, one condition of the payment was that CY Leung would "support the acquisition of the DTZ group by UGL". Leung agreed to the secret payment in early December 2011, and signed with UGL just after announcing his intention to run for Hong Kong's CE. He did not disclose the payment, which was paid after he took office.⁵⁵

The case was referred to the ICAC in 2014, but there seems to be no progress so far. LegCo member Albert Ho Chun-yan has been following this case. He told the press in July 2016 that according to "credible sources", the lack of progress was because neither the CE Office nor the Executive Council had responded to requests for information by the ICAC made nearly a year ago.⁵⁶

Meanwhile, there was an unusual staff shake-up at the ICAC – acting Head of Operations Rebecca Li Bo-lan, the highest-ranking official involved in the UGL investigation and known for solving several significant cases throughout her career – was replaced by the current Director of Investigation (Private Sector) Ricky Yau Shu-chun. The switch is a controversial choice, because "unless Rebecca Li made huge mistakes, there would not be a change",⁵⁷ while Ricky Yau was involved in approving expenses for former commissioner Timothy Tong Hin-ming, who is accused of claiming lavish expenses on food and gifts. ICAC staff was shocked at news of the switch. CY Leung was called on to explain whether he had taken part in the decision relating to Li's position in the ICAC.

3.4. Commissioner on Interception of Communications and Surveillance

The CIOCS is entrusted by the Interception of Communications and Surveillance Ordinance (ICSO) with the main functions of overseeing the compliance by four law enforcement agencies (LEAs)⁵⁸ with the statutory requirements in relation to interception of communications and covert surveillance; and conducting reviews to ensure full compliance by these LEAs and their officers with the requirements of the

⁵⁵ Angus Grigg and Lisa Murray, "Secret \$7m payment to C.Y. Leung agreed to on same day rival bidder trump", *The Sydney Morning Herald*, 14 October 2014.

⁵⁶ Karen Cheung, "CY ducks questions as to whether corruption watchdog shake-up is linked to his secret UGL payments", *Hong Kong Free Press*, 11 July 2016.

⁵⁷ Per Stephen Char Shik-ngor, former lawyer for chief investigators at Chantal Yuen, "Corruption watchdog replaces acting Head of Operations in surprise move", *Hong Kong Free Press*, 6 July 2016.

⁵⁸ Customs and Excise Department, Hong Kong Police Force, Immigration Department and ICAC.

Ordinance, the Code of Practice issued by the Secretary for Security and the prescribed authorisations.⁵⁹

The Security Bureau proposed amendments to the ICSO in 2015, which was passed by the LegCo in 2016. Among the amendments, it is widely welcomed that the CIOCS is now granted the power to listen to intercepted materials to investigate possible violations by LEAs.⁶⁰ However, the amendments failed to address other severe weaknesses in the ICSO.

3.4.1. Not regulating interceptions/obtaining Internet Communications

Under ICSO, ‘intercepting act’ means the inspection of the contents of the communication *in the course of its transmission* by a postal service or by a telecommunications system, by a person other than its sender or intended recipient. Internet communications, however, are stored on service providers’ servers after the instant transmission. It is suspected that LEAs can access the communications by requesting for the stored data from the service providers, thereby bypassing the ICSO’s regulations. The former CICSO confirmed that it had not received any report from LEAs that requested authorisations to surveil Internet communications tools, implying that the ICSO has indeed been bypassed. Since the ICSO’s introduction a decade ago, Internet communication tools such as email, Whatsapp, Telegram, have become a major way of communication among Hongkongers, including political parties, NGOs, activists, journalists and lawyers. Not amending the ICSO according to technological advancements is either extreme ignorance or intentional, so that LEAs can violate privacy without stringent oversight.

3.4.2. Lack of Criminal Consequence for Violations by LEAs

⁵⁹ Commissioner on Interception of Communications and Surveillance *Annual Report 2014 Summary*, 2015, para 2.

⁶⁰ See for example Hong Kong Journalists Association *Submission to LegCo on Interception of Communications and Surveillance (Amendment) Bill 2015*, 2 May 2015.

Currently, any officials who violate the ICSO are punished according to respective departments’ internal disciplinary mechanism. Considering the grave impact of unauthorised interception of communications and surveillance on privacy, it is undesirable to only rely on Personal Data (Privacy) Ordinance or the Common Law offence of misconduct in public office for prosecution; the criminalisation of certain violations against ICSO is more favourable.

3.4.3. Failure to accord heightened protection for journalistic materials

The amendment bill’s omission to accord equal protection for journalistic materials as information protected by legal professional privilege is also criticised.⁶¹

4. Conclusion

The Government reiterated that it had no plan or timetable to set up a human rights institution despite the UN Treaty Bodies⁶² repeated recommendations that Hong Kong should consider establishing a human rights institution, in accordance with the Paris Principles, with adequate financial and human resources, with a broad mandate covering all international human rights standards accepted by Hong Kong and with competence to consider and act on individual complaints of human rights violations by public authorities. The UN Human Rights Committee recommends that such institution should be empowered to enforce the Hong Kong Bill of Rights Ordinance, which incorporated most articles of the ICCPR⁶³.

The government’s claim that the existing mechanism works well is obviously unsound, as shown in this report. In fact, human rights in Hong Kong are facing enormous challenges from within and from China. Hong Kong needs a truly independent human rights commission with a broad mandate and authority to enforce the Bill of Rights Ordinance and rights enshrined in other domestic and international instruments.

The United Nations Committee Against Torture held a hearing on Hong Kong’s implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in November 2015. Hong Kong civil society

⁶¹ *Ibid.*

⁶² UN Human Rights Committee in CCPR/C/CHN-HKG/CO/3, para.7, reiterating its previous recommendation (CCPR/C/HKG/CO/2, para.8); UN Committee on Economic, Social and Cultural Rights in E/C.12/CHN/CO/2, para.40; and UN Committee on the Rights of the Child in CRC/C/CHN/CO/3-4, para.20.

⁶³ UN Human Rights Committee: Concluding Observations: Hong Kong, China, 29 April 2013 (CCPR/C/CHN-HKG/CO/3), para 7.

submitted joint shadow reports to the Committee Against Torture and the establishment of a Human Rights Commission 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 a human rights commission over the years despite repeated recommendations by UN treaty bodies, and Beijing's strong desire to control Hong Kong in more and more aspects, the hope of establishing an oversight body that can keep the government in check is slim.

MONGOLIA: ABSENT IN NATIONAL POLICY-MAKING *Centre for Human Rights and Development*¹

1. Introduction

Mongolia's human rights record has been reviewed by the United Nation's Human Rights Council (HRC) in the second cycle of the Universal Periodic Review (UPR) in 2015. The members of the UN HRC encouraged the government of Mongolia on its efforts to implement the recommendations of the first cycle; and provided further recommendations.

By initiative of the president of Mongolia, a 'Law on Amnesty' was adopted on the occasion of the 25th anniversary of the first democratic election and the establishment of the permanent parliament. In accordance with this law over 3,000 prisoners were released; and out of which 1,700 were fully discharged of guilt¹. The number of cases filed relating to corruption and abuse of public office has increased². A new criminal code has been adopted, which *inter alia*, has abolished the death penalty. Other laws have been adopted including the Law on Public Hearing, and the Law on Development Policy and Planning, to ensure public participation in decision-making and an opportunity to monitor the state budget expenditure.

A number of sensational cases in 2015 were reminders of the need for a legal environment to protect human rights defenders' rights. These included a case of torture for political purposes; two cases on serious violations of children's rights; and the government's decision to demarcate huge lands as free trade [special economic—ed.] zones. However, the NHRCM's position is still unclear on these violations, and the interests of the public.

The National Human Rights Commission of Mongolia (NHRCM) was created by law in 2000, and established operationally in 2001. It has been reviewed three times by the International Coordinating Committee of National Human Rights Institutions (ICC); and awarded 'A' status each time. This accreditation expresses the success of the NHRCM in its performance over fifteen years. However, the UN HRC has advised the NHRCM in the UPR (2nd Cycle) "to undertake steps to comply better with the Paris Principles"². There have not being any amendments to its enabling law, since its adoption.

¹ *Contact Persons: G. Urantsooj <gurantsooj@rocketmail.com> and B. Enkhtsetseg.* The report draws on CHRD's presentation, 'Impacts of Cooperation Between Civil Society Organisations and the NHRC and Improving the Cooperation', at the 15th anniversary conference on the theory and practice of the NHRC; the NHRC's own report; documentary movie; interviews; and information from official websites. The draft report was circulated to NGO Forum (40 human rights organisations) and to the NHRC for comments. It was also presented at the second national human rights defenders forum for comments. These comments have been reflected in the final draft.

² The Government of Mongolia was reviewed by the UN Human Rights Council in 2010 and 2015 and received a total of 290 recommendations: 11 were related to the activities and independence of the National Human Rights Commission.

Since 2005, there have been a total of 39 recommendations to the NHRCM in the annual reports of the Asian NGO Network on National Human Rights Institutions (ANNI). Some of these recommendations were implemented; and with the following results including:

- NHRC regularly meets two times per year with representatives from civil society organisations, for improved cooperation and consultation;
- Stationing permanent senior officers at 21 provinces, providing closer service to local communities;
- Annual inspections of places of detention, for prevention of torture and protecting rights of suspects and defendants;
- Monitoring the violation of people’s rights and interests due to mining operations, under the theme of ‘Business and Human Rights’;
- Receiving complaints online;
- Conducting online trainings in human rights.

However, the recommendations for full compliance with the Paris Principles including transparency of appointment for members; requirements for members; laws, regulations and funding to ensure independence, have not been implemented.

One of the main reasons for the lack of progress in this area can be the domestic political and social situation; and particularly the interests of the two main political parties dominating the Mongolian parliament for the past 26 years³.

The annual reduction of the budget of the NHRCM is definitely restricting the opportunity for its full operation. Therefore, the NHRC itself needs to advocate for its financial independence and to be provided with adequate funds to perform its responsibilities.

The draft amendments to the enabling law of the NHRCM, initiated by the president and the parliament, are inadequate for full compliance with the Paris Principles, e.g. criteria for selection of members and the selection and appointment process itself.

Also, the people and the majority of civil society organisations have not demanded changes to the law of the NHRCM due to their lack of knowledge of the Paris Principles and the relevant mandate and responsibilities of the national institution for the promotion and protection of human rights.

In 2015, 42 laws of Mongolia have been amended and newly adopted: at least 17 may affect communities and the public interest. However, in 2015 while the NHRCM submitted its recommendations on 24 draft laws and policy documents; among these were only three of the 17 that have human rights implications.

³ The Mongolian People’s Party established in 1921, and the Democratic Party established in 1991, have ruled the country since the 1990 democratic revolution in turn or in coalition.

No	Laws of Concern	NCHRM’s response
1.	Law on Citizen’s Health Insurance	None
2.	Law on Free Zones	None
3.	Law on Laws and Regulations	Recommendation in 2014
4.	Law of Courts	None
5.	Law on Capital City Tax	None
6.	Law on Renovation of City, Settlement Areas	Recommendation in 2014
7.	Law on Babysitting	None
8.	Law on Public Hearing	None
9.	Law on Traffic Safety	None
10.	Law on Firearms	None
11.	Law on Amnesty	Recommendation in 2014 and 2015
12.	Law on Development Policy and Planning	None
13.	Law on Joint Pension	None
14.	Criminal Code	Recommendation in 2014 and 2015
15.	Law on Violations	Recommendation in 2014 and 2015
16.	Law on Election	None
17.	Law on Value Added Tax	None

As observed in a previous ANNI report, even after the NHRCM submits its recommendations on draft laws, there is no monitoring and follow-up on whether its opinions are taken into consideration in the final draft.

There is no provision in the enabling law of the NHRCM on its role in the legislative process. Such an article could have been included in the new Law on Laws and Regulations adopted in 2015. This opportunity was missed. While Article 13.2.5 of the new Law does state that all laws and regulations should be based on prior assessment of the human rights, economic, social and environmental impacts; there is no clarity on where the responsibility lies. It is vague provisions such as this, which are the reason for the failure of laws to fulfil their purpose.

Some CSOs recommended that the “NHRCM as the national human rights institution should make human rights assessment of draft laws and submit its conclusion within its scope of responsibilities in accordance with the Paris Principles”. However, this recommendation was not reflected in the final law.

2. Promoting and Protecting Human Rights

2.1 Compliance in Law

The authority of the national human rights institution as defined in the Paris Principles is reflected relatively well in the Law of the National Human Rights Commission of Mongolia (see table below).

Paris Principles	Law of National Human Rights Commission
To make recommendations, proposals, conclusions and information relevant to human rights to the parliament, government and other authorised organisations;	13.1.1. To make a proposal on any issues related to human rights in Mongolia; 13.1.2. To issue recommendations and proposal on whether laws, regulations and administrative decisions comply with basic human rights principles; 13.2.3. To produce a report on the situation of human rights and freedom in Mongolia;
Compliance of national laws, regulations and their implementation with international human rights norms;	N/A
To join international human rights treaties and conventions and to contribute to state reporting on implementation;	13.1.3. To submit comments on implementation of international human rights treaties and to contribute to government's reports on the treaties; 13.2.6. To support ratification and signing international human rights laws;
To provide professional assistance and coordination in developing and implementing human rights training and research programme;	13.2.4. To promote public awareness of human rights laws, regulations and international treaties and conventions; 13.2.5. To support human rights education activities;
To become a resource of information on human rights and to distribute human rights education to public;	13.2.1. To conduct research on human rights issues;
To cooperate with the United Nations, regional and other country's national organisations and non-governmental organisations as well;	13.2.2. To cooperate with international, regional and other human rights national organisations;
To conduct inspection based on complaints on human right violations and based on own initiative;	9.1. A citizen of Mongolia shall have the right to submit complaints to the Commission alone or jointly if his or her lawful rights and freedom in accordance with the Constitution of Mongolia, other domestic laws and international agreement, have been violated by a legal entity, organisation, a public servant or an individual.

However, the question remains whether the relevant legal environment exists for the NHRCM to implement its mandate in full and to operate at the level of national policy. In

other words, for the NHRCM to function at the national level there needs to be human rights policy and regulations, rather than a few employees working on a low budget and organising numerous human rights trainings in all provinces. In fact, the country lacks national policy and regulations on human rights. For instance, most of our state organisations and state authorities have not been able to shift their mindset from decision-makers to human rights duty-bearers until today. There is a lack of policy and regulations on improving human rights mechanisms, including national policy to provide human rights education and protecting the rights of human right defenders.

2.2 Compliance in Practice

The NHRCM has improved its procedure to receive complaints from people by providing free legal advice personally, or through telephone calls, and people can submit their complaints in writing or online⁴. The Commission has received and resolved 4,387 complaints; issued court claims on behalf of 25 individuals; and facilitated courts to compensate 441,753,172 MNT over the last 15 years. There is good precedent for an individual to be compensated, if the individual has been falsely charged.

In 2015, the NHRCM received 623 complaints of human rights violations and delivered 37 requests and recommendations to relevant organisations, officers and administrators. Almost 50 percent of all complaints came from suspects, defendants and prisoners. There has been a decline in the number of complaints in comparison to the previous two years. Due to the current economic situation, there are continuous violations of human rights, including non-payment of wages, unemployment, and poverty. However, there is no information on the process of monitoring of complaints procedures on the official website of the NHRCM as of today.

A case at the centre of attention of national human rights and civil society organisations and politicians was the arrest of S. Bulgan, the widow of S. Zorig who was one of the main representatives of the Democratic movement and murdered in 1998. According to the available information, S. Bulgan was arrested in November 2015 without any clear justification. This created suspicion that the arrest was politically motivated in the run-up to the parliamentary election in 2016. Some sources alleged that S. Bulgan was being tortured. The Human Rights NGOs Forum sent an official letter of request to the prosecutor and the NHRCM to inspect her conditions of detention. The chief of the Human Rights Sub-Committee of the State Great Khural, Bold Lu MP and Oyungerel Ts. MP, visited S. Bulgan.

On 19 April 2016, the Human Right Sub-Committee organised a meeting with law enforcement authorities, the NHRCM, and representatives of human right NGOs, to obtain further information on the case. During the meeting, the members of parliament were told that all information related to her case is classified as confidential.

At the meeting, questions were answered by the police, the prosecutors, the General Executive Agency of Court Decisions, and the NHRCM. However, the information

⁴ Interview with NHRCM Head of Policy Analysis and Human Rights Education, Agar-Erdene G.

differed from each other. All parties had the same answer in one respect: the denial of torture. These responses contradicted the information shared by S. Bulgan's mother, and a report from Amnesty International. Therefore, those parties were instructed to conduct deeper investigation and report back again. The Chief Commissioner of the NHRCM Mr. S. Byambadorj, who participated in the meeting, said: "We sent an official letter to the prosecutors' office and court decision enforcement authority and received relevant information on the case. The reply was that there were no violations of human rights". The meeting minute is on the official website of the State Great Khural. However, information relevant to S. Bulgan's case is not included.

The attitude of the NHRCM is indicative of its inability to conduct detailed investigation in a case that is politically sensitive. This charge has been denied by the NHRCM in its observations on the draft *2016 ANNI Report*. It claims, "The Commission has been paying constant attention to the criminal case of S. Zorig being murdered, and has taken relevant measures to protect S. Bulgan's rights as ensured by international conventions and local laws and regulations...Also we are not in a position to disclose detailed information on the case due to classified confidential information".

In fact, the issue is not the revelation of information collected as evidence during the filing and investigation procedure but the silence of the NHRCM on whether S. Bulgan is being fairly investigated; whether or not she is the victim of torture; and whether her conditions of detention are humane, in accordance with her rights as a citizen of Mongolia. Human rights NGOs and the public have expectations of the National Human Rights Commission to be independent and impartial to all parties; and to disclose the true information on the human rights situation of her detention. However, the NHRCM has failed to fulfil this expectation.

Prior ANNI reports have stated that the National Human Rights Commission has not paid sufficient attention to serious violations of human rights and public interest; nor made human rights assessments expressing its position; nor made attempt to communicate its point of view to the public. The situation has not changed for the better since then.

For instance, the violation of rights of human right defenders in 2015; the case of land grabs in Ulaanbaatar through redevelopment of the city; serious violations of children's rights (e.g. a baby girl was murdered because of domestic violence and a child was bitten by a teacher in a kindergarten); and the above case of alleged torture for political motives, have shocked the general public. Surprisingly, none of these cases are discussed in the NHRCM's annual report for 2015, which details its monitoring activities; recommendations to relevant organisations; and received and resolved complaints.

Although the Commission takes measures and conducts investigations based on the complaints received, it is strongly required that on its own initiative, it should promptly initiate investigations and issue independent human rights assessments on serious cases and violations, making sure to keep the public informed at all stages of its inquiries and as to whether the right to fair investigation has been violated or not. This is the primary

obligation of the national institution, and it has significant impact in creating the environment for the protection of the rights of citizens.

On average, the NHRCM brings two to three cases of human rights violations to court each year. In 2015, it brought one public interest case, where it was successful. In February 2015, the governor of Kherlen district (*soum*) of Dornod Province issued an order that "Citizens of the *soum* are to make a mutual responsibility agreement that fulfils equal participation for family's responsibility, property and relations...when registering their marriage". The Commission brought a complaint to the court because the order illegally violated citizens' rights to register their marriage voluntarily. The primary court found for the Commission and revoked the governor's order.

The NHRCM prepares an annual report on the '*Situation of Human Rights and Freedom in Mongolia*'. As of 2015, 14 reports have been submitted to the State Great Khural. One report was discussed by the State Great Khural, and the remaining reports were discussed by the Legal Standing Committee. Through these reports, 278 recommendations have been made for the attention and action of the parliament. The 13th annual report was discussed by the Legal Standing Committee and some relevant resolutions were issued. However, there is lack of information on the follow-up process as to what measures have been taken in accordance with the recommendations. In regard to this, the 2014 ANNI Report included a recommendation to evaluate the implementation of such resolutions. However, nothing has come of this.

There is an ex-officio council, which consists of representatives of civil society organisations actively engaged in human rights, organised by the NHRCM to assist in the fulfilment of its mandate. This mechanism has an important role to provide diverse perspectives on the activities of the Commission. Unfortunately, the correct steps have not been taken for its effectiveness. While it is supposed to meet twice a year, meetings are called on an ad-hoc basis as determined by the Commission. Also the ex-officio council is not allowed to initiate any activity. Therefore, in reality, it has been ineffective.

3. Thematic Issues

3.1 Human Rights Defenders and Women Human Rights Defenders

Mongolia does not have any rules, laws and policies to protect the rights of human rights defenders as of today. Also, 'human right defenders' (HRDs) and especially 'women human rights defenders' (WHRDs) are still unknown concepts at the national level, and even amongst civil society organisations.

In 2015, there were two cases recorded that demonstrate the requirement for a legal environment for protection of the rights of human rights defenders.

Case 1: Snow Leopards Protection Foundation biologist M. Lkhagvasumberel, 27, was found dead in Khuvsugul Lake (850 kms from Ulaanbaatar city) after going missing for six days since he left his home in November 2015. He had been working hard in Tost and TosonBumba, Umnugobi Province, where there are huge mineral resources, to protect

snow leopards and their habitat. Prior to his death, he had been attacked by strangers. According to the police investigation, he had drowned himself in an act of suicide. But his former colleagues and the local community strongly believe that he was murdered for protesting against the operations of mining companies, and supporting evidence to that effect was made public. Therefore, environmental NGOs and human rights NGOs are urging for further investigation.

Case 2: The founder and editor of the news and investigative '*Mongolian Mining Journal*' L. Bolormaa, was found dead at her home on 21 November 2015, with severe injury to the back of her head. The police investigation ruled out murder. However, the public and Globe International (an organisation to protect journalists' rights) oppose this finding and with the support of human rights NGOs are demanding further investigation based on the sensitive and dangerous nature of her human rights work.

The Human Rights NGOs Forum has submitted an official request to the NHRCM to pay attention to these cases; to proceed on the basis that the victims were human rights defenders; and to inform the public of its assessment of these deaths and the measures it has taken to secure justice for the victims. However, no proper response has been received as yet.

The Commission included its survey result on 'Implementation of Rights of Human Rights Defenders' in its 2014 annual report on the 'Situation on Human Rights and Freedom in Mongolia'. This survey was the first time on human rights defenders in Mongolia. However, no consolidated data could be extracted from the survey; and its conclusions and recommendations are too general for the protection of the rights of WHRDs and HRDs.

The NHRCM organised 72 trainings in 2015. However, none were on issues of human rights defenders. Furthermore, among the complaints it received last year, none related to the rights of human rights defenders.

Further to the cases above, on International Human Rights Day on 10 December 2015, civil society organisations conducted an open public meeting with the demand: "Let's Protect Rights of Human Rights Defenders". They gathered over 300 signatures to demand justice for the dead human rights defenders and the petition was delivered to the government of Mongolia and the Ministry of Justice.

Mr. J. Byambadorj, the chief commissioner of the NHRCM, participated in one of the monthly 'Human Rights Breakfast' meetings of the Open Society Forum, where the current situation of human right defenders was discussed. He expressed his support to cooperate with CSOs in drafting a Law on Human Rights Defenders. Later, he emphasised the demand for reform of the legal environment for human rights defenders in a meeting of the Human Rights Sub-Committee of the State Great Khural on 18 February 2016. A working group of the NHRCM has subsequently been appointed to work on the draft law with the financial and technical assistance of the Open Society Forum.

4. Conclusion and Recommendations

In the past 15 years, the NHRCM has paid significant attention to the prevention of torture and the protection of the rights of both suspects and defendants. Based on the annual reports of the NHRCM, more than 50 percent of its monitoring work has been conducted in detention centres and prisons; and also more than 50 percent of all complaints have come from suspects, defendants and prisoners.

On the other hand, the Commission's activities have not been adequate in building and strengthening the mechanisms for victim and witness protection. For instance an independent organisation called the 'Marshal Authority' was established to enforce the Law on Victim and Witness Protection. But after the change of government there was discussion on closing this new office; despite strong protests in 2015 by human rights organisations and in particular those organisations which provide direct assistance to victims. However, the newly elected parliament after the 2016 election voted in favour of the closure.

If the NHRCM and CSOs had worked together to persuade the government to change its decision by reminding it of Mongolia's human rights obligations; and to convince the authorities not to give up those existing human rights achievements, perhaps the only independent organisation for the safety of witnesses and victims could have been saved.

The transfer of the Secretariat of the National Committee on Gender into the structures of the Ministry of Population Development and Social Welfare in 2014 has practically stopped the implementation of the gender equality policy. However, the NHRCM has not expressed its opinion on this development.

Further, there is lack of cooperation with CSOs to support initiatives and activities for adoption of urgent laws and regulations for protection of victims' rights. For instance, although the Law on Combating Human Trafficking was adopted in 2011, the relevant rules and regulations for its implementation have yet to be approved. The national programme that was implemented in 2014 has not continued. The victims of such crimes are still unable to receive protection and services from the state. A review of the Law against Domestic Violence began in 2014 because the reported cases of domestic violence have been increasing every year. The revised draft law after several rounds of discussion was finally adopted in May 2016. Also the previous National Action Plan for the Promotion and Protection of Human Rights lapsed in 2011, and the next Plan has yet to be formulated and approved. The presence and participation of the NHRCM is vital to strengthen public campaigns to move forward on these initiatives and to make them meaningful.

4.1 Recommendations to the Government of Mongolia:

- 4.1.1. Implement the government's action plan on the Universal Periodic Review (2nd Cycle) recommendations of the UN Human Rights Council;
- 4.1.2. Do not cut the NHRCM's budget, so that it may be independent and impartial, in accordance with international obligations.

4.2 Recommendations to the State Great Khural and Sub-Committee of Human Rights:

- 4.2.1. Continue and regularise the transparency of meetings of the Sub-Committee of Human Rights, and the inclusion and participation of civil society organisations;
- 4.2.2. Organise regular open consultations after receiving the annual report on the situation of human rights of the NHRCM, and enable discussions on the status of implementation of the relevant decisions and resolutions;
- 4.2.3. Ensure implementation of the Law on Laws and Regulations, and cooperate with the NHRCM, particularly when making human rights assessments of draft laws and regulations;
- 4.2.4. Adopt new amendments to the Law on the NHRCM in compliance with the Paris Principles;
- 4.2.5. Amend relevant laws and regulations to ensure adequate funds for its operations, and to strengthen its independence, in accordance with the Paris Principles;
- 4.2.6. Urgently develop, adopt and implement policies and regulations on human rights education, and the protection of the rights of human right defenders.

4.3 Recommendations to the National Human Rights Commission of Mongolia:

- 4.3.1. Be vigilant on human right violations, make timely and independent human rights assessments, and publicise it to the public;
- 4.3.2. Undertake joint advocacy activities with CSOs to include relevant provisions into related laws to have enough funding to maintain its independence in accordance with the Paris Principles;
- 4.3.3. Advocate for prompt parliamentary approval of relevant laws and regulations to maintain independence of the NHRCM as the core of the national human right mechanism, in consultation and cooperation with CSOs;
- 4.3.4. Advocate to develop national human rights policies and programmes and their adoption by government;
- 4.3.5. Develop plan to implement recommendations from the United Nations Human Rights Council;
- 4.3.6. Establish a special department or designated officer with permanent responsibility for recording recommendations from the United Nations, international, regional and local human rights organisations, and develop a plan for implementation and monitoring of results;
- 4.3.7. In preparation of its annual report on the '*Situation of Human Rights and Freedom in Mongolia*', consult CSOs for their comments;
- 4.3.8. Regularise the work of the *ex-officio* (NGO) council at NHRCM, and enable it to be effective;

REPUBLIC OF KOREA: AN ACT OF DECEPTION

Korean House for International Solidarity (KHIS)¹

1. Introduction

The National Human Rights Commission of Korea (hereafter NHRCK) underwent a total of four reviews by the Sub-committee of Accreditation of Global Alliance of National Human Rights Institutions (hereafter GANHRI, formerly International Coordinating Committee of National Human Rights Institutions—ICC) between March 2014 and May 2016.

After three deferrals of reaccreditation in a row, the NHRCK was finally reaccredited its existing 'A' status in May 2016. This long process for reaccreditation by GANHRI-SCA made the international community question whether the South Korean government and the NHRCK sincerely desires to be in full compliance with the Paris Principles.

The NHRCK was also bent on maintaining its 'A' status by whatever means; and failed to encourage the government to amend the NHRCK Act in line with GANHRI-SCA recommendations.

Against this backdrop, Korean civil society's hard efforts to improve the NHRCK by following GANHRI-SCA recommendations could not bear fruit, even after an unprecedented three deferrals of its accreditation.

This report will review the actions and omissions of the NHRCK and the South Korean government throughout the process to maintain its 'A' status at GANHRI-SCA; along with Korean civil society's corresponding response; and try to present future directions for the NHRCK.

Moreover, it will introduce difficulties that Korean Human Rights Defenders (HRDs) and Women Human Rights Defenders (WHRDs) face, by discussing cases where many HRDs and WHRDs were left without support; while the NHRCK was busy portraying itself as a leader in the area of business and human rights in its effort to achieve reaccreditation of its 'A' status. Finally, this report will point out the wrongful behaviour of commissioners who have publicly expressed their hate towards sexual minorities.

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2 No improvement in the composition of the NHRCK

In May 2016, the NHRCK was reaccredited its 'A' status from GANHRI after three deferrals of reaccreditation in a row since March 2014, which was unprecedented in the history of the Sub-Committee on Accreditation (SCA).

Dating back to the 2008 review of the NHRCK's status, the SCA repeatedly expressed its concerns over full compliance with the Paris Principles. The SCA made the following recommendations: to improve the lack of diversity in the composition of commissioners; the need for transparency in selecting and appointing commissioners, including with the full participation of civil society; and the absence of functional immunity for its members.

According to a press release by the NHRCK,² "the SCA highly evaluated (sic) amendment to the Commission Act, establishment of internal regulation on selection process of human rights commissioners and consultation with selection/appointment institutions for broader participation. It encouraged the NHRCK to require announcement of vacancy for human rights commissioner and to ensure unified selection process by establishing a single and independent selection committee. The SCA commended efforts of the NHRCK to make amendment to the Commission Act which establishes provision on immunity for and qualification of human rights commissioners, enables recommendation from civil society and guarantees transparent selection process and diverse composition."

In the press release, the NHRCK said it will continue "to devote its best efforts as an independent national institution for promotion and protection of human rights to listen to voices of diverse social stratum and enhance human rights of every individual."

However, not only before the amendment to the NHRCK Act³ but also after, not a single commissioner – including the chairperson Lee Sung-ho who took office in August 2015 – has been selected and appointed in compliance with GANHRI recommendations or even the relevant provisions of the NHRCK Act.

Even the Concluding Observations to the fourth periodic report of the Republic of Korea on implementation of the International Covenant on Civil and Political Rights, adopted on 3 November 2015⁴ recommended: "The State party should adopt the

² NHRCK, "NHRCK granted A status at the GANHRI SCA", 7 June 2016, http://www.humanrights.go.kr/english/activities/view_01.jsp. As the report of the Sub-Committee on Accreditation is not public as of time of writing, the only source on the decision is the NHRCK itself.

³ The amendment to the NHRCK Act was passed by the National Assembly on 8 January 2016 and promulgated on 3 February 2016, <http://www.humanrights.go.kr/english/information/legalMaterials02.jsp>.

⁴ UN Human Rights Committee, *Concluding Observations on the fourth periodic report of the Republic of Korea*, 3 December 2015,

legislation necessary to ensure a fully transparent and participatory process for the selection and appointment of members to the National Human Rights Commission of Korea at all stages of the process, to establish an independent committee to nominate candidates, and to guarantee the independence of the members of the Commission."

Since the GANHRI-SCA first deferred its decision of re-accrediting the NHRCK in March 2014, there have been seven commissioners who were newly appointed, reappointed, or remained in office. However, not a single commissioner was appointed in compliance with GANHRI-SCA recommendations regarding their selection and appointment.

The only candidate recommended by an opposition party – through a nomination committee with civil society participation – was vetoed by the National Assembly. In selecting and appointing the others, the three appointing bodies of the 'Blue House' (Presidential Office), National Assembly and Supreme Court have completely ignored the recommendations and expectations of the international community, including GANHRI-SCA.

The entire process of the nomination and appointment of non-standing commissioner Choi E-woo, who was first appointed as a non-standing commissioner after the deferral (appointed by the President on 3 November 2014), was done behind closed doors. Moreover, his qualification to be a human rights commissioner was severely challenged as his position against strengthening protection of the human rights of sexual minorities by publicly resisting the enactment of an anti-discrimination act is well-known.

Non-standing commissioner Lee Eun-kyung (appointed by the National Assembly with the recommendation by the ruling Saenuri Party on 5 February 2015) and standing commissioner Lee Kyung-sook (appointed by the National Assembly with the recommendation by the leading opposition Minjoo Party of Korea on 16 March 2015) were also selected and appointed without any process guaranteeing the participation of civil society such as the establishment of an independent committee to nominate candidates.

More importantly, Commissioner Lee Eun-kyung's appointment raised strong resistance from human rights defenders of sexual minorities as she had no professional knowledge of and/or experience with human rights matters, and; moreover, served as a deacon of a conservative church which has been at the forefront of questioning the human rights of sexual minority groups and opposing an anti-discrimination act. She has been under constant suspicion of abusing her authority as a commissioner to prevent petitions related to sexual minority groups human rights from achieving positive decisions or remedies.

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/KOR/CO/4&Lang=En.

In March 2015, GANHRI-SCA decided to defer the review of the NHRCK for the third time in a row, specifically awaiting the selection process of the NHRCK's new chairperson. It encouraged the NHRCK to, "publicize vacancies broadly, maximize the number of potential candidates from a wide range of societal groups and educational qualifications, promote broad consultation and/or participation in the application, screening and selection process, and assess applicants on the basis of pre-determined, objective and publicly-available criteria."

However, the selection of chairperson Lee Sung-ho, who was nominated on 20 July 2015, passed the National Assembly's personal hearing on 11 August 2015 and took office on 13 August 2015, was done completely behind closed doors. Among the four requirements recommended by GANHRI-SCA, none – other than a public announcement of the vacancy made on the official website of the NHRCK – was followed.⁵ Moreover, Chairperson Lee's qualifications were also questioned as he had no direct experience with human rights matters, though he had served as a long standing judge.

When, the then candidate, Lee Sung-ho was asked about his own selection process at his personal hearing before the National Assembly, he said, "It is difficult to revoke the decision already made." He further added his commitment to improving the selection and appointment process of the NHRCK commissioners by saying, "If I take office, I will work for the establishment of appropriate selection process guaranteeing the compliance with international standards as well as the independence and diversity of commissioners. I will prepare an amendment bill for the NHRCK Act providing such selection process and make sure the NHRCK be reaccredited its "A" status at the next ICC-SCA review."⁶ However, there was no improvement in the selection process.

There were two other members whose term ended around the same time Lee was appointed as the new chairperson. Commissioner Han Wee-Soo (appointed by the Supreme Court) was reappointed one day before the personal hearing for the new chairperson without any participatory process.⁷ In addition, commissioner Kang Myeong-deok (appointed by the National Assembly on the recommendation of the opposition Minjoo Party of Korea) remains in his position for over a year now, even though his term was officially over on 12 August 2015; after the candidate nominated

⁵ The NHRCK has responded that it further publicised vacancies through e-mail to 7,588 civil society organisations ('*NHRCK Opinion on the Draft 2016 ANNI Report*', 8 September 2016). However, none of the 'NHRCK Watch' members (86 organisations) reported receiving such an e-mail which raises the question as to which CSOs were contacted and how these were identified.

⁶ "Candidate Lee, Sung-ho recognised awareness of concerns over retreat during the Hyun Byung-cheol period", 11 August 2015, *Hankyoreh*, http://www.hani.co.kr/arti/politics/politics_general/704036.html.

⁷ The Roundtable for the Transparent Selection Process of the Chairperson of the NHRCK, "*We condemn the reappointment of Commissioner Han Wee-soo again behind closed doors*", 10 August 2015.

by an independent committee with the participation of civil society was rejected by the National Assembly.

As of August 2016, the Minjoo Party of Korea is reported to be ready to nominate a new candidate for the NHRCK commissioner very soon, but there was no consultation with civil society in the process. The Party even refused to meet civil society organisations, which is clearly going backwards, given that it created an independent selection committee a year ago⁸; which was often cited as the main evidence of improved selection process.⁹

The selection process of the two commissioners who were appointed in 2016 also showed no improvement. On 3 March 2016, about two months after the former standing commissioner Yoo Young-ha resigned for the reason of running in the general election, and about one month after the promulgation of the amended NHRCK Act, the ruling Saenuri Party selected the former prosecutor Jung Sang-hwan as a standing commissioner of the NHRCK.

Article 5 (4) of the revised NHRCK Act states "the National Assembly, President or the Chief Justice of the Supreme Court should listen to recommendations or opinions from diverse social groups on candidates before selecting and appointing a commissioner with the aim of increasing the representation of diverse social groups involved in the protection and promotion of human rights."

Korean civil society criticised the amendment for not guaranteeing the implementation of the GANHRI-SCA recommendation¹⁰; and the first selection process after the amendment did not comply with even this weak provision. Aside from posting the vacancy announcement on the Party's official website and the fact that three people applied for the position, there was no effort to "listen to recommendations or opinions from diverse social groups on candidates before selecting and appointing a commissioner." This can be construed as nothing else but a violation of the act which was passed by the Party only a month ago.

The more serious issue is the Saenuri Party's violation of Article 5 (8) of the NHRCK Act which states "For every 10 members of the Commission, no more than 6

⁸ The opposition New Politics Alliance for Democracy (predecessor of the Minjoo Party of Korea) created an independent selection committee with civil society participation and nominated a candidate through several consultations. However, the National Assembly led by the ruling party voted against the candidate and there have been no responses or measures taken by the opposition party for about a year.

⁹ Korean civil society organisations including the NHRCK Watch held a press conference in front of the headquarters of the Party on 5 August 2016, criticising the Party for betraying civil society expectations by nominating its candidate in a way that cannot be differentiated from the other appointing authorities.

¹⁰ NHRCK Watch, "*The Stakeholder Opinion of Korean civil society regarding the ICC-SCA review of the NHRCK in May 2016*", submitted to GANHRI-SCA on 15 January 2016, http://www.khis.or.kr/spaceBBS/bbs.asp?act=read&bbs=p_file4&no=122&ncount=119&s_text=&s_title=&pageno=1&basic_url=

members shall be of the same gender.” The NHRCK, which is composed of 11 commissioners, must then have at least 5 female members when there is a male majority. As of February, 2016, only 4 female members sat on the Commission. Therefore the appointment of Jung Sang-hwan which makes the proportion of male commissioners 6 out of 10 can hardly be seen as compliance with the specific provision.¹¹

Most recently on 10 June 2016, after GANHRI-SCA had reaccredited the NHRCK with an ‘A’ status, the President’s Office appointed Jang, Ae-soon (Buddhist name Gye Hwan) as the successor of Han, Tae-sik (Buddhist name Bo Kwang), non-standing commissioner of the NHRCK.¹² This selection process was also done behind closed doors without even a vacancy announcement. There was no explanation from the President’s Office on which grounds Jang Ae-soon was found qualified for a human rights commissioner and through which process she was recommended, evaluated and appointed.¹³

It clearly demonstrates that all of the appointing bodies – the President, the National Assembly, and the Supreme Court – as well as the NHRCK did not follow the selection process prescribed by the NHRCK Act. Given that the amendment to the NHRCK Act was one of the main grounds for its retaining ‘A’ status, the Korean government achieved the ‘A’ status through deception, by legislating an act with which it had no intention to comply. Moreover, the selection and composition of the NHRCK, based on an act nobody observes, is no more than an attempt to undermine the rule of law and incapacitate an independent and effective national human rights institution.

2.1 Promotion of business and human rights without human rights

Diversity and plurality in the NHRCK commissioners’ composition, transparency and civil society participation in the selection of commissioners and functional immunity

¹¹ NHRCK Watch, “Neither the Saenuri Party nor the NHRCK followed the revised NHRCK Act – failing to honour the gender quota and civil society participation in the selection process of commissioners”, 22 February 2016, http://www.khis.or.kr/spaceBBS/bbs.asp?act=read&bbs=p_file4&no=123&ncount=120&s_text=&s_title=&pageno=1&basic_url=. The NHRCK has a different interpretation of the situation. It understood “the position of commissioner Kang, Myungdeuk (whose term expired as of August 2015) can be regarded as vacant with no successor appointed. Accordingly, appointment of a male commissioner (commissioner Jeong) which took place prior to appointment of successor of commissioner Kang, cannot be seen as violation of the Commission Act because male commissioners do not account for more than six tenths of the whole composition”, (*NHRCK Opinion on the Draft 2016 ANNI Report*, 8 September 2016).

¹² This appointment followed the practice of the ‘Blue House’ appointing one of the two non-standing commissioners that the President is empowered to under the NHRCK Act, from Buddhist society.

¹³ NHRCK Watch, “The appointment of Jang Ae-soon as a commissioner by the Blue House is a breach of the NHRCK Act and against the international community’s recommendations – the newly introduced selection procedures in the Act were not complied with at all”, 15 June 2016, http://www.khis.or.kr/spaceBBS/bbs.asp?act=read&bbs=p_file4&no=125&ncount=122&s_text=&s_title=&pageno=1&basic_url=.

for its members were not only the main grounds for GANHRI-SCA’s deferral of the NHRCK’s reaccreditation and subsequent recommendations but also prerequisites for a national human rights institution to substantially and effectively respond to urgent and important human rights matters and contribute to the promotion and protection of human rights.

When these fundamental grounds are weak, it is not surprising to see the NHRCK remain silent or inactive about many significant human rights issues in Korean society, including infringements on freedom of association and assembly, and continued discrimination against people with disabilities and sexual minorities.

On the other hand, the NHRCK has emphasised the importance of business and human rights by promoting various research projects and events since 2009, coincidentally around the time when concerns over its independence and effectiveness in protecting and promoting human rights were first heard inside and outside of Korea. The timing aside, it is commendable that the NHRCK is initiating advocacy on business and human rights in Korean society with attention not only on human rights violations by public authorities but also human rights abuses by private enterprises. In fact, a number of national human rights institutions in other countries are also playing important roles in raising awareness on business and human rights among the government, enterprises and people in various ways. However, the problem is that it fails to lead to meaningful changes both in policies and practices.

Most of all, according to the NHRCK Act, human rights abuses committed by private individuals including private enterprises don’t fall within the scope of the matters subject to investigation by the NHRCK. Regarding private individuals, only complaints against sexual violence and discriminatory acts are to be accepted and addressed by the NHRCK. Despite this inherent constraint, the NHRCK can make policy recommendations to change government policy in the area of business and human rights.

However, except for the policy recommendation urging the improvement of the operation of the Korean National Contact Point (a complaint mechanism established by the OECD Guidelines for Multinational Enterprises) in October, 2011,¹⁴ there has been no meaningful policy recommendation for the government issued by the NHRCK. In particular, it has not presented any policy recommendation on the human rights abuses committed by Korean companies operating overseas, which have become serious issues of concern to the international community, even after it conducted a research project on the human rights situation of Korean enterprises operating overseas in 2013.¹⁵

¹⁴ NHRCK, Press Release, “NHRCK Submitted a Recommendation to the Government on the Role of the National Contact Point to Promote Human Rights in Business”, 7 November 2011, http://www.humanrights.go.kr/english/activities/view_01.jsp.

¹⁵ NHRCK, *Annual Report 2014*, p. 80,

In 2011, a complaint against a deep-sea fishing vessel for violating human rights of its Indonesian crew was submitted to the NHRCK.¹⁶ It was the only case that the NHRCK accepted and conducted investigations even though the human rights violation concerned took place in open waters (that is overseas), as it regarded the vessel flying with Korean flag as within the territory of South Korea. Thus, the NHRCK investigated the allegations of sexual violence and discriminatory acts against Indonesian crew members (regarding private individuals, only sexual violence and discriminatory acts fall within the scope of the matters subject to investigation by the NHRCK). However, it dismissed the petition even after investigation.¹⁷

The NHRCK presents its development of the Guidelines and Checklists on Human Rights Management, for voluntary compliance of public corporations with human rights norms and standards, as an example of its leadership in Asia on business and human rights.¹⁸ However, some of these public corporations which have signed up to the guidelines are reported to be involved in severe human rights violations. For example, Korean Electric Power constructed a 756kV power-transmission tower in Miryang without full consultation with local residents and mobilised the police to crackdown on protesters.¹⁹

When it comes to business and human rights, labour rights are indispensable. However, the NHRCK has remained silent on major labour rights issues. In February 2016, the Korean Confederation of Trade Unions and the Federation of Korean Trade

http://www.humanrights.go.kr/english/publications/publications01_view.jsp.

¹⁶ US Department of State, *2012 Trafficking in Persons Report* (June 2012), p. 210, <http://www.state.gov/j/tip/rls/tiprpt/2012/>.

¹⁷ Korean House for International Solidarity, “Republic of Korea: Endless Despair”, *2012 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, p. 177, http://www.forum-asia.org/uploads/books/2012/nov/05033_ANNI%202012.pdf. According to the NHRCK, it nevertheless “made the following recommendations to the Korean government: 1) There is a need for the Minister of Food, Agriculture, Forestry and Fisheries, Minister of Land, Transport and Maritime Affairs, Minister of Foreign Affairs, and Chief of Korea Coast Guard to form a joint investigation team to investigate physical and verbal violence, sexual harassment, and wage problems and to protect human rights of foreign crews in deep-sea vessel and to provide remedial measures; 2) The president of the Korea Overseas Fisheries Association should make efforts to protect human rights and improve working conditions of foreign crews including clarifying bills of rights of foreign crews, employer’s duty to care, procedure for human rights infringements on board and standards for application when standards for working conditions including wages in Korea and country of operation are different; and 3) CEO of the company concerned should make efforts to resolve issues regarding human rights infringements, sexual harassment and wage discriminations against foreign crews and need to strengthen education for and management of both Korean and foreign crews to prevent recurrence”, (*NHRCK Opinion on the Draft 2016 ANNI Report*, 8 September 2016).

¹⁸ The NHRCK has claimed that “Public institutions are linked to private institutions through supply chains, and thus, management of supply chain, which is a main element of human rights management, can be the way to spread human rights management to private companies, (*NHRCK Opinion on the Draft 2016 ANNI Report*”, 8 September 2016).

¹⁹ *Report of the Special Rapporteur on the situation of human rights defenders*, 23 December 2013, (A/HRC/25/55), paras. 75-78, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/191/02/PDF/G1319102.pdf?OpenElement>.

Unions, the two largest trade union organisations in Korea jointly requested the NHRCK to make a policy recommendation in relation to the Korean government’s guidelines to make it easier for companies to fire poor performers and revise employment rules, saying the move is to suppress the labour rights with administrative guidelines by circumventing applicable labour laws.²⁰

However, the NHRCK has not expressed any opinion on the government’s retrogressive labour rights policies; including the expansion of temporary or precarious jobs up to date. Rather, a commissioner even complained: “I don’t understand why the NHRCK should address labour issues” when the government’s policy of expanding irregular jobs was included in the agenda for a plenary committee meeting in 2015.²¹

Moreover, while the NHRCK does not have authority to investigate all kinds of human rights abuses perpetrated by private enterprises by law, it can provide urgent relief upon requests regardless of whether the perpetrator concerned is a public or private entity. However, it has been passive, at best, in responding to urgent relief requests by victims whose human rights are negatively affected by corporate actions. In addition, there is no guarantee that the recommendations or opinions made by the NHRCK in relation to business and human rights issues are fully accepted or implemented by the state organs, public or private entities.²²

Recently, the NHRCK has been actively promoting the development of the National Action Plan (hereafter NAP) on Business and Human Rights. It presented the research outcome on the National Action Plan on Business and Human Rights in 2015. The research report prepared by a group of independent experts only identified key issues by reviewing cases of other countries developing the NAP on business and human rights in accordance with the UN Guiding Principles, rather than suggesting any practical and effective measures for the Korean government in developing its own NAP. The draft NAP on Business and Human Rights which has been developed and is to be submitted to the government by the NHRCK shortly is primarily based on the research report, therefore giving rise to the same concerns. Moreover, the extent to which the government will accept and integrate the NHRCK report in its own NAP is still in question.

While it is commendable for the NHRCK to note the importance of business and

²⁰ “Korea’s Labor Battle – Hard-working Koreans have nothing to fear about President Park Geun-hye’s labor reforms”, 2 February 2016, <http://www.wsj.com/articles/koreas-labor-battle-1454461279>.

²¹ Korean House for International Solidarity, ‘South Korea: Looking On When Not Looking Away’, , *2015 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, https://www.forum-asia.org/uploads/wp/2015/09/14-South-Korea-FINAL-11-Aug-2015_KUMAR.pdf.

²² *Ibid.*

human rights and disseminate human rights management to corporations, the NHRCK should first fulfil its fundamental mandates as a national human rights protection mechanism in order to ‘walk the talk’. It should step up its measures to provide appropriate remedies for the victims whose human rights are negatively affected by corporate actions. In addition, the NHRCK Act needs to be revised to enable it to investigate human rights violations committed by not only public corporations but also private enterprises; as well as providing appropriate remedies for the victims or recommendations to the defendants accordingly.

2.2 NHRI and Protection of HRDs and WHRDs

In accordance with Article 48 (Recommendation of Urgent Relief Measures) of the NHRCK Act, it may recommend urgent relief measures to Human Rights Defenders. In general, when a petition is filed, the process takes a lengthy amount of time. The article acts as a preventative measure for severe infringements of human rights possible in that period of time. It is therefore an important tool for the NHRCK to ensure the safety and protection for HRDs. However, the NHRCK has not issued any urgent relief recommendations on HRDs and WHRDs since July of 2013.²³

Case Study: High-altitude sit-in protest of KIA motors’ workers

The in-house subcontracted workers of KIA Motors’ factories, who have been discriminated against only because they are agency workers even though they are doing the same work as regular workers, filed a lawsuit to claim regular employee status. The court ruled partially in favour of the plaintiff, confirming that they had been illegally dispatched from the subcontractors to KIA Motors. For that reason, the workers have demanded recognition as regular workers. The trade union of regular workers and the management made an agreement to convert the status of only 465 out of 34,000 in-house subcontracted workers to regular workers if the lawsuit would be withdrawn. However, the in-house subcontracted workers’ branch rejected the offer. Moreover, the workers were worried about it might take up to 10 years to achieve regular workers status by a final decision at the Supreme Court as the company did not accept the first trial decision and appealed to the higher court.

Consequently, Choi Jeong-myeong and Han Kyu-hyup, who are members of the in-house subcontracted workers’ branch of KIA Motors (affiliate of the Korean Metal Workers Union), launched a high-altitude sit-in protest on 11 June 2015 on top of an electronic display board installed on the rooftop of the Geumsegi Building, where the NHRCK headquarters is located. In a media interview²⁴, they stated that “At first, we

²³ The NHRCK states it has received 12 requests for urgent relief since July 2013 and “even though there was no official recommendation for urgent relief, many cases were resolved through settlement or during investigation by addressing the purpose and reason for urgent relief”, (“NHRCK Opinion on the Draft 2016 ANNI Report”, 8 September 2016.

²⁴ “Spending One year in a sky prison in anger and desperation”, 7 June 2016, http://www.news1.com/ar_detail/view.html?ar_id=NISX20160530_0014117579&cID=10201&pID=1

were very naive to believe that we would receive more protection if we did a sit-in protest on the premises of the NHRCK. We were gullible enough to think that the advertising board was handled by the NHRCK.” Despite having expectations for the NHRCK, the workers’ first request for urgent relief on 24 June 2015 was dismissed.

The company which owns and operates the electronic board filed for an injunction against “obstruction of business operation” to the court claiming that their business had been negatively impacted due to the sit-in protest. As the injunction was ordered by the court on 25 July 2015, the electronic board company banned anyone except the protesters’ close family members from delivering food to the workers, which resulted in the protesters starving till 31 July because those who were allowed to deliver food could not make time to do so in a regular and coordinated way. The family members were too pre-occupied by earning an income to feed their families with their main breadwinners on strike, so that they were not able to come and deliver food three times a day. Hence the workers filed for the second urgent relief request to the NHRCK for food and water delivery, but the NHRCK once again dismissed the request.

By 10 August 2015, the situation worsened to the point of depletion of water, the third request for urgent relief was sent to the NHRCK which was dismissed yet again. After the third dismissal of the urgent relief request, the NHRCK issued a statement on 12 August, stating “the NHRCK is deeply concerned due to the fact that the situation at hand might continue for a considerable amount of time which would infringe the demonstrators’ right to health and life as a result of blockade of food.”²⁵ However, the company obstructed the delivery of food to the protesters by the trade union until 15 August when Rep. Jang Ha-na of the main opposition party intervened in the situation to reach an agreement for the staff members of the NHRCK to deliver food.

However, when the NHRCK moved its headquarters on 4 October, it announced that it would not deliver food on weekends and holidays and the delivery on weekdays would be also stopped by 16 October due to the long distance between the new headquarters and the sit-in protest site. On 16 October the advertisement company once again blocked the delivery of food, and on 20 October the demonstrators disconnected their food lines and went on a hunger strike. After 6 days into the hunger strike, the NHRCK, the advertisement company and the union held a three party dialogue. They came to an agreement that “any person except union members is allowed to deliver provisions; however, any items that can be used for protest is not permitted.”²⁶

0200.

²⁵ “NHRCK urged the police to take steps for the delivery of food to protestors”, 12 August 2015, <http://www.lawissue.co.kr/news/articleView.html?idxno=22996>.

²⁶ The court injunction order stated that only those allowed by the company can deliver food to protestors; and the company insisted on the exclusion of any union members.

The NHRCK's dismissal of urgent relief requests on four consecutive occasions brought about a dangerous situation to the sit-in protesters who were stranded without food and water. Although it issued a statement on 12 August condemning the actions by the company, and was responsible for supplying food for two months, the NHRCK did not take active measures to ensure the safety of the workers who were in a dangerous situation. Moreover, the NHRCK took no action when the advertisement company hired private security guards to threaten the workers, and arbitrarily blockaded the delivery of food which constitutes an infringement on their human rights. The sit-in protest was the last resort for the workers to make their voice heard after the company refused to accept the court decision recognising the illegality of dispatched work system. Given that, the NHRCK should have been more actively involved in the issue by taking necessary measures to protect the human rights of the demonstrators and recommending the government and KIA Motors to address the illegal 'dispatching' of workers. However the NHRCK remained inactive or passive at best.²⁷

The two protesters who had continued their struggle despite severe cold and extreme heat, agreed to terminate their sit-in on the basis that the trade union will put in effort to tackle the issue of illegal dispatches. The sit-in protest started on 11 June 2015 and continued for nearly a year, ending on 8 June 2016. As soon as their feet were on the ground, the two striking workers were arrested by the police.²⁸

2.3. Protection of human rights of sexual minorities

The 'Blue House' appointed Reverend Choi Ee-woo, who is infamous for leading the anti-LGBTQ movement, as a non-standing commissioner of the NHRCK in November 2014 despite strong protest by Korean civil society.²⁹ Later in February 2015, the ruling Saenuri Party also nominated Lee Eun-kyung, head of the law firm that supports the anti-sexual minority group movement as a non-standing commissioner. In the general election of April 2016, the Christian Liberal Party pledged to stop the enactment of an anti-discrimination law³⁰ and oppose homosexuality and Muslims and acquired 2.64% of the total votes. Although the Party

²⁷ The NHRCK's response is: "Since there is a lawsuit going on regarding guaranteeing regular position for in-house subcontractors and it should be dealt by collective bargaining, the NHRCK could not make direct engagement", ('NHRCK Opinion on the Draft 2016 ANNI Report', 8 September 2016).

²⁸ "High-altitude protesters terminated the sit-in after 363 days", 8 June 2016, <http://www.focus.kr/view.php?key=2016060800183326757>.

²⁹ MINBYUN-Lawyers for a Democratic Society and Rainbow Action Against Sexual-Minority Discrimination held a press conference to urge the resignation of commissioner Choi Ee-woo ('No to the appointment of the NHRCK commissioner incompatible with the NHRCK Act and the ICC-SCA recommendations', 10 November 2014, http://khis.or.kr/spaceBBS/bbs.asp?act=read&bbs=notice1&no=321&ncount=300&s_text=&s_title=&pageno=3&basic_url).

³⁰ An anti-discrimination act has been long pending at the National Assembly due to intense opposition of the conservative evangelical Christians against the provision of discriminatory acts on the ground of sexual orientation and gender identity.

could not get a seat at the National Assembly, it will receive a subsidy of 1.9 billion won (1.7 million US dollars) from the state as it got more than 2% of votes.

On 24 May 2016, 3,195 citizens submitted a complaint to the NHRCK, claiming that the policies of the Christian Liberal Party is violating international human rights treaties that South Korea ratified and aggravating hatred towards minority groups.³¹ Lawyer Lee Tae-hee, who was one of the Party List (elected by proportional representation) candidates of the Christian Liberal Party is from the same law firm where Lee Eun-kyung, non-standing commissioner of the NHRCK is the president. That is to say at least two commissioners of the NHRCK (Reverend Choi Ee-woo and lawyer Lee Eun-kyung) are representing the conservative section of the Christian community who treat sexual minorities as abnormal beings; and who oppose the NHRCK Act for the reason that it defines sexual orientation as a ground of discrimination to be addressed by the NHRCK.

On 19 March 2016, after Choi Ee-woo and Lee Eun-kyung joined the NHRCK, use of its building was authorised to host the so-called "conversion therapies" for LGBTQ persons, causing strong condemnation by Korean civil society.³² The NHRCK has responded that the organiser of the event submitted the request to use the meeting hall for an event titled: 'Forum on human rights of ex-homosexuality – measures to restore their human rights', the person in charge authorised usage of its facilities: "without knowing that the event was about conversion therapy for sexual minorities."³³

Commissioner Lee Eun-kyung has consistently opposed issues related to human rights of sexual minorities. Her remarks at the plenary committee meeting held on 25 July 2016 were a clear example. In discussing the NHRCK recommendation for the third phase of the National Human Rights Action Plan which will be implemented from 2017 by the South Korean government, Commissioner Lee had the following words:

"To take drastic measures to conclude an issue as "human rights or inhuman rights" when the issue is considered controversial or requires the consensus of the public is a problem. For example, if a prosecutor obtains a written oath

³¹ "Civil society organisations filed a petition against the Christian Liberal Party to the NHRCK", 24 May 2016, http://news.khan.co.kr/kh_news/khan_art_view.html?artid=201605241458001&code=940100.

³² The NHRCK Watch, the Minority Rights Committee of Minbyun-Lawyers for a Democratic Society, and Rainbow Action Against Sexual-Minority Discrimination issued a joint statement condemning the NHRCK to let its facility be used for an event which advocate for conversion therapies which are recognized as violence against sexual minority people in the international community, "We condemn the NHRCK for letting its facility used for a conversion therapy promotion event", 20 March 2015, <http://hopeandlaw.org/%EA%B3%B5%EB%8F%99%EC%84%B1%EB%AA%85-%EA%B5%AD%EA%B0%80%EC%9D%B8%EA%B6%8C%EC%9C%84%EC%9D%98-%EC%9D%B8%EA%B6%8C%EC%B9%A8%ED%95%B4%EC%A0%81-%EC%A0%84%ED%99%98%EC%B9%98%EB%A3%8C/>.

³³ 'NHRCK Opinion on the Draft 2016 ANNI Report', 8 September 2016.

from the suspect when he or she disposes a suspension of indictment, is it violating human rights? The same logic can be also applied to the issue of Students' Human Rights Ordinance. An issue that is so important to our society needs to be voted upon and requires much discussion for decision."³⁴

Lee continued,

"an example of a socially sensitive issue is the debate on Article 92 (6) of the Military Penal Code. The provision is now under the consideration by the Constitutional Court. Therefore, it is not appropriate for the NHRCK to recommend the abolition of the provision. The NHRCK should refrain from deciding on such controversial issues."

Article 92 (6) of the Military Penal Code defines sexual activity between members of the same sex as "sexual harassment" punishable by a maximum of two years of imprisonment. In fact, the NHRCK recommended the abolition of the provision in 2010 by concluding that it is based on "prejudices on homosexuality and misunderstanding of sexual harassment between two males" and is violation of the sexual self-determination right, the right to equality, and the right to privacy which are fundamental rights guaranteed by the Constitution.³⁵

In detail, the NHRCK found any sexual relations by consent is considered as the fundamental right of sexual self-determination and criminalising same-sex activity only regardless of the existence of mutual consent is not only a discriminatory act (an infringement upon the right to equality), but also a serious human rights violation as the sexual orientation of the convicted is to be exposed in the investigation and punishment process (an infringement upon the right to privacy). The NHRCK also refuted the claim that this provision is necessary to prevent sexual harassment in the military as nonsense on the ground that such crimes can be punished under other provisions in the Military Penal Code and therefore recommended its repeal.

Furthermore, the Concluding Observations of the UN Human Rights Committee on the Fourth Periodic Report of the Republic of Korea on the implementation of the International Covenant on Civil and Political Rights in December 2015 states as follows:³⁶

³⁴ Students' Human Rights Ordinances enacted and enforced by many local governments including Seoul city government clearly state that discrimination against sexual minority students should be prohibited. Korea's conservative Christian groups have continuously criticised the provision prohibiting discriminatory acts against sexual minority students as "promotion of homosexuality", "Students' Human Rights Ordinances stimulate only conflicts", 8 July 2015, <http://www.mediapen.com/news/view/82789>.

³⁵ "Military's sodomy clause is unconstitutional, NHRCK judges", 28 October 2010, http://english.hani.co.kr/arti/english_edition/e_national/446037.html.

³⁶ UN Human Rights Committee, "Concluding Observations on the Fourth Periodic Report of the Republic of Korea", 3 December 2015, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/KOR/CO/

"14. The Committee is concerned about:

(a) The widespread discrimination against lesbian, gay, bisexual, transgender and intersex persons, including violence and hate speech;

(b) The punishment of consensual same-sex sexual conduct between men in the military, pursuant to article 92-6 of the Military Criminal Act;

(c) The authorization of the use of the buildings of the National Assembly and of buildings of the National Human Rights Commission to host so-called "conversion therapies" for lesbian, gay, bisexual and transgender persons;

(d) The lack of any mention of homosexuality or sexual minorities in the new sex education guidelines;

(e) The restrictive requirements for legal recognition of gender reassignment (arts. 2, 17 and 26).

15. The State party should clearly and officially state that it does not tolerate any form of social stigmatization of, or discrimination against, persons based on their sexual orientation or gender identity, including the propagation of so-called "conversion therapies", hate speech and violence. It should strengthen the legal framework to protect lesbian, gay, bisexual, transgender and intersex individuals accordingly, repeal article 92-6 of the Military Criminal Act, avoid the use of State-owned buildings by private organizations for so-called "conversion therapies", develop sex education programmes that provide students with comprehensive, accurate and age-appropriate information regarding sexuality and diverse gender identities, and facilitate access to the legal recognition of gender reassignment. It should also develop and carry out public campaigns and provide training for public officials to promote awareness and respect for diversity in respect of sexual orientation and gender identity."

As stated above, the abolition of the specific provision was recommended not only by the NHRCK, but also by the UN Human Rights Committee. However, Lee persisted, saying that "Shouldn't a decision that was once made by the NHRCK be allowed to change? People change and times change so why can't a decision change as well?" and "Should we follow what the UN has done just because they have done it? Does

the UN recommendation have higher value than the Constitution?”.

Thus, the fact that those who ignore the recommendations of the international community as well as showing ignorance and hate towards sexual minority without shame can become human rights commissioners is not only disgraceful for the NHRCK, but it also proves that there needs to be an independent selection process.

3. Conclusion

It has been a year since chairperson Lee Sung-ho took office. The NHRCK managed to obtain the ‘A’ status from GANHRI-SCA again, despite the remaining areas of non-compliance with the Paris Principles to be tackled. Though it was not made in a timely fashion, the NHRCK’s recommendations which emphasised protection of the freedom of association and assembly and pointed out risks of the Counter-Terrorism Bill, showed Chairperson Lee’s efforts in carrying out his role with passion.

Nevertheless, the civil society still expresses its serious concerns over the composition of the leadership of the NHRCK, where 8 out of 11 commissioners are former judges, prosecutors, and lawyers, and consequential increase in the tendency of making a judgment based on positive law rather than human rights standards. What would be the value of an NHRI if it has the same procedures as the judiciary? Human rights issues are subject to tumultuous controversies in society. It is an NHRI’s role to seek and propose solutions for such social issues based on the human rights principles. Since the conservative government secured power in 2008 however, the NHRCK has shown a tendency to avoid controversies especially those that conflict with government policies.

Therefore, it is important to include the civil society in the selection process of the commissioners. It can not only eliminate the unqualified candidates who have hatred of sexual minorities or have barely no understanding on labour rights as human rights, but also bring greater diversity by including HRDs with various backgrounds as members of the Commission.

The current status of the NHRCK can be viewed as the consequence of the conservative government’s constant obstruction to its activities as the watchdog national institution for the promotion and protection of human rights. Through the 2016 general election, the opposition parties managed to regain the majority in the parliament after eight years. This brought civil society hope that the NHRCK could at least be restored to what it was eight years ago; but the opposition parties have not yet made their position clear on this issue nor are they communicating with the civil society. Hence, it is still difficult to expect optimistic and encouraging changes to the NHRCK in the near future.

Recommendation to the Government of Korea:

1. The Korean government should stop undermining the independence of the

NHRCK by appointing its commissioners behind closed doors without complying with the NHRCK Act, GANHRI-SCA recommendations and the Paris Principles. 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.

Recommendation to the National Assembly:

1. 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 accordance with the recently amended NHRCK Act passed by the National Assembly, GANHRI-SCA recommendations and the Paris Principles.

Recommendations to the National Human Rights Commission of Korea:

1. 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. Moreover, the NHRCK should encourage the three appointing bodies of its commissioners to guarantee civil society’s full engagement with the selection process of commissioners.
2. 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; the death penalty; 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. 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 citizen’s protest against major national development projects. Moreover, the NHRCK should proactively defend human rights of minority groups including sexual minorities.
3. The NHRCK should take international human rights standards-based approach in addressing human rights issues in Korean society rather than positive law-based approach, in particular in dealing with controversial issues.

TAIWAN: AN NHRI ON THE HORIZON

Covenants Watch and Taiwan Association for Human Rights¹

1. Context

The year 2015 was definitely not a year of business as usual. Many disturbing events took place; and society experienced a long stretch of political unrest. It was the year following the ‘Sunflower’ (parliament occupation) movement, and the polls showed that the ruling KMT government support level at a historical low. During the local elections in the end of 2014, the public already showed their anger through their votes, and the KMT only managed to keep one mayor among the six major cities. However, the government didn’t change any policies or make any concessions. President Ma Ying-Jeou still decided to meet with the leader of China Mr. Xi Jin-Ping in Singapore, without any public support, which again raised protests from civil society.

Another major controversy in 2015 was the revision of the guideline for the textbook for high schools, which was criticised as non-transparent as the Ministry of Education refused to reveal any information related to the revision process. The revisions re-interpreted Taiwan’s history, causing a lot of disputes and raising protests among high school students, teachers and NGOs. How the revisions were made, the related documents and records, and the list of the decision-making members: all this information was hidden by the government. Owing to that, the Taiwan Association for Human Rights (TAHR) took legal action against the Ministry of Education (MOE) for its lack of transparency. TAHR prevailed in the first trial. However, the MOE appealed and still refused to release the documents. Many high school students from different cities protested in front of the MOE for many days and got no response. Some high school students climbed over the wall of the MOE and tried to occupy its premises on the evening of 23 July 2015.

A dozen high school students (under 18 years of age) and three journalists were arrested almost immediately after they entered the office, and brought to the police station to record statements; which lasted from midnight till morning. Many NGOs

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condemned the arrest of journalists and the backward attitude of the government regarding the freedom of the press. After that, many students were sued by the MOE and charged in the juvenile court. One of the students even committed suicide on 31 July 2015.

In 2015, 15 cases were prosecuted on the charge of participating in assemblies or protests: 9 of them were found guilty and 16 persons were sentenced to imprisonment. Among these cases, only one was prosecuted for offending the Assembly and Parade Law, others were prosecuted by Criminal Law. This documented the fact that people participating in parades are still easily criminalised.

Another case was the Hua-Kuang community. The government wanted to tear down the houses in that community for urban development. Residents and their supporters held a candlelight vigil the night before the scheduled demolition. The police suddenly blockaded the area and forbade anyone from passing in or out of the area, leading to conflict. Five supporters were sentenced to 50 days because they shouted slogans or scuffled with the police. Another protester, Mr. Wang Chung-Ming was sentenced to three months imprisonment on two convictions: for protecting old trees and his participation in the vigil.

Besides, the Korean workers who came to Taiwan to protest the closing down of a Hydys manufacturing facility, following merger by a Taiwanese corporation, were also deported in June 2015; and forbidden to re-enter Taiwan because of their participation in a protest. This act shows that foreigners’ rights to peaceful assembly and demonstration are not protected in Taiwan.

About 50 people who were injured by the police during Sunflower Movement tried to sue the police, but so far only one case received compensation from the government. On the other hand, about 130 people were prosecuted by the government for breaking into the Executive Yuan. The newly elected government dropped charges, but 20 people are still on trial because of public offence charges.

In addition to the assembly and parade issue, in some cases people were punished simply because they demanded their own rights. For example, the male policeman who wanted to keep his long hair and fight for his gender identity was subject to 18 counts of

disciplinary charges by the authorities and finally was removed from his duties and lost his job. A fire-fighter, who participated in a march which criticised the overtime working issues of firemen, was punished with 42 charges and was dismissed in September 2014. The fireman tried to get a remedy through the judicial system but he lost the lawsuit in 2015. It raised serious doubt as to whether the judicial system can act as a guardian for human rights.

On death penalty issues, Taiwan executed six death row convicts on June 2015. Two of them might be innocent and one was still in the process of petition for a retrial. In recent years, whenever a murder case happened and is reported by the media, the Taiwan Alliance to End Death Penalty (TAEDP) became the scapegoat of blame, with the public denouncing them for causing the crimes! They get telephone calls in foul language and with threats: some even smashed eggs and threw paper money (which is offered to the dead) at the TAEDP office. As the death penalty has not been abolished as yet, the atmosphere and the environment make human rights work more difficult.

Among the human rights violation in 2015, we have not observed any reflection or correcting mechanism within the government. Leaving aside the Executive Yuan itself which is the major violator, the judicial system or Control Yuan didn't play any significant role in promoting and protecting human rights either. Pursuing remedies for human rights violations was out of reach for the public. There are eight constitutional interpretations by the Judicial Yuan this year, but none of them mentioned international human rights conventions. Although the newly elected President Tsai Ing-Wen has promised to establish a national human rights institution (NHRI), there is still no clarity on its final structure and scope as explained below.

2. Establishment of an NHRI

<i>Legal basis</i>	
What is the legal foundation for the establishment of the NHRI?	The legal foundation can be an Act of Parliament or through amendment of the Constitution. All the six proposals for establishment of an NI that are being considered (four by the Presidential Office Human Rights Consultative Committee—POHRCC and two by the Legislature) provide the legal foundation of the NI through an act of parliament.
What is the motivation for establishment of the NHRI?	<p>There was a wave of efforts to establish the NHRI in the early 2000s, following the first transition of governmental power from the KMT to the DPP. However, the proposal based on the work by the President's Office faced resistance from the Executive Yuan, the Control Yuan, and the Legislative Yuan. The efforts waned after a few years.</p> <p>In 2009, the Implementation Act (to domesticate the two Covenants on Civil and Political, and Economic, Social and Cultural Rights) was enacted. The government prepared the State Reports to the ICCPR and ICESCR pursuant to the UN reporting guidelines in 2011-2012, and two committees composed of independent international experts were established to review the State Reports. The Concluding Observations and Recommendations were officially presented to the government on 1 March 2013.</p>

	<p>An NHRI was recommended for establishment by the review committees as a mechanism to promote human rights. Afterwards, a 5-member task force was established within the POHRCC to oversee the process. A separate CEDAW state report review committee in 2014 urged the Taiwan government to establish a national human rights institution promptly.</p> <p>With the joint efforts of the member organisations of Covenants Watch, President TSAI Ing-wen (then the presidential candidate of the Democratic Progressive Party) publicly announced on 9 December 2015 that she would promote the establishment of a national human rights commission if elected in the 16 January 2016 national polls. On 23rd July 2016, under the renewed leadership of Vice President Chen Chien-Ren, the POHRCC for the first time adopted a resolution to urge the President's Office to submit ONE draft among the four POHRCC proposals to the Legislature for deliberation as soon as possible.</p>
<i>Selection and Appointment</i>	
<p>What is the selection process for new members of the NHRI?</p>	<p>In the draft law, the members are to be nominated by the President and approved by the Parliament. In the parliament there can be public hearings at the discretion of parliament members to initiate public participation and scrutiny. The proposed</p>

	<p>selection process was clear and transparent, but only the two legislators' proposals permitted public participation in the nomination procedure.</p>
<p>What are the qualifications for membership? Is the assessment of applicants based on predetermined, objective and publicly available criteria?</p>	<p>The members are to meet one of the three requirements: (1) having worked as a member of an NGO with particular contribution to the advancement of human rights, (2) a scholar with specialty in human rights, (3) a judge, prosecutor, lawyer or other person affiliated with the legal profession. The criteria were predetermined and publicly available, but there remains some room for interpretation, as for example, the "particular contribution to the advancement of human rights". This is left to the discretion of the President during nomination and the parliament's decision to endorse.</p>
<p>Does the law provide that the composition of the NHRI must reflect pluralism?</p>	<p>All the versions of draft law, with the exception of the one proposed by the Control Yuan, included pluralism in terms of gender, ethnicity, and areas of expertise. No specific indication was given to commissioners with the identities of or with particular mandates for minorities and vulnerable groups such as indigenous peoples or persons with disabilities.</p>
<p>Does the law provide for a fixed term of office, of reasonable duration?</p>	<p>A term is for 6 years, and there is a clear process for removal or impeachment. Removal and impeachment cannot take place unless the member of the NHRC is penalised by criminal law, impeached for misconduct as a governmental official, or</p>

	has a severe mental disability.
What is the policy on secondees or appointments to the NHRI by government?	<p>1. As required by the two bills (in Article 5) that are being considered in the Legislature, in both of which Covenants Watch has played a pivotal role, the commissioners are prohibited from participation in any activities of political parties, government, or public enterprises, including serving in a formal position or as consultant.</p> <p>2. In the POHRCC drafts (Article 4), the qualification of commissioners are human rights NGO workers or scholars. They cannot be political party or government appointments.</p> <p>3. The Control Yuan has proposed that all the 29 ombudsmen will serve as human rights commissioners at the same time.</p>
Are there elements of the state that are beyond the scrutiny of the NHRI?	The NHRC can start the investigation on its own initiative or act upon a complaint: it has access to documents, witnesses, and locations. In the draft bills of the NGO and POHRCC, no elements of the state are beyond the scrutiny of the NHRI. There were no exceptions or limitations on “national security” grounds, and no exclusion of armed forces, police, prisons, etc.

3. Key Efforts or Initiatives

The recent action toward establishing the National Human Rights Commission (NHRC) was primarily a response toward the Concluding Observation and Recommendations of the review of the initial State Human Rights Report in 2013. The action of the

POHRCC and the large-scale, high-profile civil society advocacy within and outside the bureaucracy was the driving force. This has to do with the first wave of the civil society movement for the setting up of an NHRC just before the year 2000, when DPP first took presidential office. One of the members in that movement became a key figure in the POHRCC, while other members continued to work with human rights legislators to keep the momentum going.

With the election of the new legislature (which took office in March 2016), the strategies of NGOs remained essentially the same. The difference is that the political environment became much more receptive to human rights discourse and civil society activists, as many DPP legislators, particularly legislators-at-large, were themselves activists. This change has yet to be evident in the executive branch of the government, although President Tsai did express her support for human rights during the election campaign.

The strategy for the new government actually began during the campaign, when Covenants Watch gathered member NGOs including TAHR, TAEDP, scholars and lawyers to draft the “Recommendations on Human Rights Policies for the New Government”; which were passed on to the DPP HQ through a human rights lawyer. One of the major points in the Recommendation was the establishment of the NHRC. The DPP responded favourably through public announcement of some of its human rights policies on Human Rights Day, 2015. As expected the establishment of an NHRC was among them.

In contrast to the slow motion within the government, Covenants Watch reviewed and updated the civil society version of the NHRC bill (first edition in 2002 and revised in 2008), and sent a Bill to the Legislative Yuan through Legislator Yu in December 2014. The Bill never made it to the plenary session, because of blocks by KMT lawmakers. Covenants Watch made minor modifications of the bill and asked Legislator Yu to send it to the Legislative Yuan in May 2016.

As discussed in the 2015 ANNI report, in preparation for the establishment of an NHRC, the POHRCC convened four panel sessions of consultation between May and July 2014. The major points of debate were: (1) The possible overlap and even conflict among governmental bodies, especially the power of investigation. It is argued that the

power of NHRC to conduct investigation would create conflict of jurisdiction between NHRC and the judiciary system, or between NHRC and the Control Yuan. (2) Some scholars insisted that the NHRC does not fit into the traditional division of power: legislative, judiciary, and executive. (3) Some insisted that it would require a constitutional reform to put the NHRC in the constitution, to give it legitimacy. Others thought that a parliamentary act is quite enough. (4) Some insisted that the Control Yuan can play the roles of the NHRC, and there is no need for a new institution. This view was not well received, partly because of the dismal track record of the former. (5) There is no consensus on where to put the NHRC within the governmental structure. (6) It was mentioned that the government had gone through a series of downsizing in recent years, and it is not the right time to talk about creating a new institution.

These issues were not resolved, as neither the government nor the POHRCC took any action to enhance communication. Even if the NHRC received majority support in the Legislature, there is definitely a need to have more communication on these issues. Covenants Watch has suggested that Legislative Yuan (LY) hold a formal public hearing on these issues before the bill is discussed within the LY. That hearing should be chaired by the Judiciary and Statutes Committee, rather than by individual legislators. NGOs should also make presentations to the convener of the above Committee.

Now that the term “human rights” does not carry a negative connotation in Taiwan anymore, or at least so it appears, there is a need to go into details about the power of the NHRC and its relationship with the parliament, the judiciary, and the Control Yuan. The time has come that ideological rhetoric (such as preserving the traditional governmental structure) can be put aside, and space made for matter-of-fact discussion. Apart from the public hearing by the LY, an international conference might be helpful; particularly, emphasis could be placed on the best practices of NHRC in other countries, in terms of its structure and its functions.

4. Evaluation of Efforts

The strategy to approach the new government during its election campaign turned out to be effective, at least in the initial stages, for example, to get the draft bill through the POHRCC, where it has been long stalled (see below). However, new strategies have to

be deployed to prepare for the next stages: the President’s Office, the Ministry of Justice, the Legislative Yuan, and the formal preparatory stage.

The NGOs in Taiwan have yet to devise clever and effective ways to use international support as leverage. Despite the support that Covenants Watch and TAHR enjoy from Forum Asia, it is unclear how experts in the Asia-Pacific region can facilitate the establishment of an NHRI in Taiwan. NGOs in Taiwan need to explore the new government’s interest in the possibilities of “human rights diplomacy”, and how to link that interest to the NHRC momentum.

5. Status of Previous Recommendations

The greatest change between 2016 and the previous year was the transfer of power from the Chinese Nationalist Party (or Kuomintang, KMT) to the Democratic Progressive Party (DPP). The ‘Sunflower’ Parliament Occupation Movement in March 10 2014 garnered increased attention of the public, especially the younger generation, towards democracy and operations of the government. In addition, the coalition of the Umbrella Movement in September 2014 and the disappearance of five people associated with Causeway Bay Books, also in Hong Kong at the end of 2015, spurred people’s awareness concerning the importance of safeguarding human rights in Taiwan.

The outcomes of the 2014 municipal elections and the 2016 presidential and parliamentary elections indicated a significant change in Taiwan’s political landscape. Although the DPP assumed office between 2000 and 2008, the KMT has always held the majority of seats in the parliament (Legislative Yuan) since 1949. This situation changed following the inauguration of the 9th Legislative Yuan in March 2016. For the first time, the DPP held more seats in the Legislative Yuan than the KMT by a ratio of 69:35; with five New Power Party (NPP) legislators and four People First Party (PFP) legislators. Ms. Tsai Ing-Wen of the DPP became the first female president of Taiwan on 20 May 2016.

The Presidential Office Human Rights Consultative Committee (POHRCC) seemed to be the highest authority on human rights policy in the government during President Ma’s administration (2009-2016). As early as 2013, the POHRCC formed a 5-member task force to study whether Taiwan should establish an NHRI, and the organisational

design of the NHRI. As the issue of an NHRI had been discussed in Taiwan since 1999, a consensus on a commission-type of institution seemed to have been formed over the years. The remaining issue was where to put the NHRC within the government structure in line with the requirement of the Constitution.

The task force had several rounds of consultations with academics and NGOs in 2013-2014. They came to the conclusion that an NHRC should be established. But as to the organisational design, the task force was divided on three proposals: (A) To set up a completely independent institution not attached to either of the Executive, Legislative, or Judicial Yuans nor affiliated with the Presidential Office; (B) An NHRC set up organisationally “under” the Presidential Office, but where the President has no influence over its functioning; (C) An NHRC set up in the Executive Yuan.

These proposals were received by Vice President Wu as early as June 2014, but the VP insisted that more research and consultation was necessary. The year 2015 passed by swiftly, and not much attention was given to the NHRC. To explain: all types of media were filled everyday with discussion and gossip surrounding the presidential campaign. Although on the surface, the meeting between President Ma Ying-jeou and Chinese President Xi Jinping on 7 November 2015 in Singapore seemed to be a breakthrough in cross-strait relations, the tension between the two countries was higher than ever. Domestically the KMT trailed behind the DPP in both the presidential and parliamentary elections.

A separate proposal by the Control Yuan (a collective ombudsman system) was sent to the POHRCC in January 2016. It should be mentioned that the Vice-President of the Control Yuan is also a member of the POHRCC. This proposal (D) would have made all members of the Control Yuan (each member has ombudsman duties) simultaneously as NHRC commissioners. The justification made by the Control Yuan for its proposal is the claim that more than half of the complaints it receives are human rights complaints, and therefore all that is required is its institutional and operational expansion. So in effect this proposal just tags the name of the NHRC beneath the Control Yuan, and no progress would have been made for an independent and effective national human rights institution that is in full compliance with the Paris Principles.

This year, two parliamentarians handed in new NHRI proposals to the Legislative Yuan.

One was Legislator Yu Mei-Nu: she has been working with Covenants Watch and TAHR on an NHRI bill in recent years. Her bill was to set up the NHRI under the Presidential Office, a modification of the same bill she sent in 2014, which was prevented from entering its first reading by KMT legislators. The other was Legislator Koo, who used to be the President of TAHR himself. His proposal was to set up the NHRI in the Control Yuan, but his proposal would require that 11 of the 29 Control Yuan Members become full-time NHRC Commissioners, and about a third of Control Yuan staff will be re-assigned to the NHRC. In effect Koo’s proposal would split the Control Yuan into two functioning units. Both bills passed their first reading in the parliament in early July.

Great expectations were placed in President Tsai’s new administration. The new government kept the existing POHRCC (whose term ends on 9 December 2016), but appointed three new members to the POHRCC, including SL Huang, the Convener of Covenants Watch. The first POHRCC meeting chaired by the newly elected VP Chen took place on 22 July 2016. Huang submitted a motion to discuss the establishment of an NHRI in that meeting, which was endorsed by the 5-member task force. In the meeting which spent about 2 hours on this issue, VP Chen endured several efforts by conservative POHRCC members to postpone any concrete action (by asking for the setting up of sub-committees for further research, analyses, and planning). The chairman’s determination to reach a conclusion was met finally with a unanimous agreement among members that it is imperative to set up an NHRC compatible with the Paris Principles as soon as possible.

Regarding the organisational arrangement, among the 4 proposals (A. independent, B. under the Presidential office, C. under the Executive Yuan, D. the Control Yuan) being considered by the POHRCC, the one to put the NHRC under the Executive Yuan was deemed unfit. Although the POHRCC has never used voting to make decisions, VP Chen nonetheless asked members to express their approval of the remaining three proposals, and the committee has formed a list of preferences. Proposal B (under the Presidential Office) was on top of the list, while the Control Yuan was the second.

This seemingly simple decision has moved the establishment of the NHRC a giant step forward, since in President Ma’s administration the question of institutional design remained a hurdle for further discussion.

The next steps should be:

1. The President gives a clear indication to the secretariat (the Department of Justice-DoJ);
2. The DoJ drafts a proposal to the Executive Yuan, which in turn sends it to the Legislature;
3. The Legislature discusses three proposals: one by the government, one by Legislator Yu (which is a version of the Bill prepared by Covenant Watch), and another by Legislator Koo.
4. The Legislature passes the law to set up the NHRI (hopefully before 10thDecember 2016).

Covenants Watch has filed a request to meet the Vice-President, to push the process forward, but a date had not been set at time of writing. At this meeting the time-frame of the processes described above should be clarified. Thereafter it should also become clearer as to the ways and means in which the final stage of the campaign for establishment of a national human rights institution in Taiwan can be supported internationally.

6. Strategies

As explained in section (4), the priority of preference of the three proposals under consideration at POHRCC has been ranked. The Presidential Office should then instruct the Ministry of Justice to hand in one NHRC Bill to the Legislative Yuan. Two bills (by Legislator Yu and Legislator Koo) are already in the Judiciary and Statutes Committee, so in the end the three bills will enter the debate in the Judiciary and Statutes Committee of the LY. If the Presidential Office should decide not to adopt the proposal by Control Yuan, the Control Yuan is legally entitled to send its own proposal to the LY (although, the likelihood is low, judging by the weak political will of the Control Yuan).

The NGOs prefer to put the NHRC under the presidential office (proposal A and Legislator Yu's), because it fits better to the governmental structure under the current constitution. The completely "unattached" version of institutional design could

potentially work, but officials from various departments of the government had expressed serious doubt about the legitimacy of such an institution. Of the two versions of the Control Yuan, the one proposed by Legislator Koo could function as an independent and effective NHRC. The three designs at least have the potential to function independently and comply with the Paris Principles.

The one proposed by the Control Yuan itself would most likely be ineffective, and it probably would not be compliant with the Paris Principles on three counts: (1) The members of the Control Yuan have to meet stringent legal and/or academic criteria to be nominated, and thus are not likely to include the diversity of civil society; while the staff are also civil servants without much diversity. (2) The organisational practice of the Control Yuan has been to investigate and discipline public servants against unlawful conduct, and to use existing law as the ultimate reference; the members and staff are not used to harbouring doubt over whether there are flaws in the laws themselves. (3) The Control Yuan has not been serving as a portal of international human rights norms and instruments in past decades.

Further, the design would likely be ineffective on two other counts: (1) All members are part-time commissioners, and the staff will also likely be handling Control Yuan and NHRC complaints at the same time. (2) The Control Yuan has not enjoyed the reputation of an independent and effective institution. This drawback becomes lethal to the new NHRC as it relies on a high ground of morality to exert its power of persuasion and public education.

Now that the Presidential Office has demonstrated political will (judged by VP Chen's attitude in the meeting on 22ndJuly), Taiwan has crossed the first hurdle.

Strategies to move towards an NHRC compatible with the Paris Principles should be based on the stages above that are to follow:

1. Presidential Office stage:

The focus should be on preventing making a bad choice of which among the competing proposals should be adopted. Civil Society Organisations should try to prevent proposal D of the Control Yuan from being selected. Covenants Watch will directly lobby Vice-President Chen to explain why a national human rights institution in compliance with the Paris Principles cannot be established if the Control Yuan's

proposal is accepted. This meeting will be in addition to others to brief high level officials on this issue.

2. Ministry of Justice stage:

- a. The focus should be on communicating with the MoJ so that the institutional design conforms to the Paris Principles. Civil Society Organisations could work with legislators at this stage;
- b. Request to meet the staff of MoJ and check if the proposed articles fully comply with the ICC-SCA General Observations (adopted in Geneva in May 2013);
- c. Monitor the qualification of commissioners;
- d. Monitor/confirm whether there is adequate arrangement for budget and personnel;
- e. Visits and workshops by international experts to boost the MoJ's efforts, as well as to prepare for the upcoming stage.

3. Legislative Yuan stage: Depending on the choice in Presidential Office of the versions.

- a. Although the DPP has majority seats in the Legislative Yuan, it is important to prevent KMT legislators from smearing the concept of an NHRC. Probable attacks may come from different directions: redundancy, expansion of president's power, and constitutionality.
- b. Ask the chairperson of the Judiciary and Statutes Committee in Legislative Yuan to hold public hearings.
- c. Press conference to boost public's attention on NHRC.

Preparatory stage:

- a. Again, monitor/confirm with MoJ whether there is adequate arrangement for budget and personnel.
- b. Start discussion on key documents of the NHRC, such as the "working method" which will partially determine the relationship between NHRC and the Parliament, the courts, and media.

7. Conclusion and Recommendations

President Tsai's administration has demonstrated stronger political will towards the establishment of an NHRC than her predecessors in government; and *prima facie* the envisaged institution will conform with the Paris Principles.

However, the public is not informed enough about the reason to establish an NHRC, its

functions and achievements. The opposition party may use this fact to construct attacks on the idea of an NHRC and the international human rights system in general.

With a very strong will, the Legislative Yuan might be able to pass the NHRC Act, but the idea of an independent and effective NHRC may not go through the whole process unscathed, for example, the NHRC may be criticised as redundant or ineffective, and the budget/personnel requirement may be compromised. Damages can be minimised if the government can deliver carefully crafted position statements.

A. Recommendations to the Government of Taiwan:

- (1) Start the publicity and awareness process among the general public;
- (2) Prepare a bill on NHRC with more ambition for democratisation of Taiwan and dignity of its people;
- (3) Begin developing the "working method" of the proposed NHRC.

B. Recommendations to the International Community

- (1) Support the efforts in Taiwan by sending a delegation of Commissioners and other experts from the region in November/December 2016, to meet with all concerned parties and resolve any remaining apprehension and confusion on the role and functions of a national human rights institution.
- (2) Demonstrate clearly in its meetings and interactions with stakeholders the value and importance of a national human rights institution in Taiwan.
- (3) Support civil society organisations and initiatives for the advancement of human rights and democracy in Taiwan through a range of means including moral, financial and technical support.
