





# 2013 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia

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



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## Foreword

The Asian Forum for Human Rights and Development (FORUM-ASIA), as the Secretariat of the Asian NGO Network on National Human Rights Institutions (ANNI), humbly presents the publication of the 2013 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia. Our sincere appreciation goes to all 30 ANNI member organizations from across 17 countries in Asia for their participation and commitment to ANNI. This year, ANNI continues to further its engagement with Burma Partnership and its partners inside Burma. The strengthening of the Myanmar National Human Rights Commission (MNHRC) has been and remains a principal priority especially in this period of transition. ANNI also welcomes the engagement, for the first time, with People's Empowerment Foundation (Thailand) and the Potahar Organization for Development Advocacy (Pakistan) with ANNI and the contribution of country reports. At the same time, we extend our thanks to the NHRIs that have contributed inputs to the country reports and to the Asia-Pacific Forum (APF) for its continued engagement with ANNI at various levels

Reports submitted by organizations representing 16 countries consider the developments that took place over the course of 2012 and significant events in the first quarter of 2013. As with previous years, the country reports have been researched and structured in accordance with the ANNI Reporting Guidelines that were collectively formulated by the ANNI members at its 6<sup>th</sup> Regional Consultation in March 2013. This year, the Report streamlined its focus to centre primarily on issues of *Independence*, *Effectiveness* and *Accountability* of NHRIs. Due to currency and increasing importance, two questionnaires on (i) Corporate Accountability / Business & Human Rights and (ii) NHRIs as HRDs were developed and sent to NHRIs- whose replies (where available) were incorporated into the chapters. We believe that this annual report will continue to serve its purpose as an advocacy tool to enhance the effective functioning of NHRIs and that they can continue to play its role as public defenders and protectors of human rights on the ground.

FORUM-ASIA would also like to acknowledge the contribution of the individuals who have dedicated their time and effort to the publication of this Report; namely Khin Ohmar, Elise Tillet, Miyuru Gunasinghe, Anushaya Collure, Tsai Chi-Hsun, Mandkhaitsetsen Urantulkhuur, Alistair Rooms, Urantsooj Gombosuren, Sachchal Ahmad, Dr. Renato G. Mabunga, Shoko Fukui, Bijaya Raj Gautam, Humaida Abdulghafoor, Mikyung Choe, Ravin Karunanidhi, Chumaporn Taengkliang, Warunyakorn Fakthong, Sultana Kamal,

Aklima Ferdows Lisa, Zainal Abidin, Indriaswati D. Saptaningrum, Jose Pereira and Henri Tiphagne. Our sincere thanks to the Country Program team of FORUM-ASIA who has assisted in the process. This year, ANNI especially conveys its gratitude to Balasingham Skanthakumar for his expertise and guidance in editing the Report. Finally, we would like to acknowledge the support of the Swedish International Development Cooperation Agency (SIDA) in the publication of this Report.

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

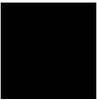


**Evelyn Balais-Serrano**

Executive Director

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

Secretariat of ANNI



# Regional Summary: NHRIs and Critical Moments in Asia

## Introduction

National Human Rights Institutions (NHRIs) have become increasingly prominent actors in the national, regional and international human rights arenas. When able to operate independently and effectively, they are important mechanisms that constitute an effective complement to the judiciary and other institutions in the national infrastructure tasked with the promotion and protection of human rights. This has been evidenced in the 2011 United Nations Human Rights Council (HRC) Resolution, during its 13<sup>th</sup> regular session; which acknowledged NHRIs as the public protectors of HRDs and encouraged States to reinforce the capacity and mandate of NHRIs to allow them to fulfill their role as Human Rights Defenders (HRDs) effectively. In 2012, the UNHRC adopted by consensus its second resolution on national human rights institutions (NHRIs). The resolution received broad cross-regional support and was co-sponsored by more than 100 States.

2012 (and significant events in the first half of 2013)<sup>1</sup> represented a litmus test for many NHRIs in the region. There were significant events for Asian states: such as budding attempts towards democratic transition; and states that faced internal conflict or communal violence, among others. Often, this involved the complicity of state actors, which renders the fight against impunity a formidable challenge.

Under such circumstances, it is imperative that national institutions are able to operate independently and effectively so that they are able to offer adequate protection to individuals and organizations that may be targeted due to their human rights-related activities, address human rights violations, facilitate access to justice and effective remedy as well as demand accountability. In this light, the focus of the ANNI Report 2013 is mainly centered on three specific concerns: namely, independence, effectiveness and accountability of NHRIs.

- 1) Independence of NHRIs – Attention was focused on the selection and appointment process of Commissioners and members of NHRIs. A scrutiny of the NHRI's composition and guarantees of independence-- which includes a review of the backgrounds (where possible), security of tenure and the NHRI's mandate, resourcing and sphere of competence -- is also provided.
- 2) Effectiveness of NHRIs – An analysis was made of the NHRI's complaints-handling processes and systems of NHRIs. This was done using publicly-available data, referrals or cases taken up by national groups, and bilateral communications with NHRIs.

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1 Coverage of ANNI Report 2013

- 3) Accountability of NHRIs – The focus was on the presentation and discussion of NHRIs’ annual reports to their Parliaments or Parliament Standing / Sub-committees. Additionally, where possible, a review was also made of the NHRI’s relationships with other institutions, such as other branches of government and the public.

The ANNI Report 2013 also focused on two thematic issues- (i) *Business and Human Rights (Corporate Accountability)* and (ii) the *NHRIs as HRDs*. On the former, a questionnaire was designed based on the ACJ Reference on Corporate Accountability (2008) to critically observe and analyze the efforts undertaken by NHRIs in promoting enhanced protection against corporate-related human rights abuses, ensuring greater accountability and respect for human rights by business actors, access to justice for victims and right to effective remedy<sup>2</sup>. It was felt necessary because of the increasing spate of rights violations perpetrated by transnational corporations and other business enterprises especially as many Asian states increasingly liberalize their economy to foreign trade and investment without corresponding safeguards or mechanisms in place. Despite the proliferation of standards, principles and voluntary codes that have been instituted in the last few years, only a handful of NHRIs are actively engaged with this issue. At the same time, the findings from the questionnaire also call to attention larger questions such as processes to monitor implementation by NHRIs, the capacity of NHRIs on this issue and the disparity between the quality and progressiveness of tools such as the ACJ references and apparent diffidence or disinterest of NHRIs.

On the second thematic focus, more recently, the report of the Special Rapporteur on the situation of human rights defenders again stressed the potential role that NHRIs can play in the protection of human rights defenders, urging NHRIs to go beyond mere compliance with the minimum standards prescribed in the Paris Principles.<sup>3</sup> While ANNI welcomes the establishment of specialized HRD focal points or entities within certain NHRIs dedicated to HRDs in response to long-standing calls<sup>4</sup>, the findings from the questionnaire reaffirm the shortcomings highlighted in the Special Rapporteur’s report on issues relating to a lack of effectiveness, responsiveness and transparency in the proceedings as well as the failure in some instances to recognize them as a special and vulnerable category of civil society with specific needs.

## NHRIs and Countries in “Transition”

2012 saw many Asian states embark on democratic transition away from previous modes of government or prolonged periods of domestic conflict. However, many teething problems, *among others*, to do with accountability, redress and reconciliation continue to remain unaddressed. In Burma, communal violence continues to grip the country and crackdowns against mass protestors against large-scale infrastructural and development projects proliferated in the absence of safeguards and mechanisms for protection, redress and remedy.

<sup>2</sup> The ICC Edinburgh Declaration (2010)

<sup>3</sup> Report of the Special Rapporteur on the situation of human rights defenders to the 22<sup>nd</sup> session of the Human Rights Council (A/HRC/22/47)

<sup>4</sup> For example, AHRC/13/22 and A/66/203

Other human rights violations include judicial harassment and arbitrary arrests/detention of human rights defenders (HRDs). The Myanmar National Human Rights Commission (MNHRC) -- established by presidential decree in 2011 -- found itself ill-equipped to deal with these emerging problems.

From 2012, the government took steps to formalize the MNHRC in legislation by an act of Parliament. However, again, the actions taken by the government suggest that the establishment of the MNHRC is a window-dressing measure showcasing its reformist credentials to the international community. For example, the draft legislation was not made public (only until very late before debate in Parliament) and consultation with civil society organizations remained limited and non-inclusive, thus preventing robust public scrutiny and input that are vital to ensure the draft law's full compliance with all aspects of the Paris Principles.

Sri Lanka is another state in transition from internal conflict that is confronted with deep-rooted issues of accountability and difficulty in ensuring reparation and justice. This was further compounded by blatant attempts to upend the rule of law and democratic institutions in the country -- such as the impeachment of the Chief Justice and undermining the independence of the judiciary in 2012.

The Human Rights Commission of Sri Lanka (HRCSL) -- whose independence was compromised after the 18<sup>th</sup> Constitutional Amendment in September 2010 brought the appointment process under executive control -- continues to experience difficulties in carrying out its work in such a restrictive operational landscape. It has been unable to assist or facilitate the implementation of the National Action Plan for the Protection and Promotion of Human Rights ('National Action Plan'). More recently, there are fears that the direct appointment of Dr. Prathiba Mahanamahewa -- a prominent apologist for the Sri Lankan administration who has been highly critical of the UN HRC resolutions on Sri Lanka in 2012 and had publicly "*endorsed*" the impeachment of the Chief Justice -- would further undermine the integrity and impartiality of the HRCSL in a time when it should instead focus its efforts on combating impunity and demanding accountability.

Similarly in Nepal, a country at a critical moment in its modern history, has announced the dates for national elections in November 2013 after emerging from a difficult period that included the abolition of the monarchy, transition from civil strife that ended in 2006 and the recent expiration of parliament that failed to fulfil its mandate of drafting a new Constitution. During that time, the interim government passed the NHRC Act that eroded any guarantees of independence and autonomy -- among which includes financial controls, restrictions on staff selection and recruitment imposed by the Executive and procedural flaws such as a statute of limitations for filing of complaints. The moves to debilitate the Commission have been widely alleged as a political compromise to provide amnesty for State and non-State actors involved in human rights violations during the conflict period. In response to these controversies, the ICC-SCA conducted a special review of the NHRC Nepal in July 2013 but the decision has been deferred to November 2013 pending a request for further information from the Commission. There is a sense of fear that NHRIs in these countries will continue to be beholden to their governments instead of performing their role as independent public bodies in a unique position, especially in a time of transition, to hold their governments accountable to human

rights obligations and to ensure that international human rights norms and standards are mainstreamed into national policy-making and practice.

Elsewhere, a transfer of power in 2012 under controversial circumstances saw the ousting of the first democratically-elected President of the Maldives. The regime change was fraught with a series of human rights violations including crackdowns on peaceful protestors, intimidation and harassment of opposition party members as well as restrictions against the media and violence employed against journalists. Further instances of reprisals and repression on the exercise of legitimate dissent protesting against the new government were reported in a particularly turbulent year in Maldives. While the Human Rights Commission of the Maldives (HRCM) conducted an inquiry into the events surrounding the February incidents, civil society expressed disappointment at the highly watered-down and uncritical assessment -- chief among which was a glaring failure to condemn security personnel for excessive use of force and misconduct. This has been the trend for other significant "*challenging*" cases involving human rights defenders, such as bloggers and whistleblowers against the government, which the HRCM has been worryingly silent on.

## **Working Relationship between Civil Society and NHRIs**

More recently, in January 2013, a leadership crisis gripped the National Human Rights Commission of Indonesia (Komnas HAM). Controversial changes to the code of conduct for Chairpersonship were made, not long after the Chairperson Otto Nur Abdullah assumed office. In a plenary session among the Commissioners, there was a suggestion to revise the existing model of leadership in Komnas HAM. It was proposed that the length of service be shortened from two-and-a-half years to one-year. This change would entail an annual rotation of the leadership for the 2012-2017 terms in order to promote collective and collegial leadership of Komnas HAM.

According to a Coalition of Civil Society Organizations (Indonesia) - which includes ANNI members ELSAM, KontraS, Imparsial and HRWG monitoring these developments in the Komnas HAM -- the changes in the code of conduct were highly suspicious and may be linked to external political bargaining in light of presidential elections to be held in 2014. The organizations also registered their concern that the contentious changes were enacted to accommodate certain candidates accused of poor human rights track records. Eventually, the new code of conduct was applied retroactively, annulling the Chairmanship of Otto Nur Abdullah and his two deputies Sandrayati Moniaga and M. Nurkhoiron, who assumed office on 23 November 2012. Such a decision did not seem pertinent to the logic of collective collegial leadership that was promulgated. The International Coordinating Committee of NHRIs Sub-Committee on Accreditation (ICC-SCA) received the request for a special review on Indonesia and had invited a response from the Komnas Ham. Based on this, they will decide in November 2013 whether or not to conduct a special review in March 2014.

NHRIs must be, and must be seen to be, independent and impartial. If not, they risk having their investigations challenged, recommendations ignored, or suffer a fractious relationship with rights bearers and defenders they are mandated to protect. That continues to be the case for

the National Human Rights Commission of Korea which remains unable to stand up to scrutiny over its independence, effectiveness and separation from the government. It is unfortunate that a country with a dynamic and robust civil society working on a variety of issues such as government accountability, development aid monitoring, the environment, disability/labor/migrant worker rights and repressive national security laws are unable to count the NHRCK as an ally in the face of persistent persecution and harassment of HRDs by the government. In her recent visit to South Korea in June 2013, the Special Rapporteur on the situation of human rights defenders concluded that the former administration of Lee Myung-bak had eroded the effectiveness of the National Human Rights Commission of Korea (NHRCK) during five years in office up to the end of February. Once held as an exemplar for other NHRIs in the region to emulate, the NHRCK is no longer seen as a key player in the promotion and protection of human rights in the country and has suffered the loss of confidence of many national stakeholders.

## Marked Improvements and Good Practices

2012 also saw marked improvements in the performance of many NHRIs in the region. This has taken place mainly when NHRIs can operate in an environment that is conducive for them to carry out their work. The Mongolian example provides a noteworthy paradigm for collaboration between various stakeholders. Beyond the discussion of NHRI reports in Parliament, this year, the NHRCM's annual report was further discussed at an extended meeting on the joint initiative of the Legal Standing Committee of Parliament and the NHRCM with the participation of government representatives and civil society actors. As a result, a Resolution was issued (annexed to the country report in these pages) that assigned the Prime Minister to develop a plan of action to implement unfulfilled recommendations made in the NHRCM's annual reports and to report on the status of recommendations and commitments made by the Government to the treaty bodies, among others.

The National Human Rights Commission of Malaysia (SUHAKAM) also notably took steps to hold violators of human rights accountable for massive and brutal crackdowns against peaceful protestors over *Bersih* rallies (from 2012-2013) in the lead up to General Elections in 2013. SUHAKAM conducted two public inquiries to investigate allegations of human rights violations during the assemblies. The report found the police forces guilty of using "disproportionate force", misconduct against participants and attempts at preventing the media from discharging their role and responsibilities. Regrettably, the police have been lackluster in responding to and implementing SUHAKAM's recommendations; effectively rendering them beyond reproach. The police have similarly resisted calls from other independent bodies to establish an independent external oversight body to address police misconduct.<sup>5</sup> Despite these setbacks, the public inquiries conducted by SUHAKAM were timely and laudable as it was able to proceed independently without any political or bureaucratic interference. A similar effort was recently taken by SUHAKAM in its Report of the National Inquiry into Land Rights of Indigenous Peoples.

Efforts must now be taken to urge the Government to table the SUHAKAM Reports for debate in Parliament for the purposes of adopting these recommendations and giving effect to them immediately.

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5 Royal Commission to Enhance the Operation and Management of the Royal Malaysian Police

## Countries without NHRIs

In Taiwan, in a landmark Human Rights Review organized jointly by the Taiwanese government and civil society to appraise the state's human rights performance and compliance with international treaty bodies, namely the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). The review was conducted by a group of independent experts who then provided a list of concluding observations and recommendations -- chief among which was the establishment of an independent national human rights commission with time-bound indicators.<sup>6</sup> Despite the rejection by the UN Secretary-General of Taiwan's request to deposit the instruments of ratification, because it is not a UN member state; the conduct of the review is of added significance as the Taiwanese government nevertheless passed the *Implementation Act*, which gives both treaties special status in domestic law just below that of the Constitution. This laudable measure sends a signal to the international community that Taiwan aspires to abide by international norms regardless of its diplomatic status. That the review was also conducted "on-site" also highlighted the openness of the government towards civil society participation and engagement in this unique process. There is certainly the impetus and momentum for the establishment of an NHRI following the conclusion of the review.

Pakistan successfully witnessed her democratically-elected civilian government complete its first full five-year term and proceed to successfully conduct elections in 2013. The passage of the National Commission for Human Rights Bill in 2012 was part of the wider institution-building efforts towards a more democratic framework in the country. While there are many positive and laudable provisions in the law -- such as the integrity of the selection process, diverse representation of society, the legal powers and resourcing of the Commission, problematic concerns remain that may mar its independent and effective functioning. For example, the jurisdiction of the PNCHR does not extend over the full law enforcement apparatus of the country, including the intelligence agencies. A recent worrying development pertains to the relegation of the Ministry of Human Rights to a unit of the Ministry of Law and Justice, after newly-elected Prime Minister Nawaz Sharif assumed office. A corollary of that was the dissolution of the National Assembly and Senate Standing Committees on Human Rights and likelihood that visibility and attention on human rights issues in Parliament will be diminished. The PNCHR, which recently opened calls for nomination of Commission members, has its work cut out for it.

The examples of Pakistan and Taiwan should provide some encouragement for other countries who are confronted with the same problems of low political will or resistance by the government. In Japan, while a "Draft Bill on the Establishment of a Human Rights Commission" was submitted by the ruling Democratic Party of Japan to the House in September 2012, the dissolution of Parliament a month later due to elections halted these plans. Despite these frustrations, civil

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6 The group consisted of NYU School of Law Professor Philip Alston, NYU professor Jerome Cohen, a renowned expert in Chinese law, Nisuke Ando (Japan); Virginia Bonoan-Dandan (the Philippines); Theodor van Boven (the Netherlands); Shanthy Dairiam (Malaysia); Asma Jahangir (Pakistan); Manfred Nowak (Austria); Eibe Riedel (Germany); and Heisoo Shin (South Korea).

society in Japan should take advantage in the interim to develop a plan for action or demand further consultation with the authorities to address problematic provisions in the bill -- such as issues of mandate, independence and resourcing -- that if left unaddressed, will not meet the minimum standards required for the NHRI to be considered credible and to ensure their independent and effective functioning.



# Burma: “Lost in Transition”

Burma Partnership<sup>1</sup>  
Human Rights Education Institute of Burma

## I. General Overview

In 2012, Burma’s transition process continued with the government undertaking a series of noteworthy and necessary steps towards democratic reform. However, such developments have been stained by continuing grave human rights violations against ethnic and religious minorities and human rights defenders. In Kachin State,<sup>2</sup> armed conflict persisted with the Burma Army intensifying its offensive against the Kachin Independence Army (KIA) in December 2012, launching air strikes and firing cluster bombs in areas near Internally Displaced Persons (IDPs) camps and civilians. Meanwhile, in Arakan State, two serious outbreaks of communal violence between Arakanese Buddhists and Rohingya Muslims have occurred, leaving at least 100 people dead and over 100,000 displaced. Although the violence has been perpetrated by both communities, the government has failed to take any meaningful steps towards constructively addressing the systemic and institutionalized discrimination against the Muslim population.<sup>3</sup> The anti-Muslim violence has since been spreading to other parts of the country.

The government continued to suppress the activities of dissidents, including through arbitrary arrests and detentions,<sup>4</sup> and judicial harassment. At least 200 political prisoners still remain behind bars. For instance in December 2012, security forces resorted to Burma’s old-fashioned way of dealing with protesters, using incendiary devices against peaceful protesters opposing the Letpadaung copper mine in Sagaing Region. These serious human rights violations are taking place in Burma in a context where there is still no rule of law or an independent and impartial justice system.

In light of these grave human rights violations, the Myanmar National Human Rights Commission (MNHRC) has been worryingly silent. The Commission hasn’t investigated or released statements on any of the cases of violence or judicial harassment against human rights defenders, nor has it called for the repeal of old oppressive laws or for compliance with international human rights standards. Some Commissioners visited both Kachin State and Arakan State, releasing statements<sup>5</sup> after their visit. The statements only focus on humanitarian needs and fail to address the perpetuation of human rights violations

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1 Prepared by Khin Ohmar, Coordinator of Burma Partnership

2 Burma Must End Offensives and Dialogue with Ethnic Armed Groups for a National Political Settlement, Burma Partnership, 14 January 2013, available at <http://bit.ly/18Acgik>

3 “All You Can Do is Pray”: Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma’s Arakan State, Human Rights Watch, April 2013, available at <http://bit.ly/18AChyl>

4 Burma/Myanmar: New Forms of Control and Threats to Freedoms of Expression, Assembly and Association Amidst Reforms Fanfare, Forum Asia, March 2013, available at <http://bit.ly/18AcqC5>

5 List of statements by the Myanmar National Human Rights Commission available at <http://bit.ly/NGo1Eo>

and discrimination against religious minorities and ethnic nationalities. This raises questions about the willingness of the Commissioners to actively promote and protect human rights, and their freedom of expression and independence from President Thein Sein, who established the Commission and nominated the Commissioners.

In 2012, the MNHRC also started a transition from a presidential commission towards one established by the Parliament. On 16 March 2012, the Parliament refused to allocate to the MNHRC the budget requested by the government as part of the 2012-13 National Planning Bill. The decision was based on the fact that the Parliament considered the MNHRC's establishment as not being consistent with the 2008 Constitution. On 27 March 2012, the MNHRC released a statement<sup>6</sup> announcing that as a consequence of the Parliament's decision, it had begun drafting an Enabling National Human Rights Commission Act, that it would submit the draft to the President and, if approved, present it to the Parliament for adoption. Only a year and half later, in July 2013, the draft bill was published in the state-run newspaper *The Mirror*. The Office of the High Commissioner for Human Rights (OHCHR) and the Asia Pacific Forum (APF) have both been able to provide feedback on the draft legislation.<sup>7</sup>

The MNHRC has been engaging at the regional and international level. In November 2012 it was accepted as associate member of the APF<sup>8</sup> and in September 2012 as a member of the South East Asia NHRIs Forum (SEANF).<sup>9</sup> However, while the MNHRC has been engaging with the international community, the draft legislation was not published in 2012 and consultation with civil society organizations has been limited and non-inclusive, despite numerous calls to do so.<sup>10</sup>

The publication of the MNHRC enabling law in July 2013 marks an important development for the future shape, mandate and powers of the Commission. However, the law has not been yet debated or adopted in Parliament, thus making it difficult to provide, at this stage, a detailed analysis of it.

Parallels can be drawn between the status of the country and the MNHRC. Fundamental challenges and serious concerns regarding the government's and the commission's commitment to promote and protect human rights remain. So far Burma and the MNHRC's transition have yet to produce tangible changes, leaving many to wonder whether the country and its national human rights institution are becoming "lost in transition."

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6 Statement of the Myanmar National Human Rights Commission on Its Establishment and Its Current Status of Functioning, 27 March 2012, available at <http://bit.ly/Mb16iQ>

7 Roundtable Considers Founding Legislation for Myanmar NHRI, Asia Pacific Forum, 19 February 2013, available at <http://bit.ly/11B9yEC>

8 APF Membership Expands to 19, APF, 16 November 2013, available at <http://bit.ly/13xKdqp>

9 Statement of Myanmar National Human Rights Commission (MNHRC) concerning its membership in South East Asia NHRIs Forum (SEANF) No. 6/2012, 17 September 2012, available at <http://bit.ly/11tIRjT>

10 Open Letters Call for Civil Society Consultation on the Enabling Law of the Myanmar National Human Rights Commission, Asian NGO Network on National Human Rights Institutions, 8 May 2013, available at <http://bit.ly/11B7OeD> and Burma's Civil Society Calls for Transparency and Inclusiveness in Drafting of the National Human Rights Commission Enabling Law, 10 May 2012, available at <http://bit.ly/Q6aYgQ>

## II. Independence: Lack of Trust and Legitimacy of Members

The Myanmar National Human Rights Commission (MNHRC) was established on 5 September 2011 by the Union Government of the Republic of the Union of Myanmar Notification No. 34/2011.<sup>11</sup> According to the Notification, the MNHRC is charged with promoting and safeguarding the fundamental rights of citizens in accordance with the 2008 Constitution. The government Notification lists the 15 members of the Commission.<sup>12</sup> Currently, the members of the MNHRC were selected and appointed by President U Thein Sein, at his sole discretion, with no consultations; and announced in the government Notification mentioned above.

In a letter dated 12 January 2012, the MNHRC added that Commissioners were on a five years tenure, which may be renewed for another term, and that they enjoy criminal and civil immunity for acts taken while executing the responsibilities and entitlements of the MNHRC.<sup>13</sup> Current members of the MNHRC include three women out of 15 members and representatives of ethnic nationalities such as Chin, Karen, Kachin, Shan and Arakanese.<sup>14</sup>

Tomás Ojea Quintana, Special Rapporteur on the situation of human rights in Burma, in his report in March 2012 summarized:

“While the President appointed commissioners representing different ethnic minority groups, the vast majority are retired Government civil servants. Some informed the Special Rapporteur that they had been neither consulted nor informed in advance of their appointment.”<sup>15</sup>

The current composition of the MNHRC is of serious concern. Many consider the MNHRC to be an institution that could not promote and protect human rights because of its current membership. Deep-rooted trust issues amongst the current Commissioners are an important obstacle to civil society cooperation and engagement with the Commission, but also a strong limitation on the Commission’s legitimacy.

As detailed in the 2012 *ANNI Report*, the 15-member body includes former military regime’s ambassadors, as well as retired civil servants with little prior knowledge of human rights.<sup>16</sup> There are no representatives of NGOs, trade unions or professional associations. For instance, U Win Mra, the Chairman of the MNHRC is a retired career diplomat. He served as the permanent representative of Burma to the UN from 1994 until 2001. In his capacity as the regime’s former Ambassador to the UN in New York, U Win Mra spent seven years routinely defending the regime against allegations of human

11 Formation of Myanmar National Human Rights Commission, Union Government of the Republic of the Union of Myanmar Notification No. 34/2011, available at <http://bit.ly/QmEtWtH>

12 Ibid.

13 See “Burma: Curb Your Enthusiasm, Analysis of the Establishment of the New Myanmar National Human Rights Commission,” 2012 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia, FORUM-ASIA2012, available at <http://bit.ly/176x1A5>

14 “We won’t be influenced by the govnt,” The Myanmar Times, 19 September 2011, available at <http://bit.ly/MaXJIP>

15 Progress report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana,” paragraph 19, 7 March 2012, available at <http://bit.ly/NoOVkA>

16 ANNI, op. cit.

rights violations. Since he was appointed as the Chairman of the MNHRC, he ruled out the possibility for the Commission to look into human rights abuses in ethnic conflict areas,<sup>17</sup> explained that the release of political prisoners is not a priority,<sup>18</sup> and rejected the possibility of establishing a truth commission to investigate the violence in Arakan State saying:

“Truth commissions are established by new governments in countries that have transformed after violence, unrest and human rights abuses so they can be rediscovered and revealed. That is why it is a different condition here: the transition in Myanmar was peacefully attained by the election.”<sup>19</sup>

The MNHRC also failed to investigate or comment on serious human rights violations committed by the government or its security forces such as the violent crackdown against peaceful protesters at the Letpadaung copper mine in Sagaing Region. On 29 November 2012, riot police attacked a camp of demonstrators opposing the Letpadaung copper mine with water cannons, tear gas and incendiary devices, resulting in injuries to at least 70 activists and monks.<sup>20</sup> The MNHRC has released no statements related to human rights defenders at risk, threatened, arbitrarily arrested or judicially harassed. It also has not played any preventive role in relation to the protection of human rights defenders.

In June 2012, the Commission visited Arakan State after communal violence. In the statement about its findings, the MNHRC stated:

“It was noted that the basic needs of food, clothing, shelter and health of the victims at the above-mentioned relief stations are being met .... The Tatmadaw (the Armed Forces), the Police Force and the Border Immigration Headquarters are providing security for the respective areas and stations.”<sup>21</sup>

Reports from the Office for the Coordination of Humanitarian Office and Médecins Sans Frontières alert the international community about the squalid conditions in which Rohingya IDPs are living in Arakan State.<sup>22</sup> In addition, Human Rights Watch released a report with evidence of the Burma Army and the local security forces’ discrimination against the local Rohingya population, and their active role in some cases in the violence

17 Myanmar human rights panel rules out conflict abuse probe, The Brunei Times, 15 February 2012, available at <http://bit.ly/116o2TW>

18 Win Mra, Chairman of the MNHRC says the Release of Political Prisoners is Not a Priority, The Irrawaddy, 11 May 2012, available at <http://bit.ly/116ofXg>

19 Human Rights Body Cool on Truth Commission Proposal, The Myanmar Times, 13 August 2012, available at <http://bit.ly/PG8uWf>

20 List of monks and activists who received medical attention in hospitals as a result of the violent crackdown of the Letpadaung protests, as documented by the Assistance Association for Political Prisoners (Burma), available at: <http://bit.ly/116oGkB>

21 Statement No. (4/2012) of Myanmar National Human Rights Commission Concerning Incidents in Rakhine State in June 2012, available at <http://bit.ly/NG45V6>

22 Medical Aid to Arakan State Rohingya Blocked, MSF Says, The Irrawaddy, available at <http://bit.ly/1161qGh>

against them.<sup>23</sup> Tomás Ojea Quintana, in his latest report, mentioned that he received allegations of human rights violations committed by NASAKA (the Border Immigration forces) against the Muslim population and recommended to suspend their activities in the area.<sup>24</sup> In this context, it seems that the Commission's visit to Arakan State was a way to appease the international community and legitimize the government's actions, while on the ground independent investigation reveals a dire humanitarian situation and violations committed by the Army and the government's forces.

With the forthcoming legal establishment of the MNHRC, the draft legislation must require a diverse composition, a public, transparent and broad consultation process open to different groups of societies, ensure adequate representation of civil society, publish criteria for appointment, lay out clear qualification requirements to ensure members have knowledge of human rights, and require for the composition of the Commission to reflect pluralism, including gender balance and representation of ethnic nationalities, religious minorities and vulnerable groups.

In 2012, members of the MNHRC attended numerous consultations and trainings on human rights and independence, especially regarding its founding legislation. The OHCHR, the EU,<sup>25</sup> the UN Secretary General,<sup>26</sup> the Raoul Wallenberg Institute<sup>27</sup> and the APF<sup>28</sup> all offered support to the Commission. However, this is not enough for the people of Burma to place trust in the current Commissioners. As the enabling law of the MNHRC will be adopted, the Commission needs to be re-shuffled and new members must be appointed according to the process described above.

In 2012, the MNHRC did not have its own staff members but was assisted by staff from other government departments. In early 2013, staffs were recruited mainly from graduates of the Rangoon Law School. No information about the recruitment policy is available. New staff attended in-house training on human rights given by the Commission members themselves. This is a cause for concern, knowing the poor level of understanding of human rights of the Commissioners' themselves.

### III. Effectiveness: "A paper-shuffling mechanism"

Despite being in the process of drafting its enabling law, the MNHRC continued to operate and receive complaints during 2012. A statement dated 6 October 2011 currently regulates the complaint handling mechanism of the MNHRC.<sup>29</sup>

23 Human Rights Watch, op. cit., "All You Can Do Is Pray"

24 Report of Tomás Ojea Quintana Special Rapporteur on the situation of human rights in Burma, 6 March 2013, available at <http://bit.ly/1162SZh>

25 Catherine Ashton Launches a Program to Help the MNHRC, 17 April 2012, available at <http://bit.ly/115VLQr>

26 UN Secretary General Offers Support to strengthen MNHRC's Independence, 9 May 2012, available at <http://bit.ly/115VTPT>

27 Human Rights Documents to be Translated to Myanmar: NHRC, 9 February 2013, available at <http://bit.ly/115W1iu>

28 APF Offers Assistance to Myanmar's New NHRI, 27 April 2012, available at <http://bit.ly/115VQ6M>

29 Myanmar National Human Rights Commission Accepting of Complaint, 6 October 2011, available at <http://bit.ly/QDEFoo>

The statement explains that the person whose rights have been violated must send the complaint; it also requires the complainant to provide a copy of his or her national registration card. In ethnic nationalities areas, it is not unusual for people to not have national registration cards and many might be afraid of interacting directly with the MNHRC due to its members' former links to the regime. Civil society organizations or third parties should be allowed to lodge complaints on behalf of victims of human rights violations. In addition, there is no provision to guarantee the complainants or witnesses security and, when necessary, confidentiality. The statement also makes no mention of the right to remedy and the concrete powers and actions the MNHRC could take when facing human rights violations. Instead it states:

"If the Commission concludes that the alleged violations of the fundamental rights in the Constitution against a citizen are true, it will take steps in accordance with its rules of procedure to promote and safeguard the fundamental rights."

The rules and procedures haven't been released so far. The statement also explains that

"Matters that have been brought before a court or under the proceedings of a court of law and matters that have been finally decided by a court are not relevant under this announcement."

Another source of information regarding the MNHRC complaint mechanism can be found in the presentation given by the MNHRC at a seminar organized by OHCHR in Rangoon. The document, called *Presentation on Recent Developments on Myanmar National Human Rights Commission Complaints Handling, Investigations and Cooperation with the Special Procedures of the United Nations*, explains in detail the MNHRC complaints handling mechanism.<sup>30</sup>

**TABLE 1: NO. OF COMPLAINTS RECEIVED BY THE MNHRC IN 2012**

| Total Number of Complaints   | 2866 |
|--|------|
| Number of Complaints Accepted and Referred to the Government                 | 830  |
| Number of Answers Received from the Government                               | 51   |
| Number of Complaints sent back to Complainant to seek other means of redress | 147  |

In the presentation, the Commission further explains that complaints can be referred "to the Office of the Union Government for onward transmission to the Ministry or body identified by the Commission as responsible. [...] As a result, when the complaints are

<sup>30</sup> Presentation on Recent Developments on Myanmar National Human Rights Commission (MNHRC) Complaints Handling, Investigations and Cooperation with the Special Procedures of the United Nation, MNHRC, available at <http://bit.ly/Zx2CGi>

investigated by the Ministry or the body identified as responsible, they are occasionally found to be invalid.”<sup>31</sup>

The mechanism described above is of serious concern. The MNHRC does not investigate the complaint itself, but rather transfers it to the concerned authorities and asks them to carry out the investigation. As stated above by the Commission, the complaints are then found to be invalid. It is not surprising that complaints are dismissed when the authority that allegedly committed the human rights violations are the very same authorities that investigate the complaint. The MNHRC’s answer to complaints is limited to transferring information to the concerned authorities. As of today, the MNHRC seems to be nothing more than a “paper shuffling” body.

For instance, the Kachin Women Association of Thailand (KWAT) referred the case of Sumlut Roi Ja, an ethnic Kachin woman abducted by the Burma Army.<sup>32</sup> Her husband took the case to the Supreme Court, which dismissed it without even hearing his testimony. As a consequence, KWAT forwarded the case to the MNHRC. The Commission’s answer to the case (see Annex 1) is a simple letter informing KWAT that the commission forwarded the case to the Office of the Union Government. This is not an isolated case. The organization, Human Rights Defenders and Promoters (HRDP), submitted more than 800 complaints to the MNHRC. HRDP only received an answer from the MNHRC for 13 cases, including two labor rights cases, two cases of torture and nine cases of land grabbing. The 13 responses out of 800 complaints only state that the Commission will work on the case.

#### **IV. Accountability**

The presentation by the MNHRC mentioned above is the only activity report available. It was not widely distributed or disseminated to the public, in the media, or on the internet. The report was sent to the President but there have been no interaction with the Parliament or debate regarding the activities undertaken by the MNHRC in its first year of activities. As stated in its report, “Our formal relations with the Ministries are only through the Office of the Union Government. Ours with the Parliament is non-existent at present.”<sup>33</sup>

In addition, engagement with civil society is very limited. As mentioned above, despite numerous calls for consultations on the draft enabling law of the MNHRC, our calls were not answered. One meeting co-organized by OHCHR in January 2012 involved both civil society and Commission members. According to HRDP, in the “consultation” the Commission refused to hand out the draft legislation to participants. It also refused to answer questions on the presentation. This meeting was more an information sharing mechanism rather than a genuine consultation to consider civil society members concerns, suggestions and recommendations on the draft legislation.

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<sup>31</sup> Ibid.

<sup>32</sup> Sumlut Roi Ja Still Missing One Year On, Burma Campaign UK, available at <http://bit.ly/Zx6tDa>

<sup>33</sup> MNHRC, op. cit.

The MNHRC does not genuinely engage with civil society members and recognizes that it has no relations with the Parliament. The MNHRC seems to be only accountable to the President, thus reinforcing the feeling that it is nothing more than the President's Commission rather than an independent Commission established to protect and promote the human rights of the people of Burma.

The draft legislation lately published will be a unique opportunity to enhance the independence, pluralism and effectiveness of the MNHRC. The current draft might be subject to changes, thus limiting the value of an analysis at this stage. Next year's *ANNI Report* will analyze the legislation and evaluate its application over the year of 2013.

## V. Conclusion and Recommendations

Proceeding with enacting an enabling law without ensuring a transparent and inclusive consultation process would only result in a Commission that does not meet the criteria for international recognition as a credible NHRI, and that has no legitimacy and trust from the peoples' whose rights the Commission is supposed to promote and protect. To ensure the MNHRC's transition is towards an independent, effective, transparent and accessible human rights institution, the Union government of Burma, Parliament and the MNHRC must take into consideration and implement the following recommendations.

### Recommendations to the MNHRC, the President, and the Parliament:

- Ensure that the MNHRC's enabling law fully complies with the Paris Principles, including by ensuring that the MNHRC has a broad mandate based on universal human rights principles, that its membership reflects pluralism, that the selection process of its members ensures inclusive representation, including that of civil society, and that the MNHRC is accorded adequate financial independence and resources as well as power of investigation;
- Delay or suspend the enabling law's deliberation in Parliament in order to organize a consultation process that includes all relevant stakeholders, including both registered and non-registered civil society and community-based organizations, grassroots peoples and communities throughout the country, especially those from ethnic areas and women's groups, as well as the media;
- Ensure that the publication of the draft legislation is also made available in ethnic nationality languages, and that these are disseminated widely, especially through the media and that sufficient time, and resources are provided for the public to provide feedback on its content and meaningfully participate in the drafting process.

### To the Myanmar National Human Rights Commission:

- Foster transparency and engage on a regular basis with civil society groups including both registered and non-registered civil society and community-based organizations inside the country and on the border, as well as grassroots people and communities throughout the country, especially those from ethnic areas, women's groups and media.

**To the Office of the High Commissioner for Human Rights (OHCHR), the Asia Pacific Forum (APF) and international organizations:**

Engagement with the MNHRC must concentrate on:

- Securing a solid legal framework for the MNHRC that fully complies with the Paris Principles;
- Encouraging an inclusive consultation process with all relevant stakeholders, including both registered and non-registered civil society, community-based organizations inside the country and on the border, as well as grassroots people and communities throughout the country especially those from ethnic areas, women's groups, and the media;
- Increasing transparency of the MNHRC's activities and its functions;
- Increasing accessibility of the MNHRC to victims of human rights violations;
- Starting outreach programs about the MNHRC for victims of human rights violations to increase public awareness of the Commission's existence, functions and mandate;
- Starting capacity building activities for civil society and community-based organizations, including on the Paris Principles.

**Annex 1:**

(Unofficial Translation by Burma Partnership)

Republic of the Union of Myanmar  
 Myanmar National Human Rights Commission  
 Yangon  
 Letter No. 3/101(1674)/Complaint/  
 Date 2012 December 31  
 To  
 Office of Union Government  
 Office No. (18)  
 Naypyidaw

**Subject: Matter concerning the letter calling for immediate release of Sumlut Roi Ja who was abducted by soldiers of Lwan Lone Bwan (South) Frontline Unit under 321st Light Infantry Battalion**

As mentioned above, the commission received a letter for notice. The letter stated that: on 28 October 2011, while the 70 year old complainant Maru Ze Dau himself, his 28 year old daughter-in-law Daw Sumlut Roi Ja, and his 31 year old son Maru Dau Lum (husband of Sumlut Roi Ja), were harvesting corn, 3 Burma Army soldiers came and threatened them to

supply harvested corn to their Lwan Lone Bwan base; [the soldiers] accused complainant Maru Ze Dau and his son Maru Dau Lum that they were the KIA people's militias and threaten to kill them although they denied; [they] tied up their hands and took them to Lwan Lone Bwan base; although U Maru Ze Dau and son escaped while they were on the way [to the base], the daughter-in-law (Sumlut Roi Ja) was taken to the base; [Maru Ze Dau] didn't know if his daughter-in-law was still alive or not; she was mother of a newborn baby; the baby was crying; the son (Maru Dau Lum) became mentally unstable; the 70 year old complainant himself struggled to take care of the baby; complainant himself was a former soldier (ID No – 340328) who served in light infantry battalion no (27) from 1969-1975; [he] calls for unconditional release of his daughter-in-law; Maru Dau Lum, husband of Sumlut Roi Ja, had filed complaint to Naypyidaw Supreme Court on 27 January 2012; he [Maru Dau Lum] was informed that the case would be heard on 23 February 2012; Maru Dau Lum was not allowed to attend the hearing although he wanted to; only the military officer from Light Infantry Battalion 321 was allowed to attend; he [the officer] stated that they did not have any women with a name called Sumlut Roi Ja at their base; Maru Dau Lum, husband of Sumlut Roi Ja and son of Maru Ze Dau, received official letter of dismissal of the case after two weeks; family of complainant Maru Ze Dau were not satisfied with the legal system and will continue to wage fight for justice, his [Maru Ze Dau] son Maru Dau Lum, was living in IDP camps near the border; and his daughter was living with her grandparents on China side of the border.

Following the discussion of Commission's complaint assessment team on 28 December 2012, [We] have attached profile of person abducted and court decision in Burmese and English, and papers of case submissions to Kachin government in Burmese and English.

[Attachment]

Chairperson (On behalf of)

(Sitt Myaing, Secretary)

Copied to

- Office Copy
- Interdepartmental Circular Letter File

# Indonesia: Plummeting Credibility

Institute for Policy Research and Advocacy (ELSAM)<sup>1</sup>

## I. General Overview

Throughout the year of 2012, Indonesia did not experience any significant improvement in its human rights situation. This is apparent from: the stalled effort to resolve past human rights abuses, continued land-related conflicts with no equitable settlement, torture and inhuman treatment of prisoners that is still happening, high rate of violation of freedom of religion or belief, increase in intolerance and violence, and the passing of many legislation that threaten human rights. Violence continues to happen and even to escalate, especially in Papua.<sup>2</sup>

There is no progress in the resolution of past human rights abuses because of the stalling of the establishment of both the *ad hoc* human rights court and the Truth and Reconciliation Commission. The government shows no real commitment to establish the TRC, and the Attorney-General's Office still has not followed up the results of the Human Rights Commission's investigation to enable the case to be pursued in court. Several initiatives and promises made by the government, including forming a team under the Coordinating Ministry for Political, Legal and Security Affairs, have failed. Meanwhile, the Indonesian Human Rights Commission (Komnas HAM) completed two more investigations of past human rights abuses, namely the Mass Killings of 1965-1966 and the Mysterious Shooter of 1982-1985. The Witness and Victim Protection Agency (*Lembaga Perlindungan Saksi dan Korban* – LPSK) continues to provide medical assistance and psycho-social rehabilitation for victims. Until now, victims are still demanding the resolution of past human rights violations.

A similar stagnation can also be seen in various cases of land disputes. Throughout 2012, there were 59 cases of land disputes between companies and community members, with four of them involving fatalities. The government has yet to respond seriously and take concrete steps to resolve the conflicts. The formation of a joint team comprising of representatives from the National Land Agency, the Police and other relevant agencies, did not have a clear follow up. The absence of an equitable resolution is also seen in other cases of conflict rooted in natural resources.

Cases of torture, cruel, inhuman and degrading treatment continues to be found and to rise in number. It is recorded that between December 2011 to November 2012, there

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1 Prepared by Zainal Abidin, Deputy Director of ELSAM (The Institute for Policy Research and Advocacy)  
 2 2012 Report on Human Rights Situation in Indonesia, "Rapid Escalation of the Stagnacy of Human Rights Protection", ELSAM, 2013

were 83 cases with 180 male and 11 female victims. There were 24 persons killed in total and many others who were abused. The incidents took place in police detentions, correctional facilities/detention centers, and other places of detention, with police officers scoring highest as reported perpetrators. Even though in some cases the perpetrators were brought to justice, they were given light sentences and the victims were left with inadequate remedy.

As with torture, the number of violations of the freedom of religion or belief also increased in 2012. They were found in 28 out of 34 provinces<sup>3</sup>, with 274 cases and 363 separate acts recorded – an increase of four percent from the previous year. There were 166 acts of violation committed by state actors and as much as 197 acts by non-state actors. The high rate of violations by state actors shows that the approach to the right to religious freedom has been more of restriction rather than guarantee or protection. In event of conflict between religious majorities and minorities, the state often times restrict the rights of the minorities in order to avoid escalation of conflict. The police, as law enforcement officials in the field, are very often involved in those various violations.<sup>4</sup>

Several cases of violence have also become part of Indonesia's human rights situation in 2012. In Papua, 133 incidents were recorded, including a shooting by an unidentified person, the discovery of a body of a victim of violence, the use of force and firearms by officials who claimed that they were necessary for law enforcement, and much communal violence. At least 56 victims were killed and 173 were injured. The civilians make up the largest group of victims (40 killed, 155 wounded), followed by police officers (10 killed, 6 wounded), members of the military (3 killed, 10 wounded), and armed civilians (3 killed, 2 wounded). No significant steps were taken to put an end to violence in Papua, although the government has stated repeatedly that they will not implement a repressive policy.<sup>5</sup>

Other violations include discrimination and restrictions of freedom of expression, often accompanied by violence, against LGBTs and journalists. The situation is aggravated by many legislation that were passed that contradict human rights. The agenda to reform laws to protect human rights is on hold in the government and is not being deliberated in the parliament. More and more local regulations are not human rights friendly.

The aforementioned problems were the same problems faced by the National Commission of Human Rights, which was in line with the civil society's forecast. In early 2012, along with the selection of new commissioners for the 2012-2017 period, the civil society put forward an analysis elaborating the human rights cases the Commission will likely have to deal with. This document recommended the Selection Committee to select new Commissioners with a good understanding of human rights issues and a good sense of direction and priority in dealing with human rights problems.<sup>6</sup>

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3 Halili, et.al., *Leadership Without Initiative, The Condition of Freedom of Religious/ Belief in Indonesia 2012*, Setara Institute, p. 27 online at <http://www.setara-institute.org/sites/setara-institute.org/files/Reports/Religious%20Freedom/130617-laporan%20KBB%202012%20ENGLISH.pdf>

4 Executive Summary, 2012 Religious Freedom and Intolerance Report, Wahid Institute, 2012  
5 2012 Report on Human Rights Situation in Indonesia, "Rapid Escalation of the Stagnacy of Human Rights Protection", ELSAM, 2013

6 Position Paper, "Promotion of Human Rights and the Strengthening of the National Commission of Human Rights", Civil Society Coalition for Human Rights and the Commission of Human Rights, 25 December 2012

During 2012, the Human Rights Commission received 6,284 complaint files of a range of issues: land disputes, labor, environment, arrest and detention, discrimination, and others. The Police was the most frequent subject of complaint to have violated human rights in terms of arrest, detention, discrimination in investigation, shooting and violence, and torture. The second most frequent were corporations in cases of land, labour and environmental disputes. The number of complaints against companies shows that they are non-state actors with a high likelihood of violating human rights. The Human Rights Commission also recorded a disturbing level of intolerance, marked by the many social conflicts with a variety of backgrounds.<sup>7</sup>

Many of the complaints that were filed to the Commission were followed up. Some that went through mediation, such as a dispute between community members and a company, found success. However, there were other human rights problems that the Commission was not entirely unable to resolve due to its limited mandate, such as past human rights abuses, comprehensive and equitable settlement of land cases, as well as problems of religious freedom. Various recommendations issued by the Commission were not implemented by agencies that were the subject of the complaint; as was the case in previous years. As a consequence, various human rights violations continue to repeat themselves.

Throughout 2012, the Commission was active in the effort to formulate a policy to resolve past human rights abuses, but was unsuccessful in promoting that policy and the establishment of a human rights court. After completing the investigative report for the Mass Killings of 1965-1966, the Commission came under attack from parties that objected to the result of the investigation.

The same goes for land dispute complaints that the Commission received. The Commission's recommendations were not complied with or implemented by state agencies. The Commission has been active in monitoring torture cases; but was still unable to push for a mechanism for prevention and to provide effective remedy for victims. In cases of religious freedom, the Commission had a less than significant role. Not only were its recommendations unheeded; some individual Commissioners opposed the Commission's official decision in those matters.

Until mid-2013, the same human rights problems still retain prominence.

## II. Independence

In 2012, the Commission underwent a selection of new Commissioners for the 2012-2017 period. As explained in the *2012 ANNI Report*, thirty names made the shortlist and were submitted to the Parliament. However, since the September deadline could not be met,

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7 Laporan Data Pengaduan Tahun 2012 Sub Bagian Penerimaan dan Pemilahan Pengaduan Komnas HAM, 2013. See also the 2012 Report, "It Is Time to Knit Tolerance and Social Harmony", the National Commission of Human Rights, 10 December 2012

the President issued a Decree in August 2012 to extend the tenure of the existing Commissioners until their replacements were appointed.<sup>8</sup> After some delays, Parliament finally selected thirteen Commissioners in October. In November 2012, the leadership of the Commission were elected to hold the position for 2.5 years. In March 2013, as a result of changes in the internal rules of procedures and the shortening of the leadership period, another change in leadership took place.

In general, the selection process was carried out according to Komnas HAM's enabling law and its own rules of procedure.<sup>9</sup> The enabling law has provided the number of members (Commissioners), the criteria of members, the length of tenure, and the composition of leadership. Members of the Commission should be professionals, dedicated, and of high integrity. They also should be those who have internalized the aspiration for a state under the rule of law and of welfare, and those who have at their center the values of justice and respect for human rights and obligations.<sup>10</sup> Members could be religious figures, community leaders, members of non-governmental organizations, and university academics.<sup>11</sup> In addition, the Selection Committee provided extra requirements such as a graduate degree.<sup>12</sup> The Human Rights Commission is expected to be an independent agency, with members who are independent as well. The membership should reflect diversity, but there are no regulations on gender equality or representation of minority groups. The length of office for Commissioners is a fixed five year term.

The civil society coalition noted two important things regarding the criteria of Commissioners and the selection process. In the past, the differences in individual competence and in their acceptance of the universality of human rights have made it difficult for the Commission to reach collective decisions. The civil society coalition therefore proposed an additional criteria, which was the acknowledgement and acceptance of the universal values of human rights, as a key requirement to be met by applicants. In addition, the coalition also recommended the holding of a public debate or an open forum, where the applicants can expound on their views on human rights and engage with the public directly. At the time, the chair of the Selection Committee promised to accommodate these suggestions.

The selection process was carried out in a mostly open and transparent manner. The Selection Committee came up with 30 names which were then submitted to the Parliament.<sup>13</sup> However, there were some things of note. First, there was a legal challenge that was filed in court by one applicant who did not pass the administrative screening for lack of a graduate degree. Secondly, some failed applicants expressed disappointment for not having access to the review score and the grounds of rejection. Thirdly, there

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8 The 2007-2012 Commissioners' terms ended in September 2012

9 Article 86, Law No. 39 of 1999 on Human Rights

10 Article 76 para. (3), Law No. 39 of 1999 on Human Rights.

11 Article 84 letter d, Law No. 39 of 1999 on Human Rights.

12 Regarding the Selection Committee of the National Commission of Human Rights, see the 2012 ANNI Report.

13 See the 2012 ANNI Report.

were little information on the human rights track record of some people who made the shortlist. The main concern of the civil society was that these individuals lacked the competence, understanding, and proven commitment in human rights defense, to rise to the increasing challenges the Commission is and will continue to face.

After the Parliament received the list, it held a “fit and proper test” for the candidates, which included 1) paper writing, 2) interview, and 3) public hearing of input. After lobbies and deliberations, the Parliament selected thirteen names with a closed ballot poll on 22 October 2012.

The names of the individuals appointed, and the number of votes each received, is presented below:

| No  | Name                | Votes    |
|-----|---------------------|----------|
| 1.  | Sandrayati Moniaga  | 48 votes |
| 2.  | Maneger Nasution    | 45 votes |
| 3.  | Natalius Pigai      | 43 votes |
| 4.  | Otto Nur Abdullah   | 42 votes |
| 5.  | Ansori Sinungan     | 42 votes |
| 6.  | Muhammad Nurkhoiron | 38 votes |
| 7.  | M. Indadun Rahmat   | 38 votes |
| 8.  | Siane Indriani      | 36 votes |
| 9.  | Roichatul Aswidah   | 35 votes |
| 10. | Hafid Abbas         | 35 votes |
| 11. | Siti Noor Laila     | 33 votes |
| 12. | Dianto Bachriadi    | 28 votes |
| 13. | Nur Kholis          | 28 votes |

Some parliamentarians claimed that the thirteen members adequately reflected the diversity of professional backgrounds, as well as organizations and regions of origin.<sup>14</sup> Furthermore, the composition was considered ideal to deal with predicted problems like land disputes, as some members were experts in the field.<sup>15</sup> Civil society organizations responded to the thirteen names with a variety of comments, including statements of approval since the majority of them were human rights activists and four of them were women.

<sup>14</sup> Trimedya Panjaitan, of the Indonesian Democratic Party for Struggle (PDI Perjuangan). Kompas.com., “Ini 13 Komisioner Komnas HAM Terpilih” [These are the 13 Selected Commissioner of Human Rights], Monday 22 October 2012. [http://nasional.kompas.com/read/2012/10/22/15494334/Ini\\_13\\_Komisioner\\_Komnas.HAM.Terpilih](http://nasional.kompas.com/read/2012/10/22/15494334/Ini_13_Komisioner_Komnas.HAM.Terpilih)

<sup>15</sup> An interview of MP Nudirman Munir with Elshinta Radio, 22 October 2012

On the other hand, there were some concerns because some individuals were relatively less well known in the field of human rights. Their competence and acceptance of universal human rights values could not be determined. A greater concern was the indication that some members were selected merely because they represented a particular group, regardless of their actual capability and stance on the universality of human rights. These factors were expected to influence the impartiality and effectiveness of the Human Rights Commission's work.

In November 2012, the leadership of the Commission was elected from among its members. They were Otto Nur Abdullah as the Chair and Sandrayati Moniaga and M. Nurkhoiron as Deputies. Those elected were well received by the civil society and human rights activists, as they are widely known figures with proven track records in the struggle for and defense of human rights.

However, in January-March 2013, a suggestion was put forward by nine Commissioners to amend the rules of procedures, including to change the leadership on an annual basis, which they say better suited the collective/collegial nature of the Commission. This proposal created a division within the Commission and an internal conflict ensued. Objections and inputs came from within the staff of the Commission and from without. The criticisms failed to sway the members, so the change was put into effect and a new set of leaders were elected in March 2013.<sup>16</sup>

The conflict left an unresolved tension between Commissioners, and between staff members, that threatens to undermine the independence and effectiveness of the Commission.<sup>17</sup> Public support to the Commission was seen to have dropped and many responses to the statements of individual members have not been positive. This was denied by the Deputy Chair of the Commission, who claimed that the internal situation did not have any influence on the level of public support to the Commission, referring to the fact that people continue to lodge complaints to the Commission and the Commission continues to process cases.<sup>18</sup> However, a different view was expressed by another member who said that there was still tension among them.<sup>19</sup>

Some members of the public were critical of the Commission and had lost confidence in it; while others still find the Commission somewhat useful and are prepared to give the Commission the opportunity to prove itself.<sup>20</sup> This situation gives rise to discussion on precisely what the collective/collegial nature of responsibility-sharing among the members means.

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16 The election of the new leaders, namely Siti Nur Laela as Chair, Dianto Bachriadi, and Imdadun Rahmat as Vice-Chairs in its plenary session on 6 March 2013 was marked by the *walkout* of four other Commissioners who did not agree to annual internal rotation of these position and the introduction of this change with retrospective effect

17 Interview with a staff member of the National Commission of Human Rights, 12 July 2013

18 Interview with Deputy Chair of the National Commission of Human Rights, 5 July 2013

19 Interview with a member of the the National Commission of Human Rights, 15 July 2013

20 Extracted from various interviews with civil society organizations, victims, and other individuals, June-July 2013

The Commissioners' competence, independence and integrity were questioned by the public after confusing and unclear statements and responses were expressed by the Commission. This also indicated a failure in clarifying its steps and stance with regard to dealing with particular human rights issues.<sup>21</sup> This raised questions about the Commission's professional standard, how they make determinations and reach conclusions on human rights matters, and how each Commissioner or the Commission as a whole make views public. The Commission has recently adopted a revised code of conduct in their plenary meeting in July 2013. However, more effort is needed to ensure that the code is effectively implemented and utilized in the daily operations of the Commission.<sup>22</sup>

It is also important to set out how individual Commissioners should work and implement their mandate. It is understood that some members attend office infrequently, only turning up for the plenary meetings of the Commission; whereas according to the regulations they must work full-time. There is no mechanism to address this, as members operate outside of any form of supervision or discipline.<sup>23</sup> Some staff view that, without due evaluation and enforcement of ethical conduct, the Commission's credibility will continue to plummet.<sup>24</sup>

### III. Effectiveness and Accountability

In 2012, the Human Rights Commission received a total of 6,284 files of complaints in eleven violation categories. The rights most frequently referred to as the basis of complaint were the right to justice, the right to welfare, and the right to security. The parties most frequently the subject of a complaint were the police, corporations, and the local government. After registration, the complaints were distributed to the monitoring division and the mediation division.<sup>25</sup>

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21 In general, the media perceives public statements of Commissioners as representative of the Commission's institutional stance, as evidenced by the way the reports refer to these as "KOMNAS HAM's" views; and there has been no objection from the Commission so far, reinforcing this perception. Two cases may illustrate the problems cause: first, is the statement made by one Commissioner on the shooting of military personnel in Papua, which led to formal apology of the Commissioner to the Indonesian Armed Forces (TNI), see [http://regional.kompas.com/read/2013/02/27/1117550/Komisioner.Komnas.HAM.Minta.Maaf.ke.TNI?utm\\_source=WP&utm\\_medium=Ktpidx&utm\\_campaign=KontakTembakDiPapua](http://regional.kompas.com/read/2013/02/27/1117550/Komisioner.Komnas.HAM.Minta.Maaf.ke.TNI?utm_source=WP&utm_medium=Ktpidx&utm_campaign=KontakTembakDiPapua); and second, the statement made by a Commissioner in regard to the Miss World competition in Bali that this event can be a violation of the human rights of Indonesian people, see <http://news.detik.com/read/2013/08/27/073918/2341341/10/komisioner-komnas-ham-penyelenggaraan-miss-world-di-indonesia-langgar-ham>

22 The new Code of Conduct/Ethics was adopted as internal regulation No 003/KOMNAS HAM/VII/2013 at Komnas HAM's plenary session on 2-3 July 2013

23 Interview with a staff member of the Commission, 20 July 2013. The name of the source is with-held for obvious reasons.

24 Interview with a staff member of the Commission, 20 July 2013

25 2012 Complaint Data Report, the Commission's Sub-Division of Complaint Reception and Classification, 2013

The Commission has consistently received about 4000-6000 complaints annually in the last five years. However, the Commission experiences various problems in its effectiveness in implementation of its mandate. These problems are: 1) complaints handling; 2) weak nature of its recommendations to other state agencies; 3) inadequate budget allocation; and 4) human resources. These four problems are interrelated and affect the Commission's overall effectiveness.<sup>26</sup>

The Commission has an existing complaints handling system set out in its standard procedures<sup>27</sup> that are accessible to the public.<sup>28</sup> This complaints procedure has been used as a reference when receiving and handling complaints and cases.<sup>29</sup> The Commission has also opened different channels for filing complaints: from visiting the Commission's office, by phone, fax, e-mail or postal mail, or other means.<sup>30</sup> Also, based on practice, the Commission can receive complaints presented in person to individual Commissioners.<sup>31</sup>

A weakness in the existing system is the difficulty to access follow-up information after the complaint has been filed. The Commission can provide information about the complaints that have been received and are processed;<sup>32</sup> however, it has yet to have a system to provide information regarding the status and progress of the complaint, without the complainant having to visit or write to the Commission repeatedly.

Moreover, the Commission does not have a database that is centralized and accessible online. This can cause problems of data retrieval caused by a change of Commissioners or because the case is handled by different staff members. Other divisions, such as Research, might have difficulty in obtaining information from complaints filed in and followed-up by the Commission, to support studies on promoting human rights.<sup>33</sup> However, in one document of the Human Rights Commission, there is a plan to build an online complaints handling system, and the expectation that transparent and known classification standards will be used.<sup>34</sup>

26 Based on Law No. 39 of 1999, the Commission has the mandate of research and study, monitoring, mediation, and human rights education and awareness raising. The Commission also has an additional mandate as the investigator for gross human rights violations and oversee cases of racial and ethnic discrimination

27 The Commission has at least the following: 1) Monitoring and Investigation Procedure; 2) Human Rights Mediation Standard Procedure, 3) Complaint Services Operational Standard

28 Complaint procedures are available in booklet form and can be seen on the Commission's bulletin board

29 Interview with a staff member of the Commission, 20 July 2013

30 The Commission's Guide to Complaints and the Results of the Work of the Sub-Division for Complaint Reception and Classification

31 Interview with a Deputy Chair of the Commission, 5 July 2013. Interview with a staff member of the Commission, 18 July 2013. Interview with a complainant, 11 July 2013

32 In 2012, the Commission responded to 21 requests for information from individuals, community organizations, corporations and the government. See the Commission's Guidelines of Complaints and the Results of the Work of the Sub-Division for Complaint Reception and Classification

33 Interview with a staff member of the Commission, 20 July 2013

34 The Commission's Guide to Complaints and the Results of the Work of the Sub-Division for Complaint Reception and Classification

One example of this, is when the Aceh Human Rights NGO Coalition requested the Commission in 2012 for information on the follow-up of its investigation of human rights violations in Aceh during martial law. This request was granted, albeit with only minimum information provided. In March 2013, the Aceh Human Rights NGO Coalition filed their grievance to the Central Information Commission.<sup>35</sup> The Information Commission held a hearing for the “information dispute” case and passed judgment on 31 May 2013, granting part of the Coalition’s petition.<sup>36</sup>

It is acknowledged by some complainants that the Commission has been quick to respond to various complaints. The Commission is able to organize a field visit or other types of action, especially of high profile cases, at short notice. However, this tendency to react to every potential human rights violation has also been criticized because it indicates that the Commission sets its priorities for intervention solely on the basis of “urgent situations”, rather than a coherent and considered perspective. This can leave old cases unattended and the implementation of recommendations that the Commission has issued, unmonitored.<sup>37</sup>

Another problem is the different ways in which different Commissioners handle the same human rights issue: such as the 1965-1966 Mass Killings. There are also differences in the approach of the current Commissioners compared to the previous period. For example, the new Commissioners decided not to continue implementing the ongoing plan of action which was developed by the previous Commissioners and victims, such as joint action for reconciliation as contained in the “Bakti Kemanusiaan untuk Sampang” proposal; but instead developed a totally new step in dealing with the Shi’ites in Sampang, Madura (discussed below). However, as the interaction and direct communication of victims with current Commissioners was not as frequent as before, victims were not fully aware of Komnas HAM’s new plan in tackling their cases.<sup>38</sup> It resulted in different recommendations being sent to the same government agencies, confusing them (and the victims/complainants), and making it less likely that they will be implemented.<sup>39</sup>

There is also a problem with the utilization of staff and the number of staff for complaints-handling. Often, a person filing a complaint personally at the Commission’s office will refuse to be received by a staff member and would only be willing to be welcomed by one of the thirteen Commissioners. The Commission has failed to communicate with the public and convince them that their staff is completely competent to handle a complaint. Secondly, based on the complaint-handling procedures, once a complaint has been registered, a staff member will be appointed to carry out a preliminary analysis before it is taken to the next phase. The number and competence of staff members analyzing complaints is inadequate compared to the number and complexity of the complaints to be analyzed.<sup>40</sup>

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35 Interview with the Aceh Human Rights NGO Coalition, July 2013

36 See the Ruling of the Central Information Commission: Number 304/XII/KIP-PS-A/2012, 31 May 2012

37 Interview with a complainant, 11 July 2013

38 Interview with a complainant, representing Shi’ites

39 Interview with a complainant, 12 July 2013

40 Interview with a staff member of the Commission, 18 July 2013

To address this, the Commission has a program called the Complaint Services Quality Enhancement (*Peningkatan Kualitas Pelayanan Pengaduan – PKPP*) that includes capacity-building of staff and synchronizing the complaints reception schedule at the six regional offices of the Commission. The purpose of this program is to increase the quality of service and the capability of staff at the Complaints Services division. It also improves coordination and information-sharing between the complaints handling staff in the Jakarta (capital) office with the other offices in six provinces for an integrated and synergized complaints services function.<sup>41</sup>

The final and persistent problem is budget allocation. Based on experience, the budget allocation for the Human Rights Commission has been insufficient to allow optimum implementation of its mandate. The effort to raise the Commission's budget has been unsuccessful except for the 2012 Commissioners' pay rise. Financial resources are important, especially because some cases require extensive investigation and monitoring before the case report can be finalized, and budget limitations restrict those activities.

On the other hand, there is some criticism that the Commission is working inefficiently and without proper management of case priorities. It is also said that the Commission could harness external resources, such as NGO networks as a source of information, which could compensate for the lack of internal resources, if properly managed.

From January to November of 2012, the Commission received 5,422 complaints. The following are some of the major cases handled by the Commission:

### ***Resolution of Past Human Rights Violations***

Past human rights violations was a primary work of the Human Rights Commission in 2012. Many victims groups continue to encourage the Commission to strive for a resolution. One case in particular was the 1965-1966 Massacre.<sup>42</sup> The Commission continued its investigation of the Killings and also of the mysterious shootings of 1982-1985, which were finally completed in July 2012. The Commission concluded that both cases were gross human rights violations and recommended *ad hoc* human rights courts be constituted for both cases.<sup>43</sup> The report was submitted to the Attorney-General's (AG's) Office, which was sent back to the Commission on the basis that it was incomplete.<sup>44</sup> The difference in how the Commission and AG's Office view the report of the investigation is unresolved until now.

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41 The Commission's Guide to Complaints and the Results of the Work of the Sub-Division for Complaint Reception and Classification

42 [www.liputan6.com](http://www.liputan6.com)., "Komnas HAM Diminta Selesaikan Peristiwa 65/66" [The Commission is Requested to Resolve the 65/66 Incident], 17 January 2012. Sumber: <http://news.liputan6.com/read/372732/komnas-ham-diminta-selesaikan-peristiwa-65-66>

43 Executive Summary, Investigation of Gross Human Rights Violation of the 1965-1966 Incident. The Commission, in addition to recommending the establishment of an *ad hoc* human rights court also recommended a resolution through a Truth and Reconciliation Commission

44 Merdeka.com., "Kejaksaa Agung Kembalikan Berkas Pelanggaran HAM ke Komnas HAM" [Attorney General Sent Human Rights Violation Files Back to Human Rights Commission], 9 November 2012. Sumber: <http://m.merdeka.com/peristiwa/kejagung-kembalikan-berkas-pelanggaran-ham-ke-komnas-ham.html>

The Human Rights Commission was also part of a small task-force formed in 2011 by the government, and under the Coordinating Ministry for Political, Legal and Security Affairs. The task-force was mandated to formulate a concept for the resolution of past human rights violations.<sup>45</sup> The Commission actively provided the task-force with recommendations and suggestions. However, until the end of 2012, the task-force failed to deliver on its mandate. However, in the course of its participation, the Commission engaged actively with various parties, including civil society organizations and victims.

One important development with regards to the resolution of past human rights abuses is the Commission's policy to issue a Victim Status Document.<sup>46</sup> The Commission issued many of these documents in 2012 for victims of various incidents including the 1965-1966 Mass Killings and the 1984 Tanjung Priok incident. Until April 2012, there were 840 applicants for the Victim Status Document. From the total number of applicants, 628 have been issued recommendations, 70 were still verified, and 212 files were still incomplete.<sup>47</sup>

Some victims were still waiting for the issuance of this document, which is essential to obtaining medical assistance and psychosocial rehabilitation from the Witness and Victim Protection Agency (*Lembaga Perlindungan Saksi dan Korban – LPSK*). The delay was because some victims' applications have not been properly filed; or because the Commission has not properly documented the application when carrying out an investigation on the relevant incident. These reasons were not communicated well to the applicants; and they proceeded to report this to the Ombudsman (*Ombudsman Republik Indonesia – ORI*) for maladministration of public service.<sup>48</sup> Following this action, the Commission then tried to communicate with the LPSK,<sup>49</sup> but no resolution has been reached to date.

### ***Torture in Sijunjung, West Sumatera***

In December of 2011, police officers in Sijunjung, West Sumatra committed torture that led to the death of Faisal (14) and his brother, Budri (17). The victims' family, along with counselors from Padang Legal Aid Institute (LBH Padang), filed the case with the Commission. Responding to the case, the Commission promised to correspond with the Police headquarters and, one month after, conducted a field visit together with LBH Padang. The Commission found indications of premeditated murder and torture by the police and recommended an investigation of the police officers, including members of the Pursue and Ambush Team (*Tim Buser/Buru Sergap*) who initially apprehended the victim.

45 Asasi Bulletin, "Dinamika Penyelesaian Pelanggaran HAM Masa Lalu: Konsisten Dengan Komitmen Awal atau Mencari Jalan Baru?" [The Dynamics of the Resolution of Past Human Rights Abuses: Abide by the Initial Commitment of Find a New Way?], ELSAM, March-April Edition, 2012

46 The issuance of the Victim Status Document stated officially in 2011 to 13 victims of enforced disappearances of 1997-1998

47 The Human Rights Commission, "Data on Application for Recommendation by Victims and Families of Gross Human Rights Violations", April 2013

48 [www.detik.com](http://www.detik.com), "Kerja Lamban, Komnas HAM diadukan ke Ombudsman" [HR Commission Reported to the Ombudsman for Slow Work], 4 April 2013. Sumber: <http://news.detik.com/read/2013/04/04/182837/2211865/10/kinerja-lamban-komnas-ham-diadukan-ke-ombudsman>

49 See the Letter from the Ombudsman of the Republic of Indonesia to KontraS, Ikohi, ELSAM, 27 May 2013.

The Police responded by placing the Chief of the Sub-District Police on non-active duty and investigated members of the unit. In January of 2012, nine members were questioned by the Professional Accountability (*Propam*) Division of the West Sumatra Provincial Police. However, only four police officers were named as suspects and put on trial; while the other perpetrators were given disciplinary action and then transferred to a different region. The case proceeded slowly and, on 13 November 2012, saw the four defendants on trial.<sup>50</sup> In January 2012, all of the defendants were sentenced to only one to two years of imprisonment.

### ***Attack on the Shia Community in Sampang, Madura: Freedom or Religion or Belief***

One of the most prominent cases in 2012 was about the attack on the Shi'ite community in Sampang, Madura, the violation of their religious freedom, and the criminalization of their leader. They were cast out and now live in exile, unable to return to their home village. The persons providing support to these people have filed a report to the Commission in August 2012.<sup>51</sup>

The complaint was handled by the Commissioners of the previous period (2007-2012) who issued a number of recommendations. The Commission also provided its view on the criminalization of the leader of the community, who was indicted for heresy, claiming that the court had not upheld human rights.<sup>52</sup> In the Commission's opinion, the government had failed to protecting followers of Shia Islam such that they were subject to repeated attacks.<sup>53</sup> In August 2012, the Commission issued a five-point recommendation on this case, which was largely ignored by the Government.<sup>54</sup>

The Commission also planned a reconciliation and reintegration program for the victims by sending them back to their home village and providing an empowerment program, which were both part of a program titled "A Humanitarian Dedication for a Peaceful Sampang" ("*Bakti Kemanusiaan Untuk Sampang Damai*"). However, before the program had the chance to start, there was a succession of Commissioners. The new Commissioners had a different proposal and the new team in charge of the issue stated that they will not go through with the initial program but employ a different approach based on trust-building. However, this is considered a failure because the case is still unresolved until now.<sup>55</sup>

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50 2012 Report on Human Rights Situation in Indonesia, "Rapid Escalation of the Stagnacy of Human Rights Protection", ELSAM, 2013.

51 Interview with a victim advocate, 11 July 2013.

52 Hukumonline.com., "Banyak Pelanggaran Dalam Putusan Kasus Syiah" [Many Violations in the Shia Ruling], 17 September 2012. Sumber: <http://www.hukumonline.com/berita/baca/lt505712a59d1b7/banyak-pelanggaran-dalam-putusan-kasus-syiah>

53 [www.tempo.co](http://www.tempo.co)., "Pemerintah Gagal Lindungi Warga Syiah di Sampang" [Government Failed in Protecting the Shi'ite in Sampang], 27 August 2012. Sumber: <http://www.tempo.co/read/news/2012/08/27/058425694/Pemerintah-Gagal-Lindungi-Warga-Syiah-di-Sampang>

54 [www.portalkbr.com](http://www.portalkbr.com)., "Kasus Syiah, Pemerintah Abaikan Rekomendasi Komnas HAM" [In Shia Case, the Government Neglected the HR Commission Recommendation], 5 November 2012

55 Interview with a victim, a member of Shiite community Sampang Madura, July 2013

In June 2013, the displaced Shia Muslims living in a public sports facility were evicted by the government and taken to Sidoarjo, East Java, to be “relocated”. Previously, in February 2012, the Commission had requested the government to move the displaced persons to a more decent and accommodating location, such as a temporary housing, but not relocate them out of Sampang.<sup>56</sup>

Their situation remains uncertain and the Commission was criticized, among others: (1) for not explaining clearly the steps it will take and for inconsistencies in its approach, (2) for not formulating a plan together with the victims and their advocates, and (3) for having poorly communicated with the victims and advocates.<sup>57</sup> The advocates regard the Commission to have failed in handling this case.<sup>58</sup>

### ***Construction of a Steam Power Plant in Batang, Central Java***

The plan to build a Steam Power Plant at Ujungnegoro, Batang, Central Java, was rejected by the people, since it would cause loss of livelihood and environmental pollution. In July 2012, the people filed a complaint with the Commission. In September 2012, the police acted violently justifying themselves on the basis that the affected people had taken an investor hostage; and arrested five persons.<sup>59</sup> The victims then complained to the Commission.

On 10 October 2012, the Commission conducted an investigation and found possible violations by the government of the right to information – since the people were not provided with a clear, transparent and comprehensive plan of the project – which then caused the unrest. The Commission gave the parties mentioned in the report 30 days to provide a written response.

On 19-21 February 2013, the Commission met thousands of citizens to follow-up on the alleged human rights violations around the construction project and against the five citizens who were arrested. The Commission gave a guarantee of protection to the people who were uneasy with the presence and intimidation of military personnel in the area.<sup>60</sup> In April 2013, the Commission reiterated the number of violations against the community surrounding the project, which were the right to complete information

56 [www.lensaindonesia.com](http://www.lensaindonesia.com), “Anggap GOR Tennis Sampang Sudah Tak Layak, Komnas HAM Ajukan Hunian Sementara untuk Pengungsi Syiah,” [Consider the Sampang Sports Complex Inadequate, the HR Commission Proposes a Temporary Shelter for the Shia Refugees]. 28 February 2013. Source: <http://www.lensaindonesia.com/2013/02/28/komnas-ham-ajukan-hunian-sementara-untuk-pengungsi-syiah.html>

57 Interview with an advocate for the Shia Community in Sampang, Madura, 11 July 2013

58 Interview with an advocate for the Shia Community in Sampang, Madura, 11 July 2013

59 [www.vhrmedia.com](http://www.vhrmedia.com), “Tolak PLTU, 5 Warga Batang Ditahan” [Rejecting Steam Power Plant, 5 Batang Citizens Were Arrested], 31 October 2012

60 “Komnas HAM Berikan Jaminan Perlindungan HAM untuk Warga Sekitar PLTU Batang” [Komnas HAM gave human rights protection guarantee to the citizens surrounding Batang Steam Power Plant], 25 February 2013, see <http://www.mongabay.co.id/2013/02/25/komnas-ham-berikan-jaminan-perlindungan-ham-untuk-warga-sekitar-pltu-batang/>

on the construction plan of the Steam Power Plant; and the right to feel safe, since the military and police operations deep in the village had caused restlessness among the citizens of Batang Regency.<sup>61</sup>

In August 2013, the Commission issued seven recommendations, among others, to urge the government to stop land appropriations before the environment impact assessment of the project is completed, through which the feasibility of the project can be evaluated. In addition, the recommendation also urged the police and the army to withdraw its personnel from the site, and to desist from efforts to coerce the local community to accept the Steam Power Plant project.<sup>62</sup>

### ***Tiaka Incident, Central Sulawesi***

On 20 and 22 August 2011 people protested against the existence of the Joint Operations of Boats (JOB) between PT. Medco and PT. Pertamina in Tiaka Island, Morowali Regency. On 22 August 2011, groups of people on their way home from Tiaka Island, by boat, were blocked by the police. Allegedly, the police acted with excessive force which caused deaths of two persons and left six injured from shooting and violence, and the police also arrested and detained several protestors.

On the incident, Chief of Police Resort of Morowali Regency was investigated by the Central Sulawesi Police Area, the progress and conclusion of which is unknown. Meanwhile, 12 of the people arrested by the police were brought to trial. In January 2012, they were sentenced to five months imprisonment for causing loss to the company.<sup>63</sup>

The Commission received a complaint and urgent request to deal with the case. The Commission then sent a team to monitor the situation on 25 August 2011 and 7 – 10 October 2011. In February 2012, the Commission completed its report and concluded that the operation of the company in that region has not brought positive change and economic development to the community. In addition, the police's handling of the people's protest was not done according to applicable procedures resulting in fatalities and injuries. There was sufficient evidence of human rights violations including the right to life, right to be free from cruel, inhuman and degrading treatment, right to security, and the right to publicly express opinions. The Commission recommended the central

61 "Komnas HAM: Ada Pelanggaran di Proyek PLTU Batang Jateng" [HR Commission: Violations in Batang Steam Power Plant Project, Central Java], 3 April 2013, see [http://www.portalkbr.com/nusantara/jawabali/2542707\\_4262.html](http://www.portalkbr.com/nusantara/jawabali/2542707_4262.html)

62 Komnas HAM's letter No 2.057/K/PMT/VIII/2013, on 2<sup>nd</sup> recommendation related to Batang Steam Power Plant

63 "12 Terdakwa Kasus Tiaka Dihukum Lima Bulan Penjara" [12 Defendants of Tiaka Case Sentenced to five months imprisonment], 20 January 2012, see <http://www.tempo.co/read/news/2012/01/20/179378732/12-Terdakwa-Kasus-Tiaka-Dihukum-Lima-Bulan-Penjara>

and regional government to review the mining license; urged an investigation to be conducted; and for the matter to be resolved through dialogue. The Commission also recommended the company to implement the Voluntary Principles on Security and Human Rights and urged the company to fulfill its moral responsibility to the victims who were killed or injured and for the damage caused by the incident.<sup>64</sup>

In July 2012, the Human Rights Commission mediated between the company and the community members to settle the issue at the Central Sulawesi Provincial Parliament building. The meeting was attended by a representative of the Governor of Central Sulawesi, the Provincial Police, the District Government of Morowali, the village chief and the community members of Baturube Village, Bungku Utara District and the Mamosalato District. Sources say that the mediated meeting produced a number of agreements including for the company to meet the peoples' demands of the construction of educational and other facilities.<sup>65</sup>

### ***Violence in Ogan Hilir Regency, South Sumatera***

Komnas HAM since 2009 has received complaints on land disputes between the people and PTPN VII Cinta Manis Unit at Ogan Komering Ilir Regency (now Ogan Ilir Regency). The people demand the land that was managed by PTPN VIII which has no Cultivation Rights Title, to be returned to the people. The dispute caused various kinds of violence: among others on 27 July 2012 there was a clash between the police and the people, which resulted in one child's death, and injuries to four others.

To respond the complaint, Komnas HAM conducted an investigation on 30 July – 3 August. In its report, Komnas HAM concluded that the police conduct was not in accordance with procedure; especially, the use of live bullets, and no justification for the use of excessive force. Komnas HAM identified the human rights violated as being the right to life; right to freedom from cruel, inhumane and degrading treatment; right to security; child rights; and right to health. Komnas HAM came out with several recommendations, among others: liability on the incident to investigate, to assess the policy of plantation permits, and dispute settlement through dialogue and non-violence.<sup>66</sup>

On the incident, the police conducted inquiries into 120 alleged perpetrators. Six police officers were found responsible and were tried for indiscipline at South Sumatra Police Area. In November 2012, the disciplinary trial by the police charged Chief of Ogan Ilir Police Resort, AKBP Deni Darmaphala and five other officers as guilty and issued written warnings.<sup>67</sup> The police also arrested nine civilians for possession of weapons; who were indicted at trial court in October 2012.

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64 Monitoring and Investigation Report of a Violent Incident in Tiaka Island, Central Sulawesi, the National Commission of Human Rights, February 2012

65 Interview with a staff member of the Commission, 20 July 2013

66 Monitoring and investigation Report on Violence at Ogan Ilir, South Sumatera, August 2012

67 Sindonews.com., "Kapolda Ogan Ilir dan 5 Perwira ditegur" [Ogan Ilir Resort Police Chief and 5 Officers Reprimanded], 7 November 2012. Source: <http://daerah.sindonews.com/read/2012/11/07/24/686400/kapolres-ogan-ilir-5-perwira-ditegur>

Until January 2013, the settlement of land disputes in the region was not reached. This has caused greater anger among the people and more protests on 20 January 2013 and 25 January 2013. In the protest on 25 January 2013, the police dispersed demonstrators and arrested two persons. The solidarity protests then continued on 28 and 29 January 2013 in front of the Area Police Headquarter in Palembang, to demand the suspension of the Chief of Ogan Ilir Police Resort who is considered to be responsible for violence against the farmers. On 29 January, the protest knocked down the gate of South Sumatra Police Area Headquarter, provoking the police to chase protestors and attack them. Twenty-six protestors were arrested by the police; 14 of whom were subsequently released.

Following the incident of 29 January 2013, Komnas HAM has received a complaint from WALHI South Sumatra complaining about the conduct of Ogan Ilir Chief of Police Resort and South Sumatra Police Area in dispersed the protest through violence. On 1-2 February 2013, Komnas HAM concluded that the protest was the outcome of the unsettled land dispute. The Commission recommended the provincial government to facilitate settlement between the parties, and to evaluate the Ogan Ilir Chief of Police Resort who was deemed responsible for the conduct of police officers involved in the incident.<sup>68</sup>

### ***Attack on WALHI Activist, Bali***

On 5 November 2012 there was violence, assault and intimidation committed against I Wayan Gendo Suardhana at the law office of Wihartono & Partners at Jl. Hasanuddin, Denpasar. At the time, the victim was advocating a case of suspected breach of Environment Impact Analysis in the construction of a stretch of road over a body of water in the toll road project between Benoa – Ngurah Rai – Silitiga, Nusa Dua. He was also handling a case of natural tourism management permit over 102.2 hectare Ngurah Rai Great Forest Park.

On 25 January 2013, the Commission responded to the incident by sending a letter to the Chief of Bali Provincial Police, urging him to take legal action against the perpetrators and requesting his explanation in 30 days. On 2 July, the Commission met with the Bali Provincial Oversight Inspector for case exposition and dissection that included this case and found that investigations had commenced. However, there were several obstacles such as the witnesses not identifying the perpetrator, and the inability of the police to locate the alleged perpetrator.<sup>69</sup> The case is unresolved.

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68 Monitoring Report on the Fulfilment of Right to Justice and Right to Freedom of Opinion, Komnas HAM, 1-3 February 2013

69 See the Commission's letter to the Chief of Bali Police Number 280/K/PMT/II/2013, 25 January 2013

## IV. Thematic Focus

### A. The Human Rights Commission as Human Rights Defender (HRD)

Threats against human rights defenders were still found in 2012. Nineteen cases of threats and violence against HRD were recorded, where the victims were mostly journalists (thirteen cases). The perpetrators, such as in previous years, were mostly state officials, military members, police officers and civil service police unit (Satpol PP).<sup>70</sup> The targets of threats were human rights activists, anti-corruption activists and journalists; and in various forms such as violence, maltreatment, threat by text messages, phone calls, social media, threat of criminalization, etc. Threats were also received by the Commission, commissioners, staff members and their families.<sup>71</sup> Until now, the threat against Komnas HAM is still growing.<sup>72</sup>

There has been no special standard of security for human rights defenders (HRDs). In processing complaints of threats against HRDs, the general procedure used is the same as that of other citizens.<sup>73</sup> The effort to push for a special law on HRDs has not been fruitful; and has been diverted into initiatives for amendment of the Human Rights Law or a separate Law on the National Commission of Human Rights.<sup>74</sup> During 2012, the Commission and civil society members discussed the need for inclusion of provisions on the protection of human rights defenders in the draft amendments.<sup>75</sup>

The Commission, whether Commissioners or staff, consider the threats they receive as an occupational hazard. They have a standard way of dealing with threats: which is to coordinate with the police<sup>76</sup> and to just try to be safe. This is on an incident-by-incident and case-by-case basis, and not part of a wider protection system. The Commission also coordinates with the police on every complaint of a threat to human rights defenders. No action has been taken to set-up a specialized desk or unit for human rights defenders.<sup>77</sup>

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70 Interview with staff of Imparsial, June 2012

71 Interview with Deputy Chair of the Commission, 5 July 2013. Interview with a staff member of the Commission, 20 July 2013

72 The level of threat increased following the Commission's investigation on the attack of Cebongan prison in Yogyakarta by members of the Army Special Forces Command (Kopassus TNI). The threats were in the form of cursing against the Chair of the Commission, text message to the Chair and staff of the Commission, and through the mass media

73 Interview with a staff member of the Commission.

74 The Commission is advocating for the amendment of Law Number 39 Year 1999 on Human Rights and suggested a separate Law on the National Commission of Human Rights. Currently, the provisions on the Commission are found within the Human Rights Law of 1999

75 Interview with ex-Chair of the Commission 2007-2012, Ihdhal Kasim, July 2013

76 Coordinating means informing the police for every rally that is held in front of the Commission's office, every possible attack, and every threat. The Commission also communicates with the National Police regarding the security of the Commission's office. Interview with the Chair of the Commission, 5 July 2013

77 There has been a suggestion to establish a HRD desk at the Commission since 2012

Some sources state that this is due to the limitation of resources, either human or monetary. In addition, the creation of a special unit encountered some bureaucratic obstacles, and the compromise was to manage cases and allocate staff on an ad-hoc basis.<sup>78</sup> There is no special insurance-cover for the Commissioners and staff members exposed to additional risks because of their work.

The Commission also does not organize any special trainings for human rights defenders, either for its own Commissioners, staff, or members of civil society, and human rights activists. The limited training that was done was only based on the sharing of senior staff experiences in dealing with threats. From what is heard from the Commission's staff, there is a need for a training on risks and threats and the procurement of safety and security equipment, especially in field work.

In 2012, the Commission assisted a journalist who received threats from a person who was suspected of committing human rights violations. The Commission provided security and facilitated a safe-house. The journalist was also threatened with termination of employment for submitting a video recording to the Commission. The Commission dealt with the case effectively.<sup>79</sup>

Another case related to a human rights defender was the attack and intimidation against the chair of the Bali chapter of Wahana Lingkungan Hidup/WALHI (Indonesian Forum for the Environment/Friends of Earth – Indonesia). The reason for the attack was suspected to be his activity in campaigning against environmental violations in a number of development projects in Bali. The Commission received a report in 7 November 2012 and responded by sending a letter to the Bali Province Chief of Police to take immediate action including investigation.<sup>80</sup>

In the future, the Commission expects to have a human rights protection mechanism for its members and staff, from emerging threats or risks. A recommendation for this would be to build a human rights defender security system and establish a human rights defender network. Another recommendation is strengthening the regulations establishing state obligation to protect human rights defenders, and imposing criminal penalties on those intimidating or committing violence against human rights defenders or obstructing their work.

## **B. Komnas HAM and Corporate Accountability**

In 2012, corporate accountability was an important issue of concern for the National Commission of Human Rights. It became an issue of importance because of the many complaints the Commission received regarding corporate operations and human rights abuses, land disputes, and environmental destruction. Many years ago, the Commission began an investigation on the suspected gross human rights violation in the Sidoarjo

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78 Interview with the Chair of the Commission for the period of 2007-2012, 15 July 2012

79 Interview with a staff member of the Commission, 20 July 2012

80 Commission's letter to the Bali Province Police Chief, 25 January 2013

mud flood, East Java. After completion, the report was made public in August 2012 and the Commission concluded that there were many human rights violations related to the situation.

The Commission does not have a separate complaints mechanism dedicated to human rights violations committed by corporations, as it is covered by the regular complaint mechanism. The Commission does not have a regular monitoring activity aimed at a variety of corporate operations. The monitoring and investigation activities of corporations are all based on complaints received.

In 2012, after the investigations on the Lapindo mud flood, the Tiaka incident, land dispute cases involving companies, mining operation, and several other cases, the Commission produced recommendations that were sent to the government and relevant agencies, including the provision of remedies for victims.<sup>81</sup> In the mud flood case, for example, the Commission identified eighteen different human rights violations and recommended that compensation be provided to the victims.

Even though the Commission does not have regular monitoring for corporate operations, it reports and analyses every year the number of cases related to corporations, based on complaints received.<sup>82</sup> The monitoring of policies or regulations on corporate practices has been done since 2012, using indicators matched with various human rights standards.

In addition, the Commission has tried to promote human rights compliance in corporate operations by approaching relevant ministries, such as the Ministry of Energy and Mineral Resources, to provide some policy suggestions to ensure the companies in the mining sector pay good attention to human rights.

There are also some steps taken to engage in international cooperation to strengthen human rights protection against corporates.<sup>83</sup> In 2011, the Human Rights Commission hosted an international meeting of Southeast Asian NHRIs on the issue of human rights and business: especially the expansion of oil palm plantations. The meeting produces the Bali Declaration.<sup>84</sup>

The Commission also organized a conference to promote corporate human rights responsibilities, especially in plantations, to traditional communities/indigenous peoples and the environment.<sup>85</sup> In 2012, the Commission engaged in a series of meetings, among them with the business community, to raise their awareness of human rights.

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81 Interview with a staff member of the Commission, 18 and 20 July 2013

82 2012 Complaint Data Report, the Commission's Sub-Division of Complaint Reception and Classification, 2013

83 Interview with the Chair of the Commission for 2007-2012 period

84 Bali Declaration strives to formulate corporate responsibility particularly in plantation, traditional communities, and the environment. The international meeting of South East Asian Human Rights Institutions on '*Human Rights and Business: Plural Legal Approaches to Conflict Resolution, Institutional Strengthening and Legal Reform*', 28 November – December, 2011

85 Interview with the Chair of the Commission for the 2007-2012 period, 5 July 2013

The Commission has no training programs on violations in the context of corporate operations.<sup>86</sup> In 2012, some limited training courses were provided to several companies, including to CEOs. The Commission also provided input for the companies own assessment.<sup>87</sup> The Commission is only just initiating a discourse on Business and Human Rights and does not as yet have a long term strategy on this issue.<sup>88</sup>

One of the Human Rights Commission's role is as a mediator in cases of human rights violations or disputes between companies and members of the community. This mediation is done for some cases that were reported to the Commission. There were some companies that were not willing to accept mediation by the Commission for several reasons, such as: the Commission is not seen as a neutral party for its predisposition to side with victims; and because of the Commission's mandate of human rights protection and promotion, the companies fear that the result will not be favorable to them.<sup>89</sup> Meanwhile, civil society activists are also concerned that this mediation will not be successful because of imbalance in power and influence between the Commission and corporations.<sup>90</sup>

Currently, the Commission is giving greater attention to corporate accountability. This is apparent in the appointment of a Special Rapporteur for Business and Human rights, the studies on corporate regulations conducted by the Research Division, and the investigations and monitoring of cases related to corporations under the Enforcement Division. However, these initiatives and activities are seen to be un-coordinated.<sup>91</sup> The Commission needs a clearer and more systematic program for business and human rights, including regular and specific programs, and not only *ad hoc* ones.<sup>92</sup>

## V. Conclusion and Recommendations

Indonesia's human rights enforcement will be increasingly challenging. Various cases are outstanding and the backlog will increase. The Commission, as an agency with an important role in the advancement, enforcement and protection of human rights should increase its capacity to address that problem, for the benefit of victims and the general public. Concrete steps need to be taken to increase its effectiveness and the quality of its work significantly. If it fails to do take those necessary steps, the Human Rights Commission will rapidly lose its credibility and be unable to be effective in fulfilling its mandate.

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86 Interview with a staff member of the Commission, 20 July 2013

87 Interview with the Chair of the Commission for the 2007-2012 period, 15 July 2013

88 Interview with an environmental activist, 15 July 2013

89 Interview with a staff member of the Commission, 20 July 2013

90 Interview with an environmental activist, 15 July 2013

91 Interview with the Deputy Chair of the Commission, 5 July 2013. Interview with a staff member of the Commission, 18 and 20 July 2013

92 Interview with the Chair of the Commission for the 2007-2012 period, 15 July 2013

### **Recommendations to the Government of Indonesia:**

- Acknowledge the Commission's authority by providing as much access as possible to the Commission to exercise its mandate; and by implementing its recommendations at the national and sub-national level; as well as by providing the Commission with adequate budget allocation.

### **Recommendations to the Indonesian Parliament:**

- Strictly supervise the Commission's performance bearing in mind that the Commission is experiencing a decrease in public credibility. The Parliament bears a moral responsibility to monitor the Commissioners they have selected and to support an increase in budget allocation. In addition, the Parliament needs to provide the space in which the Commission can provide input on legislation being deliberated in the Parliament that will have a human rights impact.

### **Recommendations to State Agencies:**

- Law enforcement agencies must cooperate in the implementation of the Commission's mandate. The Attorney-General's Office must work together with the Commission to follow-up the investigation of the Commission in cases of gross human rights violations and to resolve differences between themselves in the interest of victims.

### **Recommendations to the National Commission on Human Rights:**

- To address the current human rights situation, the Commission must prioritize the most critical issues.
- To address the uneven level of competence among its Commissioners; and contradictory positions between Commissioners based on their external affiliations.
- To enact and enforce a strict code of conduct, activate the Oversight Body (Advisory Council), and impose ethical penalties for members of the Commission in violation.
- To (re-)organize the complaint reception system, the documentation system, and the information flow, utilizing technology. Moreover, increase the quality of reports produced from monitoring and investigations to ensure that the recommendations produced are strong and based on credible data and analyses.
- To improve the capacity of the Commission's human resources; refrain from making premature conclusions of possible human rights violations; and prevent individual statements to be expressed which will be assumed to be the Commission's official opinion.
- To strategize for effective implementation of its recommendations by improving inter-agency lobbying and network-building with civil society.

- To push for regulations that guarantee protection for human rights defenders, establish a protection system both for staff and non-staff human rights defenders.
- To have a clearer and more systematic program on business and human rights, synergizing all of the Commissions' functions: which are monitoring/investigation, research, mediation, and public education. The Commission needs to provide training to staff regarding corporate responsibility and organize more trainings for community groups, especially those affected by corporate operations.



# Malaysia: Minimal Impact despite Major Measures Taken

ERA Consumer Malaysia<sup>1</sup>

## General Overview

The human rights situation in Malaysia has not seen any improvement in 2012, as similar violations as in previous years were recorded. The Prime Minister in 2011 announced that the government would undertake various reforms in 2012 to improve the human rights situation. However, those words were nothing more than mere lip service. Instead of focusing on improving human rights situation or the worrying financial deficit, the Government of Malaysia (GOM) was preoccupied campaigning actively throughout the year for the General Election which was held in May 2013.

The most significant human rights problems in Malaysia included restrictions on freedom of speech, assembly and association; restrictions on freedom of press including media bias, book banning, censorship, and the denial of printing permits; and restriction on freedom of religion. Apart from these, police brutality and death in police custody remain a huge concern.

However, it has to be noted that the GOM annulled the remaining three Proclamations of Emergency, and repealed the restrictive and draconian laws of Internal Security Act 1960 (ISA), the Banishment Act 1959 (BA) and the Restricted Residence Act 1933. Many of the provisions of these laws violate international human rights principles and norms including those of the Universal Declaration of Human Rights (UDHR).

Despite being a member of the UN Human Rights Council, it is regrettable to mention that after so many years Malaysia still has not acceded to the six remaining core human rights instruments. The GOM has only ratified the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CRC), and Convention on the Rights of Persons with Disabilities (CRPD) thus far. In fact, some of these Conventions were ratified with reservations. This has placed Malaysia in the group of countries with the lowest tally; in that they have only ratified or acceded to three core international instruments.

Suhakam, the national human rights commission, actively confronted a few pressing human rights issues that are particularly prevalent in Malaysia. After receiving many complaints on land grabs and eroding native customary land rights, the Commission conducted a nationwide Native Customary Land Rights Inquiry in 2011 which was concluded towards

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<sup>1</sup> Prepared by Ravin Karunanidhi, Secretary General of ERA Consumer Malaysia

the middle of 2012. The inquiry received a lot of publicity and was conducted with full transparency and was kept under the personal purview of the Chairman.

Apart from that, 2012 also saw Malaysians, under the leadership of few prominent civil society groups, exercising their right to assembly on big scale with Bersih 3.0 being the most famous one. These gatherings and rallies were discouraged by the government and labeled as illegal. However, Suhakam rebuked the government for banning the public protests and went ahead to monitor them.<sup>23</sup> Apart from monitoring these rallies and expressing the importance of the freedom of assembly, the Commission also took a step further by criticizing the authorities for exerting excessive force on the participants of the rally.<sup>4</sup>

Due to the deplorable state of detention conditions and increasing death in custody by the year, Suhakam conducted monthly visits to detention centers in Malaysia to monitor its condition and also the treatment of detainees.<sup>5</sup>

## I. Independence

### A. Composition, Appointment Process and Tenure

Suhakam was established in 2000 by statute, namely the Human Rights Commission of Malaysia Act 1999 (Act 597). It was set up to provide the public with a channel to submit complaints about violations and abuse of human rights, as well as to create awareness and understanding of human rights issues in Malaysia.<sup>6</sup>

Prior to the amendments made to Act 597 in 2009, section 5 of the said Act states that members of the Commission shall be appointed by the Yang di-Pertuan Agong (titular King of Malaysia who is head of state) on the recommendation of the Prime Minister (who is head of government). It further states that the members of the Commission shall be appointed from amongst prominent personalities including those from various religious and racial backgrounds and they shall hold office for a period of two years with an eligibility of reappointment. This particular section undermined Suhakam's independence and it risked being downgraded by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC-NHRI) from 'A' status to 'B' status.

The amended Act now states that members of the Commission shall be appointed by the Yang di-Pertuan Agong on the advice of the Prime Minister acting on the decisions

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2 <http://www.freemalaysiatoday.com/category/nation/2012/04/28/suhakam-bar-council-show-support-for-bersih-3-0/>

3 SUHAKAM (2013) 2012 Annual Report, Kuala Lumpur: "The Commission's Press Statements 2012" (pp 167)

4 <http://www.themalaysianinsider.com/malaysia/article/suhakam-finds-excessive-force-and-misconduct-by-cops-in-bersih-rally/>

5 SUHAKAM (2013) 2012 Annual Report, Kuala Lumpur: "Report of the Complaints, Monitoring and Inquiries Group" (pp 62 & 63)

6 Approved text of the speech on the Human Rights Commission of Malaysia Bill 1999 delivered in the Dewan Rakyat on 15 July 1999 by Minister of Foreign Affairs, Syed Hamidin Syed Jaafar Albar.

of a consultative committee. It also states that a member of the Commission shall be appointed for a term of 3 years with the option of being reappointed for another term of 3 years. The committee mentioned above consists of the Chief Secretary to the government who shall act as the Chairman of the Commission and three other members, from amongst eminent persons, to be appointed by the Prime Minister. On 22 June 2009, further amendments to Act 597 were tabled in Parliament. The amendment was passed wherein the words "eminent persons" was replaced with "three other members of the civil society who have knowledge of or who have practical experience in human rights matters, to be appointed by the Prime Minister". However, the term "civil society" is not defined leading to concerns that the members of "civil society" appointed by the Prime Minister might be from organisations that are established by, or are associated, with the government of the day.

Despite the amendments, the independence of the Commission is still doubtful as there is no provision to ensure civil society's full and transparent participation. The members of the selection committee appointed by the Prime Minister in 2010 were kept secret until it was disclosed by an unnamed source to the media on 1 April 2010. However, the government only acknowledged the media report five days later, having come under heavy pressure from civil society to reveal the members of the selection committee.

Selected Malaysian civil organisations received a letter from the Director General of the Prime Minister's Department in February 2010 about the nomination of candidates for new Commissioners; wherein each organisation was allowed to nominate one person, and they were only given a short deadline of one week to make their nomination. Although the GOM took cognizance of the recommendations of the ICC-NHRI and made certain positive amendments to the enabling Act, the nomination process of the Commissioners is still not satisfactory, as it is still not transparent nor fully inclusive and participatory. In November 2012, the legal bureau in the Prime Minister's Department sent nomination forms to approximately 80 different NGOs and organisations in Malaysia requesting them to nominate candidates for the 2013-2016 session within two weeks.

The sincerity of the GOM in this situation has to be questioned as the invitations were only extended to several CSOs; especially to those that have been critical of both the GOM and the Commission. It seems as though it was done purely to deflect criticisms by civil society towards Suhakam and the GOM for the failures of the Commission, as some members of the Commission would be nominated by civil society. Although nothing has been said that the nomination can only be made exclusively by the 80 organisations that received the letter, it is to be noted that there was limited publicity on the nominations. Those who wished to nominate members of the Commission had to download a form on a website and submit a list of names online. However, it is a disappointment that the procedure was not transparent as the government kept the selection committee a secret, and it was never revealed even after the new batch of Commissioners were appointed.

Although the enabling Act fails to include qualification provisions of Commissioners, the Human Rights Commission of Malaysia (Amendment) Act 2009 (hereinafter 'Act 1353') provides the characteristics of the members of the Commission. Section 5 of Act

1353 states that members of the Commission shall be appointed from amongst men and women of various religious, political, and racial background who have knowledge of, or practical experience in, human rights. In accordance with the provision, the composition of the membership of the Commission consists of a near satisfactory pluralism; although a better gender representation is lacking.

Similar to the year 2010, there was a gap of 39 days between the end of tenure and appointment of new Commissioners in 2013.<sup>7</sup> The tenure of the Commissioners ended a week after the General Elections nominations and the new batch was only reappointed after the election; despite the outgoing Commission announcing early in 2013 that it would like to monitor the General Elections.<sup>8</sup> The government was heavily criticized for not appointing the commissioners earlier as CSOs and opposition Parliamentarians saw this as a deliberate move by the GOM to avoid Suhakam monitoring the controversial elections. For the first 22 out of the 39 days without Commissioners, a total of 79 cases were lodged.<sup>9</sup> The Commission could not act on it as the enabling law clearly stipulates that only Commissioners can decide if an inquiry is necessary as they are the governing body of Suhakam.

Currently, the amended Act provides that the Commissioners hold office for a period of three years with an option of being reappointed to a maximum of one additional term only.<sup>10</sup> However, this term of three years is not enough as the Commissioners will need a longer time to plan and implement all their activities and policies. In fact in April 2011, the current chairman, Tan Sri Hasmy Agam, expressed his grouse that the three year term is too short.<sup>11</sup>

It is unprecedented and commendable that as opposed to the previous Commissioners, six out of the seven Commissioners including the Chairman, serve the Commission on a full time basis. All previous Commissioners served the Commission on a part-time basis, as they wore other hats at the same time, This compromised the effectiveness of the Commission and portrayed a picture of the Commissioners and the GOM not prioritising human rights; and therefore not being committed to upholding human rights in Malaysia. It is pertinent to note that it is the self-imposed responsibility of the new Commissioners that prompted them to serve on a full time basis, as the enabling Act does not oblige them to do so. The GOM should have made it compulsory for the Commissioners to serve on a full time basis in conformity with the recommendations made by the CSOs and the ICC-NHRI which said, "Members of the NHRIs should include full-time remunerated members[...]."<sup>12</sup>

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7 <http://www.thestar.com.my/News/Nation/2013/06/04/Three-new-faces-for-Suhakam.aspx>

8 [http://elections.thestar.com.my/story.aspx?file=/2013/1/31/nation/12648577#.UhW3\\_D\\_66\\_I](http://elections.thestar.com.my/story.aspx?file=/2013/1/31/nation/12648577#.UhW3_D_66_I)

9 <http://www.thestar.com.my/News/Nation/2013/05/22/79-complaints-lodged-but-zero-Suhakam-commissioners.aspx>

10 Section 5(4) Human Rights Commission of Malaysia (Amendment) Act 2009

11 <http://www.freemalaysiatoday.com/2011/04/18/three-year-term-is-too-short-says-suhakam-chief/>

12 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, "Report and Recommendations of the Sub-Committee of Accreditation", Geneva, 21-23 April 2008 (p.12)

There is nothing which requires the Commissioners to declare any outside interests because the enabling Act states that the Commissioners will be given allowance and not remuneration for their work thus, inadvertently making them part-timers.

Although the enabling Act is silent on the requirement that Commissioners should be free from political affiliations, the amended Act A1353 states that members of the committee choosing the Commissioners should not be a) actively involved in politics or registered with any political party; and b) any person who is and was a law enforcement officer.

The Commissioners of Suhakam are not provided with any appropriate human rights training. The trainings attended by the Commissioners or Suhakam staff are usually those provided by regional organizations such as the APF.

In comparison to the previous Commission members, the current line-up of seven, boasts two human rights defenders and one renowned civil society activist. Apart from that, some of the NHRI staff themselves are active human rights defenders. The Chairman of the Commission is a former diplomat who has served as ambassador to various countries during his service. However, despite being a former civil servant, he has been known to be very vocal in advocating human rights and also has openly criticized the GOM on numerous occasions for failing to adhere to universally accepted human rights norms.<sup>13 14</sup>

## **B. Government Representatives on NHRIs and Staffing by Secondment**

When the Commission was initially set up in 1999, most of the staff were newly employed and independent from the government. Those employed were either recent graduates, members of civil society, or from the private sector. However, all Head of Departments and key positions were seconded from the government to help establish the Commission. This slowly reduced and eventually only the secretary of the Commission, who is the chief of staff, was seconded. In 2012, the Commission welcomed its first independently appointed secretary, Ms Rodziah Abdul.

Although there is no specific recruitment policy for hiring into Suhakam's workforce, those with social science and legal background are usually given priority. It is to be noted that Suhakam boasts a workforce with rich variety of disciplines. Suhakam staff are employed based on the need of the situation and are usually employed on a contract basis initially. Upon performing well, they would be confirmed in their positions, and their employment made permanent.

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<sup>13</sup> <http://www.thestar.com.my/News/Nation/2012/05/04/Suhakam-Cops-infringed-on-human-rights-at-Bersih-20-rally.aspx>

<sup>14</sup> <http://www.malaysiakini.com/news/235281>

## II. Effectiveness

In compliance with the Paris Principles and the Human Rights Commission of Malaysia Act 1999, Suhakam has a complaints-handling mechanism which inquires and looks into allegations of human rights violations and abuse. Such powers are carried out by the Commission's Complaints and Inquiries Working Group (CIWG). Section 4(1)(4) of the Act states that in furtherance of the protection and promotion of human rights in Malaysia, the functions of the Commission shall be to inquire into complaints regarding infringements of human rights referred to in section 12. Section 12 of the same Act states that the Commission may, on its own motion or on a complaint made to it by an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or a group of persons, inquire into allegation of the infringement of the human rights of such person or group of persons. However, the Commission may not enquire into a complaint which is being heard or has been determined by a court of law.

The powers relating to inquiries under the Act are provided under section 14 whereby it states that the Commission has power to procure and receive both written or oral evidence and to examine witnesses that the Commission thinks necessary. The Commission has power to require all evidence of any witness to be given on oath or affirmation as if s/he were giving evidence in a court of law. Apart from that, the Commission could summon any person residing in Malaysia to attend any meeting of the Commission to give evidence or produce any document or other things in her/his possession and to examine her/him as a witness. The Act also allows the Commission to admit, notwithstanding any of the provisions of the Evidence Act 1950, any evidence – whether written or oral – which may be inadmissible in civil or criminal proceedings and to admit or exclude the public from such inquiry.

Despite stating the above, there is no provision which sets out how complaints should be made; although it can be in the form of a memorandum<sup>15</sup> or via SUHAKAM's official web portal.<sup>16</sup> Upon receiving a complaint, an officer will be appointed by the Commissioner in charge to investigate the complaint and this would usually be done by an officially written order. The said complaint will then be filed and given a file number and the complainant will be notified of it within three working days. The officer receiving the complaint (in the event the complainant complains personally in Suhakam's office) will conduct the first evaluation and make recommendations and plan actions in regards to the complaint with the Assistant Chief Secretary of the CIWG (Supervisor). If the complaint is received in other forms (emails, letters), the Supervisor is responsible for evaluating the complaints. The decision on case classifications will be made by the Commissioner responsible or Supervisor based on past precedents. For complaints outside the Commission's jurisdiction, a letter will be sent to the complainant informing them.

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15 SUHAKAM (2011) 2010 Annual Report, Kuala Lumpur: Report of the Complaints and Inquiries Working Group (p. 35). It was reported that out of the 1,005 reports received by the Commission, 42 were in the form of a memoranda.

16 <http://www.suhakam.org.my/sumber;jsessionid=265BD6403EA6179A105771C60B58D99A>

Cases with element of human rights violations will then be passed on to the relevant officers and investigation on the complaint will be carried out. The contents of all correspondence shall be acknowledged, approved and signed only by the Commissioner in charge as the officers are not allowed to sign any official letters. Officers intending to make any visits for the purpose of fact collection must obtain approval of the Commissioner, and the report of the visit has to be presented to the Commission. The final process is the case evaluation wherein Suhakam will take note of the accusation and the reply by the individual/ agency complained about (violator). The Suhakam officer will evaluate based on physical evidence and not based on perception. The officer in charge will then inform and discuss the development of the case with the Supervisor and Commissioner until the case is solved. Finally, a notification letter signed by the Commissioner will be sent to the complainant.

It has to be noted here that the Commissioner has the liberty to give any instruction in regards to the case at any stage of the development of the case as deemed suitable. Apart from that, each case will be decided by the Commission as a whole or individual Commissioner; and the officer is not allowed to take any action that does not conform to previous practice without the approval of the Commission or the Commissioner.

Having explained the formal procedure of the complaints-handling process above, the report takes up three complaints/inquiries undertaken between the years 2011 and 2012 as case-studies on the effectiveness of the Commission:

#### **A. BERSIH 2.0 Public Inquiry**

On 9 July 2011, the Bersih 2.0 public assembly was held in Kuala Lumpur to show support for the demands made by the Coalition for Fair and Free Elections (BERSIH), for free and fair elections in Malaysia. Prior to the assembly, the GOM had declared BERSIH as an illegal entity and various preventive actions were taken by the Malaysian Police including the arrest of several individuals connected to the coalition. The Ministry of Home Affairs and the police also released several statements to the effect that the assembly was illegal as no permit had been issued under section 27 of the Police Act 1964.

Subsequent to the assembly, Suhakam received several memoranda and complaints from various quarters including organizations and individuals alleging infringement of human rights during the assembly. In light of the above, the Commission decided to conduct a Public Inquiry to investigate the allegations of human rights violations during the assembly.

During the Public Inquiry, the Commission recorded statements of the organizers, participants, media and the police. In fact, the Bar Council, the police force and the Attorney General's chambers were invited to act as observers during the entire proceedings to which only the Bar Council and the Royal Malaysian Police accepted the invite. For the purpose of the inquiry, a panel was formed comprising three Commissioners: namely Prof Datuk Dr Khaw Lake Tee (Chairperson), Prof Emeritus Dato' Dr Mahmood Zuhdi bin Hj Abd Majid (Member), and Mr Detta Anak Samen (Member).

For the purpose of the public hearing, the Panel of Inquiry called 31 witnesses and received 42 exhibits, including medical reports, photographs and video recordings during the course of the proceedings. The Panel sat for a total of 16 sessions from 11 October 2011 to 17 April 2012 during which the testimonies of 31 witnesses were heard. The Panel also visited several locations namely, Tung Shin Hospital, Chinese Maternity Hospital, the Federal Hill and KL Sentral to obtain a better understanding of the events as testified by the witnesses before the panel. All 31 witnesses were given equal opportunity to relate their version of the incident and were not subjected to unfair and prejudicial questioning.

At the conclusion of the inquiry, the Commission prepared a detailed report stating its findings and recommendations for each issue. The Commission was unbiased in its reports and recommendations made. However, it is disappointing that the recommendations made especially to the GOM and the police forces were very soft and had no bite. The recommendations were merely advisory in nature without the Panel calling for action to be taken against human rights violators.

### **B. BERSIH 3.0 Inquiry**

BERSIH announced that it was organizing a rally called '*Duduk Bantah*' ('Sit and Protest'/'Sit-Down Protest') which was popularly known as Bersih 3.0 on 28 April 2012 from 2–4 pm at various locations in the country including *Dataran Merdeka* (Independence Square), Kuala Lumpur. On 27 April 2012, the police issued a press statement that it had obtained an *ex parte* court order dated 26 April 2012 under section 98 of the Criminal Procedure Code prohibiting any assembly and the public from attending, gathering or participating in any assembly at *Dataran Merdeka* from 28 April to 1 May 2012. Subsequently, the authorities offered alternative venues but these were rejected by the organizers on the ground of insufficiency of time for the required changes to be made.

However, it was reported in the media that the police would allow the public to assemble at the six locations announced by the organizers on condition that no procession was permitted and no gatherings were to take place in *Dataran Merdeka*. The police blocked several roads in the city and *Dataran Merdeka* was cordoned off with barricades and was heavily guarded by the authorities. Despite the above, many untoward incidents and human rights violations took place on that day after 3pm.

Subsequent to the rally, Suhakam received 16 complaints from members of the public and a memorandum alleging human rights violations. The complaints concerned the use of excessive and unwarranted force on the participants of the rally and members of the media and urged the Commission to conduct a public inquiry. Upon receiving overwhelming complaints and calls to conduct a public inquiry, the Commission called upon the public, media and authorities to submit information, documents and evidence for its investigation and consideration. On 21 May 2012, the Commission announced its decision to hold a public inquiry into the allegations of human rights violations during and after Bersih 3.0.

The terms of reference of the Public Inquiry were to determine whether there were any violations of human rights against any person or party during and after the gathering.

Apart from that, the Commission was to recommend measures to be taken to ensure that such violations do not recur again in the future.<sup>17</sup> A panel for the purpose of the Inquiry was formed comprising three members of the Commission namely Prof Datuk Dr Khaw Lake Tee (Chairperson), Prof Emeritus Dato' Dr Mahmood Zuhdi bin Hj Abd Majid (Member), and Mr Detta Anak Samen (Member).

The public hearing which started on 5 July 2012 ended on 10 January 2013 wherein the Panel sat for a total of 29 days. During the inquiry, 49 witnesses which consists members of public, media and police personnel were called to testify before the panel. The panel also received 67 exhibits and identified documents, photographs, video recordings, news clippings, medical reports and police reports. Apart from the inquiry, the panel also visited the following sites:

- Dataran Merdeka and the surrounding areas; and
- Kompleks Pasukan Simpanan Persekutuan Polis DiRaja Malaysia, Cheras where the police demonstrated the use of barbed wires, tear gas, command vehicle, sound commander and explained the procedures on crowd control.

Similar to the previous Public Inquiry, the panel invited the Police, Bar Council, Bersih Steering Committee and the Attorney General's Chambers to act as observers and assist with proceedings. All parties except the AG's chambers accepted the invite and participated fully.

The Panel took note of the various recommendations made by the Commission in its previous inquiries and was of the opinion that the recommendations contained therein were still relevant and therefore are still applicable.

After conducting a thorough inquiry and observing every single incident, the Panel at the conclusion of the inquiry made a series of recommendations especially to the police force. The police were found to have used excessive and unwarranted force in handling the protestors on that day. Apart from criticizing the police, the Panel were of the opinion that the police should have facilitated the assembly in the spirit of the Peaceful Assembly Act 2012. The Panel also said that with the experience of handling large crowd in various events in the past, the police should have been more vigilant in differentiating a peaceful assembly from a riot. Apart from that the Panel also recommended that the police review and amend its Standard Operating Procedure / Standing Orders in the dispersal of assemblies, in line with international human rights standards such as the Universal Declaration of Human Rights, International Convention on Civil and Political Rights etc., and to emulate best practices of other police forces in the world.

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17 <http://www.nst.com.my/latest/suhakam-5-bersih-3-0-inquiry-starts-thursday-1.100299>

However, recommendations made were not just for the police as the Panel did not spare the members of the public. The public especially participants of public assemblies were told not to take the law into their own hands and to appreciate and respect at all times, that the police have their roles and responsibilities in maintaining and preserving the security, peace and law and order.

The Panel also strongly recommended that the police investigate into all the complaints lodged by public even if the complaint was against other police personnel and were asked to make the investigation reports available to avoid being labeled as biased.

### **C. National Inquiry into the Land Rights of Indigenous Peoples**

From December 2010 to June 2012, Suhakam conducted its first ever National Inquiry into the Land Rights of Indigenous Peoples in Malaysia in response to numerous and continuous complaints received by the Commission from the Indigenous Peoples (IPs) of Malaysia. The National Inquiry deals essentially with the issue of IPs land rights, specifically the increasing and incessant infringements or violations of these rights.

In presenting the report of the Inquiry, the Commission hoped that the three branches of the Government – the Executive, Legislative and Judiciary will look into the plight of the marginalized IPs and do what could be done to redress the situation. The Commission recommended for the consideration and follow-up actions of the GOM, whereby some of the proposals could be implemented within possibly a short period of time, while others might take medium and long-term time frames.

Among the proposals made, the Inquiry strongly recommended the establishment of an independent National Commission on Indigenous Peoples that would look into the effective recognition, as well as the promotion and protection of their rights to land and identity. The Inquiry also strongly urged the establishment of an Indigenous Land Tribunal or Special Commission which should be empowered to decide on complaints brought before it.<sup>18</sup>

The Commission engaged a cooperative and responsive approach for the Inquiry by getting a wide range of stakeholders involved. Among them are government departments and agencies, non-governmental organizations, indigenous communities, private companies, media and other interested groups and individuals as the Inquiry sought to identify and develop solutions that would bring improvements to current land ownership status of the IPs in Malaysia.

The inquiry was conducted in various stages starting with introductory sessions followed by public consultations with stakeholders. At the same time, the Inquiry also called for written public submissions. Upon concluding the above mentioned processes, the Inquiry conducted public hearings to hear selected cases from the consultations and submissions. Apart from these, the Inquiry also studied the land rights of the IPs in Malaysia and the legal framework of their land rights.

At the conclusion of the Inquiry, the Commission made 18 strong recommendations divided into 6 main themes. These recommendations call on the GOM to look into the plight and legal and human rights of IPs seriously. Apart from that, the Inquiry sees that it is critical that the injustices faced by the IPs are dealt with in an expeditious and holistic manner. It has to be noted here that all 7 commissioners including the Chairman were actively involved in the entire Inquiry process and the Inquiry was done without fear or favor.

Recommendations made to the GOM and other stakeholders were based on the findings of the Inquiry and were concrete enough to solve many troubles of the IPs in Malaysia. However, the recommendations made have no bite as they are merely advisory, and the GOM or other stakeholders are not bound by it. In fact, the report sent to the Parliament has not been deliberated and it is highly unlikely that any action will be taken to address the issues.

### **Relationship with Civil Society Organizations**

Relations between CSOs and Suhakam in the past were notorious for being stormy. However, this has improved tremendously over the last few years whereby CSOs are often included in consultations and discussions with the Commission. In 2012 the Commission initiated few meetings and consultations with CSOs in Malaysia which was well received by the CSO community. In fact, Professor Datuk Dr Khaw Lake Tee, the Vice Chairman of Suhakam, attended the Universal Periodic Review (UPR) consultation organized by COMANGO (Coalition of Malaysian NGOs) and fully participated in it. This improved relationship is due to the NGO background of some Commissioners and not because of a change of policy. Having said that, there is no assurance that this strong relationship between the Commission and CSOs would remain after the expiry of the current Commission's term.

### **III. Thematic Issues**

In 2009, Suhakam announced that it had set up a human rights defenders (HRDs) desk to improve the protection for human rights defenders in Malaysia. Commissioner Michael Yeoh who made the announcement in a Roundtable Discussion with NGOs on 11 March 2009 said: "The idea of setting up the Human Rights Defenders Desk arose from suggestions from participants of the previous civil and political rights session with NGOs held on 17 July 2008. As human rights defenders from NGOs and civil society face risks of arrest and harassments at public assemblies and demonstrations from law enforcement [personnel], participants urged Suhakam to publicise the need for protection of human rights defenders."<sup>19</sup>

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19 Report of the Roundtable Discussion on Economic, Social and Cultural, Civil and Political Rights with NGOs, 11 March 2009 (p. 2)

It is to be noted that, in fact, Suhakam does not yet have a designated desk for human rights defenders (HRD desk) responsible to receive and investigate into complaints on human rights violations. However, the Commission does set-up ad hoc Task Forces / focal points to handle HRDs in need when situation arises. There is also a mechanism within Suhakam that responds to requests for assistance from HRDs at risk. It does so by conducting investigation, monitoring as well as visitations, and meetings with relevant stakeholders.

However, the effectiveness of this is questionable because of past incidents. For example, those participating in the peaceful candle-light vigils during the 50<sup>th</sup> Anniversary of the ISA were arrested by the police despite the presence of Suhakam Commissioners.<sup>20</sup> In fact, Suhakam also sent its team of observers to monitor the Bersih 3.0 rally on 28 April 2013. Their presence again did not deter the authorities from using excessive and unwarranted force on the protesters. Nevertheless, Suhakam must be commended for sending its team to monitor the vigil and condemning the police for arresting those in the peaceful assembly. Moreover, the Commission even conducted a Public Inquiry to investigate the alleged human rights violations during Bersih 3.0 as discussed above.

Despite having a few roundtable discussions with civil society organisations (CSOs), Suhakam has never lobbied the government openly for the implementation of international standards for the protection of HRDs such as the UN Declaration on Human Rights Defenders (HRDs) into domestic law. No dialogue has been held between the government of Malaysia and the UN Special Rapporteur on HRDs.

#### **IV. CONCLUSIONS AND RECOMMENDATIONS**

After 13 years of existence, the performance of Suhakam under the leadership of Tan Sri Hasmy Agam has been commendable. Although the Commission could not convince the GOM and Parliament to push for an amendment of the governing law to further increase their power and jurisdiction, the Commission operated well within its limited powers. The Commission has become very vocal to the extent that they have chided the GOM publicly for not conforming to universally accepted human rights norms.

However, it is disappointing that recommendations made by the Commission are not taken seriously by the GOM. None of the Commission's reports have ever been debated or even mentioned in the Parliament and the GOM has never formed any Committee or Task Force to look into recommendations of Suhakam. The Commission should be more bold and hard hitting in the future so that the GOM would start taking it more seriously.

#### **Recommendations to the Government of Malaysia**

- To implement recommendations made by Suhakam especially on the ratification of the remaining six core human rights treaties;

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20 <http://thestar.com.my/news/story.asp?file=/2010/8/3/nation/20100803145014&sec=nation>

- To ensure the appointment of Commissioners in the future is more transparent and inclusive;
- To ensure the Commissioners serve the Commission on a full-time basis;
- To give Suhakam more powers to conduct spot checks in places of detention;
- To give Suhakam more independence by taking it out of the purview of the Prime Minister's department;
- To act on findings made by Suhakam in the National Inquiry and Public Inquiries;
- To give Suhakam more relevance and prominence by consulting it before presenting draft legislation to the Parliament.

### **Recommendations to the Parliament of Malaysia**

- To give more importance to Suhakam's *Annual Report* by debating it in Parliament;
- To amend the governing Act of Suhakam whereby the Commission is to be accountable and answerable to the Parliament and not GOM as this would increase the independence of the Commission;
- To push for further amendments to Act 597, Act A1353 and Act A 1357 to give the Commission greater powers of enforcement.

### **Recommendations to Suhakam**

- To be more vocal on basic human rights which are also enshrined in the Constitution of Malaysia such as freedom of assembly, freedom of religion, freedom of speech and issues of undocumented Malaysians;
- To organize public campaigns especially on issues that the government has continuously failed to act on;
- To increase their outreach programs especially on human rights education and on the job scope of the Commission, as many do not know of the jurisdiction of the Commission and those that are aware often view the Commission as an elitist organization;
- To continue acting as middle-person between GOM and civil society in holding more meaningful meetings.



# Philippines: Divided Leadership and Lacklustre Performance

Philippine Alliance of Human Rights Advocates (PAHRA)<sup>1</sup>

## I. General Overview

President Benigno Aquino III considered 2012 a year of continued resurgence of the economy bolstered with increased confidence in good governance. He took pride in the dramatic leaps the country has taken in the global competitive index of the World Economic Forum; the unprecedented attainment of investment-grade status from the most respected credit ratings agencies in the world; and the astounding 6.8 percent Gross Domestic Product (GDP) growth in 2012.<sup>2</sup>

Amidst this enthusiasm, cases of extra-judicial killings (EJK), enforced disappearances, torture, illegal arrests as well as other political, civil, economic, social and cultural rights violations increase halfway into the Aquino administration. What becomes alarming “is the growing number of threats and killings of rights defenders” as observed by the UN Special Rapporteurs’ on human rights defenders, Margaret Sekaggya, and on extrajudicial killings, Christof Heyns.<sup>3</sup>

In 2012 alone, the Commission on Human Rights of the Philippines (CHRP) reported 43 cases of EJK involving 48 victims; 14 cases of Enforced Disappearance involving 17 victims; and, 39 cases of Torture involving 63 victims. There were 65 documented cases of arrest and detention by the Task Force Detainees of the Philippines involving 133 individuals. The spate of arrests came after the Department of Interior and Local Government (DILG) and Department of National Defense (DND) announced its Php467 million bounty for some undisclosed list of 235 communist leaders.<sup>4</sup> This list would definitely be used to harass political activists and leaders of peoples’ organizations with or without legal charges and would constitute another institutionalized utter disregard of the right to due process.<sup>5</sup>

In an October 2012 interview with Radio New Zealand, President Aquino brushed aside criticism of his human rights records as simply “leftist propaganda”. He issued Administrative Order (AO) 35 in November “creating the inter-agency committee on extra-legal killings, enforced disappearances, torture and other grave violations of the right to life, liberty and security of persons”. He promoted military officers charged with

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1 Prepared by Dr. Renato G. Mabunga, lead writer and member of PAHRA Council of Leaders

2 State of the Nation Address (SONA) 2013

3 Office of the High Commissioner for Human Rights (OHCHR) Statement. 12 July 2012

4 2012 KARAPATAN Year-End Report on the Human Rights Situation in the Philippines

5 National Union of Progressive Lawyers (NUPL) Press Release. 10 December 2012

cases of human rights violations.<sup>6</sup> Brig. Gen Eduardo Añonas was appointed chief of the Intelligence Service of the Armed Forces of the Philippines (ISAFP). He was among those charged in the abduction and disappearance of Jonas Burgos. Brig. Gen. Aurelio Baladad was appointed Deputy Chief of Staff for Operations and before him Lt. Gen. Jorge Segovia who was assigned to head the Eastern Mindanao Command. Baladad and Segovia were among those charged in the illegal arrest and torture of the Morong 43.<sup>7</sup>

2012 also witnessed positive developments in policy reforms. The President signed into law Responsible Parenthood and Reproductive Health Act of 2012, which is restrained for implementation by the Supreme Court following petitions of unconstitutionality by the Catholic Church; the Compensation for Martial Law Victims Act, early 2013, providing compensation, recognition and acceptance of the historical facts of grave human rights violation during Martial Law; the Muslim Mindanao Autonomy Act 288 or the ARMM Human Rights Commission Charter of 2012, an independent regional national human rights institution vested with the powers and mandate of the national Commission on Human Rights within the autonomous region; Republic Act (RA) 101361 or the *Kasambahay* Law in January 2013, an act instituting polices for the protection and welfare of domestic helpers; the Anti-Enforced or Involuntary Disappearance Act of 2012, an act defining and penalizing enforced or involuntary disappearance; and the Ratification of the Rome Statute.

#### **A. Culture of Impunity Persists: Still No National Human Rights Action Plan**

However, until today, President Aquino has never finalized and signed the National Human Rights Action Plan (NHRAP), highlight during the 1<sup>st</sup> and 2<sup>nd</sup> Philippine Universal Periodic Review Process (UPR) in 2008 and 2012; a framework that would guide Government's compliance with its international human rights obligations. It has failed to ensure greater transparency through a general right of access to official information – a Freedom of Information (FOI) law<sup>8</sup>. The right to information is not only on the accessibility of police blotters and military camp records but also of transparency of business plans and records containing also financial reports affecting people, their sources of subsistence and the environment, particularly in areas of extractive industries. The CHR has neither called to task the Aquino administration on the NHRAP nor determinedly consolidated its reach

6 A case of torture filed in June 3, 2008 against Col. Domingo Tutaan, Jr. was unattended in the Commission on Human Rights (CHR). In 2013, the National Capitol Region (NCR) of the CHR was reported to have reviewed and confirmed that there was indeed a human rights violation and a case of torture. In the meantime, Col. Tutaan has already been designated as Head of the AFP's Human Rights Office (AFP HRO). He was also subsequently promoted to a one-star general. The NCR-CHR conclusion was submitted to the Commission and notified Gen. Tutaan, who was then soon to receive his second star promotion, of the finding. The promotion was unimpeded presupposing a clearance from the CHR. Formal requests by PAHRA for information and disclosure to both the NCR-CHR and the Office of the Chairperson remain unanswered till the time of this writing. The need for a policy of vetting designated Human Rights Officers, especially the Heads of the AFP and PNP HR Offices, has also been raised but has gone unnoticed, much less unanswered. (Refer to PAHRA letters both dated 11 April 2013)

7 2012 KARAPATAN Year-End Report on the Human Rights Situation in the Philippines

8 Frankel, Maurice *Freedom of Information and Corruption* <http://www.cfoi.org.uk/pdf/corruptionmf.pdf>

on the necessity of the FOI as a right and an indispensable component in the fight against corruption through its regional offices, seminars, trainings, lectures, talks and information dissemination.<sup>9</sup>

Though there is a noted decline in terms of statistics, very few have been made to pay for what they have wrongly done. According to the Philippine Alliance of Human Rights Advocates (PAHRA), "government and the security sector have miserably failed to diligently investigate and appropriately prosecute the past and present violations. The culture of impunity persists."<sup>10</sup> This culture of impunity in the realm of civil and political rights is rooted in the impunity of economic, social and cultural rights. Most of the reported cases arise from situations of struggle against mining operations, destruction of environment, demolitions of urban poor communities, land and work, and corruption in the bureaucracy. Lately, violations are directed at human rights defenders.

Government's denial of human rights as a pillar of development and good governance laid down an environment that perpetuates a culture of impunity, emboldens perpetrators, condones and sets out new targets for violations. This is the general backdrop against which the Commission on Human Rights Philippines (CHRP) reported 2012 as a year of considerable achievements with serious human rights challenges. "Despite wide-ranging positive developments such as the passage of major human rights laws, the CHRP continues to grapple with serious human rights challenges like in the face of unabated human rights violations, particularly summary killings."<sup>11</sup>

## **B. CSO-HRDs' Reflective Assessment of NHRI: Very Serious Concerns**

Two more years are left before the present members of the Commission would have ended their terms. Human Rights Defenders (HRDs) in civil society were very concerned as to the perceived divided leadership and lackluster performance of the Commission. After the presidential elections in 2010, expectations of the CHRP were raised when a Human Rights Defender who struggled against repression during the martial law years and had later become a parliamentarian was chosen by the Chief Executive to become Chairperson. As was and is done with various bodies and/or agencies of duty-bearers, HRDs sought a dialog with the CHRP to mutually assess performance, determine accountability and pinpoint areas of possible cooperation.

The requested dialog last November 14, 2012 was regrettably not granted. The CSOs nonetheless pushed through with the assessment of the CHRP without the latter's presence. Twenty-four (24) national organizations participated in the Reflective Assessment. Much of the results of the said assessment<sup>12</sup> have been incorporated in this report.

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9 Commission on Human Rights. *Status of CHR's Strategic Plan in Terms of Outputs-Outcomes for the Period 2011-1<sup>st</sup> Quarter of 2013*. Prepared by Planning and Programming Division (PPD) of the Strategic and Development Planning Office (SDPO). P. 19, Table 10 Human Rights Activity [sic], January-December 2012

10 PAHRA Statement. *A Call to all Human Rights Defenders: Conduct Creative & Courageous Actions on Four (4) Fronts to End Impunity*, 22 July 2013

11 2012 CHR Report

12 CSO Reflective Assessment. "The Commission on Human Rights of the Philippines: A Fragmented Commission and Below-Par Performance". November 14, 2012

## II. Independence

The Philippines is a multi-party democracy with an elected president and legislature, constitutionally mandated democratic institutions, and a vibrant civil society. It “values the dignity of every human person and guarantees full respect for human rights.”<sup>13</sup>

Pursuant to Section 17, Article XIII of the 1987 Philippine Constitution, former President Corazon Aquino on 5 May 1987 issued Executive Order (EO) 163 declaring the creation of the Commission on Human Rights Philippines (CHRP). It is vested with the powers and functions to investigate complaints of violation against civil and political rights, provide assistance and legal measures to victims, monitor State compliance with international treaty obligations on human rights, establish programs towards the promotion and protection of human rights, and the like.<sup>14</sup>

The 1987 Philippine Constitution minimally defined the composition and qualification of the Commission. It shall be composed of a Chairperson and four members; natural-born citizens; at least thirty-five years old, not have been candidates for any elective position immediately preceding appointment; and the majority shall be members of the Philippine Bar.<sup>15</sup> The Commission is appointed by the President on fulltime basis and shall not engage in any profession or business that may affect its office. It shall have a seven-year term without re-appointment.<sup>16</sup>

Most members of the Commission were appointed in 2008 during the administration of former President Gloria Macapagal-Arroyo except for the current Chairperson Loretta Ann Rosales, who took office in 2010 due to vacancy. Her predecessor was appointed the Secretary of the Department of Justice (DOJ). Rosales’ appointment to the Commission shall be only for the unexpired term of her predecessor.<sup>17</sup>

There is no defined and instituted procedure regarding selection and appointment process of the Commission. Neither is there legal provisions ensuring human rights background of candidates, gender equality, civil society participation and transparency in the whole process.

Practices have been varied. The experience in 2010 appointment of Rosales spoke of the tension and experience of non-guidelines. This urged international bodies and local organizations to call on the Aquino Government into establishing a transparent and a participatory process that would ensure the independence of the Commission. In its letter to the President, the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) noted the critical importance of a procedure at par with the minimum international standard as a “firm foundation”

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13 1987 Philippine Constitution. Article II, Sec. 11

14 Executive Order No. 163, Section 3

15 Ibid. Section 2

16 Ibid

17 Ibid. Section 2, para. 3

of the Commission's pluralism and independence. The Asia-Pacific Forum on National Human Rights Institutions (APF) through its Chairperson wrote, "the failure to undertake such a process may be seen as breaching the Paris Principles and lead to a review of the Commission on Human Rights of the Philippines accreditation status. In this regard I note that direct appointment by the executive has in the past led to a review of the accreditation status of other national human rights institutions, and has been the subject of comment in United Nations fora."<sup>18</sup>

Various recommendations were forwarded in aid of instituting a credible selection and appointment process. Human rights and civil society organizations (CSOs) recommended a mixed panel or committee of decision-makers, open applications and consultations with stakeholders as required by international standards. This would make the process focused on front-runner candidates' credentials, stance on issues and human rights advocacies. "In fact, with this process, critics of candidates will have to make their negative statements in public, with some proof, instead of unsubstantiated comments to the press," according to CHR Commissioner Cecilia R.V. Quisumbing.<sup>19</sup>

Unheeding the call from multi-stakeholders, the appointment boiled down to political connections and compromise with the President. Had the Congress enacted the proposed Charter of the Commission in 2009, independence and pluralism should have been instituted. In Section 12 of the proposal, "the nomination, selection and appointment process shall be transparent and shall ensure broad-based consultation with stakeholders."<sup>20</sup> CSOs may submit their nominees to the President.<sup>21</sup>

Despite having no Charter in 2012, the Commission "has taken further steps to fine tune its procedures in the investigation and monitoring of human rights violations and abuses. It revised, updated and published the CHR's Omnibus Rules of Procedures and the Manual on Investigation and Case Management Process; Draft Handbook for CHR Lawyers and Investigators on International Humanitarian Law; and a Protocol on Case Management of Children who are Abused, Exploited and Neglected."<sup>22</sup> Currently, it has renewed attempt to re-file the Commission's proposed Charter in Congress. This bill hopes to strengthen the Commission's independence, elaborate its powers and reinforce a functional and organizational structures.

### **A. On Leadership and other Guarantees of Independence and Pluralism**

Leadership is crucial in ensuring a unified command in understanding and implementing organizational vision, mission and mandate. CHRP's leadership is contingent on the dynamics of its Commissioners functioning as a collegial body on matters pertaining to the institution. It has a big role in developing attitudes of the staff and officers.

<sup>18</sup> [http://www.chr.gov.ph/MAIN%20PAGES/news/PS\\_7July2010\\_ChairSel.htm](http://www.chr.gov.ph/MAIN%20PAGES/news/PS_7July2010_ChairSel.htm)

<sup>19</sup> Ibid

<sup>20</sup> CHRP. (Draft copy) "An act strengthening the Commission on Human Rights and for other purposes", 12 July 2013

<sup>21</sup> Ibid

<sup>22</sup> 2012 CHR Report

It is alarming that the Commission's leadership body is perceived as divided.<sup>23</sup> Policy decisions and actions seem to be devoid of consensus of the Commission *en banc* ('in full bench'/as a whole). Although noted that such problem is the cumulative effect of years of institutional weaknesses, it is not a reason for each Commissioner to work and decide alone or in faction. This division among the Commissioners is noticeable today more than before and highlighted by differing loyalties of officers and staff under the Focal-Commissioner System.<sup>24</sup>

The lack of unified leadership of the Commission also reflects in the quality of performance of their regional offices and directors. Because there is no institutionalization of leadership functions, regional offices highly depend on the capacity and character and commitment of its regional heads.<sup>25</sup> There is no clear mechanism to exact accountability of the regional directors and, to some extent, this is also true of Commissioners at the national level.<sup>26</sup> This gap should be addressed in its new Charter.<sup>27</sup>

The division within the Commission poses a hindrance in guaranteeing pluralism vital to the establishment of effective cooperation among other sectors of government and society. Accordingly, "pluralism and diversity are important: they enhance an institution's independence, credibility and effectiveness; they increase the likelihood of cooperation and collaboration with other stakeholders, and they demonstrate that the institution

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23 CHRP Capacity Assessment. November 2012

24 See: 2010 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia

25 Minutes: CSOs/NGOs. Reflective Assessment on the Commission on Human Rights Philippines. UP Diliman, 14 November 2012

26 Focal Commissioners for the PWDs and the National Monitoring Mechanism (NMM) have not been made accountable for the little or no leadership to the tasks agreed upon within the Commission itself. According to the Coalition for implementing the UN Convention for PWDs in its recent 2013 parallel report: "*Despite having a focal person for disability-related concerns, the Commission has demonstrated very limited awareness about rights of persons with disabilities in general as stated in the Convention. It still appears to operate from a medical / charity model of disability. It has not displayed significant efforts or instituted procedures since it was created in 1987 to examine violations of human rights of persons with disabilities. As an example, at least two recent complaints filed by persons with disabilities in the National Capital Region remain pending for one to two years, with no assurance of timely resolution, despite repeated follow-up.*" At the beginning of 2013, PAHRA had written a letter to remind the Focal Commissioner for the NMM to reconvene soonest the NMM, as its last meeting was in August 2011. At that time, the Memorandum of Agreement (MOA) was not yet even finalized and agreed upon, much less endorsed by the President. The Focal Commissioner had not been able to effectively monitor the progress of the seven (7) cases which were the cause of PAHRA's suspending its attendance in the formation meetings of the NMM as the non-reporting of the concerned security forces officers were seen as a prelude of what could happen in the NMM. (Refer to the letter of PAHRA, January 2013, which remain unanswered at time of writing). An instance of unprofessionalism as expressed in favoritism was pointed out in the case of a person appointed by the Chairperson to the office of the Media-CSO Liaison Office, which did not function for two years. Despite this dismal performance, the person was promoted to the Office of the Chair. (Refer to the letter of PAHRA, March 2013, which is unanswered at time of writing)

27 There are still no provisions in the CHRP Charter recently filed in Congress that clearly state to whom the Commissioners are accountable. Many HRDs are appalled at the unchecked incidents of unprofessional actions of some Commissioners and Directors, including even outright human rights violations that erode the integrity and credibility both of the Commissioners and of the CHRP as an institution. It is likewise very disappointing that there seem to be acquiescence on the part of uninvolved Commissioners and Directors. See also: The Free Legal Assistance Group (FLAG). *Position Paper on House Bills on the Commission on Human Rights*. February 2009, p.5, as it points out the need for a mechanism for accountability

itself takes equality seriously.”<sup>28</sup> Based on CSOs assessment and result of the Capacity Assessment of the CHRP, the current leadership does not command unity amongst themselves and within the rank and file; fails to unite all in one common direction and action. It is doubtful, for instance whether the Roadmap presented by the Chairperson to the public on 10 December 2010 was a collective effort of the Commission.

Whereas before, CSOs were informed of a unified stance of the Commission regarding issues and concerns, today, they are at a loss as to whether such engagement and collaboration is based on Commission approved policies or guidelines or just on an individual's (Commissioner/Officer) opinion.

CHRP-CSO relations were made possible through personal contacts. Thus, current engagements and project collaborations are mainly categorized on personal-relational aspects, which are insufficient to evaluate the impact of CHRP's actions on violations on the ground.

Reports would also point that the President looks at CHR as another government agency serving at the pleasure of the Executive; and assumes that the Commission take the lead in defending the administration's inaction on human rights. These perceptions endanger the independence of the Commission. The Commission is mandated to monitor government compliance to international human rights obligations and asserts its identity in fulfilling its protection and promotion mandates. It is there to welcome government's positive actions for human rights, criticize and advise it for its failure to do so. It is not an implementing arm of the government but rather guides it to perform its functions according to international human rights standards. CHRP seems to confuse itself and needs to clarify its mandate and delineate its functions from that of the Presidential Human Rights Committee (PHRC).

The Commission acts more of an *alter ego* of the government. Its pronouncements and media releases are more in defense of the current administration's human rights record, rather than setting guidelines on a rights-based approach. Many NGOs tend to think of this condition as patronage which brings back the unresolved issue on appointment, criteria and selection process of commissioners. The non-establishment of a selection process makes the Commission's independence even more vulnerable and susceptible to control especially with an attached issue of budget appropriation.

“The truest test of independence is found in the actions of the institution: an institution should have the ability to conduct its day-to-day affairs independently from any outside influence. This means that the institution has the authority to draft its own rules of procedure, which cannot be modified, by an external authority. An institution's recommendations, reports or decisions should not be subject to an external authority's

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28 UNDP-OHCHR Toolkit for collaboration with National Human Rights Institutions (published December 2010 by the United Nations Development Programme and the Office of the High Commissioner for Human Rights)

approval or require their prior review.”<sup>29</sup> Rules of procedures must not remain on paper, it must be observed.

The CHR has an Omnibus Rule of Procedure. It has a Quick Response Team or program, which attends to emergencies even during holidays, weekends and beyond office hours. However, it falls short by shunning requests falling under these circumstances. It reproaches victims rather than assist them in filing grievances; sometimes lacks propriety in the conduct of its investigation and inquiry by availing assistance from groups or company or security command under question.<sup>30</sup>

### III. Effectiveness of the Commission

#### A. On Complaints-Handling

Pursuant to Section 18(2), Article XIII of the 1987 Constitution of the Philippines, in relation to Section 3(2) of Executive Order No.163, s. 1987, the Commission on Human Rights is vested with authority “to adopt its operational guidelines and rules of procedure, and cite for contempt for violation thereof in accordance with the Rules of Court.”

In 2012, it updated, revised, approved and published its Omnibus Rules of Procedures. It “takes cognizance of and investigate, on its own or on complaint by any party, all forms of human rights violations and abuses involving civil and political rights”;<sup>31</sup> “monitors the Philippine Government’s compliance with international human rights treaties and instruments to which the Philippines is a State party... shall also investigate and monitor all economic, social and cultural rights violations and abuses, as well as threats of violations thereof.”<sup>32</sup>

Investigation of cases whether civil or political or economic, social or cultural in nature maybe taken *motu proprio*<sup>33</sup> by the Commission or upon validation of complaint by victim/s, his/her relatives/community, non-government organization, or any government or private entity. It aims to determine whether civil and political, or economic social and cultural rights have been violated by State authorities or their instrumentalities, or by non-state actors including private entities, armed groups or individuals; to assess, monitor and identify gaps in the enjoyment of rights and to map out trends with a view

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29 UNDP-OHCHR Toolkit for collaboration with National Human Rights Institutions (published December 2010 by the United Nations Development Programme and the Office of the High Commissioner for Human Rights)

30 Minutes: CSOs/NGOs. Reflective Assessment on the Commission on Human Rights Philippines. UP Diliman. 14 November 2012: In the case of 3 missing Muslims in January, investigators from the Legal and Investigation Office (LIO) admonished the family of the victims because they did not approach the right office. The CHR concerned offices’ response to complaints from Salcedo, Tampakan, and Bayog, Zamboanga was lukewarm

31 CHR. Guidelines and Procedures in the Investigation and Monitoring of Human Rights Violations and Abuses, and the Provision of CHR Assistance. Rule 2, Section 1. 2012

32 Ibid

33 On its own initiative based on reports gathered from any source

to advise government on necessary reforms, recommend appropriate courses and/or policy measures to improve compliance with State obligations on human rights.<sup>34</sup>

The primary obligation to investigate cases of violation relies on the Commission's Regional Offices or sub-offices, which has the territorial jurisdiction of the cases. On special circumstances, the Commission *en banc* may assume jurisdiction of the investigation where the case is "of national, regional or international implication, or extraordinary on account of the complexities of the issues or of the personalities involved, or the unusual or sensational character of the facts, or which seriously affect those who are marginalized, disadvantaged and vulnerable."<sup>35</sup>

Rule 4, Section 6 of the Omnibus Rules of Procedure of CHR<sup>36</sup> provides for an immediate and appropriate action upon receipt of report or complaint, such as preliminary evaluation of the report or complaint to determine whether the matter falls within the CHR mandate. It may employ initial field investigation or fact-finding mission for such purpose. Prescribed time periods have been mapped out for the implementation of the Commission's obligations of conduct and of result.

Rule 4, Section 11 of the Omnibus Rules of Procedure details the processes of CHRP investigation. They are by way of notice, letter-invitation, order, or subpoena. CHRP officials are designated for such a process.<sup>37</sup>

Finally, Rule 4, Section 17 provides that "the final investigation report shall be completed within ten (10) days from termination of the investigation proper. The final evaluation of

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34 CHRP. Guidelines and Procedures in the Investigation and Monitoring of Human Rights Violations and Abuses, and the Provision of CHR Assistance. Rule 3, Section 2-3. 2012

35 Ibid. Rule 4, Section 8. 2012

36 Commission on Human Rights of the Philippines (CHRP). *Omnibus Rules of Procedures*. Rule 4, Section 6. 2012: "The recommendation as to the proper course of action to be taken by the CHR shall be submitted to the Office of the Regional Director concerned or to the Commission within two (2) days from the conclusion of the preliminary evaluation or initial investigation; and in urgent cases, not later than twenty-four (24) hours." Furthermore, "the investigation proper shall commence immediately after the preliminary evaluation of the report or complaint, which in no case shall be later than fifteen (15) days from receipt of the complaint or report"

37 CHRP. *Omnibus Rules of Procedures*. Ibid

- a) *The Chairperson or any Commissioner in cases of national, regional or international concern or importance, regardless of the situs of the violation or threats thereof; or*
- b) *The Regional Director, or in his/her absence, Chief Investigator of the CHR Regional Office or Sub-Office concerned, for cases taken cognizance of or filed with the CHR Regional Office or Sub-Office concerned.*

*The processes shall:*

- a) *Inform the respondent/s, and other parties concerned of the date, time and place of the scheduled conference or dialogue;*
- b) *Require the respondent/s to respond to the complaint by way of an answer, counter-affidavit or comment within the period prescribed in this Rule;*
- c) *Inform the respondent/s that in case of failure to attend or respond to the complaint, the Commission or any of its Regional Offices or investigation committee concerned shall proceed with the investigation and decide on the case on the basis of the evidence and documents on record;*
- d) *Inform the invited resource persons, if any, of the time, date and place of the conference or dialogue; and for said resource persons to submit their comment, opinion or position on the issue on or before the scheduled date of the preliminary conference or dialogue or inquiry within ten (10) days from receipt of such invitation or within such period as the CHR investigating authorities may deem reasonable.*

the case and preparation of the resolution shall be made within fifteen (15) days from the submission of the final investigation report, together with all the evidence gathered in the course of the investigation and/or conference or dialogue. These shall be referred to the appropriate legal officer, through the Regional Director. The legal officer shall then evaluate and draft the resolution for the case subject to the review and approval of the Regional Director, who shall release the same within five (5) working days from final evaluation of the case.”

However, there are cases, despite the assistance and persistence of follow-up actions by civil society, where CHR Resolutions or Final Reports are not seen.<sup>38</sup> There is a tendency to focus national resources mainly on and prioritize investigations of sensational national cases and forgetting to give equal due diligence and thoroughness to cases of similar proportions in violations and bring local incidences to national attention.<sup>39</sup>

Sample practices in carrying out its investigation and monitoring functions can be gleaned from the cases resolved by the Commission between 2010-2013 which were forwarded to PAHRA for the purpose of this report:

1. (*Motu proprio* investigation) Killing of Dr. Leonard Co, Julio Borrromeo, and Sofronio Cortez in an alleged encounter between forces under the 19<sup>th</sup> Infantry Battalion, Philippine Army and members of the communist New People’s Army (NPA) at Sitio Mahiao, Barangay Lim-ao, Kananga, Province of Leyte on 15 November 2010. Resolved by the Commission *en banc* on 22 November 2012.
2. (Complaint investigation) Alleged extra-legal killing of former Police Inspector Nathaniel Capitanea by Director General Dionisio Santiago and other operatives of the Philippine Drug Enforcement Agency (PDEA) at Joya Towers Condominium, Makati City on 22 August 2009. Resolved by the Commission *en banc* on 24 November 2011.
3. (*Motu proprio* investigation) Alleged shoot-out in Paranaque City between Government law enforcement officers and alleged group of armed robbers resulting to the death of sixteen (16) persons including innocent civilians, and the wounding of several others on 5 December 2008. Resolved by the Commission *en banc* on 6 December 2010.
4. (Complaint investigation) Displacement complaints of residents of Didipio, Kasibu, Nueva Viscaya by the mining operations of Oceana Gold Philippines Incorporated (OGPI), and members of the Philippine National Police-Regional Mobile Group (PNP-RMG) in Kasibuon 2 October 2009. Resolved by the Commission *en banc* on 10 January 2011.

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38 Refer among others, to cases of the enforced disappearances of the PICOP 6 in Agusan del Sur (Mindanao) (CHR Case No: CRG-Y2K-42-AS).

39 A case in point would be the massacre of the Miraflores brothers in Zambales. (CHR Case No: CRG-Y2K-42-AS). According to the National Bureau of Investigation (NBI), one or the other brother bore broken lower leg bones and had marks of possible torture. The CHR did not follow these through, either on the regional or national level. Fear, poverty and low-profile were factors that marginalized the incident, and eventually reduced to the status of being mere statistics in the data bases of human rights violations.

5. (*Motu proprio* investigation) Arrest, Detention and Torture of Abdulkhan Ajid by Capt. Sherwin Guidagen, SSgt. Elmer Magdaraog and Sgt. George Awing in Basilan on 23 July 2011. Resolved by CHRP Region IX on 18 April 2012.
6. (Complaint investigation) Capión massacre 1Lt. Dante Jimenez, *et al* (elements of 27<sup>th</sup> Infantry Battalion, Philippine Army) on 18 October 2012. Resolved by CHRP Region XII on 18 June 2013.

The first four cases were directly assumed by the Commission *en banc* while CHRP Regional Offices handled the last two. They all bear national, regional or international implications as human rights are national and international issues, the “accused” were duty-bearers and situations happened in the exercise of their functions and responsibilities as State agents. There is therefore a blurred definition on what merits a Commissioner’s investigation.

In all the cases, prompt responses of the Commission are remarkable. It acts on cases only days after the filing of complaint or after receiving reports. It is however saddening that it takes an average period of two years to finally resolve cases on matters of the Chairperson’s or Commissioner’s investigation. It takes an average of eleven months from the last activity related to the investigation to file resolutions of the cases or write the final report assuming it follows Rule 4, Section 17 of the CHRP Omnibus Rules of Procedures.

Certainly, CHRP investigations are supposed to stick to the human rights questions of the case using available laws of the land, applicable jurisprudence and in accordance with international norms and standards. It does not venture whether the precipitating conditions of violations are legitimate or officially sanctioned. It looks at details of a case from the optic of rights, the arbitrariness of the commission of violation and the omission of responsibilities of State agents based on substantial evidence. Its resolutions are in forms of recommendations for action regarding the case “be it an endorsement for the filing of appropriate criminal, administrative or civil actions before the competent fora; or endorsement for appropriate legislative, judicial, administrative and policy measures; or for the grant of financial assistance, whenever applicable.”<sup>40</sup> It is however, unclear how the Commission monitors the impact of the recommendations as most of accused are still in active service and justice is still elusive for many victims of human rights violation. With the long period for the Commission’s case resolution to come out, most witnesses become uninterested or afraid to testify.

There are some cases<sup>41</sup>, however, wherein CHR’s monitoring warranted a necessary intervention to ensure the State’s compliance of due process to avoid a domino effect of violations, especially those of media low-profile incidences. There is a concomitant danger as well that pronouncement of human rights violations are held back until the whole legal investigation is finished even though some of the violations should be stopped as in the case of Norman Mariano<sup>42</sup> in Dona Remedios Trinidad, in the province of Bulacan.

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40 Ibid. Rule 4, Section 17, para. 3. 2012

41 Refer to the PICOP 6 and the Dona Remedios Trinidad (DRT) cases

42 Norman Mariano was subjected to interrogation without counsel and was coerced to sign blank papers as a conditionality to be treated of his gunshot wound while being detained in a military hospital in July 2011

## B. On Competence and Methods of Operation (efficiency, internal capacity)

The Commission has a total of 539 filled-up positions in 2012. Two hundred forty-seven (247) personnel are assigned in the central office and 292 personnel in regional offices. Of this number, 278 were male while 261 were female. It has 113 lawyers, 158 investigators and 54 trainers/education officers.

Pursuant to the FY2012 General Appropriations Act, the Commission was provided with a budget appropriation of US\$8,307,130 for its programs and projects plus an allotment balance carried over from FY2011 in the amount of US\$175,355; thus the Commission worked with a total budget of US\$8,475,310.<sup>43</sup>

The mandate of CHRP is composed of a range of responsibilities detailed in its operations. It demands competence, responsible and reliable staff or employees, and enough budget. It requires accountability.

The CHRP was tasked to head and convene the Oversight Committee of the Anti-Torture Law 2009 (RA 9745). Despite repeated request of CSOs to CHRP to convene the body given the numerous problems encountered in cases filed in courts, the Committee has not been convened. Learning from this, the Philippine Congress, did not include similar provision under the Anti-Enforced or Involuntary Disappearances Act (R.A. 10353).

The CHRP is often times the last recourse of victims to exact justice. Thus, incompetence has no place in the institution as inefficiency of personnel backfires primarily on the victims. Such was the case wherein the affidavit prepared by CHR Region was used by the prosecutor against the victim<sup>44</sup>. In the Lenin Salas torture case, the investigation was also flawed which caused the dismissal of the case.

CSOs are tempted to believe that the Commission is disoriented in terms of its functions. They question how the Commission's Manual of Procedures is being observed and the concept of sensitivity practiced in dealing with the victims and support groups.<sup>45</sup> In the case of three missing Muslims in January, CHR admonished the families of the victims for not approaching the right office.

There is no clear policy on joint investigation with CSOs, as the Commission does not always want to endorse the (joint) final report.

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43 2012 CHR Report

44 Torture Case managed by Balay Rehabilitation Center (PAHRA member), name of victim withheld

45 On a Saturday of November 2012, Children's Legal Rights and Development Center (CLRDC) requested assistance from the Commission to at least facilitate or order a Quick Response Team (QRT) for children who were victims of abuse but were informed as it was a Saturday, there was no one at the CHRP office to take action. Similar experiences of PAHRA member, MAG when requesting QRT from a Regional Director of CHR for an arrest and torture case in Zamboanga on a Saturday. The Director said he would attend to it first thing on Monday

There are existing desks on children and women; CHR is even designated as the Gender and Development Ombudsman but no clear procedures, guidelines, programs and plans on these areas, which cause frustration to advocates of these sectors. It does not lead in educating the public of the impact of lowering the age of criminality of children in conflict with the law.

There is no system of case-feedback within the Commission, from the national office to the region and vice versa. Even if there is, it is not working and burdened by the infighting among the commissioners and loyalties of the directors and staff. The issue of professionalism has affected the efficiency of the Commission and it exacts its toll in the manner of its slow responses to cases and unsatisfactory assistance.

The Commission fails to provide and publish opinions, recommendations, proposals and reports on major human rights issues in the country. It does not comment on the human rights perspective of existing bills and legislations that impact on human rights. If it does they are not published and popularized.

Despite the fact that the CHR acknowledges their lack of personnel and resources to be able to respond quickly to reports of arrests without warrants or abductions or extrajudicial killings, especially in the interior of rural areas, it does not resolve yet the issue of deputation or accreditation of others, as a group of CSOs has recommended to the CHR a long time ago.

Inefficiency within the Commission could have been avoided if human rights education and internal capacity building is built-in the institution for all its employees. It is not incorporated in the plans of the Commission and of its Human Resource Department's staff development program. No wonder human rights education (HRE) in the country "has been implemented at the appreciation level only [even as] CHRP and its stakeholders have developed useful materials to supplement HRE."<sup>46</sup>

Human resource is the blood of the Commission and the life of any organization. Investing on it is a lifetime guarantee that CHRP (personnel, staff and even the commissioners) possess needed human rights orientation; skills in promotion and protection are multiplied and continuously enhanced. It is observed that only the top-level management avails of the education and training opportunities. And, sometimes it is more of a 'junket' than need.

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46 Maricel T. Fernandez and Alex B. Brillantes, Jr, PhD. *The State of Human Rights Education in the Philippines: Issues, Concerns and Directions*. December 2012. HRE is implemented for compliance purposes only: generally, human rights concerns are incorporated in various subjects taught in schools. At the elementary and high-school levels, human rights values are integrated superficially in Social Studies (Araling Panlipunan). At the college level, it is incorporated in the National Service Training Program (NSTP), Social Sciences Courses, Constitution, Bill of Rights, among others. Where appropriate and when the opportunity arises, the teachers incorporate HR in the Gender and Development (GAD) and Violence Against Women and Children (VAWC)

### C. On External Impact

The effectiveness of the current Commission can be gleaned from the performance of its mandate. The lack of public information of its annual assessment and reports of its overall functioning makes it more difficult to determine as to what the Commission really achieved. It has no impact as to its role of monitoring the government, as it has no critique on its performance *vis-a-vis* its obligations as a State Party to many international human rights instruments.

On HRE, CHR performance is disappointing. It gives doubt as to the impact of its education program for the security sector with its continuing dismal records on the promotion and protection of human rights. It fails to monitor how AFP-Human Rights manual is implemented on the ground given that it endorses it.

CHRP provides spaces for CSO/NGO to participate in its activities when it sees inputs from CSOs are valuable. Despite the many activities done jointly with the CHR, these were on a per activity and per program basis. There has been no joint planning on a strategic level even as it was stated in its 2010 Roadmap. The relationship between CSOs and CHR has not yet been institutionalized. What has been set up by the CHRP as an office and with an officer-in-charge was non-functional for two years.

It is observed, however that a practice of putting exorbitant registration fees especially on conferences makes it difficult for the latter to participate. A case in point was the holding of Education Conference in Tagaytay (first scheduled at PICC); fees were first set at US\$71 (Php3,000) then later raised to US\$118 (Php5,000) even as feedback in this regard was sent earlier to the Commission's program in-charge. No one from among the 24 organizations who assessed the performance of CHRP in November 2012 attended the conference.

CSOs particularly human rights NGOs work on specific programmed and tight budgets. They are willing to input human resources and contribute ideas, but may never juggle funds for external activities outside of its approved project funding. Sponsors and financiers for activities are a big consideration as to determine participation of NGOs.

NGOs acknowledge the contribution of the Commission in the anti-mining campaigns by coming up with the Didipio Resolution (2011), assistance during the Alternative Minerals Management Bill (AMMB) Caravan, and designation of focal person for indigenous peoples (IPs). However, CSOs wonder how the Resolution was used, popularized and maximized as the questioned Oceana Gold Philippines (OGPI) company proceeded with its operations. It was a surprise then that, CHR Region 2 commended OGPI for "incorporating and observing a human rights perspective in the conduct of its business affairs and for giving due consideration to cultural rights within its mining operations in Nueva Vizcaya and Quirino".<sup>47</sup> The CHR National Office was not aware of this commendation. Related government offices on mining and IPs' concerns have minimal knowledge, if none at all on the said resolution. CHR regional offices' response to complaints from Salcedo, Tampakan, and Bayog, Zamboanga was lukewarm.

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47 <file:///D:/NETWORKS/CHR/CHR%20and%20Chamber%20of%20Mines%20of%20the%20Philippines%20awards%20to%20Oceania%20-%20Didipio%20mining%20area.htm>, accessed August 3, 2013

The focal person on IPs has no linkage or coordination with the National Commission on Indigenous Peoples (NCIP).

There is a wide disparity in documented cases between the CHRP and human rights NGOs. Yet, there is no attempt on the part of the Commission to investigate and validate on its own these cases and reports. It relies more on receiving complaints before acting or investigating. Even with complaints, local offices vacillate on its response. Many cases (particularly EJK) in Mindanao are not included in its data. Particularly, the killings in Compostela valley patterned after the style of the Davao Death Squad (DDS), which the CHR regional office refuses to recognize.<sup>48</sup>

The Commission is full of bureaucratic requirements. It is hard to invite CHRP doctors to visit detention centers, even if cases are already publicized. NGOs still are required to furnish formal request letter to compel CHRP to use its visitation power. CHRP medical team are usually ill prepared in conducting visits to jails. They lack equipment or intentionally forgetting to bring their kits for handling and assessing patients. Their services are not satisfactory. Feedbacks on this regard are sent from time to time to the Commission but nothing so far has changed.

#### IV. Thematic Focus

This section bears the responses of the CHRP on the questionnaire sent by ANNI on "NHRIs: Role as Defender of Human Rights Defenders (HRDs)" and on "Business and Human Rights".<sup>49</sup>

##### A. NHRIs as Human Rights Defenders

NHRIs are also subjected to attacks. This is an accepted fact by the CHRP whose investigators experienced harassments and physical threat in the conduct of their work.<sup>50</sup> While these occurrences have been addressed institutionally through the Commission's provision of legal services, being equipped and trained to face work related risks remain a challenge for the Commission. Its capacity building program for investigators excludes threat and risks assessment and planning, and, basic protection and survival skills. As of this writing, CHRP is yet to come up with an official resolution on HRDs to guide its orientation and program development. It even "does not have dedicated personnel, unit nor specific budgetary allocation for the protection of defenders. Budget for HRD protection is incorporated in the regular allocation of the Commission."<sup>51</sup>

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48 Minutes: CSOs/NGOs. Reflective Assessment on the Commission on Human Rights Philippines. UP Diliman. 14 November 2012

49 Full texts of the CHRP responses to the two questionnaires are uploaded at [www.philippinehumanrights.org](http://www.philippinehumanrights.org) website

50 The Commission's investigators from the regional office (CHR Region IX) were fired upon during the conduct of investigation and Lawyers from the Legal and Investigation were stalked and harassed on the road by military body guards of a government official. They also have been confronted with harassments and threats in the form of administrative and/or criminal charges which have been addressed through the provision of the Commission's legal services

51 CHRP response to the "Questionnaire for NHRIs: Role as Defender of Human Rights Defenders"

In fairness to the Commission, there are efforts made to include general concerns of HRDs in government engagements and in international fora. For one, it involves HRDs in consultations regarding policy proposals and reporting processes of the Human Rights Council (HRC) and UN Treaty Bodies.<sup>52</sup> In some cases, it has intervened in disputes between HRDs and authorities.<sup>53</sup> Lately, the Commission joined hands with Human Rights Defenders – Pilipinas (HRDP) to initiate efforts in enhancing security/protection skills of HRDs (for both external HRDs and CHRP staff). Entitled, 'Enhancing Security by Human Rights Defenders' this maiden joint project aimed to provide introductory training and capacity-building formation for Human Rights Defenders (HRDs) particularly on security and precautionary measures. Then again, the above-mentioned engagements were all on activity-level, there needs to be a programmatic approach within the Commission in handling issues and concerns of HRDs.

## **B. The NI and its efforts in Corporate Accountability**

Business particularly extractive industry (mining) in the Philippines has taken center-stage in the Philippine development plan.<sup>54</sup> On 6 July 2012, the President released Executive Order No. 79 otherwise known as "Institutionalizing and Implementing Reforms in the Philippine Mining Sector Providing Policies and Guidelines to Ensure Environmental Protection and Responsible Mining and the Utilization of Mineral Resources". While it declares "no go zones" (areas closed to mining), requirements of Cost-Benefit Analysis, Preliminary Environmental Impact Assessment (PEIA), and Extractive Industries Transparency Initiative (EITI), moratorium on applications and permits, review of mining projects and contracts, recognition of local autonomy and the Free, Prior and Informed Consent (FPIC), and the like, its catch-all phrase in Sec. 1 "...all existing mining contracts, permits and agreements are valid, binding and enforceable..."<sup>55</sup> gives misleading signals. The commission of mining-related violations in 2011 up to the present provides more justification that the EO fails

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52 Partnership with Civil Society Coalitions and Networks during the UPR process; engagement in the Treaty Reporting Mechanisms: CESCR, Committee against Torture, Migrant Workers, CERD, CRC and in the recent ICCPR reporting.

53 Commission in partnership with the AFP, the PNP, Alternative Law Groups (LLG), PAHRA and the Hans Seidel Foundation launched the project "Community-Based Dialogue Sessions on Human Rights Promotion and Protection Between the AFP and the PNP, and CSOs and Local Communities". The project involves the conduct of a series of dialogue sessions in different areas nationwide. These dialogue sessions provide a venue for civilians and officers of the AFP and the PNP to discuss together and share information the human rights situations on the ground, identify issues and gaps as well as mechanisms for cooperative efforts. On a case level, one recent example is on the detention of Cocoy Tulawie, a human rights defender from Sulu

54 27 October 2011: Memo instructing the Department of Environment and Natural Resources (DENR), Climate Change Commission (CCC), Presidential Assistants on Climate Change and Environmental Protection as Mining Study/Policy Group. Mining is included in the industrial priority list (Arangkada 2011), and the Medium Term Philippine Development Plan (MTPDP)

55 Alyansa Tigil Mina (ATM). Philippine Mining Situationer. 2013

to ensure compliance of companies to sustainable development, human rights, poverty eradication and full human potential. It does not require industries to include Human Rights Impact Assessment (HRIA) in its regulatory reporting regimes.<sup>56</sup>

Mining related violations do not only affect individuals; they concern the gamut of economic, social and cultural rights (ESCR).<sup>57</sup> At present, the Commission reviews its existing mandates to include monitoring and investigation of ESCR cases especially those perpetrated by Non-State Actors (NSA). A provision on this sort is included in its proposed Charter. Although the Commission is mandated to investigate and monitor cases of human rights violations and other similar concerns, it is not legally authorized to adjudicate and issue binding decisions, orders and judgments. Thus it is inevitable for the CHRP to refer cases to the domestic jurisdiction. More so, the CHRP does not have the legal mandate to enforce its decisions. Once endorsed, the CHRP will continuously monitor the concerned government agencies' compliance with the recommendations of the CHRP.<sup>58</sup>

## V. Conclusion and Recommendations

This report is an effort to initiate dialogue toward institutionalization of CSO-CHRP Relationship. It wishes to reaffirm the crucial importance of productive engagement and cooperation between NGOs and NHRIs in enhancing roles for promotion and protection of human and peoples' rights. We believe that both the CSOs/NGOs and the CHRP look forward in finding ways of ensuring independent, efficient, effective and accountable National Human Rights Institution with the vibrant cooperation of civil societies.

To make this happen, the Philippine Alliance of Human Rights Advocates (PAHRA) is calling on:

### The President of the Republic of the Philippines:

- To come up with concrete pronouncement and finally lay down a human rights agenda that would serve as a pillar of his anti-corruption regime and political slogan: "*matuwidnadaan*" (straight path);

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<sup>56</sup> CHRP has advocated for the inclusion of the requirement of human rights impact assessment (HRIA) reports in the guidelines for the national observance of human rights in the mining industry during the consultations with government agencies involved in the regulation and monitoring of mining activities. CHRP seeks to operationalize the "Respect" Pillar of the UN Guiding Principles on Business and Human Rights through the institutionalization of the HRIA. CHRP coordinated with international NGOs that conducted a HRIA of the activities of a mining firm in Mindanao, and convened stakeholders for validation at the community level and at the level of concerned national government agencies

<sup>57</sup> CHR (IV) Resolution No. A2011-004 (January 2011): "Among the violations allegedly committed by Oceana Gold against the indigenous community, which the Commission has cited in its report, are: the right to adequate housing and property rights; right to freedom of movement, the right not to be subjected to arbitrary interference; the right to security of persons; and the right of the indigenous community to manifest their culture and identity"

<sup>58</sup> CHRP response to Survey on Business and Human Rights. 2013

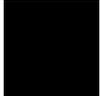
- To approve the Philippine Human Rights Action Plan (PHRAP) and direct all agencies to fully implement it;
- To establish criteria for candidates and set up mechanism ensuring transparency in the selection process of the Commission which allows active participation of civil society.

### **The Congress of the Philippines:**

- To make priority the passage of the CHRP Charter, expanding and strengthen the Commission's role to promote, protect and fulfill the political, civil, economic, social and cultural rights of the Filipino people;
- To provide needed budget and ensure automatic appropriation for the CHRP to effectively implement its mandates and programs;
- To establish, among others, mechanisms for accountability of Commissioners and Directors.

### **The Commission on Human Rights of the Philippines:**

- To come up with common understanding on the issues of HRDs and their application in all its offices through adoption of resolution, programs and activities specifically geared towards protection of HRDs;
- Popularize and issue timely public pronouncements, guidelines and positions on issues affecting human rights conditions on the ground;
- Clarify relationships and establish internal mechanisms to present a clear, unified vision and leadership of the Commission;
- Strengthen the whole Commission (leadership and ranks and files) with the knowledge on human rights and the capacity to promote and protect these with effectiveness and efficiency in implementing programs and mandate;
- Institutionalize CHRP–CSOs relationship following recommendations of the Kandy Program of Action.



# Thailand: National Security Trumps Rights

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

## I. General Overview

Considering the human rights situation in Thailand, there are three main concerns which aggravate the situation. These concerns are: the intense political conflict during the past five years; the conflict in the southernmost provinces; and economic growth and migrant workers.

### A. Human rights violations resulting from intense political conflict

The 2007 Constitution, which is currently in force, is a result of the *coup d'état* on 19 September 2006. Therefore, the current government has been trying to push for the amendment of the Constitution. The proposal for the amendment has been a political issue and created political polarization. This is due to the fact that there are people who profit from the Constitution in many ways; especially from the quota of appointed senators prescribed by the Constitution which amounts to one-third of the total number. The 2007 Constitution also gives more power to the judicial branch than the other two branches (legislative and executive), through conferring authority upon the judicial branch to select the independent bodies under the Constitution, namely the National Human Rights Commission and Constitutional Court etc.

The amendment signifies the desire of the cabinet of ministers (executive) to take back power. The Constitution seems to give protection to people's rights; but in reality, the Constitution is the mechanism for management of power-sharing among state actors. The military can conduct a *coup d'état* and draft a new constitution whenever the power-sharing does not benefit their group; or when more power is given to one group than the other group. The government can dissolve the parliament and have a new election. The military can conduct a *coup d'état* to support the other group to form a new government. Therefore, the constitutional amendment is not for the benefit of the people but is actually for the sake of sharing the spoils of political power. The question of how to have the people participate in the amendment process, to guarantee their benefit, has not really been addressed.

Due to the political uprising in 2010, many people were imprisoned on charges that included arson and destruction of public property at the Ubonratchatani city hall,

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<sup>1</sup> Prepared by Ms. Chumaporn Taengkliang, Democracy Program officer; Ms. Patcharee Sae-eaw, Advocacy Officer and Ms. Warunyakorn Fakthong, ASEAN Program Officer

obstruction of justice and violating the Emergency Decree. Some of them are in the hearing process while the others finished the process in the court of first instance. Twenty-one political prisoners are still imprisoned and are not allowed to be bailed out. Moreover, in 2012, the government has dispersed supporters of the People's Alliance for Democracy (PAD / 'Yellow Shirts') by firing tear gas which caused injuries to both the protesters and the media. The media were also obstructed from reporting the situation.

The severity of *lèse majesté* laws (Article 112 of the Thai criminal code) is very high. The penalties are between 3 to 15 years of imprisonment; and most alleged offenders do not have the right to bail because their offences are considered against the traditional law that the royal family cannot be disrespected or criticized. There have been efforts led by a group known as 'Enlightened Jurists' to push for the amendment of Article 112. These initiatives were through academic publications and presenting a petition on a legislative proposal to the parliament. More than 30,000 people signed the petition; but it was not considered by the parliament. Members of the group were threatened and assaulted by the opponents. They were also warned to cease their campaign by a high-ranking military officer through media. Moreover, they were not allowed to hold academic forums to inform the public about their actions in universities and the government compound.

A resolution regarding the matter was adopted at one of the meetings of the National Human Rights Commission of Thailand (NHRCT). The Commission concluded that Article 112 was not considered as a human rights violation; despite the fact that there is international pressure to protect the victims of the law. However, according to the universal human rights standards – including the International Covenant on Civil and Political Rights (ICCPR) – to which Thailand is a party, Article 112 violates many rights of the people; such as right to bail and right to freedom of expression. There are also reports of torture of the alleged offenders during their detention. The NHRCT should initiate a discussion on the law in order to make it compliant with international human rights standards.

## **B. Violence and human rights violations in the southernmost provinces of Thailand**

The violence in the southernmost provinces of Thai reoccurred due to the gun robbery which took place in Narathiwat Rajanagarind (Pileng) Army Camp in Narathiwat on 4 January 2004. The overall situation has not improved.

The information from Deep South Watch suggested that more than 12,946 incidents happened during January 2004 to March 2013. The total number of casualties was 15,578 which includes both military officers and civilians. Among this, 5,617 persons (2,152 Buddhists, 3,319 Muslim, 146 unidentified) were killed and 9,961 persons (5,857 Buddhists, 3,139 Muslim, 965 unidentified) were injured.

More than 150,000 military officers were sent to the area during the past nine years. Three special laws which are the 2008 Internal Security Act, the 2005 Emergency Decree and the 2004 Martial Law are still being enforced. These three laws are the main source

of human rights violation to the people. One hundred percent of the victims of the laws are Muslim. Moreover, martial law has given military officers, powers over civilians.

In the most recent attack on a Thai military camp in Narathiwat province on 13 February 2013, 16 insurgents were killed. This was a starting point for a discussion on peace and non-violent approach to solving the problems of Thai Muslims (although there has been a secretive process of peace talks for quite some time). On 28 February 2013, there was an official announcement facilitated by Malaysia welcoming peace talks and signed by representatives of the *Barisan Revolusi Nasional Melayu Pattani* (BRN) and the Government of Thailand.

Before the current ceasefire, two peace talks had previously been conducted. However, the Muslims living in the area viewed that the equality and the dignity of the people were absent from the peace talks, due to the fact that the representative from the BRN was actually forced to participate in the process; while other militant groups such as the Pattani United Liberation Organization (PULO) and *Runda Kumpulan Kecil* (RKK) were excluded.

### **C. Adverse impact of Economic Growth on Communities and Migrant Workers**

The massive amounts of foreign direct investment coming into the country caused human rights violations against the people in local communities. Many government policies facilitate this large-scale investment; without considering the impact on the environment, and the interest of the people in the communities. This is due to the fact that the government and many politicians are stakeholders or beneficiaries of this investment. Often-times, people are excluded from the decision making process. Sometimes, the public hearings are actually organized; but the participants in the hearing are people from a different community who are not affected by the projects.

On 22 December 2012, Tungcum Limited, a gold mining company in Wangsapung district in Loey province, held a public hearing of stakeholders at the city hall to evaluate the environmental and health impact of the project. The company hired people from communities outside of the affected area to participate; and did not allow people from the affected communities to be present at the hearing. Police officers were also present to guard the hearing; barb-wire fencing was put in place; and company trucks were parked to block entry into city hall of people opposed to the project.

Human rights violations against workers are still present. There were cases of workers being forced to work in a cold storage, without being provided standard protection equipment. Some were forced to work overtime to catch up with the production deadline. This caused them health problems and accidents. Moreover, the workers have often been accused by the media of using violence against their employers (when they organize protests after being laid off and denied fair wages) and being a threat to public order (when they organize protests for their rights and justice which often end in their being beaten-up by the police).

The government is still using the framework of national security when viewing the issue of migrant workers. It continues to take measures which are against the protection of their rights. This causes millions of migrant workers inability to access the nationality verification process for the purpose of changing their legal status in the country. Due to the limitation caused by the law and the conditions set for entering the social insurance system, migrant workers are facing problems in exercising their rights as provided in the Social Insurance Act.

Rohingya refugees in Thailand are living in insecurity. The people in Arakan state (Burma) are still suffering from massive human rights violations and loss of security of the person (including rights to life and liberty). This situation enables higher influx of trafficked persons from that region into Thailand. At present, the Thai government still lacks a concrete policy concerning the protection of these people who are seeking refuge; and is continuing to expel them from Thailand.

## II. Independence

### A. Non-Transparent Selection Process

The non-transparent selection process caused problems to the National Human Rights Commission of Thailand and an absence of real human rights workers in the Commission.

The 2007 Constitution has changed the selection process of the commissioners. The Selection Committee is composed of five judicial representatives; the President of the House of Representatives; and the Leader of the Opposition in the House of Representatives.<sup>2</sup> This is different from the previous Constitution where the composition of the selection committee included different sectors of civil society including human rights non-governmental organizations.

The present seven member selection committee cannot guarantee an independent process. This affects the composition of the current Commission which is comprised of six former government officers out of seven members. (The 2007 Constitution has reduced the number of Commissioners, from 11 persons to only 7). There is one member from the business sector; however, that Commissioner was once listed as violator of human rights by the first Commission! Moreover, out of the seven Commissioners, there are only 2 female members: Mrs. Visa Benjamano and Prof. Amara Pongsapitch, the Chairperson of the NHRCT. There is no Commissioner with a background of human rights work with civil society organizations (CSOs). Nevertheless, there are some Commissioners who have been working closely and actively with CSOs.

A transparent selection process of independent persons from diverse sectors is very important for the effective operation of the NHRCT. There has been an attempt to propose an amendment to the NHRCT Act on this issue, and CSOs were invited to give their opinions. However, so far, the CSOs have never seen the draft amendment to the enabling Act.

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2 See the Constitution of the Kingdom of Thailand: Articles 243, 204, 206, 207, and 209, online at [www.senate.go.th/th\\_senate/English/constitution2007.pdf](http://www.senate.go.th/th_senate/English/constitution2007.pdf)

## B. Secretariat composed of government bureaucrats

According to the regulations on the selection of the secretary-general (senior-most executive officer) of the NHRCT, only a Level 10 ranking government officer may be appointed to the position. This bars civil society and human rights activists from becoming candidates in the selection process, despite their expertise in human rights.

The secretariat of the NHRCT is also having problems regarding its operation as most of its staff are government officers transferred from state agencies which do not deal with the issue of human rights. Therefore, they lack expertise in human rights protection and promotion.

The *2010-2011 Annual Report* of the NHRCT mentioned that the Commission conducted two capacity-building activities for its staff regarding human rights. However, there were altogether only 75 participants in both events, out of 207 staff (2011).

Moreover, the working process of these former government bureaucrats is time consuming in nature, and has become an obstacle to the work of the NHRCT, due to the fact that cases of human rights violation are urgent in nature and often require immediate action.

Cases of human rights violations have been constantly increasing during 2012–2013. This can be assumed from the 700 cases registered with the National Human Rights Commission of Thailand (NHRCT); which is additional to the backlog of 1,400 cases received by the Commission since its establishment and that are still unresolved.

These 700 cases – which is the average number of cases received each year by the NHRCT – is the responsibility of the 200-odd staff and seven Commissioners who operate through sub-commissions. However, the Commission can only complete inquiries into half of the total number of the cases they accept for consideration. Therefore, the human resources that the NHRCT has, is insufficient compared to its case-load. However, as more than half of its budget was dedicated to expenditure on human resource (please see Table 1); a relevant question is whether the NHRCT should have better financial management if it increases its staff numbers.

**TABLE 1: Annual Budget of 2010 and 2011 categorized by type of expenditure**

| Types of Expenditure |                  | Amount (Baht)      |                    |
|----------------------|------------------|--------------------|--------------------|
|                      |                  | 2010               | 2011               |
| 1.                   | Human Resource   | 81,416,100         | 91,246,400         |
| 2.                   | Administration   | 70,569,200         | 87,968,600         |
| 3.                   | Durable Articles | -                  | 2,449,400          |
| <b>Total</b>         |                  | <b>151,985,300</b> | <b>181,664,400</b> |

### C. Monitoring the work of NHRCT through Sub-Commissions

So far, the NHRCT has set up 24 sub-commissions to work on specific human rights issues. Each sub-commission also appoints its own working group which is comprised of a Commissioner as a Chairperson and experts on the specific issue of the sub-commission. This creates an opportunity for CSOs who have been working closely with the affected persons to become part of the work of the NHRCT.

However, the selection process of the sub-commissions is not advertised publicly. The members of the sub-commissions are often invited by the Commissioners in their capacity as the Chairpersons of each sub-commission. Therefore, there is still a lack of inclusive participation from all CSOs actively working on each specific issue.

It is very important for the NHRCT to be able to screen received cases effectively. From the statistics, each year the NHRCT needs to consider around 700 cases. This is in addition to the 1,400 cases leftover from the first Commission. The NHRCT should be able to see which cases fall within their mandate and which cases can be referred to other agencies.

Due to the above-mentioned problems, some Commissioners have created informal complaint mechanism to directly receive complaints. However, it is still a concern because not every person can send the complaints directly and informally to the Commissioners and this might create a patronage system between the Commissioners and those who have access to them.

A related question is whether the complaints sent through these informal channels will unfairly affect other cases sent through the formal process; and how the Commissioners will prioritize cases when there is a limitation of human resources in conducting field investigations.

Another interesting issue is the integration and collaboration among the sub-commissions in receiving complaints. From observations made and also from interviews with the NHRCT, it seems that the sub-commissions are working separately. Although there is a meeting of 7 sub-commissions every week, this meeting is only for consultation on cases that each sub-commission is working on. However, it cannot be denied that the issues of human rights are often cross-cutting in nature and require many sectors to work together. This also further creates problems as some cases are not being considered by the appropriate sub-commission.

### III. Effectiveness

Some examples of cases of human rights violations received by the NHRCT are discussed below, based upon an interview with the Commission by the Peoples' Empowerment Foundation.

The NHRCT has proposed a policy in erasing criminal history records of those who have committed crimes with light punishment including those who fail to collect conscription

notice and certain cases of domestic violence. The NHRCT proposed that cases of crimes with light punishment should not be included in the criminal history record due to the fact that this will affect the lives of those with records in the future, especially when they seek employment. Moreover, the NHRCT also proposed a change of listing the persons who commit such crimes in the accused history record instead of criminal history record. This proposal is awaiting the cabinet's approval.

The NHRCT has suggested to the state authorities that protection should be given to the accused who have not received the final verdict of the court. The protection should also begin from the time of the crime scene reconstruction made by the accused to support their confession, and during the time of the media conference, to protect the accused from certain questions. The Royal Thai Police is considering this recommendation.

The Commissioners are conducting a study on legal amendments to Thai laws in order to conform to the Convention Against Torture (CAT) and the International Convention for the Protection of All Persons from Enforced Disappearances (ICPED).

A sub-commission for strategic operations on human rights in the southernmost provinces of Thailand was created and there are sub-commissioners based in the area to receive complaints. The sub-commission consists of Commissioners from the headquarters and from the southernmost provinces; and they meet every month in Pattani province. Most of the cases sent to the NHRCT are human rights violations in judicial administration, land issues, and environmental issues.

Most of the time the local people send cases on serious human rights violations to NGOs in the area, rather than the NHRCT. The reason is that when the Commission receives cases of human rights violations committed by the state authorities, in addition to its own preliminary investigation, it refers the complaints to superiors of the accused perpetrators such as the Fourth Army Area, the Police, and Southern Border Provinces Administration Center (SBPAC) to conduct their own investigation. These are the agencies against whom these allegations of human rights abuses have been made.

The NHRCT has field staff in three southern provinces but the authorities do not respect or support the work of local Commission staff. Their procedure is to send the complaints to the security agencies for more information; and thereafter hope to arrange a meeting between the military, the victims, and the NHRCT.

The NHRCT has referred 34 cases to the three security agencies, but only eight cases were investigated. In the second year of the term of the sub-commission there was follow-up on the remaining 26 cases and 23 more cases were referred to the above-mentioned agencies. Until now, there has been no progress on these cases.

Among the reasons state authorities gave to the NHRCT for their inability to investigate the 57 cases are that: the accused are no longer in those areas as they have been transferred elsewhere; and that the complaints date back to 2004-2006 and are too old for inquiries to be conducted. Another reason is that they did not receive the cooperation of the community

when they called them for an investigation. On this matter, many NGOs working on the issue of justice, question the rationality in referring cases to the security agencies when these agencies are also the accused.

Regarding the new complaints, the NHRCT has negotiated with the local security agencies for it to be able to visit, investigate, and collect information immediately once it receives complaints on an arrest to investigate cases of torture.

The sub-commission in the southernmost provinces has made the following policy recommendations to the authorities:

- The sub-commission proposed the abolition of the three security laws (Act for the Security of the Kingdom; Emergency Decree; and Martial Law)
- NHRCT is planning to make a recommendation on the rotation of the military officers which is done every six months. The local people expressed their view on the matter that this rotation is not suitable to the situation in the area, since the new officers do not have a good understanding on the culture and the specific area context. The security agencies responded on the matter and informed that military officers from other areas will no longer be relocated to these areas.
- The NHRCT in collaboration with the Rights and Liberties Protection Department has created a training module on human rights violation in the case of torture to conform with the Convention Against Torture.

The NHRCT spent two years investigating cases concerning the protest by the United Front of Democracy Against Dictatorship (UDD) during 12 March-19 May 2010, before making its recommendations. The Commission received 32 complaints, interviewed almost 200 witnesses, and examined other related evidence. The cases received were categorized as follows:

- Cases that happened before 7 April 2010;
- Cases related to the state of emergency announcement made by Mr. Abhisit Vejjajiva (the prime minister during the time of the protest) and the establishment of the Center for the Resolution of the Emergency Situation (CRES);
- Cases of the clash between state authorities and the UDD on 10 April 2010 which was directed by the director of the CRES;
- Cases of victims of M-79 explosion in Saladaeng Intersection on the night of 22 April 2010;
- Cases of victims of the clash near the National Memorial on 28 April 2010;
- Cases related to the raid and protest done by the UDD around the Chulalongkorn Hospital;
- Cases related to the riot, the clash, and vandalism, during 13-19 May 2010; and
- Cases of victims in Pathumwanaram Temple area after the UDD had announced that it would cease its protest on 29 April 2010.

Questions were raised by academics and civil society organizations concerning the reliability of the report done by the NHRCT. The NHRCT viewed the UDD's protest as not falling within freedom of assembly. Its attitude towards the issue is reflected in the report by mentioning the invasion of the UDD into government compounds and public areas which caused trouble to the public. This includes the narrative on the use of weapons and the existence of 'Black Shirt' people among the UDD which justifies the enforcement of the Internal Security Act and the establishment of the Center for the Resolution of the Emergency Situation (CRES) by Mr. Abhisit Vejjajiva to disperse the protest.

On the other hand, the report does not focus on the fact that the government led by Mr. Abhisit Vejjajiva was acting beyond its constitutional power. The report only repeats the claim of the CRES that the dispersal of the protest was done to maintain the law and order in the country; even though many people have been killed in the process and the rights of the people have been violated.

From the report, the NHRCT is viewed as having double standards on the matter. It is undeniable that most agencies in Thailand were hostile to the Thaksin Shinawatra regime, and that negative attitudes towards the UDD has created bias in judging the issue. The NHRCT report is not based on human rights standards and principles. Instead, the general view is that the gathering of people in the UDD-organized protest was a violation of the human rights of the general public through blocking of roads and causing other disruption and inconvenience to others! Therefore, Abhisit's government was justified, in the opinion of the NHRCT, in issuing the Emergency Decree to control the situation.

The sub-commission on civil and political rights has organized a consultation under the title, "Elimination of Violence: Article 112 in the Thai Criminal Code". The problem regarding this Article, is not only in its enforcement, but also the law of *lèse majesté*<sup>3</sup> itself. There was a proposal from a group known as 'Enlightened Jurists' on both short-term and long-term solutions. The short term solution is for the NHRCT to give its recommendation to the Constitutional Court suggesting that the Article is contrary to the Constitution and human rights principles and all the alleged offenders under Article 112 be bailed out. The long term solution is to make a public campaign out of this issue for the amendment of this law because it affects the rights and freedoms of the people.

However, at the end of the consultation, the NHRCT has made a resolution regarding Article 112 which concludes that the Article is for the protection of the honor of the King who is the head of the state. The compromise it makes is to promise to continue to work according to the Constitution and the law by balancing Article 112 with the right to freedom of expression.

Regarding the issue of the Rohingyas, the NHRCT's sub-commission on civil and political rights has been taking up the issue since 2009. The Commission received complaints on human rights violations of the Rohingyas and went to the field to investigate the

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3 Offence of defamation, insult or threat to the King and/or the Queen and/or the Heir-Apparent of Thailand

complaints. Evidence was found of violations and thereafter the case was referred to respective agencies.

The two main concerns raised by the NHRCT are the human rights violations in the repatriation of the Rohingyas; and the policy in dealing with the Rohingyas arrested during their transit to a third country. The NHRCT does not agree with the repatriation of the Rohingyas, since Burma does not accept these people as their citizens. The NHRCT has also asked the Department of Special Investigation (DSI) to protect the Rohingyas from human rights violations and human trafficking.

Mr. Paiboon Waraha-paitoon, the National Human Rights Commissioner, proposed that the issue of Rohingya should be taken up as a regional issue especially within the Association of South-East Asian Nations (ASEAN) due to the seriousness of the issue which cannot be tackled only by one affected country. However the issue must be solved on the basis of national security and human rights, in his view.

The NHRCT has conducted research and organized public forums on sexual harassment in the workplace. This succeeded in achieving the proposed policy; and the Civil Service Commission and Parliamentary Officials Commission have made regulations on sexual harassment in the workplace. Moreover, the Bangkok Mass Transit Authority (BMTA) has also conducted training and established a complaint center on sexual harassment.

The NHRCT sent its recommendation to the Social Security Office regarding the right to claim for reimbursement from the social security fund in case of legal termination of pregnancy (in cases of rape or when the pregnancy endangers the life of the women). The Social Security Office has informed its provincial offices on the matter.

The NHRCT was successful in proposing the change of title of intersex persons. The intersex persons can now make decision of the title that s/he prefers; whereas in the past s/he was forced to use the title indicated by their biological sex (mostly male) which is determined by either a medical doctor or their parents. However, for transgender persons, their title will still remain according to their biological sex.

The NHRCT made a recommendation to the Ministry of Defense on the change in using the term "Permanent mental disorder" to "Gender identity disorder" in the conscription certificate (*Sor Dor* 43). The change became effective in April 2013.

In terms of public communication, besides disseminating information through its website, press conferences, forums and mobile exhibitions, the NHRCT also broadcasts its own radio and television programs. However, the information cannot reach out to the public considering the fact that these programs are often broadcast during the daytime or early morning. The NHRCT may need to seek cooperation from the government in providing time slots from the government owned radio or television channels in order to reach out to larger audiences.

Regarding the NHRCT website, there is a considerable amount of information concerning human rights but information regarding the performance of the NHRCT itself such as the *Annual Report*, *Annual Financial Report*, reports on the performance of each sub-commission, and report on progress on the complaints received by the NHRCT is not included in the website.<sup>4</sup> This information will be useful for the public to follow the work of the NHRCT. Moreover, most of the articles uploaded in the website are from the period of the first Commission. The English page<sup>5</sup> of the website has a lot of mistakes such as broken hyperlinks and errors in downloading some files.

#### IV. Cooperation with Regional and International Organizations

ASEAN established the ASEAN Intergovernmental Commission on Human Rights (AICHR) on 23 October 2009 to protect human rights of the people in the sub-region. However the AICHR and the NHRCT have not been cooperating. In the view of Thai CSOs, the NHRCT should play its role in protecting human rights of the people at the national level; while the AICHR should work on the same mandate at the regional level, especially on the cross-border issues. In reality, so far there has been no concrete cooperation between the two human rights bodies. The Thai AICHR representative views the protection of human rights at the national level as his first priority; which has caused confusion and duplication in the work of the two mechanisms.

NHRCT is also a member of the International Coordinating Committee for National Human Rights Institutions (ICC). The Chairperson of the NHRCT was previously elected as the Chairperson of the Asia-Pacific Forum of National Human Rights Institutions (APF).

At the sub-regional level, the NHRCT is a member of the South East Asia NHRIs Forum (SEA-NF) which is a sub-group of the APF. There are altogether six member institutions from Thailand, Malaysia, Indonesia, Philippines, Timor-Leste, and the newest member is from Myanmar (Burma). One of the strategic priorities of the SEA-NF is to promote the establishment of NHRIs in Southeast Asian states which do not as yet have a national institution for the promotion and protection of human rights. Member institutions in the SEA-NF have cooperated on issues of human trafficking and migration.

The NHRCT will not investigate cases of human rights violation in another country but will only investigate the cases of human rights violations of foreigners in Thailand or cases of human rights violations committed by Thai citizen in other countries.

The NHRCT uses its regional network in matters of cross-border and transnational issues and has cited with approval the example of the case of human rights violations of mine workers in the Philippines which was committed by a Korean business and where the Commission on Human Rights of the Philippines cooperated with the National Human Rights Commission of Korea.

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<sup>4</sup> See <http://www.nhrc.or.th>

<sup>5</sup> See <http://www.nhrc.or.th/2012/wb/en/index.php>

## V. Conclusion and Recommendations

Following the review of the human rights situation in Thailand above and the performance and effectiveness of the National Human Rights Commission of Thailand, the Peoples' Empowerment Foundation makes the recommendations below to concerned stakeholders for the improvement and strengthening of the National Human Rights Commission:

### **Recommendations to the Government of Thailand:**

- Respect and comply with the recommendations and reports of the NHRCT while upholding universal human rights standards.

### **Recommendations to the Parliament of Thailand:**

- Amend the Constitutional provision on the selection process for independent bodies such as the NHRCT to be more inclusive and transparent while ensuring the independence of the oversight mechanisms.
- Approve the NHRCT Bill proposed by the NHRCT to remove limitations and barriers in the work of the NHRCT and to ensure better protection of the human rights of the people.

### **Recommendations to the National Human Rights Commission of Thailand:**

- Improve the complaints and investigation mechanism to be more effective.
- Improve coordination with other national human rights mechanisms such as the Ombudsman.
- Strengthen and assist local offices of the NHRCT, for example in the southern provinces, to be more assertive with local authorities especially the state security forces.
- Do not allow police and military authorities to summon complainants to the NHRCT for interrogation at the police station or military camp.
- Update the website to inform public on the activities and public positions of the Commission for greater transparency and accountability. Use the website to inform the public of ongoing investigations and to advocate for human rights.
- Promote the participation of people, including civil society organizations, especially human rights defenders in all aspects of operations.
- There should be consultation with AICHR to improve the communication between regional and national mechanisms; and for a more effective referral system of human rights violations from national to regional level.

# Timor-Leste: Lacking Pro-activeness and Transparency

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

### I. General Overview

The human rights situation in Timor-Leste seems to be improving<sup>2</sup> after the crisis of 2006<sup>3</sup> which directly involved members of Timor-Leste Security Force (PNTL) and defense force (F-FDTL). In 2012, particularly during and after two national elections which took place in March-April and July respectively, there were very few incidents involving human rights violations committed by PNTL.<sup>4</sup>

In the District of Viqueque, during the election campaign, there was conflict between supporters of FRETILIN and CNRT political parties. The police shot dead a CNRT supporter during the confrontation. This conflict escalated after the election result was announced when FRETILIN supporters' burned houses of other's supporters. Physical violence ensued and a number of supporters were injured.

On 15 July 2012 in Metinaro in the Dili District, supporters of FRETILIN blocked the road to the Eastern part of the country. A university student taken into custody within a police vehicle, and not showing any signs of resistance, was killed by the police. The case was prosecuted before the courts and in June 2013 the perpetrator was sentenced to 16 years in prison.

On 31 May 2013, members of the PNTL special 'Task Force' unit beat a youth at a public event in Colmera, Dili. The members of the Task Force also beat and harassed a member of the National Parliament who was trying to protect the youth. The case is now under investigation and court proceedings have been commenced.

On 14 June 2013, the United Nations Development Programme (UNDP) organized a meeting with Timor-Leste local NGOs working in human rights and justice at the Timor-Leste NGO Forum to evaluate the work of the *Provedor dos Direitos Humanos e Justiça* (PDHJ – Ombudsman for Human Rights). All NGOs considered that the PDHJ has done very little to deal with human rights and justice issues.<sup>5</sup>

1 Prepared by **Jose Pereira, Legal Researcher**

2 See UNESCO, Human Rights Handbook for Journalists in Timor-Leste, 2013, <http://unesdoc.unesco.org/images/0022/002202/220249e.pdf>

3 See USAID, The Crisis in Timor-Leste: Causes, Consequences and Options for Conflict Management and Mitigation, 2006, <http://timor-leste.usaid.gov/sites/default/files/USAID%20Timor-Leste%20Conflict%20Assessment%20Nov%202006.pdf>

4 See US Department of State, Timor-Leste Human Rights Report 2012, 2013, <http://www.state.gov/documents/organization/204454.pdf>

5 NGOs that attended the meeting were HAK Association, JSMP, Forum Tau Matan (FTM), Fokupers (Women's Organization), LABEH, Luta Hamutuk, Alola Foundation, and the Commission for Justice and Peace

Many cases occurred where the PDHJ did not take any action to intervene or denounce cases such as forced evictions conducted by the PNTL.<sup>6</sup> The PDHJ also refused to meet with victims of evictions that were brought to their office by NGOs. The PDHJ did not intervene in cases where children were being prosecuted at the court and were unaware of their rights. There were also cases where children had completed their prison sentences, but remained in custody as they were unable to access legal advice regarding their rights.<sup>7</sup>

The PDHJ seems to be very passive on the subject of intervention during human rights violations. The PDHJ simply receives cases, and refers cases that are outside of its mandate to other relevant institutions. The PDHJ also fails to provide public access to information regarding cases received.<sup>8</sup>

The PDHJ has signed three Memorandums of Understanding (MoU) with the Indonesian Human Rights Commission (Komnas HAM) on victims of enforced disappearances. However, there has been no implementation. The reasons cited for failing to implement the MoUs are a lack of human resources and integration of costs in its budget.<sup>9</sup>

## II. Independence

The PDHJ was established based on legal provisions in the Constitution of the Democratic Republic of Timor-Leste (RDTL)<sup>10</sup> and Law No. 7/2004.<sup>11</sup> The Constitution of RDTL only sets out general principles and guidelines in relation to a National Human Rights Institutions (NHRI). Law No. 7/2004 defines all of the specific details, processes and procedures of the PDHJ.

The legal provisions of Law No.7/2004 clearly set out that the PDHJ is an independent body. Therefore, the PDHJ is obliged by law to perform its role and duties as an independent institution to watch, protect and promote, human rights and justice in Timor-Leste.

In 2011, the Government established a Decree Law No. 25/2011<sup>12</sup> on the organic framework and status of the PDHJ which establishes the rules necessary for the PDHJ to achieve its objectives as a specialized institution with technical services in the areas of human rights and good governance.

**Constitution of the Democratic Republic of Timor-Leste (CRDTL):** On 22 March 2002, two months before restoration of independence, the Constituent Assembly of the Democratic Republic of Timor-Leste (now the National Parliament) approved the Constitution of the Democratic Republic of Timor-Leste (CRDTL).

6 See *8 Myths about Evictions in Dili and the Ex-Brimob Case*, 20 June 2011, <http://easttimorlegal.blogspot.com/2011/06/8-myths-about-evictions-in-dili-and-ex.html>

7 Personal communication from FTM

8 Personal communication from HAK Association

9 General Director for Human Rights and Justice (GDHRJ) of PDHJ in an interview with JSMP in May 2013

10 See Constitution <http://www.jornal.gov.tl/lawsTL/RDTL-Law/RDTL-Constitution.pdf>

11 Law No. 7/2004 is online at <http://www.jornal.gov.tl/lawsTL/RDTL-Law/RDTL-Laws/Law-2004-7.pdf>

12 Law No. 25/2011 is online at <http://www.jornal.gov.tl/lawsTL/RDTL-Law/RDTL-Decree-Laws/Decree%20Law-25-2011%20%20.pdf>

The characters, role and powers of the Timor-Leste National Human Rights Institution are defined clearly in Articles 27, 150 and 151 of the CRDTL.

**Ombudsman for Human Right and Justice (PDHJ) (Art. 27.1-5):** This article defines the character and role of the PDHJ in receiving complaints from citizens, the appointment of an Ombudsman and the collaboration of administrative organs and public servants with the PDHJ.

This provision defines the PDHJ as an independent body that actively investigates complaints presented by citizens against public authorities, to determine whether public authorities are acting within their legal mandate, to prevent the abuse of power and to proceedings to rectify any injustice.

**Abstract Review of Constitutionality (Art. 150):** The Ombudsman is empowered by the CRDTL to request a declaration of the unconstitutionality of any law, action and decision taken by State institutions (Art. 150 (f)). The power to seek a declaration as to the unconstitutionality of a law is limited to the President of the Republic, the Speaker of National Parliament, the Prosecutor General and one-fifth of the members of the National Parliament.

The CRDTL provides the Ombudsman with authority to influence and contribute to the development of legislation in Timor-Leste, in terms of reviewing laws that are against human rights and justice principles set out in the Constitution and international covenants.

**Unconstitutionality by Omission (Art. 151):** According to this article, the PDHJ together with the President of the Republic and the Public Prosecutor are constitutionally entitled to request the Supreme Court of Justice to review the unconstitutionality by omission of any legislative measures deemed necessary to enable the implementation of constitutional provisions. Once again, the CRDTL grants strong powers to the Ombudsman to request the revision of unconstitutionality of legislative measures.

**Law No. 7/2004 on the Organic Regulations of PDHJ:** Two years after the adoption of the CRDTL, in May 2004 the Timor-Leste Government decreed Law No. 7/2004 for the establishment of the PDHJ. This law is to comply with all the legal provisions in the CRDTL that the PDHJ should focus on the promotion and protection of human rights, freedoms and safeties as well as the need to establish a democratic state based on the rule of law; an effective public administration which is free of corruption and nepotism; the promotion of a culture of efficacy, transparency, integrity and responsibility within public entities and organs; compliance with Customary International Law; and the United Nations Principles relating to the Status of National Institutions better known as the 'Paris Principles'.

**Appointment procedures (Article 12.1-5 and Article 16.1-6):** The Ombudsman is appointed by the National Parliament with an absolute majority of votes (Art. 12.1). The National Parliament publicly announces the candidacy of the Ombudsman for a period of one month (Art. 12.3). The National Parliament will vote on all candidates; for one to be elected to the position of Ombudsman in a plenary session (Art. 12.4). Then the Ombudsman him/herself will appoint two or more Deputy Ombudsmen (Art. 16.1).

The vacancy is publicly opened for candidacy and there will be public participation in the process, but it is difficult to guarantee the balanced representation of all social components and gender equality in the PDHJ organizational structure.

There are several reasons for this that can be taken into consideration:<sup>13</sup>

**Political patronage:** It will be difficult for candidates who are independent from a political party or represent civil society, or women, or people from minority groups, to compete with candidates coming from strong political parties.

**Inclusiveness, Diversity, and Independence from Government:** Even though the list of candidates constitutes people from all sectors of society, it is still difficult for all sectors to have representation in the PDHJ structure, because the Deputy Ombudsmen are appointed by the Ombudsman. There is therefore a risk that the Ombudsman will appoint individuals who have political ties or the same interests, etc. They may also choose to appoint someone from the list of candidates for the Ombudsman position.

**Different selection and appointment process from human rights commissions:** The Director-General for Human Rights and Justice of the PDHJ, Mr. Ximenes, stated that the appointment of Commissioners to NHRIs – as is the case in Indonesia with Komnas HAM – is different to the appointment of the Ombudsman as in Timor-Leste. Human Rights Commissions tend to be more plural in composition than the Office of the Ombudsman; as is evident in Timor-Leste.

**Public consultation:** Based on legal provisions and normal practice, the National Parliament does not have any public consultation on the list of candidates for Ombudsman. The National Parliament will meet in plenary session to vote for the Ombudsman.

**Criteria for eligibility (Article 13.1-2):** There are several criteria for the candidate for Ombudsman as follows:

- The candidate for the Ombudsman of the PDHJ shall have a) experience and qualifications to investigate and report on human rights violations, corruption, political influence and mismanagement; b) proven integrity; c) a solid knowledge of the principles of human rights, good governance and public administration.
- The candidate for the Ombudsman for Human Rights and Justice should also be recognized for their standing in the community, as well as their high level of independence and impartiality.

**Mandate and office removal (Article 19.1-6 and Article 21.1-5):** The Ombudsman for Human Rights and Justice (PDHJ) is elected for a term of four years and may be re-elected only once for the same period (Art. 19.1). The Deputy Ombudsmen are also appointed by the Ombudsman for the same term and may be reappointed only once for an equal period. The Ombudsman can be removed from his office based on the legal provisions set out at Article 21.

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<sup>13</sup> Interview with Mr. Valerio Ximenes by JSMP in May 2013

**Privileges and immunities (Art. 18.1-7):** This legal provision sets out the privileges and immunities for the Ombudsman.

**Funding sources:** The PDHJ has an annual budget that is allocated by the State Budget approved in the National Parliament. The amount in the State Budget allocated to the PDHJ in 2011 was USD \$1.145 million; in 2012 it was USD \$1.249 million, including USD\$600,000 from development partners.<sup>14</sup>

**Income and Assets of Ombudsman (Article 14):** The Ombudsman for Human Rights and Justice will disclose his list of assets to the National Parliament before his inauguration, which is kept confidential by the President of the National Parliament. The law does not specify whether the Deputy Ombudsmen are also obliged to disclose their list of assets. There is also no provision or obligation on the Ombudsman and Deputy Ombudsmen to furnish their assets and incomes annually, or at the end of their term; to know whether there has been any enrichment by virtue of their office.

**Staff Recruitment:** Current staff numbers are 89. 11 positions remain to be filled.<sup>15</sup> There are two recruitment procedures. Public recruitment is conducted by the Commission of Public Recruitment; and positions are also filled through an internal recruitment process. In 2012 the PDHJ opened internal competition for eight vacancies, and public competition for 32 vacancies, at various levels. There are only two staff members who are public servants seconded to the PDHJ.<sup>16</sup>

**Accountability:** Based on the provisions of Law No. 7/2004, Article 46, the PDHJ should submit an *Annual Report* every year ending 30 June. Besides an activity report, the PDHJ should also submit special reports to the National Parliament on cases or matters of a serious nature in the public interest.

In 2012, the PDHJ did not present its *Annual Report* to National Parliament for discussion. The PDHJ also did not have a public launch of the report nor publish it on its official website.<sup>17</sup> Therefore, the Annual Report is inaccessible to most.

The PDHJ does not appear to have published any other special reports on specific issues because there were no other reports published on its official website nor distributed to the public. JSMP considers that the number and types of human rights violations committed by the PNTL could have been the subject of a special report; as could have been the forced eviction case.<sup>18</sup>

**Recommendations of the PDHJ:** In response to whether the recommendations of the NHRI are made in public; the PDHJ said that some recommendations were public and some were kept in confidence. The observation of the JSMP and civil society in general, is that the PDHJ only makes recommendations to government and state institutions without any follow-up on

14 PDHJ 2012 Annual Report, p. 95

15 PDHJ 2012 Annual Report, p. 85

16 Interview with DG of PDHJ Mr. Valerio Ximenes, by JSMP in May 2013

17 See PDHJ website <http://pdhj.org/wp/sample-page/relatoriu-anual-pdhj>

18 See *8 Myths about Evictions in Dili and the Ex-Brimob Case*, 20 June 2011, <http://easttimorlegal.blogspot.com/2011/06/8-myths-about-evictions-in-dili-and-ex.html>

whether the recommendations are being considered and implemented, or not. It is not right to deny the public to knowledge of the recommendations made. Further, the recommendations

do not appear to contain real or concrete sanctions based on principles and guidelines on the rights to remedy and reparation for victims; to prevent such violations being committed by the same institutions in future.

**Domestic laws:** The PDHJ said it does make opinions and recommendations on the domestic legal framework. However, in the opinion of the JSMP, the PDHJ does not utilize fully its constitutional powers and mandate for revision of any domestic legal framework or any proposed bills containing human rights violations by the State. For example, the draft Land law gave too much power to the State and public companies to acquire land from the people. Fortunately, the President of the Republic vetoed this law, after it was approved by the National Parliament in 2012.

**Visit to prisons and detention centers:** The PDHJ said that it has been conducting weekly monitoring of prisons and police detention centers and without any restrictions. The PDHJ has good cooperation with the Commander of National Police of Timor Leste and the Ministry of Justice.

The NGO Forum Tau Matan (FTM) stated in an interview on 14 July 2013 that there are some children in prison who have no access to lawyers or public defenders, and some are still in prison even though they have completed their sentences. This indicates the visits of the PDHJ to prisons are not effective in protecting the rights of children.

### III. Effectiveness

The PDHJ is defined in Law No. 7/2004 as the institution entitled to receive complaints from the public about human rights violations committed by public institutions. In the execution of this exclusive role, the PDHJ has established mechanisms to respond to and handle public complaints.

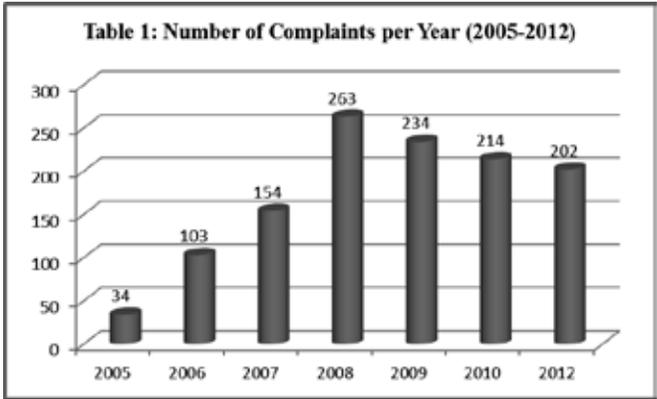
The PDHJ has established regional offices in four other districts besides the capital Dili, to bring its services closer to the public, and particularly to facilitate the public's ability to make complaints. Within its offices, the PDHJ has established a unit responsible for direct complaints-handling. The PDHJ also created a complaint form to be completed by the public to make their complaints. Besides these mechanisms, the PDHJ also has other mechanism such as telephoning in and a mobile complaint service which visits remote locations across the whole of the territory.

**Number of complaints registered:** The total number of complaint cases that the PDHJ registered in 2012 starting from January to December is 202.

The PDHJ has logged the number of complaints received each year started from 2005-2012 as presented below:<sup>19</sup>

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<sup>19</sup> PDHJ 2012 Annual Report, p 55



The table shows that between 2007 and 2008 the number of complaints increased sharply. However, between 2009 and 2012, the number of complaints received each year has been declining in comparison to 2008.

The explanation about the initial increase in the number of complaints could be that the PDHJ was successful in its first years in term of dissemination of information regarding its roles, the ways and mechanisms of presenting complaints, so many people knew how to make their complaints.

The explanation about the number of complaints decreasing after 2008, could be that the PDHJ was successful in its work of raising awareness and training on human rights and justice and good governance. So, some of the public institutions having become more sensitized to these issues, there was a corresponding decrease in the number of complaints.

**Complaints Mechanisms:** Based on data provided by the PDHJ, the mechanisms that are frequently used by the public to make their complaints are via the registration unit at each office, and using the complaint form, as presented below:<sup>20</sup>

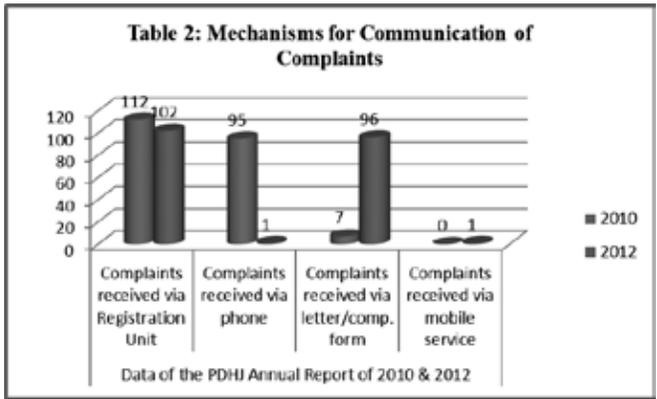
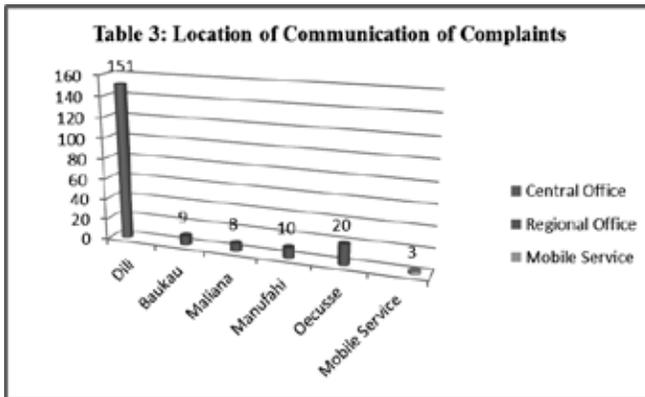


Table 2 shows that the most popular mechanism is registration. The least used mechanism is the mobile service; perhaps because of lack of awareness of this mechanism, or its ineffectiveness because of the poor condition of roads. There is explanation in the PDHJ's *Annual Report* as to the high number of complaints received via telephone in 2010 in comparison to only one complaint in 2012. This is maybe because phone charges are costly; and that the public prefer to register their complaints in person.

The following table<sup>21</sup> shows the number of cases registered at the central and regional offices of the PDHJ, including through the mobile service that operated in all sub-districts.



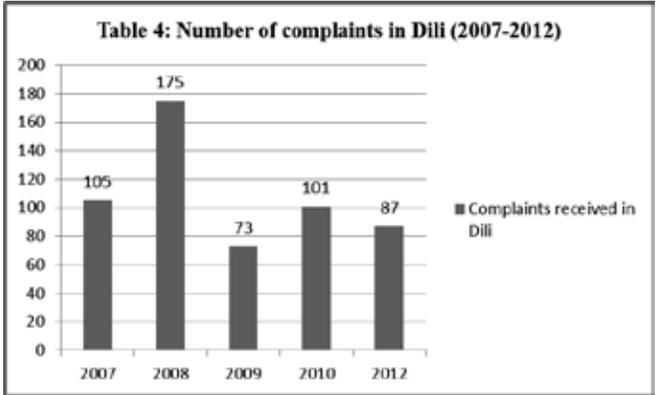
The table shows that Dili office received most of the cases with a total of 151 cases, almost 75 percent of complaints in comparison with regional offices and the mobile complaint service.

This maybe because Dili is the most populated district; the administration of state institutions is centered in Dili; PNTL units are concentrated in Dili; and more people in Dili have awareness of, and access to, the PDHJ. On the other hand – considering that almost all of state institutions are centered in Dili; that most of these institutions have access to information and training on human rights and justice and good governance; and that the members of the PNTL have undergone professional training on human rights, justice and law conducted by the PDHJ itself – the increasing and high number of complaints in Dili could also be interpreted as revealing the PDHJ's lack of effectiveness in reducing violations of human rights, justice and good governance.

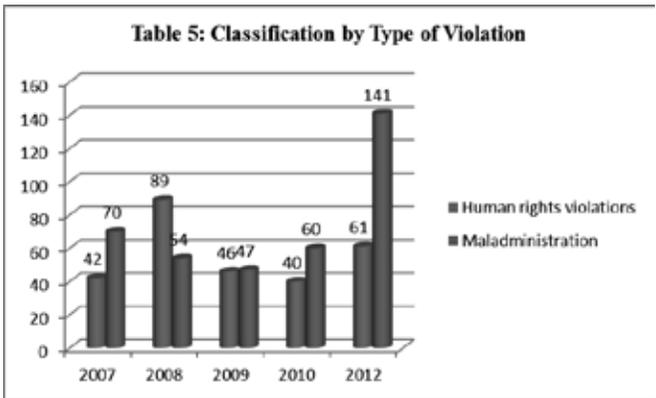
The number of complaints received in Dili between 2007 and 2012, shows the varying trends of a sharp increase in 2008 and followed by a sharp decrease in 2009. See Table 4, below:<sup>22</sup>

<sup>21</sup> PDHJ 2012 *Annual Report*, p 57

<sup>22</sup> PDHJ 2012 *Annual Report*, p 58

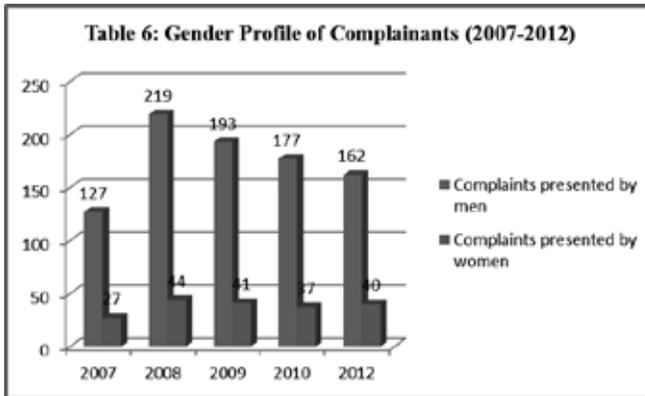


Among the 202 complaint cases, there was one complaint from a foreign citizen. Based on PDHJ information, there are 61 cases of human rights violations and 141 cases of maladministration and abuse of power (see Table 5 below<sup>23</sup>). The cases of human rights violations remain the same between 2007 and 2012. The Table below illustrated that the PDHJ is still far from successful in reducing violations of human rights and maladministration.



The PDHJ also disaggregated the complainants by gender. From the total number of cases registered, there were 162 cases reported by men and 40 cases reported by women in 2012. In the *2012 Annual Report*, the PDHJ said that the number of complaints presented by women was increasing. As Table 6 below illustrates, this is not entirely accurate as there has been a fall in the number of complaints from women in 2012 as compared to 2008.<sup>24</sup>

23 PDHJ 2012 Annual Report, p 59 & other annual reports at the official website of the PDHJ [www.pdhj.org](http://www.pdhj.org)  
 24 PDHJ 2012 Annual Report, p 59



### A. Complaints-Handling Process

There are several steps taken by PDHJ to process complaints that are received:<sup>25</sup>

**Notification:** Following registration of the complaint, within 10 days the complainants are formally notified in writing that their complaint has been received. Within 45 days the complainant receives a second written notification as to whether their complaint has been considered as within the PDHJ's power to investigate; or referred to other institutions; or not taken up for any action. Bodies such as the PNTL, F-FDTL, ministries and other relevant institutions are also notified through direct delivery by PDHJ staff.

**Preliminary Evaluation:** This is the first step to identify and classify complaints. Based on this evaluation, and in accordance with its mandate as provided in the legislation, the PDHJ will decide whether it will take any action or not. There is a Commission of Case Management (CCM) within PDHJ to undertake this evaluation. The CCM will present the results of the evaluation to the Ombudsman to make a decision.

The results of the preliminary evaluation of 202 cases registered in 2012 have shown that there were 63 cases outside of the PDHJ's mandate. The PDHJ itself only investigated 93 cases regarded as admissible; while 48 cases were referred to other relevant institutions for investigation. The data from the year 2007-2012 has shown more complaints are rejected as inadmissible than those that are actually investigated by the PDHJ itself (see Table 7 below):<sup>26</sup>

<sup>25</sup> PDHJ 2012 Annual Report, p 60

<sup>26</sup> PDHJ 2012 Annual Report, p 61

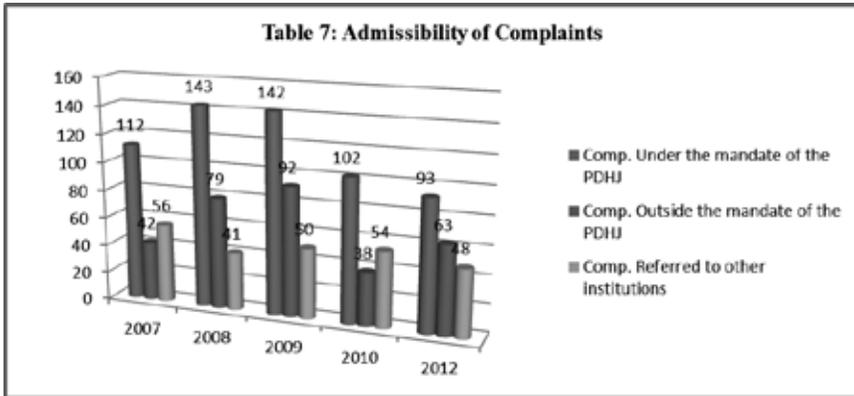


Table 7 above shows that the number of complaints outside the mandate of the PDHJ from 2007 to 2012 remained very high. The annual reports mention that all of the complaints outside the mandate of the PDHJ were closed and no further action taken. There is no information available on what these complaints were about; nor the reasons for their inadmissibility. This is a matter for concern.

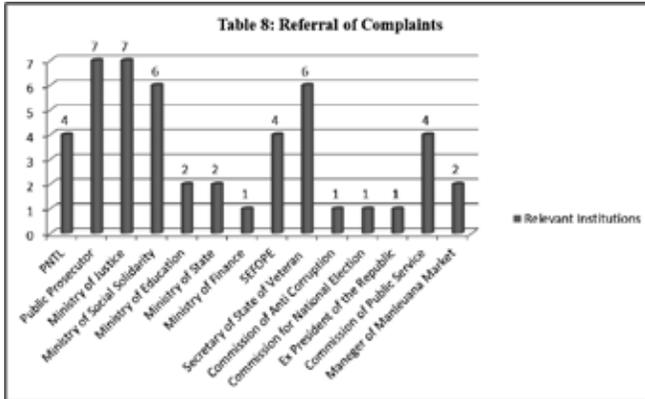
The reason why the number of the complaints outside the mandate of the PDHJ still remains high could be that the dissemination of information on the role of the PDHJ was not fully effective, so there is still confusion in the public on the mandate of the PDHJ.

The PDHJ has tried to follow some of the basic rules of complaint handling. However, its *Annual Report* has shown that it is not really effective as the arrears of cases from previous years is very high; and the number of new cases is increasing, which reduces attention to the old cases. The number of cases where investigation has been concluded is very small compared with the total number of cases registered and investigated. The lack of human resources and limited capacity of staff have contributed to this issue.<sup>27</sup> Further, the limited budget affects PDHJ activities.

**Referral of Cases:** Cases that are not within the mandate of the PDHJ were referred to relevant State Institutions. 48 cases were referred to other relevant institutions and individuals such as PNTL, Public Prosecutor, Ministry of Justice, Ministry of Finance, Ministry of Social Solidarity, Ministry of State, Ministry of Education, Secretary of State for Professional Training and Employment (SEFOPE), Secretary State for Veterans, the Anti Corruption Commission, the Commission for National Elections, the Commission of Public Service and the manager of Manleuana Market. The number of complaints referred to these institutions and individuals can be seen in Table 8 below.<sup>28</sup>

<sup>27</sup> Interview with Director-General for Human Rights and Justice of the PDHJ conducted by JSMP in May 2013

<sup>28</sup> PDHJ 2012 *Annual Report*, p 61

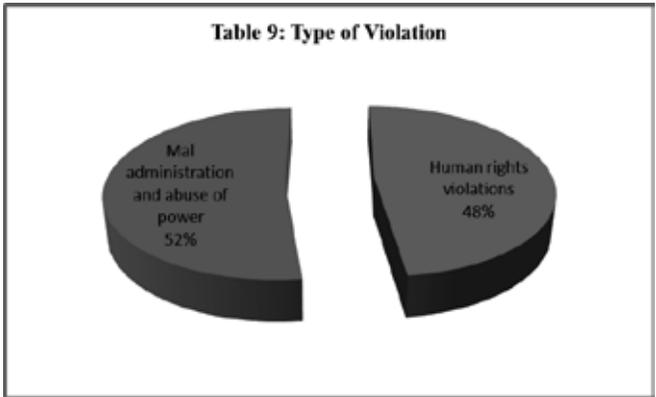


Most of the complaints referred to these relevant institutions and individuals were regarding land disputes, civil disputes, workplace relations, veteran entitlements, and subsidies for the elderly. These are cases of human rights violations that were committed by public institutions, and are therefore relevant to the mandate of the PDHJ.

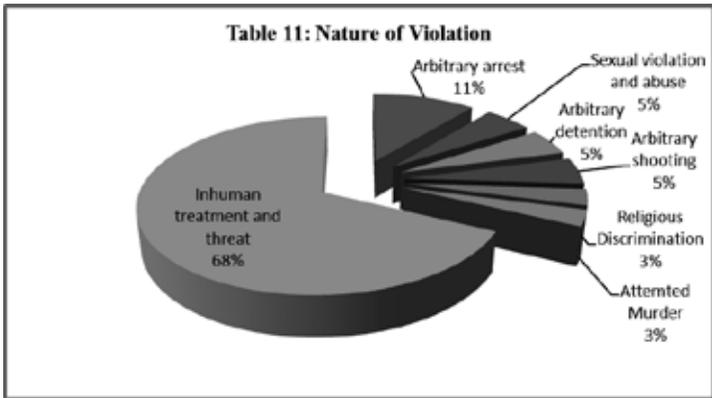
There is no detail on these cases in the *2012 Annual Report* of the PDHJ; nor reasons for their referral to other bodies. The PDHJ should also investigate workplace dispute complaints and stand with these workers to defend their rights, if their rights have been violated. The PDHJ should also support veterans and the elderly to defend their rights which are protected in the Constitution and laws.

The PDHJ does not mention whether there has been any follow-up of the referred cases. There does not appear to be any tracking of the referrals to know whether the institutions concerned have dealt with them appropriately; and whether the complainants were satisfied with the outcome.

**Investigation:** The PDHJ investigates complaints considered within its legal mandate based on Article 23 of Law No. 7/2004. Through investigation it determines which cases are to be processed and which are to be closed based on the evidence. The PDHJ investigated 80 cases registered in 2012. There were 38 cases of human rights violations and 41 cases of maladministration and abuse of power (see Table 9 below).<sup>29</sup>



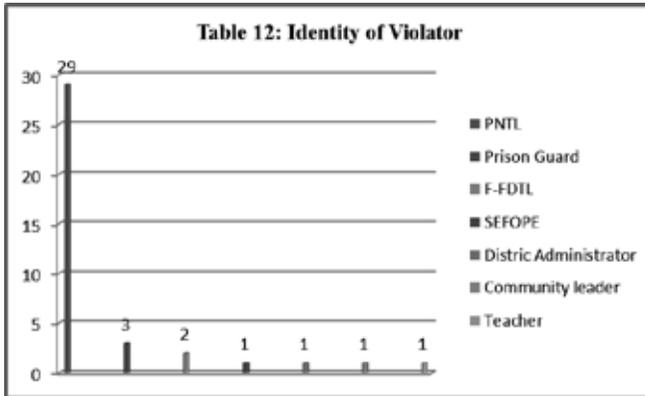
The results of PDHJ investigations of 38 cases of human rights violations showed many types of human rights violations committed by State institutions. There were 26 cases of inhumane treatment and threat; 2 cases of sexual violence and abuse; 4 cases of arbitrary arrest; 2 cases of arbitrary detention; 2 cases of arbitrary shooting; 1 case of religious discrimination; and 1 case of attempted murder as presented in percentages as below.<sup>30</sup>



The Timor-Leste National Police (PNTL) committed the majority of these human rights violations with a total number of 26 cases; followed by prison guards with 3 cases; and Timor-Leste military forces with 2 cases. A complete breakdown is presented in Table 12 below.<sup>31</sup>

<sup>30</sup> PDHJ 2012 Annual Report, p 64

<sup>31</sup> PDHJ 2012 Annual Report, p 65



The Timor-Leste National Police (PNTL) is one of the state institutions that committed the most human rights violations. This fact is shown in the annual reports of PDHJ and Amnesty International.

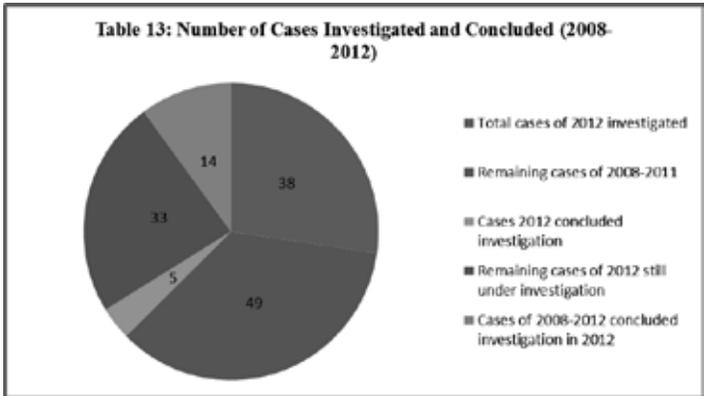
The PDHJ continually makes recommendations to the PNTL regarding human rights violations that have been committed. These recommendations do not appear to have made any real changes in the attitudes of the PNTL regarding human rights violations. As shown in the report the number of human rights violations is increasing; and the majority are committed by members of the PNTL.

There are several reasons why the recommendations of the PDHJ did not make any change to PNTL attitudes. Firstly, the PDHJ's failure to follow up on the PNTL's implementation of PDHJ recommendations does not provide any incentive for the PNTL to take action. Secondly, the PDHJ's handling of complaints does not follow human rights standards for complaints-handling and the Basic Principles & Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law of December 2005.<sup>32</sup>

The investigation process can be quite lengthy. Besides investigating new cases, in 2012 the PDHJ investigation officers continued to investigate cases from 2008 to 2011. In 2012 the total number of cases of human rights violations investigated was 87. The investigation officers concluded investigation of 5 cases from 2012 and 9 cases from 2008-2011. The remainder of cases requires further investigation. Please see Table 13 below.<sup>33</sup>

<sup>32</sup> See Chapter VI Treatment of Victims, VII Victims' rights to Remedies, VIII Access to Justice and IX Reparation for harm suffered

<sup>33</sup> PDHJ 2012 Annual Report, p 65



The number of cases of human rights violations reported is increasing annually, and especially in the last two years.<sup>34</sup>

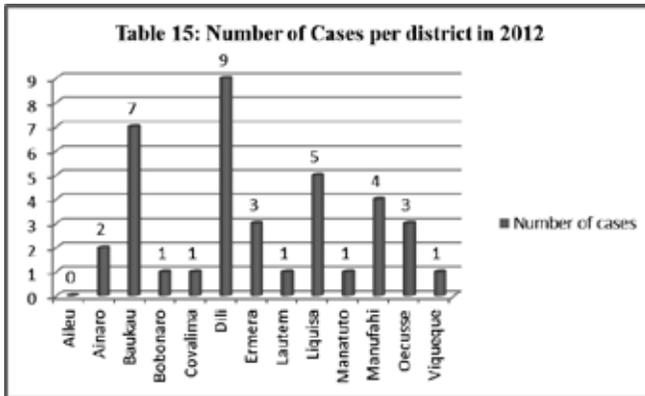


There could be two interpretations of this rising trend of reported human rights violations. The first is that the increase is because of the effectiveness of community education undertaken by the PDHJ. Therefore, the public has been made aware of the existence of the PDHJ and its role, as well as the mechanisms to communicate their complaints. The second interpretation could be that the number of violations is increasing because the PDHJ is not operating effectively to prevent human rights violations.

The following table sets out the number of cases of human rights violations by district.<sup>35</sup>

<sup>34</sup> PDHJ 2012 Annual Report, p 65

<sup>35</sup> PDHJ 2012 Annual Report, p 66



The PDHJ closed some cases for various reasons including insufficient evidence or where complainants themselves withdrew the complaint because of mediation in traditional/customary dispute resolution mechanism/s.

**Investigation based on initiative of Ombudsman:** The Ombudsman can open investigations based on his own initiative according to the provision of Law No. 7/2004, Article 35. In 2012, there were 3 cases of human rights violations investigated and concluded in the same year on this basis. The perpetrators of these human rights violations were the PNTL and Prison Guards. The PDHJ submitted recommendations to these institutions to respect human rights and follow the rule of law.

**Human Resources:** The PDHJ has established an investigations unit. This unit is unable to conclude investigations on time due to limited human resources. In 2012, investigation officers investigated between 17 and 49 cases.

**Number of Cases Concluded in 2012:**<sup>36</sup> As previously mentioned the PDHJ concluded investigation of 14 cases of human rights violations in 2012 which included cases from 2008-2011. In its Annual Report, the PDHJ does not provide detailed information on all cases. However, a sample of cases taken up for action is presented below.

**Case No. 006/2012/DH:** Cruel inhumane and degrading treatment committed by members of the PNTL. The PDHJ recommended the Secretary of State for Security and the General Commander of the PNTL, to take disciplinary measures; and also recommended the Public Prosecutor to undertake criminal prosecution.

**Case No. 052/2012/DH:** Cruel, inhumane, and degrading treatment, persecution and religious discrimination committed by F-FDTL. The PDHJ recommended the Secretary of State for Defense, and the General Commander of the F-FDTL, to take disciplinary measures; and also recommended the Public Prosecutor to commence criminal prosecution.

**Case No. 083/2012/DH:** Cruel, inhumane and degrading treatment of a student by a school-teacher. The PDHJ recommended the Ministry of Education to transfer the teacher that committed the violation as a disciplinary measure. Considering the nature of the violation, the PDHJ should have recommended the Public Prosecutor to undertake criminal proceedings against the teacher. Violations of this nature, when committed to a minor under the age of 17, are punishable under the Timor-Leste Penal Code Article 155 with between 2 to 6 years imprisonment.

**Case No. 044/2010/DH:** Sexual abuse of a school-child by a teacher. The PDHJ recommended the Ministry of Education to transfer the teacher concerned. Considering the nature of the violation, the PDHJ should have recommended the Public Prosecutor to undertake criminal proceedings against the teacher. In the Timor-Leste Penal Code Article 177, the offence of sexual abuse of a minor (aged 14 or under), is punishable with between 5 to 15 or 20 years in prison.

The JSMP is unable to specifically analyze cases that have been concluded due to a lack of detailed description in the report. Generally, some of the recommendations of the PDHJ have not been appropriate based on the type of violations committed. Cases of cruel, inhumane and degrading treatment, and sexual abuse, are considered as criminal matters and therefore should have been directed to the Public Prosecutor for criminal prosecution.

#### **IV. Thematic Focus**

There are two thematic areas focused in the *2012 ANNI Report*. These are on NHRIs as Human Rights Defenders; and NHRIs and Corporate Accountability. The ANNI circulated two questionnaires to obtain information from the NHRIs on these thematic issues.

The PDHJ has provided its responses to the questionnaires. The area of Corporate Accountability seems to be new to the PDHJ. Therefore, all of the responses were negative. On the other hand, there were positive responses to the role of NHRIs as defenders of human rights defenders. The JSMP wishes to acknowledge the full cooperation of the PDHJ in responding to both questionnaires.

##### **A. NHRIs as Human Rights Defenders**

Human rights defenders are those individuals, groups and organs of society that promote and protect universally recognized human rights and fundamental freedoms. Human right defenders seek the promotion and protection of civil and political rights as well as the promotion, protection and realization of economic, social and cultural rights.<sup>37</sup>

##### **Protection of NHRIs against attacks, harassment, threats and intimidation**

The PDHJ said that its staff have faced intimidation from the community in the field when they conducted monitoring during the national elections period in 2012.

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<sup>37</sup> UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms

Based on the observation of the JSMP, this happened might be because the dissemination of information on the competence, roles and works of PDHJ did not reach out to all people or there might be because of some people (from political parties) are still suspicious as to whether the institution has ties to any political party.

The mechanisms or channels that the PDHJ staffs used to report are the police and the PDHJ Ombudspersons. There is no specific legal framework to protect staff against retaliation, threat, intimidation or discrimination.

The PDHJ staff are said to be aware of the risks related to their work; and to receive training on appointment. However, it is not clear to the JSMP whether training is on risk management or general duties and responsibilities.

### **Security measures**

The measures taken by the PDHJ is to communicate directly with the National Police Commander. This is insufficient to guarantee the security of staff, in the opinion of the JSMP. It would be better to train and equip staff on how to manage the potential risks. As most human rights violations are committed by the police; these risks might even come from the police itself.

### **Focal-Point or Desk for HRDs**

The PDHJ said that it has established focal-points for HRDs, through telephone hotline and the internet. This response indicates the low priority of this issue to the PDHJ, as these are the same mechanisms for reporting human rights violations in general; and are not specific to HRDs or their unique vulnerabilities.

### **Witness Protection and legal/financial/medical assistance services**

The PDHJ said that based on its structure and mandate it only receives and handles complaints. According to JSMP, the PDHJ should extend its services protection of witness, legal assistance, limited financial support and medical assistance. These services are considered as emergency services for the vulnerable. The PDHJ should propose an adequate budget to resource these additional activities and services.

### **Awareness-raising activities on HRDs and their role**

The PDHJ said that it has been conducting trainings and workshops to community leaders, PNTL, F-FDTL Guard of Prisons; and other public sector workers including school-teachers on integrating human rights education into the school curriculum. However, in the JSMP's view, all of the awareness-raising activities that the PDHJ has conducted were about human rights, and not about human rights defenders and their work.<sup>38</sup>

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<sup>38</sup> See the 2012 the PDHJ annual report, page 22 to 25 and other annual reports in the official website of the PDHJ [www.pdhj.org](http://www.pdhj.org)

## Public Statements

The PDHJ said that it uses press releases, the electronic media, etc. to denounce violations suffered by individuals and organizations acting to defend human rights as a result of their work, as well as voicing support. However, in the opinion of the JSMP, the PDHJ very rarely responds through public statements to such violations. In early 2013, the PDHJ has chosen to keep silent on public statements made by the Prime Minister which threaten and criticize the decisions of the courts, the Anti-Corruption Commission, and the PDHJ itself; which undermine the promotion of justice and human rights and justice and good governance in the country.

### B. NHRIs and Corporate Accountability / Business and Human Rights

In Timor-Leste there are several multilateral and corporate investments in extractive industries but there have been no big issues related to human rights, social or economic violations.

There have been several issues related to salaries but it has been solved through mediation of the Secretary of State of Professional Training and Employment (SEFOPE) and Labor Unions. The Labor Unions and SEFOPE in Timor-Leste have very important roles in promoting and protecting the rights of workers.

JSMP would like to stress the important of the role of the PDHJ in protecting the social, cultural and economic rights of people in future as there will be mega-projects in Timor-Leste with potential violations by corporations/multinationals particularly in Suai and Betano.

## V. Conclusion and Recommendations

Generally, the human rights situation in Timor -Leste is progressing and improving since the 2006 national crises. The PDHJ has contributed to this progress, even though there are still some gaps in implementation of its mandate due to limitations and challenges as described previously. The PDHJ has abundant powers conferred by the Constitution and Law No. 7/2004 to monitor, protect and defend the people's rights against violations committed by State institutions. The selection of the Ombudsman is mostly political compared with that of Commissioners such as in Indonesia. The PDHJ has established a system and mechanisms to facilitate the complaint handling process even though some of the mechanisms are not yet effectively functioning. The big challenges for the PDHJ are limited human resources and budget gaps. There are few qualified staff in the investigation unit and limited facilities.

The number of human rights violation cases has increased as well as the number of pending cases or cases under investigation. There is no detailed information about cases referred to other State institutions and there is no follow-up done to know the progress and results. The PDHJ did not follow up the recommendations made to public institutions whose members had committed these violations to see whether the recommendations were considered and complied with. Further, the PDHJ did not follow-up regarding the processing of cases referred to other relevant institutions. Accordingly, the JSMP's analysis is that the presence of the PDHJ has not made any impact on human rights violations committed by State institutions.

Most recommendations directed to State institutions responsible for crimes committed were not appropriate nor did they correspond with the gravity of the types of crimes committed, such as case of cruel, inhumane, and degrading treatment and sexual abuse. The PDHJ should publish detailed results of the investigations in the annual report based on the provisions of Law No. 7/2004, Article 45. The annual report should be published by any means accessible to citizens as provided for in Article 46. There have been no concrete actions and sanctions taken based on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law to prevent the repetition of human rights violations and the occurrence of new types of human rights violations in the future.

The number of cases with investigations concluded in 2012 was small compared with the number of cases investigated. Failure of the PDHJ to follow up whether their recommendations have been implemented means that those institutions involved in human rights violations do not deem it necessary to take any action to remedy these violations. The PDHJ did not launch the annual report to the public, nor did it present the report to the National Parliament for consideration and did not publish it on its official website. There weren't any special reports on the official website or launched to the public or presented to the National Parliament even though there have been many cases that should be considered in as topics for special reports such as the increasing number of cases of eviction, and cruel, inhumane and degrading treatment committed by PNTL.

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

- To consider the establishment of a Commission for Human Rights and Justice in which the Commissioners represent all components of society rather than an Ombudsman that may be the subject of political influence putting at risk the independence of the institution;
- To approve a sufficient annual budget to increase the number of its human resources, training and infrastructure to support the execution of its planned activities;
- To monitor and oversee the activities of the PDHJ in terms of monitoring, protection and defense of human rights and justice as mandated by the Constitution and Law;
- To read and discuss the *Annual Report* of the PDHJ, to better promote the work of the PDHJ, as well as to promote human rights and justice;
- To request the PDHJ to present its *Annual Report* on time as provided for in Law No. 7/2004.

#### **Recommendations to the Timor-Leste National Police (PNTL):**

- To fully consider, cooperate, and take concrete actions to implement the recommendations of the PDHJ to contribute to the protection and promotion of human rights and justice;

- To continue capacity building for police members particularly on the subject of human rights, laws and professional actions in the field;
- To be prudent and careful in the selection and recruitment of new members to reduce the number of ill-disciplined recruits.

**Recommendations to the Public Prosecutor:**

- To consider as one of its priorities the prosecution of cases of human rights violations involving members of the PNTL and to contribute to the reorientation of PNTL as one of the institutions that protects and promotes rather than violates human rights;
- To implement disciplinary measures with proper sanctions based on the seriousness of the crimes committed to deter and prevent the commission of such offences in the future.

**Recommendations to the Ministry of Education:**

- To fully consider, cooperate and take concrete actions to implement the recommendations of the PDHJ to contribute to the protection and promotion of human rights and justice;
- To undertake capacity building of teachers from kindergarten to secondary school in correct teaching methods and children's rights;
- To undertake capacity building on human rights, justice and laws to prevent them from violating the rights of students.

**Recommendations to the Secretary of State for Professional Training and Employment (SEPOFE):**

- To fully consider, cooperate and take concrete actions to implement the recommendations of the PDHJ to contribute to the protection and promotion of human rights and justice in the country;
- To take serious actions against any institutions, organizations or companies that violate the rights of workers to prevent the repetition and the occurrence of new violations in future.

**Recommendations to the Ombudsman for Human Rights and Justice (PDHJ):**

- To fully implement its roles as protector of human rights and justice as mandated in the Constitution and Law No.7/2004;

- To make use of all mechanisms for complaint handling particularly by phone call and the mobile service through providing a free call number for public to present their complaints freely and by undertaking community education regarding the availability of the mobile service;
- To increase the number of professional staff and undertake capacity building to increase the qualification of staff particularly those in the investigation unit;
- To focus and effectively investigate cases under the mandate of the PHDJ to decrease the number of pending cases and to prevent the increasing number of human rights violations;
- To provide full and detailed information to the public about concluded cases, those under investigation and those referred to other State institutions;
- To follow up cases referred to other State institutions to monitor the progress and results and then to publish this information on their official website and launch it to the public in the form of the annual report together with other related information;
- To handle human rights violations based on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law to prevent the repetition of violations and the occurrence of new type of human rights violations in future;
- To regularly, annually and in a timely manner launch the annual report to the public, present it to the National Parliament and publish it in official website for public to access based on the provision of the Law No. 7/2004;
- To produce special reports on cases considered in the national interests to present to the National Parliament and the public in general.

# Bangladesh: Still to Prove Itself

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

## I. General Overview

This report is a critical assessment of the performance of the National Human Rights Commission (NHRC) of Bangladesh in the protection and promotion of human rights, mainly between January to December 2012 as well as during the first half of 2013. This report draws attention to selected issues of concern on independence and effectiveness of the NHRC as an institution; and examines its full compliance with the international standards for national human rights institutions – the ‘Paris Principles’.

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

Bangladesh, no doubt, has seen some progress in economic and social sectors in 2012. Yet the overall human rights situation in 2012 was not satisfactory. As in previous years, extra-judicial killings (mentioned as “crossfire” and “encounter”) and enforced disappearances, with incidents of detention without trial, torture and death in police or jail custody, were reported too.

**Law and Policy Development:** Several positive measures for human rights have been taken through enactment of legislation by the Parliament and policy formulation by the executive and judicial directions in 2012. Some of the initiatives include the enactment of the Anti-Human Trafficking Act 2012, the Pornography Prohibition Act 2012, the Domestic Violence Resistance and Protection Act 2012, and the Hindu Marriage Registration Act 2012.

The Government has passed a much-awaited amendment to the labor law: the Bangladesh Labor (Amendment) Bill of 2013, on 15 July 2013. Under the new law, workers will no longer need approval from factory owners to form trade unions and any factory that sells products within Bangladesh must set aside 5 percent of net profits in a welfare fund.<sup>2</sup>

1 Prepared by Sultana Kamal, Executive Director. ASK. The generous support by the NHRC in providing relevant information and input on the draft and the research support provided by Aklima Ferdows Lisa of ASK is gratefully acknowledged.

2 <http://online.wsj.com/article/SB10001424127887323664204578607814136238372.html>; <http://www.thedailystar.net/beta2/news/more-clout-for-workers/>

The new Children Act was passed on 16 June 2013 by the National Parliament. The new Act is harmonized with the United Nations Convention on the Rights of the Child (CRC) and has referred to the CRC in the preamble and replaced the Children Act 1974. The Act recognizes an individual [aged 18 or below] as a child, providing a universal and internationally recognized definition for a child.<sup>3</sup>

**Law and Order:** Throughout 2012, the law and order situation remained alarming. There were about 512 incidents (higher than the 375 incidents that occurred in 2011) of political violence in which 74 persons died and 7,327 were injured.<sup>4</sup> The law enforcing agencies along with the ruling party cadres were threatening to foil the political demonstrations conducted by the opposition. One such incident was the brutal killing of a pedestrian Bishwajit Das, by ruling party cadres on 9 December 2012, during a strike by the opposition.

The Islamic outfit Jamaat-e-Islami and their student wing, Islamic Chhatra Shibir held violent demonstrations on numerous occasions to demand the release of their leaders accused and convicted for war crimes in 2013. It is reported that law enforcers were particular targets of attack including extortion of their arms. They also engaged in vandalism, looting, arson, and setting fire to vehicles, during these political activities. Following the sentence of Delwar Hossain Sayeedi on 28 February 2013<sup>5</sup>, activists of Jamaat-e-Islami and its student wing Islami Chhatra Shibir attacked the Hindu community in different parts of the country.<sup>6</sup> Hindu properties were looted, their houses were burnt into ashes, and temples were desecrated and set on fire, which unfortunately is continuing till date.

**Enforced Disappearances:** Taking reference from media reports, ASK documented that in 2012, 56 people were reported to be missing; of them eight were released; the bodies of four were recovered; and six were handed over to the police, and the whereabouts of the rest remain unknown.<sup>7</sup> The relatives of the victims alleged the involvement of law enforcement agencies, especially the Rapid Action Battalion (RAB), in these incidents. These incidents have sparked insecurity among people. Authorities concerned have not taken any initiative to solve the problem; but rather their inconsistent statements have hindered proper investigation.

**Extra-Judicial Killings:** Although the Awami League-led coalition took office on the promise of stopping extra judicial killings by law enforcement agencies, the incidents of “cross fire” and “encounter” have continued. ASK has conducted fact-finding in several such cases for confirmation. According to news reports, 91 persons were victims of extra judicial killing in 2012<sup>8</sup>; and 22 persons in 2013 (January-June).

3 <http://childrights.thedailystar.net/2013/08/child-act-2013-a-milestone-for-protection-of-vulnerable-children/>; <http://www.askbd.org/ask/2013/06/18/children-act-2013-bill-finally-enacted-parliament/>

4 Ain o Salish Kendra Human Rights Situation 2012, [http://www.askbd.org/web/?attachment\\_id=2486](http://www.askbd.org/web/?attachment_id=2486); [http://www.askbd.org/e-newsletter/2013/03\\_march/index.html](http://www.askbd.org/e-newsletter/2013/03_march/index.html), [http://www.askbd.org/web/?page\\_id=1331](http://www.askbd.org/web/?page_id=1331)

5 <http://archive.thedailystar.net/newDesign/news-details.php?nid=270923>

6 <http://www.thedailystar.net/beta2/news/us-worried-at-violence/>

7 Ain o Salish Kendra Human Rights Situation 2012, [http://www.askbd.org/web/?attachment\\_id=2486](http://www.askbd.org/web/?attachment_id=2486)

8 Ain o Salish Kendra Human Rights Situation 2012, [http://www.askbd.org/web/?attachment\\_id=2486](http://www.askbd.org/web/?attachment_id=2486)

**Attacks on Journalists:** Violence and harassment against journalists was a major concern in 2012. In many instances, law enforcement agencies were responsible for such violations; along with their failure to provide adequate protection for journalists to carry out their professional duties. ASK documented that at least 442 Journalists were attacked in 2012. Among them 74 were attacked by law enforcing agencies, 87 were attacked by terrorists, 72 by political leaders and five were murdered.<sup>9</sup> While carrying out their professional duties about 50 journalists had been suited by Ministers, MPs or their party cadres. The television journalist couple Sagor Sarwar and Meherun Runi, were killed in their own residence on 11 February 2012.<sup>10</sup> Despite repeated commitments from government high-ups, no progress has been made in the investigation of the case; leave alone bringing the perpetrators to book.

**Violence against Women:** Violence against women was widespread resulting in many deaths of women due to domestic violence, rape, sexual harassment, dowry, fatwa, acid violence etc. In 2012, 538 women were tortured for dowry resulting in the killing of 263 and suicide by 19. One-thousand one-hundred and forty-nine (1,149) women and children were victims of rape in 2012. Last year, 48 women were tortured in the name of *fatwa*<sup>11</sup>; among which only 16 cases have been filed with police. Twenty-two women were subjected to physical violence and mental torture as a result of *fatwas*.

**Attacks on Minorities:** Number of attacks on religious and ethnic minorities have heightened their insecurity throughout the year. Several attacks have taken place on the minority Hindu community in different parts of the country. Indigenous community in the CHT and in plain lands also came under various forms of attacks. The worst communal attack occurred in Ramu on 29 September 2012, when mobs burned down 20 Buddhist temples and over 100 houses in Ramu, Ukhiya of Cox's Bazar and Patiya in Teknaf.<sup>12</sup> On that day 7 ancient Buddhist temples were completely burned; and 13 were partially burned, looted and destroyed in Ramu, Ukhiya and Teknaf. In addition, 27 Buddhist houses were completely burned; and 77 were partially burned and destroyed.<sup>13</sup> Besides, age old documents were destroyed; some valuable Buddhist monuments and other properties were looted. Police and the local administration did not take adequate deterrent action to prevent this; and no visible action has been taken so far against the perpetrators.

**Safety of Workers in Garment Industry:** A deadly fire at Tazreen Fashion Garments on 24 November 2012 caused the death of 112 workers and injury to 150 others.<sup>14</sup> Five investigation teams were formed by the Government. The Fire Service investigation team found that the factory had violated the building code and safety measures prescribed by the Bangladesh Labor Act 2006. The deaths also occurred because the workers were prevented from leaving the shop floor. Compensation for the families of the dead and

9 Ain o Salish Kendra Human Rights Situation 2012 , [http://www.askbd.org/web/?attachment\\_id=2486](http://www.askbd.org/web/?attachment_id=2486)  
10 <http://archive.thedailystar.net/newDesign/news-details.php?nid=240636>

11 'Fatwa' is a decision pronounced by Muslim religious leaders

12 [http://en.wikipedia.org/wiki/2012\\_Ramu\\_violence](http://en.wikipedia.org/wiki/2012_Ramu_violence)

13 Ain o Salish Kendra, Human Rights Situation 2012, [http://www.askbd.org/web/?attachment\\_id=2486](http://www.askbd.org/web/?attachment_id=2486)  
14 <http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMTFFfMjdFMTJfMV8xXzE1MTIzMg==>

for medical treatment for injured workers was promised by the Bangladesh Garment Manufacturers and Exporters' Association (BGMEA) after DNA verification. However, there were complaints from workers of delays or non-payment of compensation. In a public interest litigation filed by ASK, BLAST, BRAC and Nijera Kori, the High Court directed to conduct immediate inspection of the working environment in garments factories, over which national and international community also expressed their concern.<sup>15</sup>

**Border Killings:** Killings at India-Bangladesh border by the Indian Border Security Force (BSF) was very alarming in 2012. Newspapers reported that 48 Bangladeshis have been killed and other 271 were tortured on the border by BSF (Border Security Force) in 2012.<sup>16</sup>

**General Human Rights Situation in 2013:** The general human rights situation in the first half of 2013 was similarly worsening. The current political tension has been heightened due to the ongoing rift between the government and opposition parties on the issue of a caretaker government. The opposition parties have been very active in street protests against the present government in recent times. In many instances such moves have turned into violence. Violent protest and excessive use of force by the law enforcement agencies were rampant following the verdicts given by the International Crimes Tribunal to hold the trial for war crimes during the liberation war of 1971. On many occasions, the violent protests by the anti-war crime trial groups have led to the looting and burning of houses of religious minorities and brutal killing of the members of law enforcement agencies. On the other hand, the excessive use of force has claimed the lives of some 100 people in three months.

Bangladesh has seen the emergence of a new religious group, Hefajat-e-Islam (Protector of Islam), in the early part of 2013. This group, for the first time, conducted violent demonstrations against the women's policy in 2011.<sup>17</sup> However, in 2013 it made headlines after holding large rallies against the 'Shahbag protesters' – who were demanding highest punishment for war criminals – terming them as 'atheists'; and calling for action against them from the government.<sup>18</sup>

The group also put forward a 13-point demand, which includes banning women's interaction with men in the workplace, restriction on women's education etc.<sup>19</sup> On 5 May 2013, Hefajat-e-Islam organized a siege and rally in the capital city Dhaka, to press home their campaign. This turned violent; clashing with law enforcers, burning shops, buildings, and vehicles. Later in the evening, they gathered at Motijheel, the business center of the capital and refused to leave the place until their demands are met. Law enforcers then carried out a heavy handed midnight 'flush out' operation; allegedly leaving several protesters and police dead.<sup>20</sup>

15 Ain o Salish Kendra Human Rights Situation 2012, [http://www.askbd.org/web/?attachment\\_id=2486](http://www.askbd.org/web/?attachment_id=2486)

16 <http://archive.thedailystar.net/newDesign/news-details.php?nid=240109>

17 [http://newagebd.com/newspaper1/archive\\_details.php?date=2011-04-01&nid=13870](http://newagebd.com/newspaper1/archive_details.php?date=2011-04-01&nid=13870)

18 <http://archive.thedailystar.net/newDesign/news-details.php?nid=127788>; <http://bdnews24.com/bangladesh/2013/04/04/hifazat-chief-implementing-jamaat-agenda>

19 <http://bdnews24.com/bangladesh/2013/04/06/govt-must-accede-to-our-demands-hifazat>

20 <http://bdnews24.com/bangladesh/2013/05/05/hifazat-sets-vehicles-on-fire>

On 24 April 2013, an eight-story commercial building, Rana Plaza, collapsed in Savar, a sub-district close to the capital of Bangladesh.<sup>21</sup> The search for the dead ended on 13 May with the death toll of 1,129.<sup>22</sup> Approximately 2,500 injured people were rescued from the building alive. It is considered to be the deadliest garment-factory accident in history, as well as the deadliest accidental structural failure in modern human history.<sup>23</sup>

**NHRC's role in addressing the human rights situation:** The NHRC has undertaken quite a few activities in 2012 for the protection and promotion of human rights. It has also been cited in the media on several occasions. However, its role was mostly limited to promotional activities like providing trainings; organizing seminars, conducting research etc. With regard to the protection of human rights, activities of the NHRC were largely limited to writing letters to relevant government authorities. However, the NHRC contests this assessment on the basis that having 453 complaints in 2011; it had disposed of 346 petitions within 2012.<sup>24</sup>

The NHRC is perceived as very weak in accomplishing one of its critical mandates: fact-finding of human rights violations. It is true that the Chairperson paid solidarity visits to places of gross human rights violations including Ramu, Bashkhali, Sundorganj and the Rana Plaza site. However, systematic and institutional level fact-finding missions, with clear guidelines and expertise is not evident. The NHRC contests this view and insists that: "After the visit of honorable chairman, the commission sends the fact finding mission to the spot where the incidents have occurred. It is not true that the fact finding mission do not work following the appropriate methodology. It works very sincerely. Several fact finding missions have been conducted by the Commission."<sup>25</sup> It is worthwhile to take note that even the NHRC *Annual Report 2012* provides the information that the NHRC conducts fact-finding mostly on complaints on violation of the rights of individuals such as allegations of deprivation of the liberty of one Mr. Hossain, who was languishing in prison for several years even after the court ordered him to release; unfair treatment of Laboni Sultana- a teenage girl by the examiner, physical injury to a retired navy officer etc.<sup>26</sup>

Moreover, even though the Chairperson makes comments on almost all major human rights violations, the NHRC has seldom issued official statements on human rights issues and situations. According to its *Annual Report 2012*, the NHRC issued 21 press statements in 2012, with no information on the issues concerned.<sup>27</sup> The NHRC website gives the impression that most of the press statements are on events organized by the NHRC and not on expressing its position on vital human rights issues.<sup>28</sup>

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21 [http://en.wikipedia.org/wiki/2013\\_Savar\\_building\\_collapse](http://en.wikipedia.org/wiki/2013_Savar_building_collapse)

22 <http://www.theguardian.com/world/2013/jun/23/rana-plaza-factory-disaster-bangladesh-primark>

23 <http://www.bbc.co.uk/news/world-asia-22394094>

24 NHRC response to draft report, 9 September 2013

25 NHRC response to draft report, 9 September 2013

26 <http://www.nhrc.org.bd/PDF/Annual%20Report%20English%202012.pdf>

27 Ibid

28 <http://www.nhrc.org.bd/news.html>

The NHRC's submission of its own report to the Universal Periodic Review of Bangladesh in the UN Human Rights Council was one noteworthy activity undertaken by the NHRC in 2012. The report failed to satisfy everyone; but the NHRC should be commended for taking its own position and initiating consultations with CSOs and the government around the draft report. The NHRC also organized a 'mock UPR'<sup>29</sup> and participated in the UPR working group session in Geneva in April 2013 with a large delegation. However, the NHRC did not express its position or provide any reflection during or after the UPR Working Group session.

According to its *Annual Report 2012*, the NHRC has sent specific proposals on the formulation of the Human Trafficking Deterrence and Suppression Act 2012, the Pornography Control Act 2012, the draft Children Act 2012, and the draft Rights of Persons with Disabilities Act 2011, in conformity with international human rights standards.<sup>30</sup> Another positive note to be mentioned here is that, after the fire at Tazreen Fashion Garments on 24 November 2012, and upon the direction of High Court the NHRC recommended names for the probe committee.

At the same time it is important to highlight that certain inconsistencies have been seen in the position of the NHRC on many occasions. For example, on 4 July 2012, Human Rights Watch (HRW) released its report titled *The Fear Never Leaves Me – Torture, Custodial Deaths, and Unfair Trials after the 2009 Mutiny of the Bangladesh Rifles*. One of the recommendations was to "disband RAB and create a non-military unit within the police or a new institution, which puts human rights at its core to lead the fight against crime and terrorism"<sup>31</sup> which resonated the views of many human rights organizations in Bangladesh.

This report immediately received strong criticism from the government, terming it as "interference to state sovereignty" and "part of conspiracy". Interestingly, the NHRC Chairperson himself echoed these views with his comment that "a foreign organization like Human Rights Watch cannot recommend disbanding the Rapid Action Battalion".<sup>32</sup> He even went further in an article published on the online news portal BD News 24.com on 12 July 2012, to justify his position and said that anyone making a report on the human rights situation on Bangladesh, should first consult with the NHRC.<sup>33</sup>

## II. Independence

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

With the mission to ensure the rule of law, social justice, freedom and human dignity

29 <http://nhrc.org.bd/PDF/Mock%20UPR%20held.pdf>

30 NHRC *Annual Report 2012*, [http://www.nhrc.org.bd/About\\_NHRC.html](http://www.nhrc.org.bd/About_NHRC.html)

31 <http://www.hrw.org/reports/2012/07/04/fear-never-leaves-me>

32 <http://www.thedailystar.net/newDesign/news-details.php?nid=241279>

33 <http://www.nhrc.org.bd/PDF/chairman%20on%20bdnews.pdf>

through promoting and protecting human rights in Bangladesh, the National Human Rights Commission (NHRC) was re-constituted on 22 June 2010 under the National Human Rights Commission Act 2009 (NHRC Act 2009) passed by the National Parliament on 14 July 2009.

The establishment of a National Human Rights Institution for the promotion and protection of human rights was a long-standing demand from the civil society groups as well as members of the international community. The civil society and international community strengthened its advocacy to establish a state watchdog to monitor the human rights situation in the country. As part of the process, draft legislation was prepared in the 1990s following a wide range of consultations among the stakeholders.

After the general election in 2008, the Parliament enacted the National Human Rights Commission Act 2009, superseding the 2007 Ordinance, and reflecting the constitutional and international human rights obligation espoused in the 'Paris Principles' relating to the status of national human rights institutions. The UN General Assembly in 1993 endorsed a set of minimum criteria designed to ensure the independence, effectiveness and pluralism of the national human rights institution known as the "Paris Principles". Therefore, the National Human Rights Commission of Bangladesh was established as an independent and statutory institution.

**Established by a distinct law or legislation:** The founding Act (NHRC Act 2009) highlighted the independence of the National Human Rights Commission. According to Section 3(2) of the Act: "The Commission shall be a statutory independent body having perpetual succession and the power, among others, to acquire, hold, manage, dispose of property, both moveable and immovable, and shall by the said name sue and be sued." To strengthen the independence, holding the posts by the members have also been secured in the Act. According to Section 8(1) of the Act: "The Chairperson or any Member of the Commission shall not be removed from his office except in like manner and on the like grounds as the Judge of the Supreme Court, ensuring that they cannot be removed from their post merely by the wish of the executive."<sup>34</sup>

To ensure further independence, the founding Act has also given the NHRC the power to formulate necessary rules for itself (Sec 30). However, a major constraint in this regard is that any rule, formulated by the Commission needs the approval of the President to be enacted. In the absence of its own secretariat, the NHRC needs to send the draft rules to the Ministry of Public Administration, and the Ministry of Law, Justice and Parliamentary Affairs, for vetting. This process enables the Executive to have its control in the whole process undermining the independence of the NHRC.

For example, to get the approval of the 'staff rules' of the NHRC took three years (2008-2011) and with a huge compromise. The compromise has fundamentally hindered the

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

independence of the NHRC.<sup>35</sup> Except for the 'staff rules', the NHRC has not been able to move forward on any other rules like the rules on mediation or for complaint handling, that are very necessary for fulfilling its mandate.

**Financial Independence:** In terms of resourcing, the founding Act ensured the independence of the NHRC in using its resources. The NHRC Act 2009 reads: "the Government shall allocate specific amount of money for the Commission in each fiscal year; and it shall not be necessary for the Commission to take prior approval from the Government to spend such allocated money for the approved and specified purpose" (Sec 25).<sup>36</sup>

However, the Act limits the NHRC in getting direct funding from donors. The current multi-donor 'National Human Rights Commission Capacity Development Project' is a joint project undertaken by UNDP and the Government of Bangladesh (GOB). The UNDP project is mobilizing maximum resources for the NHRC. In 2012 this project has contributed USD1, 400,000 while the government allocated a mere USD196, 250.

The very small allocation from the state and the limitation of not getting direct funding from the donors is hindering the independent functioning of the NHRC. The largest part of the amount provided by the state is being used for the salary and remuneration for the staff and members of the NHRC. On the other hand, since the UNDP is an inter-governmental agency, it has its own limitations and preference with regards to human rights activism i.e. the promotional activities, not the activities for the protection of human rights violations. Moreover, the dependency on the UNDP-led project is portraying the NHRC as an organization limited to seminars and symposiums in expensive hotels, ensuring the presence of a selected class of people, and not standing for the poor victims of human rights violations.

**Autonomous of any State agency or entity in carrying out its administrative functions:** According to the NHRC Act 2009, the institution is recognized as a 'statutory independent body'. On many occasions, the NHRC has also given the impression that it does not face any interference from the government; and the Commission members time and again praised the cooperation they receive from the Government.<sup>37</sup> While we noted some examples of cooperation in case of increasing budgetary allocation, providing human resources, status and protocol to the NHRC members, examples of lack of cooperation from the executive branch of the government have also not gone unnoticed.

The National Human Rights Commission of Bangladesh is still below the standards set forth in the Paris Principles and ICC (International Coordinating Committee of National

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35 The rules regrettably made it possible for the government to ensure that the Secretary (key administrative person) will always be a seconded person from the government. Moreover, the service rule very cleverly ensured that senior positions like Directors and Deputy Directors within the NHRC can only be filled up with government seconded staff.

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

37 <http://opinion.bdnews24.com/bangla/2012/05/17>

Institutions for the promotion and protection of Human Rights) General Observations regarding the selection of the members. ICC General Observations clearly emphasize that the selection process has to be transparent, the vacancies should be advertised broadly, and broad consultation should take place throughout the selection and appointment process.<sup>38</sup> According to the NHRC, the representation of women and pluralistic composition of the Commission, in conformity with the Paris Principles, reflects the demand of civil society groups and other stakeholders from home and abroad.

The present Chairman and members of the National Human Rights Commission were appointed on 22 June 2010 for the first term and after the completion of the three (3) years term, they were re-appointed on 23 June 2013 for another term except Niru Kumar Chakma, who already served as a member for six years in two terms. A leading women's rights activist has been chosen in the place of Niru Kumar Chakma. This selection has brought some controversy – not because of her qualification for the position – but because she is married to the Law Minister, who is also one of the members of the selection committee.

There was no initiative from the selection committee for any open dialogue or public call or consultation with the civil society regarding the selection and appointment of the members of the National Human Rights Commission. *Ain o Salish Kendra* (ASK) even urged the Chair of the selection committee to set an example through initiating an open and transparent selection process that enables all stakeholders, including civil society and human rights organizations, to contribute in the process prior to the recent appointments to the Commission.<sup>39</sup>

The Paris Principles state that “the national institution shall have an infrastructure which is suited to the smooth conduct of its activities”.<sup>40</sup> However, it still lacks an effective institutional frame-work and adequate person power to unleash the huge potential of a national institution like the National Human Rights Commission.<sup>41</sup> Furthermore, it should be taken into consideration whether the honorary members of the Commission are able to make adequate contribution in the functions of the National Human Rights Commission as they are otherwise occupied. However, so long as the law is not amended, it should also be taken into consideration that the National Human Rights Commission needs honorary members who can really contribute to the functions of Commission.

### III. Effectiveness

In this section, the effectiveness of the NHRC is assessed through its complaints-handling process. According to Section 2(f) of the National Human Rights Commission Act 2009, “Human Rights” means Right of 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

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38 <http://nhriwatch.wordpress.com/2011/05/25/nhrc-bangladesh-awaits-icc-accreditation/>

39 Dhaka Tribune, <http://www.dhakatribune.com/law-amp-rights/2013/jun/14/ask-urges-speaker-engage-civil-society-selecting-nhrc-body>

40 <http://nhriwatch.wordpress.com/2011/05/25/nhrc-bangladesh-awaits-icc-accreditation/>

41 *Annual Report 2012*, [http://www.nhrc.org.bd/About\\_NHRC.html](http://www.nhrc.org.bd/About_NHRC.html)

other human rights documents and ratified by the People's Republic of Bangladesh and enforceable by the existing laws of Bangladesh. The NHRC Act 2009 describes functions of the Commission in Chapter 3. The key functions are to inquire *suo moto* (that is complaints considered at the NHRC's own discretion); or into a petition presented to it by a victim of human rights violation or abetment caused by a person, state or government agency, institution or organization.<sup>42</sup>

According to the National Human Rights Commission (NHRC) *Annual Report 2012*, the NHRC received a total of 635 complaints in 2012. Among these complaints, the Commission has resolved or disposed of 392 cases, while 236 cases remain pending; that means more than 62 percent of the complaints were disposed of. Moreover, the NHRC received 635 complaints excluding the e-copies (e.g. applications sent originally to someone other than the NHRC) of which 392 were disposed of and 242 are under review. The total number of complaints for the year 2012, including CC complaints is 885 (635 + 250).

The *Annual Report 2012* of NHRC also states that the number of complaints lodged with the NHRC in 2012 has witnessed a sharp increase and exhibits an increasing trend of complaints disposal over the last few years. It is a very positive sign that the number of complaints is increasing in every year, from 76 in 2009, 166 in 2010, 453 in 2011, to 635 in 2012. In the year 2012, the NHRC took up 14 *suo moto* complaints: of these 14 complaints, investigations have been conducted by the NHRC into nine cases.<sup>43</sup>

In order to evaluate the complaints-handling process of the NHRC, a few cases are discussed below.

### A. Case 1: Visually-impaired woman and her right to employment

**Background of the case:** A visually impaired woman, Farzana, completed her masters' degree from Dhaka University. She was living with her family members in Dhaka. Following wrong treatment given to her when she was studying in grade 12, Farzana became blind. She was facing various difficulties in everyday life. But that medical error could not demoralize her to face life with confidence and courage. She submitted an application for a job at Agrani Bank, Bangladesh. The Bank authority did not agree to allow her to sit for the entry examination for the vacant position. An article was published in a daily newspaper. The Bangladesh Legal Aid & Services Trust (BLAST) brought this issue to the attention of the NHRC and sought its support in this regard.

**Action taken by the NHRC:** The NHRC responded immediately to this case and directed the Managing Director of Agrani Bank, Bangladesh to accept Farzana's application. The same day, the Managing Director confirmed that Farzana was admitted to the entry examination for the position she applied for. Finally, Farzana met the eligibility requirements for that position.

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

43 *Annual Report 2012*, [http://www.nhrc.org.bd/About\\_NHRC.html](http://www.nhrc.org.bd/About_NHRC.html)

**Outcome of NHRC's intervention:** The NHRC acted promptly on this issue and took necessary and justified measures by giving the direction to the concerned authority of Agrani Bank, Bangladesh to accept the application of Farzana. As a result, her right to employment has been ensured.

**Comment:** While we recognize and appreciate NHRC's effort to ensure the right of Farzana as individual, we are not sure whether the NHRC has taken this example to solicit specific policies and guidelines to address similar cases and sustain the impact.

### **B. Case 2: NHRC rescues Sri Lankan National: Collaboration between NIs**

**Background of the case:** Mr. Abdur Rahim, a Bangladeshi citizen, moved to Sri Lanka in 1998 after marrying a Sri Lankan citizen, Ms. Mirzabeen. They set down their roots in Sri Lanka and even had a son. Fifteen years later on 28 July 2012, Mr. Rahim came to Bangladesh with his son Omar Rahim. Initially Mr. Rahim told his wife that Omar's grandmother wanted to meet him and that was not the reason for the trip, but soon it became clear that he was not being entirely truthful. After a few months in Bangladesh, Mr. Rahim refused to return to Sri Lanka and left his son with his grandmother and left for Norway. Ms. Mirzabeen had no clue what to do and finally lodged and won a case in a Sri Lankan court. After that, she lodged a complaint with the Sri Lankan Human Rights Commission and implored it to help in bringing her son back.

**Actions taken by the NHRC:** The Sri Lankan Human Rights Commission requested the National Human Rights Commission of Bangladesh to rescue her child. The NHRC Bangladesh presented the case to a court which issued a search warrant. Following the warrant, NHRC consulted with the Upazila Nirbahi Officer of Dohar, where Omar was staying, and the officer in charge of the Dohar Police Station established a rescue squad. The team rescued Omar and presented him to the court and the court ordered Omar to be sent back to his mother.

**Outcome of NHRC's intervention:** Finally, Omar Rahim was reunited with his mother in Sri Lanka in February 2013. Ms. Mirzabeen congratulated the NHRC Bangladesh by expressing her gratitude and appreciation of the initiatives taken by the NHRC.

**Comment:** The effective and efficient interventions of NHRC Bangladesh and the collaboration between the NIs of two countries have brought the result.<sup>44</sup>

### **C. Case 3: Limon – the victim of the brutality of law enforcers**

**Background of the case:** Limon, a 16 year old student was shot in the leg by RAB personnel on 23 March 2011, while he was grazing his cows by a river bank in Sathuria village, Rajpur Upazilla, Jhalakathi district. He was rushed to the hospital and survived but his leg had to be amputated.<sup>45</sup> Although the DG of RAB issued a statement the next day admitting that

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<sup>44</sup> <http://www.nhrc.org.bd/news.html>

<sup>45</sup> [http://www.askbd.org/web/?page\\_id=835&view=archive&bymonth=03&byyear=2011](http://www.askbd.org/web/?page_id=835&view=archive&bymonth=03&byyear=2011)

he had been shot accidentally, subsequently RAB filed two cases against him: first, one for possession of arms and the second, for obstructing them in their duties. His mother, Henoara Begum had filed an FIR on 10 April 2011 with the police accusing six members of RAB 8 Unit of shooting her son. When Limon's mother tried to file her complaint against RAB, the police didn't register this until the court ordered them to do so. Then after over a year of delay, the police investigation report in Henoara Begum's case (case filed by Limon's mother) absolved RAB of responsibility in shooting Limon.

The Government formed five investigation teams, but none of the reports were made public. In the police investigation, Limon and his family had not been interviewed or questioned by the investigators. After delayed submission of charge sheets, numerous postponements of court hearings, almost a year and a half later the police investigation report cleared RAB members on grounds of no evidence.

According to a newspaper report on 11 July 2012, the NHRC chairman has rightly reacted on 10 July 2012 to all vindictive police actions against Limon as "an act counter to the rule of law and a child rights violation".<sup>46</sup> On 29 August 2012 *Ain o Salish Kendra* (ASK) issued a statement and demanded immediate, impartial and judicial inquiry. If Limon does not get justice, it would set a negative example in the society and frustrate the nation's aspirations for democracy and promoting human rights and particularly the constitutional right to life and equality under the law, said the statement. After delayed submission of charge sheets, numerous postponed court hearings, 18 months later the police investigation report cleared RAB personnel of their involvement in the case citing the ground that there was no evidence.<sup>47</sup>

In 2012, Limon and his family members were attacked and falsely accused by a local known RAB informant. According to Limon, that was an attempt to implicate him along with his family in a murder case by RAB source. Limon's mother also received a strange phone call from RAB official on 31 October 2012. In 2012, *Ain o Salish Kendra* (ASK) along with the human rights defenders in Jhalakathi and other support groups have continued to provide legal aid, medical and other support to Limon Hossain in his fight for justice against RAB's impunity.

**Actions taken by the NHRC:** The NHRC was vocal on this case. NHRC Chairperson has met Limon immediately after he was taken to the hospital and assured all support from the NHRC. Even the NHRC informed the media at a formal press briefing on 27 August 2012 that they will move to the High Court for Limon.<sup>48</sup>

However, on 23 June 2013 the NHRC Chairperson made an ominous proposal to Limon and his family at the Commission office when he just attended the first day of his office as the Chairman after being reappointed for the second term. According to Limon, the

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46 <http://newagebd.com/detail.php?date=2012-07-12&nid=16732>

47 <http://www.askbd.org/web/?p=1985> [http://www.newagebd.com/detail.php?date=2012-08-30&nid=21898#.UhBu\\_n\\_z1rg](http://www.newagebd.com/detail.php?date=2012-08-30&nid=21898#.UhBu_n_z1rg)

48 <http://www.newagebd.com/detail.php?date=2012-08-28&nid=21664#.UIPUB8XR7dp>

NHRC Chairperson has advised to withdraw the case that his mother had filed against law enforcers after he was shot at near his village home in Jhalakati in 2011.<sup>49</sup> The NHRC Chairperson later contested this media report claiming that it had distorted his comments as he had only informed Limon that the government might make this proposal. However, on 10 July 2013, the government decided to withdraw two cases filed by RAB against Limon Hossain.<sup>50</sup>

**Outcome of NHRC's intervention:** The National Human Rights Commission has raised its concern about the ordeal of Limon and advocated with the government. But the NHRC has not had its own investigation even when law enforcement agencies framed criminal cases against Limon and portrayed him and his family linked with notorious criminals.

It was possible for the NHRC to investigate whether the framed cases by RAB against Limon were real or not. However, while withdrawing the case against Limon, the government said that they have taken into consideration the request sent by the NHRC.

**Comment:** By standing by Limon to ensure proper justice for him, the NHRC could establish an exemplary precedent against impunity.

#### D. Case 4: Dismissal of an employee of Fire Service and Civil Defense

**Background of the case:** Mozammel Haque, an employee of the Directorate of Fire Service and Civil Defense of Bangladesh (cashier of Fire Service and Civil Defense's headquarter in Dhaka<sup>51</sup>) claimed that the authorities of the Directorate harassed him in different ways, including by filing departmental cases against him, as he protested against corruption in the office on different occasions.<sup>52</sup> He filed a complaint with the National Human Rights Commission on 26 February 2012 for its intervention in this matter and prayed to the Commission to investigate the allegation.<sup>53</sup> It is reported that he stated in the complaint filed with NHRC that he was suspended by the Fire Service and Civil Defense on allegation of misconduct without giving him an opportunity of self-defense.<sup>54</sup>

**Actions taken by the NHRC:** After that the National Human Rights Commission forwarded this issue to the Directorate of Fire Service and Civil Defense who dismissed him.<sup>55</sup> According to different media reports, the NHRC sent a letter to the Director-General of Fire Service and Civil Defense on 30 April 2012 asking him to take necessary steps about the allegation.<sup>56</sup> The complainant claimed that the NHRC sent a letter to the Information Commission on 29

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49 [http://newagebd.com/detail.php?date=2013-06-24&nid=54341#.UhrNm\\_n\\_z1rh](http://newagebd.com/detail.php?date=2013-06-24&nid=54341#.UhrNm_n_z1rh)

50 [http://www.theindependentbd.com/index.php?option=com\\_content&view=article&id=177156:govt-decides-to-withdraw-cases-filed-against-limon&catid=187:online-edition&Itemid=223](http://www.theindependentbd.com/index.php?option=com_content&view=article&id=177156:govt-decides-to-withdraw-cases-filed-against-limon&catid=187:online-edition&Itemid=223), <http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMDdfMTBfMTNfMV8xOTBfMTc1OTQx>

51 <http://www.newagebd.com/detail.php?date=2013-06-18&nid=53486#.UhxFJNhP3Gj>

52 <http://bdnews24.com/bangladesh/2013/06/17/why-nhrc-runs-without-guidelines-hc>

53 <http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMDZfMTBfMTNfMV8zXzE3MzQwMQ==>

54 <http://www.newagebd.com/detail.php?date=2013-06-18&nid=53486#.UhwzyNhP3Gj>

55 <http://bdnews24.com/bangladesh/2013/06/17/why-nhrc-runs-without-guidelines-hc>

56 <http://www.thedailystar.net/beta2/news/hc-asks-nhrc-why-it-hasnt-framed-rules-for-action/>

May 2012 termed him as 'habitual offender' after he had repeatedly asked for information about the investigation into his complaint.<sup>57</sup>

**Outcome of NHRC's intervention:** Later Mozammel Haque filed a writ petition with the High Court seeking its directive to form guidelines according to the Section 30<sup>58</sup> of the National Human Rights Commission Act 2009.<sup>59</sup> The High Court came up with the rules on 17 June 2013, in response to the writ petition, asking the National Human Rights Commission (NHRC) and its Chairman why they should not be directed to formulate a set of guidelines for disposing of complaints over human rights violations as per Section 30 of the NHRC Act 2009,<sup>60</sup> after a primary hearing on a writ petition.<sup>61</sup>

The High Court asked the Commission to explain in four weeks why it has not framed rules under the relevant law after its formation<sup>62</sup> The Court also issued a rule asking the Secretary and the Director (RTI Officer) of the NHRC why the false, misleading, defamatory information given by the NHRC Deputy Director to the Chairman of the Information Commission and the Chief Information Officer should not be declared to have been "violation of law and justice".<sup>63</sup> The Chairman of the NHRC told New Age newspaper that a set of draft rules of procedure had already been prepared, but it was yet to be approved by the members of the Commission.

**Comment:** The NHRC could bring the Fire Service and Civil Defense into a place of liability regarding this complaint instead of denigration of the victim. By making specific rules for the disposal of complaints over human rights violations with the prior approval of the President under the relevant law, the NHRC could bring more clarity, efficiency into the complaints handling mechanism and accelerate the effectiveness of the mechanism as well.

#### IV. Thematic Focus

The thematic focus of the 2013 ANNI report is (a) NIs as human rights defenders (HRDs) based on the 2013 Annual Report of the UN Special Rapporteur on Human Rights Defenders,<sup>64</sup> and (b) the Advisory Council of Jurists reference on Corporate Accountability.

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57 <http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMDZfMThfMTNfMV8zXzE3MzQwMQ==>  
 58 Power to make rules: The Commission may, with prior approval of the President and by notification in the official Gazette, make rules for carrying out the purposes of this Act (The NHRC Act 2009).  
 59 [http://theindependentbd.com/index.php?option=com\\_content&view=article&id=174338:high-court-rule-on-nhrc&catid=172:miscellaneous&Itemid=202](http://theindependentbd.com/index.php?option=com_content&view=article&id=174338:high-court-rule-on-nhrc&catid=172:miscellaneous&Itemid=202)  
 60 <http://www.thedailystar.net/beta2/news/hc-asks-nhrc-why-it-hasnt-framed-rules-for-action/>  
 61 <http://bdnews24.com/bangladesh/2013/06/17/why-nhrc-runs-without-guidelines-hc>  
 62 <http://www.newagebd.com/detail.php?date=2013-06-18&nid=53486#.UhwvBdhP3Gi> <http://www.thedailystar.net/beta2/news/hc-asks-nhrc-why-it-hasnt-framed-rules-for-action/>  
 63 <http://bdnews24.com/bangladesh/2013/06/17/why-nhrc-runs-without-guidelines-hc>  
 64 *Report of the UN Special Rapporteur on the situation of human rights defenders*, Margaret Sekaggya, presented to the UN Human Rights Council at the 22<sup>nd</sup> Session, 16 January 2013, UN Office of the High Commissioner for Human Rights, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/101/79/PDF/G1310179.pdf?OpenElement>

Questionnaires prepared by ANNI were sent to the NHRC regarding its work in the chosen thematic areas. ASK acknowledges the cooperation of the NHRC in providing these inputs to the questionnaires. In the following discussion, the information provided by the Commission is presented. The written responses from the NHRC Show that the NHRC has started some initial activities in both areas, but that there are no concrete mechanisms in place.

### **NIs as Human Rights Defenders (HRDs)**

According to the NHRC, members and staff working for the Commission haven't faced harassment, intimidation and attacks by State and non-State actors due to their human rights-related work and they are aware of the risks that their work could entail. The Commission informs that the members and staff have been trained to deal with hard situations and legal protection is available for them.

The mechanisms or channels available for staff to report or raise situations of threat, harassment and intimidation and legal frameworks or regulatory acts that safeguard against any form of retaliation, threat, intimidation or discrimination is Section 29 of the National Human Rights Commission Act, 2009.<sup>65</sup> There is no threat and risk assessment nor are there presently plans to implement various measures to guarantee the security of staff such as live monitoring, panic buttons connected to police, self-protection and risk awareness training for staff.

In response to questions on focal point/desk for HRDs with the responsibility of ensuring their protection, the NHRC referred to the focal point/desk for receiving complaints. Any person can submit complaints if human rights are violated, or abetment of violation exists, by a person, state or government agency, or institution, or organization, or a public servant. The NHRC has provided training for capacity strengthening of HRDs and this will continue.

With reference to the formal complaints mechanisms and protection programs, the NHRC informs that it can take any incident into its cognizance as *suo motu*, apart from receiving complaints and petitions. The Commission acknowledges that there are no specific remedies for witness protection, legal/financial/medical assistance in place yet.

The online submission of complaints is possible apart from other means of submission and the computerized Complaints Management System is also operational. The client satisfaction survey is due for the last quarter of the year 2013. The proposed budget from the Government doesn't reflect the necessary and sufficient resources required by the Commission for the protection of defenders.

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65 "No suit or prosecution or other legal proceedings shall lie against the Government, the Commission, any Member, officer and staff of the Government or the Commission for any publication, report or any other activity of the Government and the Commission, for anything which is, in good faith, done under this Act or the rules made there under, for any damage caused or likely to be caused by such thing"

Regarding the questions on the recommendations made by the NHRC to the Government, relevant authorities and the mechanism used by NHRC to further strengthen their work, the NHRC referred Section 19 (4) of the founding Act. The Act states that the Commission shall send a copy of the inquiry report with recommendations to the Government or to the concerned authority and the Government or the concerned authority shall, within a period of three months from receiving the report, inform the Commission about the action taken or proposed to be taken thereon; provided that, if the Government or the authority has a contrary view to the Commission, or fails or denies taking decision according to the recommendations of the Commission, the Government or the authority shall inform the Commission about the reasons of such disagreement, inability or denial within the aforesaid time limit.

According to the NHRC, the Commission pronounces opinions and recommendations on the domestic legal framework to bring it into compliance with the country's international human rights obligations and the NHRC commits itself to monitoring the legal framework affecting the HRDs, its activities, and communicate or provide input to the government. The NHRC is engaged with 'Country Wide Awareness Raising Campaign', an ongoing activity, includes HRDs and Government authorities. Moreover, there have been many workshops and seminars conducted by the NHRC on NGO collaboration in human rights issues.

In response to question regarding the NHRC's interaction and participation in international fora such as the HRC, treaty bodies and Universal Periodic Review (UPR) and consultation with civil society and HRDs, the NHRC informs that the Commission prepared its stakeholder report for UPR after a series of consultations. It has also engaged with and participated in several national and international forums working for the protection and promotion of human rights.

According to the NHRC, in cases of violations, the NHRC responds or addresses in a timely manner through public statements (i.e. press statements, media interviews etc.). The NHRC informs that it has signed a number of MOUs with NGOs and INGOs for establishing forums to facilitate dialogue and cooperation with civil society. The NHRC also informs that the Commission will add information about the situation of HRDs in their next annual report in a systematic and comprehensive manner.

The NHRC responded to the questions related to visits to prisons, detention centers mentioning that the Commission conducts visits to prisons and detention centers; and there was only a single incident of initial refusal due to unawareness of the mandate of the NHRC which has been solved later. The NHRC acknowledges that the Commission is not in a position to provide free legal assistance yet; though human rights defenders are able to notify NHRC if they believe they are persecuted and face charges as a result of their activities related to the defense of human rights.

### **Corporate Accountability/Business and Human Rights**

The second thematic focus of the 2013 ANNI Report is to audit or review the National Human Rights Commission of Bangladesh's implementation of the ACJ Reference on Corporate Accountability and its activities in general on business and human rights.

According to the NHRC, it has started focusing on Business and Human Rights issues. While exploring its next course of action in this area, the NHRC has conducted two roundtable discussions: on 'Greater Protection for Women and Children working in Business and Industry' on 29 October 2012 at its premises; and more recently, on 15 June 2013 on 'Improving Working Conditions in the Ready Made Garment (RMG) sector' at Lakeshore Hotel, Dhaka.

In response to the question relating to the review of relevant domestic legislation to ensure that rules governing creation/conduct of business at home and extra-territorially are in full compliance with international, regional and domestic human rights standards, the NHRC informed that it conducted a Consultation meeting on 'Creating Better Environment for Garment Workers and Improving Working Conditions in the Readymade Garments sector: Reforming Labor Law' on 4 July 2013 at Brac-Inn Centre, Dhaka with different stakeholders and forwarded its recommendations to amend the existing labor law of Bangladesh to the Ministry of Law.

According to the Commission it couldn't include corporate human rights/corporate accountability in the National Human Rights Plan of Action, as corporate accountability is not mentioned in the Strategic Plan 2010-2015 of the NHRC. However workers' right and rights of the vulnerable groups are focused in every course of action of the NHRC and it has created a Business and Human rights Committee to address workers' rights.

According to the NHRC, it has undertaken measures and instituted programs or assisted in awareness and capacity-building of HRDs and communities affected through the human rights violations by transnational corporations and other business enterprises. There are capacity-building measures from the NHRC in dealing with business and human rights issues, such as training and exchange visits.

The NHRC cooperates regionally or internationally to examine existing domestic, regional and international standards to determine best practices in State and regulation of the conduct of TNCs. These would include using the ICC Working Group on Business and Human Rights as an appropriate vehicle for international cooperation

The NHRC is working with one TNC to raise awareness about human rights and also advises the government on human rights implications of new legislation or policies relevant to the activities to TNCs. It engages with the government and relevant departments of state to promote a greater awareness of the impact of TNCs and other business enterprises on the realization of human rights, and the relevant State obligations with regard to the promotion and protection of human rights in their own jurisdiction and extra-territorially, including regulating the conduct of TNCs.

The NHRC does not advocate for human rights impact assessment reports by TNCs and other business enterprises to be a mandatory requirement in annual and other regulatory reporting regimes. The Commission undertakes measures on issues related to business and human rights such as facilitating dialogue between all stakeholders from government,

corporations and other business enterprises and civil society, including HRDs and trade unions. The NHRC facilitates flow of information amongst stakeholders regarding violations by TNCs and does not conduct research to assess the impacts of business operations on the realization of human rights of communities.

The Commission states that it has advocated for the creation or amendment of laws that clearly identify the obligations of corporations and other business enterprises to respect human rights. It has already recommended a few amendments and initiated advocacy to get the labor law passed. The NHRC also utilizes information obtained in the review of existing domestic legislation and remedies to engage with the government and all relevant stakeholders to promote awareness on best practices and highlight the gaps in the current regulatory framework.

In response to the question regarding advocacy, the NHRC pointed out that it has started advocacy on ratification of the international instruments relevant to business and human rights. Advocacy or initiatives regarding the introduction of broad based and innovative sanctions i.e. negative publicity orders, corporate probations, fines, de-registration, reparations and guarantees of non-repetition, among others etc. are under active consideration of the NHRC.

In relation to the questions on complaints-handling, mediation and conciliation process, the Commission informs that:

- It has a complaints-handling function and there are initiatives to promote within the community and business sector an awareness of their respective role in monitoring and receiving complaints of human rights violations, as well as other remedies.
- It has started working on awareness raising among garment workers. The workers are being made aware about their rights, human rights violations, and the mandate of the NHRC. The information regarding complaints-handling mechanism of NHRC is also being disseminated to the workers.
- It has no limitation to receiving complaints to monitor the conduct on TNCs. As per law, any aggrieved person can submit complaints.
- It works closely with the judiciary to promote access to justice, and handling cases related to public interest litigation and it has a legal obligation to assist the judiciary as and when requested. It has already extended its assistance to the judiciary.
- It engages in mediation between enterprises, trade unions, governments and victims of business-related abuse and assists the victims of business-related abuse to seek redress and compensation. According to the Commission, it refers cases to the domestic jurisdiction and follow-up.

## V. Conclusion and Recommendations

The foreword of the NHRC's *Annual Report 2012* claimed that "the National Human Rights Commission has become a household term. Not only in the big metropolitans, but by virtue of the media, especially the electronic media, the rural people are familiar with at least the name of the Commission."<sup>66</sup> As members of the civil society as well as citizens of the country, we wish to see the National Human Rights Commission of Bangladesh become more familiar and appreciated by virtue of its effective and prompt contribution for the protection and promotion of human rights around the country, not merely by the name of the Commission.

### Recommendations to the Government of Bangladesh (GoB):

- Take concrete measures to make the NHRC institutionally, functionally, financially independent to uphold it as a dignified national institution as well as an internationally acclaimed institution;
- Take immediate steps to remove the inadequacy and loopholes in the governing legislation by incorporating the provision of an open dialogue or public call or consultation with civil society in the selection and appointment of members of the National Human Rights Commission;
- Take necessary measures to amend provision in the enabling legislation regarding investigation of allegations against the security forces;
- Comply with the NHRC's recommendations with foremost preference and sincerity;
- Provide sufficient budget to reduce the Commission's dependence on donor funding as well as the right to receive direct funding;
- Cooperate with the NHRC in making the complaints-handling process more effective by respecting the recommendations of the Commission and thereby comply with the fundamental aim of the state enshrined in the Constitution emphasizing fundamental human rights and freedom which should be ensured for all citizens.

### Recommendations to the National Human Rights Commission (NHRC):

- Take steps to enhance institutional visibility through formal positions, statements etc.;

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66 NHRC *Annual Report 2012*, [http://www.nhrc.org.bd/About\\_NHRC.html](http://www.nhrc.org.bd/About_NHRC.html)

- Focus on an effective process for complaints-handling so that it could make the state liable for proper outcome and explanation regarding the complaint and do its own investigation regarding human rights violations;
- Formulate guidelines on disposal of complaints to fulfil the objectives of the enabling law;
- Take concrete steps to set up its own secretariat independent from the executive;
- Take immediate steps to move to an accessible location;
- Set up branch offices so that people can access the NHRC very easily.

# India: an Opportunity for Statutory Changes?

All India Network of NGOs and Individuals working with National/State Human Rights Institutions (AiNNI)<sup>1</sup>

## I. General Overview

12 October 2013 is a red letter day in the annals of the National Human Rights Commission (NHRC) in India as it completes 20 years of existence. This report is therefore dedicated to all those who have strived to make this institution what it is today – both from within, and from outside – those whose hard work built this institution, as well as those 1,280,000 victims<sup>2</sup> and their families who had approached this institution from across this vast country with the hope that it will fulfill their aspirations. This report also acknowledges the many from outside who rightfully own this institution as theirs; and who have monitored it through their various efforts, and continue to do so, in the hope that it evolves into a vibrant institution valiantly guarding human rights in India.

The All India Network of NGOs and Individuals working with National Human Rights Institutions (AiNNI) is fully aware that building such a unique institution of the nature of a National Institution in India is not an easy task; especially when the institution was established in 1993 (the same year as the adoption of the UN 'Paris Principles' on national institutions) while the National Commission for Women (NCW),<sup>3</sup> the National Commission for Minorities (NCM),<sup>4</sup> the National Commission for Scheduled Castes (NCSC),<sup>5</sup> and the National Commission for Scheduled Tribes (NCST)<sup>6</sup> were already functioning.

It was a new experiment at institution building, which has gradually led after two decades to a globally unique galaxy of more than 150 human rights institutions at the national and state level, dealing with different thematic concerns such as rights of women, rights of children, rights of minorities, rights of Scheduled Castes, rights of Scheduled Tribes, right to information, and rights of persons with disabilities.

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1 *Henri Tiphagne, Honorary National Working Secretary*

2 Justice K. G. Balakrishnan, Chair of the NHRC in New Delhi on 9 September 2013, <http://nhrc.nic.in/dispArchive.asp?fno=12976>

3 The National Commission for Women - <http://ncw.nic.in/> established in 1992

4 The National Commission for Minorities - <http://ncm.nic.in/> established in 1993

5 The National Commission for Scheduled Castes - <http://ncsc.nic.in/> established in 1978 (initially as a joint commission for scheduled castes and scheduled tribes)

6 The National Commission for Scheduled Tribes - <http://ncst.nic.in/> established in 1992

Its creators had envisioned an NHRC to function along with the then existing three national commissions – on Women; Minorities; and Scheduled Castes and Scheduled Tribes – as a full commission comprising a Chairperson and four full time members functioning as a team, alongside (then three and now) four part-time members who are the Chairpersons of the thematic national institutions.

The only function that the enabling legislation had specifically intended to be exclusively carried out by the full-time members of the Commission is handling complaints relating to violations of human rights. All the other nine functions: intervening in courts where issues relating to human rights were pending; visits to prisons and detention centers; promoting human rights literacy; review of all existing laws that impede human rights; study of treaties and human rights standards and working to bring about their effective implementation in India; research in the field of human rights; encouraging NGOs; and finally, the open opportunity to undertake any other function for the protection of human rights in the country, are the collective responsibility of all the members of the National Human Rights Commission.

It is heartening to note that the ANNI report is not only well read but there are also detailed responses on the India country report by the NHRC, which is uploaded on its web site. A constant chord that is struck in most of these responses, is that the provisions of the enabling legislation (Protection of Human Rights Act) limit the responsibilities of the NHRC; which rests instead with the government of India.<sup>7</sup>

It is pertinent to point out that as early as 1999, the National Human Rights Commission found that the PHRA 1993 required urgent amendment; leading it to constitute the Justice Ahmedi Committee<sup>8</sup> which submitted its recommendations on amendments to the enabling act on 18 October 1999. The Justice Ahmedi Report was then formally considered by the NHRC and finally forwarded as the recommendations of the Commission to the Government in March 2000.<sup>9</sup>

Since then, there been no other efforts taken by the Commission to discuss with the government those legal reforms that would improve its functioning. Leaving it to AiNNI to lobby with the Parliament for change<sup>10</sup> is insufficient; and speaks poorly of the institution and its capabilities.

On its 20<sup>th</sup> anniversary, it is opportune that the NHRC revisit the draft amendments by bringing varied expertise from across the country, and not excluding civil society, to incorporate the Paris Principles 1993, the main features of the ICC General Observations 2009, and to comply with the observations of the ICC-SCA in its review of 2011.<sup>11</sup>

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7 NHRC's response to the ANNI report 2012

8 NHRC Annual Report 1998 – 99, p. 25

9 NHRC Annual Report 1999 – 2000, pp. 43 - 45

10 NHRC's response to the ANNI report 2012, Para 15

11 ICC concerns to the NHRC during accreditation in May 2011

It is timely for the NHRC to impress upon the Government and the Parliamentarians, as has been the earlier practice,<sup>12</sup> to review the functioning of this institution and its original statute in light of the: extensive development of recommendations, policies and opportunities from various quarters; the growing expectations on NIs globally since 1993; the call for a new law for stronger protection of human rights in India. There is a lot for the government to do and this calls for a grand alliance of all concerned agencies and actors.

Last year Delhi suffered its worst shock with the gang rape and murder of 'the Delhi Braveheart' on 16 December 2012. There was an uproar in the country and this led the Government of India even as early as 23 December 2012 to appoint a Committee "to look into possible amendments of the Criminal law to provide for quicker trial and enhanced punishment for criminals committing sexual assault of extreme nature against women".<sup>13</sup> At a time when the entire nation was visibly expressing its discontent with the various institutions of the state, questions were also raised about the functioning of the National Human Rights Commission and its role.

What was disturbing, was that the government did not approach the NHRC to deal with the task at hand of revising the laws.

Under the PHRA 1993 (Sec 12), the NHRC has among its functions:

- (d) review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation;
- (e) review the factors, including acts of terrorism that inhibit the enjoyment of human rights and recommend appropriate remedial measures.

Despite the chairperson of the NHRC being the former Chief Justice of India, and its members having extensive experience and knowledge of the law, they were not approached to assist in its review in spite of their respective mandates, institutional memory and professional expertise that could have been utilized. It is important for the NHRC to make sure that it does not allow the Government to overlook or disregard its mandate, which will seriously hamper the NHRC being viewed as a premier human rights institution.

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12 In the early years the NHRC appealed to all MPs in Parliament to repeal the Terrorist and Disruptive Activities (Prevention) Act – TADA

13 GOI notification No SO (3003) E dated 23 Dec 2012

## II. Independence

### A. Appointment of Members

In the year under consideration (2012 – 2013), three members of the Commission, namely Justice J. P. Mathur, Justice B. C. Patel, and Mr. P. C. Sharma (IPS Retd) completed their tenure. The process of appointment is governed by Sec 4 of the PHRA 1993.<sup>14</sup>

Past *ANNI Reports* between 2008 and 2012, as well as the *2011 AiNNI Report*<sup>15</sup> have dealt in detail with issues relating to the independence of the Commission, its appointment procedures, and recommendations for reform. The ICC-SCA in its reaccreditation of the NHRC as an 'A' grade institution, has also expressed certain concerns in relation to the selection and appointment process. Among these is the 'secretive' selection process which lacks transparency as is required in the ICC General Observations 2009.

Between the retirement of the three members and new appointments to their former position, there were gaps of between four and nine months, and one vacancy remains unfilled at time of writing (see table below):

| S. No | Name of Hon'ble Member completing term | Position from which this Hon'ble Member has been appointed                            | Date of appointment and date of completion of from tenure                                 | Vacancy period     | Name of person this Hon'ble Member has been replaced with |
|-------|--|---|---|--------------------|---|
| 1     | Mr. PC Sharma [IPS Retd]               | A person having knowledge or practical experience in matters relating to human rights | First tenure from 03.03.2004 to 25.30.2009<br>Second tenure from 02.03.2009 to 27.06.2012 | More than 9 months | Mr. Sharad Chandra Sinha [IPS]<br>From 08.04.2013         |
| 2     | Justice G.P. Mathur                    | Former Judge of the Supreme Court of India  | From 15.04.2008 to 18.01.2013   | More than 4 months | Justice Cyriac Joseph<br>From 27.05.2013                  |
| 3     | Justice B.C. Patel                     | Former Chief Justice of a High Court in India   | From 27.03.2008 to 22.07.2013   | More than 4 months | Vacancy continues   |

<sup>14</sup> Sec 4 of the PHRA 1993: The Chairperson and [the Members] shall be appointed by the President after obtaining the recommendations of a Committee consisting of the Prime Minister (Chairperson); Speaker of the House of the People; Minister in-charge of the Ministry of Home Affairs; Leader of the Opposition in the House of the People; Leader of the Opposition in the Council of States; Deputy Chairman of the Council of States. It is further stated that no appointment of a Chairperson or a Members shall be invalid by reason of any [vacancy of any member in the Selection Committee].

<sup>15</sup> *AiNNI Report 2011: An NGO Report on the Compliance with Paris Principles of the National Human Rights Commission of India*, online at <http://bit.ly/lsUWIG>

Justice G.P. Mathur has now been replaced by Justice Cyriac Joseph. Mr. PC Sharma [IPS Retd] has been replaced by a serving police officer, Mr. Sharad Chandra Sinha [IPS]; and one more position remains vacant which can only be filled by a Judge who has been a former Chief Justice of a High Court.

There is no information in the public domain from the NHRC to the Government or to the Chairperson of the appointment committee pre-warning them of the vacancy so that the selection/appointment process could be started much earlier. There is no evidence in the public domain to indicate that all or a few of the Judges who have retired from the Supreme Court, and who are eligible to be appointed, were considered for this position. There is nothing in the public domain to indicate that this vacancy was made public so that 'a person having knowledge or practical experience in matters relating to human rights' could apply with all their details and competencies and from them, the Appointments Committee could have selected the most appropriate.

The non-judicial vacancy ought to have been filled by a civil society representative, and that too, a woman. The NHRC has not had a woman member for the past nine years. This is a matter of grave concern. Previously, when this was pointed out, the NHRC responded that there is a deemed member who is a woman. In other words, it claims the ex-officio appointment to the NHRC of the Chairperson of the National Commission for Women as sufficient representation of women among its members. There has not been an iota of concern expressed by the NHRC to the Government or the appointment committee on the absence of women members directly appointed to the Commission in their own right.

There was a public statement by a group of 88 individuals from across the country,<sup>16</sup> expressing concerns as regards the selection of Justice Cyriac Joseph, former Judge of the Supreme Court and Mr. Sinha IPS before their appointment. These concerns were also expressed to the Appointments Committee. Two members of the Appointment Committee also went public with their opposition to these two appointments.<sup>17</sup> The UN Special Rapporteur on Human Rights Defenders has specifically recommended that current or former members of the police or security agencies and the military should not be involved in investigation of human rights violations by state actors.<sup>18</sup> Nevertheless, these appointments were made in disregard of the ICC General Observations in relation to selection and appointment.

The 2012 ANNI Report observed that the corruption charges against the present Chair of the NHRC (and former Chief Justice of India) Mr. K. G. Balakrishnan still stand; and that in an unprecedented action, the Supreme Court on 10 May 2012 asked the government to inquire into allegations of corruption and misconduct leveled against him.

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16 <http://www.wghr.org/pdf/Protest%20Statement%20against%20NHRC%20Members%20Appointments.pdf>

17 <http://www.thehindu.com/opinion/lead/judges-have-to-watch-their-scorecard/article4753636.ece>

18 <http://www.ohchr.org/Documents/Issues/Defenders/A-HRC-19-55-Add1.pdf>, Para 152

The NHRC had responded in writing stating: “There are no charges against the Chairperson, simply allegations. ANNI has suppressed the fact that the Supreme Court dismissed the petition brought to it, refusing to entertain the allegations it contained or to issue the directives that the petitioners sought. As ANNI knows, but its foreign readers may not, the action that the Supreme Court took was anything but “unprecedented”. It simply referred the allegations to the executive, which has a duty to look into any aspersion cast on a public servant, even if frivolous.”<sup>19</sup>

This response does not stand up to scrutiny. In August 2013, the Indian Supreme Court has once again sought the Government’s response in a fresh writ petition seeking the removal of the present Chair of the NHRC for his alleged corruption and misconduct as Chief Justice of India from 2007 to 2010. The Court was also informed that the Government had not made any enquiry into the complaint submitted to it which was a pre-requisite for the removal process.

These allegations concerns the Chair of the National Human Rights Commission – the national institution which other national thematic commissions and state human rights commission look up to, since it is led by a former Chief Justice of India. The Chair or Members speak on public platforms and in statements about their ‘independence’ and also about the further need for, ‘financial and operational independence’.<sup>20</sup> However, when serious allegations are leveled against leaders, it compromises the trust of the people in the institution.

Further, with the government holding the mandate to investigate this person, it cannot be expected that such a person would be able to negotiate from a position of strength on any issue – be it the need for its own premises rather than space within a complex of government buildings; or the need for urgent amendments to the PHRA; or any other matters of importance. The Chair could have taken a leave-of-absence until his name is cleared. It is still not too late for him to do so.

### III. Effectiveness

Earlier *ANNI Reports* and the *2011 AiNNI Report* have dealt at length with the defects in the complaints-handling process within the National Human Rights Commission. Recommendations for its improvement have also been previously made. The ICC-SCA in its re-accreditation review of the NHRC also expressed its concerns on the complaints-handling mechanism and highlighted this area for special attention in its next review of the Commission in 2016.

Details of cases in the year under review are unavailable. The only information in the public domain is in annual reports – very much delayed in publication – and newsletters of the NHRC. Therefore, no cases are discussed in this year’s *ANNI Report*. Nevertheless,

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<sup>19</sup> NHRC’s response to ANNI Report 2012, Para 17

<sup>20</sup> NHRC’s press release 9 September 2013

it is gratifying to note that there have been improvements in the complaints-handling process. This indicates that positive changes are possible.

These reforms are: (i) The procedures for taking complaints on file has been speeded up; (ii) the complainants are now informed that their complaint has been registered much faster after receipt of complaint; (iii) Email is being used, where possible, in addition to the postal service also quickening responsiveness to complainants; (iv) Complaints sent by mobile telephone short message service (sms) have been received, numbered, and processed without insisting on the formal submission procedure; (v) Reports received from the state authorities are being shared with complainants in more instances than before; and (vi) The comments of the complainants on these state reports are being considered by the Commission when it makes its final decision.

Certainly, there are always more areas for improvement; for example, to match the quality of criminal investigations by the NHRC with the different skills and tools of conducting human rights investigations.

The NHRC has to link its re-organization of the complaints-handling to the establishment of the State Police Complaints Authority that has been proposed by the Supreme Court, which if implemented well will reduce the burden on the NHRC. This would enable the NHRC to move towards handling more group rights complaints especially on economic and social rights violations, displacement issues, and corporate violations. It is important that the NHRC undertake a study on its complaints handling process by a group of experts. However, improvement cannot be carried out without linking them to the staffing concerns within the NHRC; and increasing the number and quality of members of the Commission.

#### **IV. Thematic Focus on Human Rights Defenders**

***Protection of NHRIs against harassment, threats, attacks etc.:*** National and State Human Rights Institutions and their staff are by and large, not seen as prone to threats, attacks, intimidations, and/or harassment according to public perception. However, the case of threat to the former (and first) Chair of the Karnataka State Human Rights Commission, Justice S. R. Naik, has been reported. Justice Naik was openly threatened in public by a functionary of the then ruling party in Karnataka, after which the state government ensured that none of the recommendations of the SHRC were complied with.

A more recent case is that of the Chairperson of the West Bengal SHRC, Justice A. K. Ganguly, a former judge of the Supreme Court, who visited Karachi, Pakistan in June 2013 to attend a two-day seminar, jointly organized by the Pakistan Institute of Labor Education and Research and the Hamdard School of Law, in collaboration with the Human Rights Law Network (India). The State Government questioned him on his leave of absence seeking clarifications about the purpose; source of funding; violation of the Foreign Contributions Regulations Act; and if prior permission of the State Governor was sought for his visit to

Pakistan.<sup>21</sup> The background to this harassment is his pro-active role in taking up of cases of human rights violations, which has embarrassed the State Government.

Despite wide publicity to this incident, there is no known *suo moto* action initiated by the NHRC towards protecting the Chair of an SHRC from intimidation by the State Government. Undoubtedly, such treatment has also been experienced by other staff of National and State Human Rights Commissions.

***Focal Point/Desk for Human Rights Defenders:*** The NHRC has been one of the pioneer national institutions in the region to establish a focal point on human rights defenders, as early as in May 2010. Although the focal point is not exclusively assigned this responsibility (since he is also the Joint Registrar of the NHRC); it has to be emphasized that he actually won the confidence of the HRDs community across this large country. The focal point has taken special efforts to communicate with, be accessible, and respond to panic calls for assistance from human rights defenders even at late hours of the night; and to connect with the community of defenders through social networking sites and on his dedicated mobile number. Unfortunately, the focal point is only able to communicate the concerns of HRDs with the Commission and is not in a position to initiate any action on his own.

It is pertinent to note that, for the first time, in a 2010 case relating to HRDs under attack in Tamil Nadu (Case No 901/22/37/2010)<sup>22</sup> where the complainant had requested that the Commission consider engaging the services of an independent lawyer to intervene on behalf of NHRC in the proceedings before a High Court, that the NHRC assigned a lawyer in 2012 to intervene and present its investigation reports before the High Court. This effort should be multiplied in many of the HRDs' cases pending in the different courts of the country, with the permission of the court, as provided for under Sec 12 (b) of the Protection of Human Rights Act 1993.<sup>23</sup>

***Right to Information HRDs:*** Two recent cases handled by the NHRC relating to right to information (RTI) activists are of relevance to assessing the approach taken in HRD cases. It is to be recalled that RTI activists across the states are being murdered by vested interests; mostly non-state actors for filing RTI petitions. Therefore the NHRC must be

21 Times of India, Kolkata, [http://articles.timesofindia.indiatimes.com/2013-07-13/kolkata/40553472\\_1\\_fcra-justice-ganguly-wbhrc](http://articles.timesofindia.indiatimes.com/2013-07-13/kolkata/40553472_1_fcra-justice-ganguly-wbhrc), 13 July 2013

22 <http://www.nhrc.nic.in/display.asp Case No 901/22/37/2010>

23 Section 12 (b), Protection of Human Rights Act 1993 – The Commission shall perform all or any of the following functions, namely : ... (b) intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court

more proactive while dealing with these issues. In fact, there are several creative measures that could be taken up by the NHRC in its complaints-handling program as provided for under Sec 18 of the PHRA 1993.<sup>24</sup>

In these cases of complaints from RTI activists it is seen that following a report from the concerned police responsible for the area from which the RTI activist hails – to whom notice was issued – the NHRC was of the opinion that ‘prompt action’ was initiated by the police. No further intervention was believed to be required on its part, other than issuing directions that no harm is caused to the RTI activist. The cases were closed.

The first example, bearing **Case No. 1734/4/23/2012** relates to an incident where Mr. Razi Hassan, an RTI activist was followed and shot at by two named persons on a motor bike on 10.05.2012. The complaint is filed by an organization on behalf of the HRD concerned on 17.05.2012 (7 days after the incident). The police files a report 11 months after the complaint on 16.04.2013. The NHRC relying on this much delayed report passes final orders on 24.06.2013 (that is, 2 months after the response of the police); ordering no further action is required in the matter, and merely directing the police to provide security to the victim.

Such delays in response to a complaint, by the state authorities, is a serious problem in many cases pending before Commissions in India. The NHRC is therefore urged to address the issue of delays in response by the state authorities in issues relating to HRDs, failing which HRDs will continue to be vulnerable to attacks. Such delays also undermine the credibility and efficiency of the complaints-handling mechanism of the Commission; the object of which must also send out a strong message to authorities to refrain from intimidating or attacking HRDs.

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<sup>24</sup> Section 18: Steps after inquiry - The Commission may take any of the following steps upon the completion of an inquiry held under this Act, namely - (1) where the inquiry discloses, the commission of violation of human rights or negligence in the prevention of violation of human rights by a public servant, it may recommend to the concerned Government or authority the initiation of proceedings for prosecution or such other action as the Commission may deem fit against the concerned person or persons; (2) approach the Supreme Court or the High Court concerned for such directions, orders or writs as that Court may deem necessary; (3) recommend to the concerned Government or authority for the grant of such immediate interim relief to the victim or the members of his family as the Commission may consider necessary; (4) subject to the provisions of clause (5) provide a copy of the inquiry report to the petitioner or his representative; (5) the Commission shall send a copy of its inquiry report together with its recommendations to the concerned Government or authority and the concerned Government or authority shall, within a period of one month, or such further time as the Commission may allow, forward its comments on the report, including the action taken or proposed to be taken thereon, to the Commission; (6) the Commission shall publish its inquiry report together with the comments of the concerned Government or authority, if any, and the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the Commission.

**NATIONAL HUMAN RIGHTS COMMISSION  
(LAW DIVISION)  
FARIDKOT HOUSE  
COPERNICUS MARG, NEW DELHI - 110 001**

Dated 29/06/2013

Case No. 1734/4/23/2012

16 JUL 2013

To

HENRI TIPHAGNE, NATIONAL WORKING SECRETARY  
HUMAN RIGHTS DEFENDERS ALERT, NO.6, VALLABHAI  
ROAD, CHOKKIKULAM,  
KARUR, TAMIL NADU.  
(Pin Code - 626002)

Sir/Madam,

With reference to your complaint dated 17/05/2012, I am directed to say that the matter was considered by the Commission on 24/06/2013. The Commission has made the following directions.

*The Commission has received this complaint from Shri Henri Tiphagne of 'Human Rights Defenders Alert - India'. As per the complaint, Shri Razi Hasan, an RTI Activist, was shot at by two motorcycle-borne persons on 10.05.2012 at about 10.00 p.m., when he was returning home. Two suspects namely, Mohd. Raziq and Aftab Alam have been arrested by the police.*

*Pursuant to the directions of the Commission, the SSP, Muzaffarpur, has sent his report dated 16.04.2013. As per this report, FIR No. 242/12 dated 10.05.2012 U/S 341/342/324/307/504/34/120-B IPC and Section 27 of the Arms Act was registered on the incident against four named accused persons at Police Station City Muzaffarpur. During the investigation, the Commission of offences was established. Accused Mohd. Raziq was arrested and a chargesheet dated 09.08.2012 was filed against him. The remaining three accused persons absconded. However, due to the pressure of the police, accused Mohd. Aftab Alam and Mohd. Javed surrendered before the Court on 28.01.2013 and a chargesheet was filed against them also. However, accused Mohd. Rizvi is still absconding and proceedings have been initiated to declare him a proclaimed offender.*

*The report of the SSP further says that the injured Razi Hasan had told the police that though he was receiving threats from the accused persons earlier, there were no such threats any more. However, the local police has been directed to provide security to Mohd. Razi Hasan.*

*The Commission has considered the report of the SSP. The incident took place on 10.05.2012 and a chargesheet was filed against one of the accused persons within three months. Chargesheet against the two accused persons was filed within six months of the occurrence. Thus, the police appears to have taken prompt action in the matter. As to the security of the victim Shri Mohd. Razi Hasan, the SSP has already directed the local police to provide protection to him. The SSP, Muzaffarpur, is directed to ensure that no harm is caused to Shri Mohd. Razi Hasan. In case of any complaint prompt action should be taken by the police.*

*In the facts and circumstances of the case, no further intervention of the Commission in the matter is required and the case is closed.*

The second example, is the case of Mr. Srinivas Rao (**Case No. 46/1/17/2013**). This RTI HRD complained that poison was administered to him by some persons with the aim of killing him on 30.12.12. The complaint was filed on 03.01.2013. The police responded on 31.05.2013. The final order of the NHRC is dated 19.06.2013. The police reported that they have not been able to arrest the accused; yet the NHRC closes the case despite the gravity of the situation and allegation. It must be pointed that such inaction would result in the waning of trust and faith of HRDs in the complaints-handling mechanism of the Commission and would leave them vulnerable to further intensification of attacks.

### Order of the Commission in Case No. 46/1/17/2013

**NATIONAL HUMAN RIGHTS COMMISSION  
(LAW DIVISION)  
FARIDKOT HOUSE  
COPERNICUS MARG, NEW DELHI - 110 001**

Dated 26/06/2013

Case No. 46/1/17/2013

17 JUL 2013

To

HENRI TIPIAGNE, HONORARY NATIONAL WORKING  
SECRETARY  
HUMAN RIGHTS DEFENDERS ALERT-INDIA, NO.6,  
VALLABHAI ROAD, CHOKKIKULAM,  
MADURAI, TAMIL NADU.  
(Pin Code 625012)

Sir/Madam,

With reference to your complaint dated 03/01/2013, I am directed to say that the matter was considered by the Commission on 19/06/2013. The Commission has made the following directions.

*It is alleged by the complainant that on 30.12.2012 in District Prakasam, Andhra Pradesh, one RTI Activist Shri Srinivas Rao was forcibly injected poison by some culprits.*

*Pursuant to the directions of the Commission, the SP, Prakasam District, Ongole, has sent his report dated 31.05.2013. He confirms the incident and says that Crime No. 246/12 U/S 307 read with Section 34 IPC was registered at Police Station Markapur Town on 31.12.2012 at 0200 hours and the case is under investigation. He further says that all sincere efforts are being made to establish identify of the accused and to apprehend them.*

*The Commission has considered the report of the SP. A case has already been registered on the crime and the investigation is in progress. The accused are unknown and unidentified. Due to this, police has not been able to apprehend them so far. The SP, Prakasam District, is directed to ensure that investigation in the case is carried out properly and expeditiously and the culprits are brought to book. With these remarks, the case is closed. A copy of these proceedings be sent to the SP for doing the needful.*

LINK CASE NO.: 4/1/17/2013

This is for your information.

Yours faithfully,

  
ASSISTANT REGISTRAR(LAW)

The following is suggested as possible actions the NHRC could have undertaken in the above cases. The NHRC could have asked its own investigation wing, or even Ms. S. Jalaja IAS (Special Rapporteur for Bihar and former Joint Secretary of the NHRC) to visit the district; or in the second case asked the Special Rapporteur for Andhra Pradesh and former Vice-Chancellor, Prof. K. S. Chalam, to meet the HRD concerned and gather the reasons of the attack including the nature of the sensitive RTIs being filed by the activist. This could have provided an indication of whose instructions were behind the attacks. This could have then helped the police in their investigation. The NHRC could have also recommended for filing of proper charge sheets including on the real conspirators behind the attack on the HRDs.

If the RTI activists required any counseling or medical attention, or individual protection due to the attack, the same could have also been specifically provided by the NHRC; leading it to develop an HRD protection scheme of its own. The NHRC could have in such cases also provided a copy of its own enquiry report to the RTI activists; which would be useful to the HRD in his/her long term work. The NHRC could have ordered a trial observation of these two cases, if ready for trial, which would have provided it an opportunity to note the seriousness with which trials in such cases are conducted in the lower courts. The NHRC could have also asked the District Legal Services Authority to depute a senior criminal lawyer to assist the prosecution, as provided for under the Indian Criminal Procedure Code, and which is also a form of intervention provided for under Sec 12(b) of the PHRA 1993. The NHRC could have also tried to follow the sensitive RTI filed and could have intervened with the concerned Public Information Officer or Bihar State Information Commission to ensure such intimidations stop.

Such proactive measures as suggested above could help build greater confidence among these RTI activists; and would also encourage others to use the RTI Act, since they would then see the NHRC as a valiant defender of HRDs. It must however be pointed out that such measures can be taken up by the NHRC only if it enlarges the strength and number of staff working in its offices.

**Database:** In 2012 the NHRC started placing details of complaints relating to HRDs and action taken by the NHRC on its website. This is a welcome initiative to give HRDs faith in the mechanism. It is further recommended that to ensure greater transparency, and for creating awareness among more HRDs across the country, it would be good for all details of cases of HRDs disposed of by the NHRC be placed in a special database on its website.

**Complaints-Handling Mechanism:** The NHRC should address all the 20 existing State Human Rights Commissions (SHRCs) and invite them to initiate a dedicated, fast-track 'HRD complaints handling program'. This program should have the provision for the SHRC to seek the services of qualified senior lawyers for HRDs through the services of the National / State/ District Legal Services Authority. The NHRC's HRD complaints handling could be properly evaluated and better measures initiated through a survey/ feedback on the same.

**Advocacy:** Civil society organizations, and in particular human rights organizations, have been facing very serious challenges on their right to assembly, right to association and right to expression. It can be seen that often false criminal complaints are filed against HRDs by the state governments. Ample examples of thousands of activists who are engaged in peaceful protests in different parts of the country facing such cases are known to the NHRC. The NHRC is yet to address this as a concern of its own through any dedicated study on the problematic practice. Strong recommendations need to be made by the NHRC on the matter to the state governments. In addition there is an urgent need for the NHRC to undertake awareness-raising activities with government authorities about HRDs and their work through workshops, trainings and seminars with State officials in order to sensitize them.

**Interaction with international mechanisms:** The NHRC has actively participated in the second UPR process for India in 2012 and submitted an independent report to the Human Rights Council.<sup>25</sup> The NHRC has not stopped with its report, but has also consistently collaborated with civil society organizations including the Working Group on Human Rights in India and the UN, as well as with other organizations and experts, to develop a monitoring tool to monitor the 69 recommendations accepted by the Government of India during the UPR process.

What requires special appreciation is its initiative to carry out this UPR monitoring process through the development of a tool of its own (that is in the process of being finalized), in collaboration with the other national human rights institutions in the country, as well as the Planning Commission of India. This is a much appreciated special effort of the NHRC after its ICC re-accreditation in the year 2011 to maintain its independence and effectiveness.

However, the NHRC must be encouraged to 'institutionalize' this process of 'UPR recommendations monitoring' by involving all commission members including its 'deemed members'<sup>26</sup> in this process. This will allow the NHRC an opportunity for continuous engagement with its deemed members as recommended by the ICC while granting it 'A' grade status in May 2011.<sup>27</sup> It is also hoped that this will lead the NHRC to also consider presenting a mid-term assessment report to the UN Human Rights Council, thus influencing the government to implement all its UPR recommendations.

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25 <http://www.nhrc.nic.in/Documents/Reports/UPR-Final%20Report.pdf>

26 Sec 3 of the PHRA provides for: The Chairpersons of the National Commission for Minorities, the National Commission for the Scheduled Castes and Scheduled Tribes and the National Commission for Women shall be **deemed** to be Members of the Commission for the discharge of functions specified in clauses (b) to (j) of section 12 (emphasis added)

27 The ICC-SCA recommended in May 2011: "The SCA notes 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

**Public support:** The NHRC has not made many public statements on several issues through its periodic press releases. Recently the Commission announced that it “would like to collaborate with news organizations” and called upon “news organizations to develop an NHRC beat, which has the widest scope for reporting on different rights-based issues, coming under various ministries”.<sup>28</sup> However, it has so far refrained from publicly denouncing violations suffered by individuals and associations acting to defend human rights as a result of their work, as well as voicing support to HRDs publically.

**NGOs Core Group:** The NHRC established its ‘National Core Group on NGOs’ in 2001 and has re-constituted the same three times now. However, in the past three years, this core group has been convened only thrice: on 26.10.2010; on 10.02.2012; and on 22.03.2013. It also has several other core groups which have met as follows:

| S. No | Subject covered by the Core Group / Advisory Body | Last meeting held on |
|-------|---|----------------------|
| 1     | Bonded Labor                                      | 24.11.11             |
| 2     | Health  | 28.07.10             |
| 3     | Disability  | 15.09.09             |
| 4     | Mental Health                                     | 14.01.10             |
| 5     | Welfare of the Elderly Persons                    | 22.11.10             |
| 6     | Right to Food                                     | 16.08.10             |
| 7     | Lawyers   | 26.11.10             |

From the above it can be seen that the NHRC’s engagement with civil society and the establishment of its thematic working groups for dialogue and co-operation with civil society groups needs to be taken more seriously and institutionalized. This will also assist the NHRC in complying with yet another concern of the ICC-SCA of May 2011 relating to cooperation and working with civil society organizations. There is a need for urgent procedural guidelines being evolved for the effective functioning of these core group and to ensure genuine participation and follow-up measures decided in the meetings.

The consultations that it carries out with NGOs when it visits state capitals, as referred to by the NHRC in its response to the 2012 ANNI Report<sup>29</sup>, needs to be better organized and offer sufficient time to listen to the NGOs present; and engage its NGO core group members from the region to facilitate the same to ensure full participation of NGOs and to draw observations for its effective functioning.

28 <http://www.nhrc.nic.in/dispArchive.asp?fno=12976> NHRC Press Release 9 September 2013

29 [http://www.nhrc.nic.in/Documents/Reports/Response\\_to\\_ANNI\\_2012.pdf](http://www.nhrc.nic.in/Documents/Reports/Response_to_ANNI_2012.pdf), Para 34

**Conflict mediation:** One of the areas of concern pointed out in the 2012 ANNI Report relates to the concerns of HRDs on the use of the Foreign Contributions Regulations Act (FCRA) by the government of India to silence several human rights organizations in the country. This was also pointed out by the UN SR on HRDs in her 2012 report where she called for a critical review of the FCRA in India.<sup>30</sup> If unaddressed this issue will continue to seriously infringe the right to association of HRDs, which is guaranteed under Article 13 of the UN Declaration on HRDs. The NHRC in its response, had restated its offer to take up the general issue. However, no such action has been taken. The consequences of the misuse of FCRA resulting in cancellation/suspension of the work of CSOs in the country are serious. The NHRC armed with the *suo moto* power to take up such cases is urged to address this issue at the earliest which is affecting the functioning of hundreds of CSOs across the country.

**Capacity strengthening for HRDs:** The NHRC and in particular its Focal Point on HRDs does travel to different parts of the country and assist NGOs in training sessions that are conducted by them, and on occasions also provides financial assistance. However, National and State governments need to be sensitized to recognize that the rights of HRDs are enshrined in the UN Declaration on Human Rights Defenders; and these authorities are obliged to respect, protect and fulfill these rights. Therefore, there is a need for the NHRC to come out with specialized publications in major local languages dealing with the UN Declaration on HRDs; the role of the UN SR on HRDs in handling such complaints relating to HRDs; the issue of individual security of HRDs; and advocating for legislative changes by the central and state governments to protect HRDs. There is also a need for a Practice Guideline to be developed on how complaints relating to HRDs will be dealt with.

## V. Conclusion and Recommendations

The present Commission with all its structural, statutory and institutional shortcomings as well as shortage in terms of staffing and other deficiencies, has in 2012-13 tried to move in positive directions with special efforts being made by several dedicated staff from within, who are sensitive and responsive to critical comments being made from different quarters.

The 20<sup>th</sup> anniversary of the NHRC provides an opportunity for it to move towards being more independent, effective, efficient, diverse, relevant and transparent by joining hands with all forces within the country to strive towards a new statute that would make the institution relevant to the human rights challenges that it faces today. The institution also needs to use its 20<sup>th</sup> anniversary to speak to, have conversations, and develop strategies with, other existing National/State Human Rights Institutions across the length and breadth of the country.

Following the Paris Principles, the NHRC should ensure that all the lessons it has learnt to develop this 'hybrid institution' with its strong experience; and the exposure that it has benefitted from through the UN HRC, the ICC and the APF are shared with all the other institutions using this occasion.

It is only a concerted cooperative step forward by the NHRC as an institution with all critical human rights academicians, civil society organizations and rights sensitive parliamentarians that can assist this institution to move forward. However, this process also requires the government's total commitment to the Paris Principles. Can all the concerned actors collectively respond to this urgent call of the hour?

### **Recommendations to the National Human Rights Commission of India:**

It is therefore suggested that this focal point person be raised to the rank of a Member of the Commission and there is a need for 'fast track' procedure of handling complaints from HRDs as also recommended by the UN Special Rapporteur on the Situation of Human Rights Defenders, during her visit to the country in January 2011.<sup>31</sup>

The NHRC must develop specialized services for HRDs such as witness protection, financial, legal and medical assistance.

The NHRC in India is therefore encouraged to develop relevant legal frame works to safeguard N/SHRIs against any form of retaliation, threat, intimidation or discrimination and create an awareness among staff in all such institutions regarding the risks that their work entails, and properly equip and train them on self-protection and risk awareness and develop specific provisions and resources to provide adequate protection when required. These are immediate concerns for the NHRC to address given that there have also been instances of threats and pressure from the government.

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<sup>31</sup> A-HRC-19-55-Add1, 6 February 2012 [ Para 154] available at [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-55-Add1\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-55-Add1_en.pdf)

# Maldives: Effectiveness in Doubt

Maldivian Democracy Network (MDN)<sup>1</sup>

## I. General Overview

The year 2012 will be marked in the history of the Maldives as a socially and politically turbulent year. In the context of a fragile democratic transition, following the assumption of office by the first democratically elected president in 2008 through the country's first multi-party general elections, 2012 began with continuing political tensions between the opposition and the incumbent administration. The year under review will also be remembered as one of significant civil unrest featuring severe human rights violations as a result of conflict between citizens and security services, fuelled by consistent political strife between various political actors and parties.

The unprecedented transfer of power in controversial circumstances on 7 February 2012 involving the contested resignation of President Mohamed Nasheed, was followed by a police crackdown of a large demonstration on 8 February 2012. This violent attack by the authorities on peaceful demonstrators left many civilian casualties, some of whom sustained serious injuries and trauma.<sup>2</sup>

Throughout the rest of the year, several instances of clashes occurred between demonstrators and security services. Over the course of the year, Amnesty International (AI) produced several statements raising concerns about the deteriorating human rights situation in the Maldives. In September 2012, AI produced a human rights assessment in which the organisation warned of a "human rights crisis" in the Maldives.<sup>3</sup> The International Federation for Human Rights (FIDH) also produced a country situation report in 2012 in which the organisation highlighted concerns about the reversal of democratic gains in the country. The report highlighted that several months after the controversial transfer of power, the new administration had been "accused of a wide range of human rights violations, from violent repression of street protests, arbitrary arrests, sexual harassment of female protestors, torture and harassment of pro-opposition media, to legal and physical harassment of members of the opposition."<sup>4</sup> Both local and foreign media covered and reported on many of the human rights violations that took place as a result of social and political conflict arising from the controversial power transfer.

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1 Prepared by Humaida Abdulghafoor, Executive Director, Maldivian Democracy Network  
2 *Human Rights Violations - Maldives : February-June 2012*, victim testimonials compiled by Maria Ali, submitted to the 105th session of the UN Human Rights Committee in Geneva, 9-27 July 2012, [http://www2.ohchr.org/english/bodies/hrc/docs/Ingos/HRViolations\\_Maldives\\_HRC105.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/Ingos/HRViolations_Maldives_HRC105.pdf)  
3 *The Other Side of Paradise: A Human Rights Crisis in the Maldives*, Amnesty International, September 2012, ASA 29/005/2012  
4 *From Sunrise to Sunset : Maldives backtracking on democracy*, FIDH, September 2012

A Commission of National Inquiry (CoNI) was formed to conduct an independent inquiry into the circumstances of the power transfer on 7 February 2012. The report produced by CoNI observed the occurrence of excessive use of force by security services and police brutality against civilians. The report noted its finding that “[t]here were acts of police brutality on 6, 7 and 8 February 2012 that must be investigated and pursued further by the relevant authorities.”<sup>5</sup> It further recommended that “[w]ith respect to the administration of justice, in particular concerning allegations of police brutality and acts of intimidation, there is an urgent need for investigations to proceed and to be brought to public knowledge with perpetrators held to account and appropriately sanctioned.”<sup>6</sup> It is noteworthy that both the CoNI process and its subsequent report elicited a mixed and contested response from the general public, amidst allegations of political bias and interference. This is underpinned by the fact that many of the human rights violations that occurred during this period of unrest were captured by media reporters and witnessed by members of the public both directly and through live footage broadcast by the media.

On 6 February 2012, the Torture Victims Association of the Maldives (TVA) submitted a report to the Human Rights Commission of the Maldives (HRCM), following a research project documenting evidence of torture in state custody between 1978 and 2008. A report based on these testimonials, produced by TVA and Redress was submitted to the 105th session of the UN Human Rights Committee (UNHRC) in July 2012.<sup>7</sup> The UNHRC in its Concluding Observations recommended the State to investigate and address both past and present issues of torture and ill-treatment and provide redress, rehabilitation and compensation to victims.<sup>8</sup>

## II. Independence

### A. Composition of the Commission

The Human Rights Commission of the Maldives (HRCM) is composed of 5 members. The Human Rights Commission Act of 2006 (HRCA 2006) states that the members “shall be appointed from human rights organisations and among persons who are active in promoting human rights in social and technical fields such as religion, law, society, economy and health.”<sup>9</sup>

In practice, it is not evident that the appointments have been made by considering representation of civil society actors or human rights activists within the Commission. It is notable that there are very few civil society organisations in the Maldives that work

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5 *Report of the Commission of National Inquiry*, Maldives, 30 August 2012

6 *ibid* : 61

7 *This is What I Wanted to Tell You : addressing the legacy of torture and ill-treatment in the Maldives*, TVA/Redress, June 2012, [http://www2.ohchr.org/english/bodies/hrc/docs/ngos/REDRESS\\_Maldives\\_HRC105.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/ngos/REDRESS_Maldives_HRC105.pdf)

8 *Concluding observations adopted by the Human Rights Committee at its 105th session*, 9-27 July 2012, Maldives, CCPR/C/MDV/CO1, UNICCPR, 31 August 2012 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/455/83/PDF/G1245583.pdf?OpenElement>

9 Article 4(b) of the HRC Act (6/2006)

specifically on human rights protection issues. The Commission members are primarily from various technical fields such as religion, education and social science backgrounds. All but one of the commissioners have a background of several years' service in the government in various sectors including education, diplomatic services and culture and heritage.<sup>10</sup>

## B. Appointment process

As stipulated in the HRC Act 2006 (Article 5), members to the Commission are appointed through Presidential nominations/appointments on the "advice" of the parliament.<sup>11</sup> When the incumbent Commissioners were appointed in 2010, the President of the Maldives selected names following an open call for nominations. The law requires the President to propose a list of names to the People's *Majlis* (the Maldivian parliament), where a 7 member ad-hoc committee must scrutinise, conduct interviews and submit recommendations to the *Majlis*, which then selects Commissioners from these nominees. Although this process was followed in 2010, the robustness of the selection process by the *Majlis* was questioned by some candidates.

When the new Commission was appointed in 2010, a woman was appointed to the post of the President of the Commission. When the President of the Maldives nominated a woman for the Vice-President's position in the Commission, this was perceived by some sources as gender discriminatory. One member of parliament was reported in the media to have said that "it was "against human rights" to have two females in the roles of President and Vice-President while another is reported to have said that "from a religious perspective or from the perspective of good policy, there should be a male in either post."<sup>12</sup> While such views were expressed inside the *Majlis*, the delay in appointing a Vice-President as per law due to such arguments were criticised by civil society groups.<sup>13</sup> The Commission remained without a Vice-President in post for over a year.<sup>14</sup> Following this considerable delay, one of the male Commissioners was given parliamentary approval and appointed to the post on 27 December 2011. The incumbent 5 member commission constitutes 2 women and 3 men and their term of office will expire in 2015.

## C. Tenure

Commissioners are appointed to a 5 year term as per law and can be re-appointed to a further 5 years.<sup>15</sup> The dismissal process is outlined in Article 15 of the HRC Act 2006, which states that a Commissioner may be dismissed under certain conditions, by the President of the Maldives after seeking a parliamentary majority approval of two-thirds for such a decision. The law also provides for the temporary suspension of a Commissioner instead of dismissal, if the issue in question is "deemed rectifiable".

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10 HRCM website, <http://www.hrcm.org.mv/aboutus/Commissioners.aspx>

11 Article 5(a) of the HRC Act (6/2006)

12 *Parliament approves HRCM President, fails VP nominee*, Minivan News, 04 October 2010, <http://minivannews.com/news-in-brief/parliament-approves-hrcm-president-fails-vp-nominee-11875>

13 *NGOs condemn non-appointment of President and Vice President to HRCM and sexist remarks in parliament*, 02 September 2010, <http://www.mvdemocracynetwork.org/nonappointmenthrc/>

14 *HRCM almost a year without a vice president*, Haveeru Online, 13 September 2011, <http://www.haveeru.com.mv/english/details/37616>

15 Article 7 of the HRC Act (6/2006)

In the Maldives context, there are no government or civil service representatives seconded to the HRCM as staff at any level. In this respect, the HRCM is an entirely independent entity from the government and the employment framework of the civil service.

### III. Effectiveness

The HRCM *Annual Report* informs that a total of 724 cases/complaints were brought to the Commission of which 218 were resolved during the calendar year 2012.<sup>16</sup> The Commission acknowledges that 2012 was the most difficult and challenging year in the institution's history due to the situation of political instability in the country.

In the existing politically polarised and partisan context of the Maldives, the HRCM is often heavily criticised for bias and inaction on human rights violations issues and cases that are perceived to be politically motivated or attributed to particular political actors. In the absence of a specific independent public opinion survey of the effectiveness of the HRCM, public comments given in response to media reports of HRCMs published reports provide some insight into individual citizens' opinion about the institution and its performance in dealing with serious issues during 2012.<sup>17 18</sup> A cursory assessment of such comments indicate a significantly high number of negative comments and a notable lack of positive comments. The only other available satisfaction rating of the HRCM is the Commission's own baseline assessment of human rights, which states that "as more people have become aware of the HRCM its approval rating has tended to decline".<sup>19</sup> According to the report, one-third of survey respondents thought that the HRCM was not doing "that good a job or a poor job" while "a little over a quarter considered the Commission is doing a good or excellent job."<sup>20</sup>

The most critical events in 2012 when grave human rights violations were perpetrated include the police crackdown on peaceful protestors on 8 February 2012, following the controversial change of government the day before. The effectiveness of the HRCM is questioned due to the Commission's inability to respond quickly to these events. The Commission's reports on the events of 6, 7 and 8 February 2012 were produced in August 2012 (see footnotes 16,17), and victims of such violence continue to await any form of practical redress.

On 6 March 2012, a group of women protestors were water-cannoned with high pressure hoses at close range by the security services, an unprecedented action hitherto unseen in the Maldives.<sup>21</sup> On this occasion, the HRCM issued a statement condemning the excessive use of force by the police against protestors.<sup>22</sup> Earlier the same day, representatives of the

16 Annual Report 2012, HRCM, February 2013, p. 39

17 *HRCM publicly releases 3 reports* [headline translation from Dhivehi], Haveeru Online, 21 August 2013, <http://www.haveeru.com.mv/dhivehi/news/126015> [for reference to public comments to article]

18 *HRCM's report claims Nasheed's life was never in danger during resignation*, Minivan News, 23 August 2013, <http://minivannews.com/politics/hrcm%E2%80%99s-report-claims-nasheeds-life-was-never-in-danger-during-resignation-42565>, [for reference to public comments to article]

19 *The "Rights" Side of Life : Second Baseline Human Rights Survey*, HRCM/UNDP, 2012, p. 1

20 Ibid

21 *Security forces use water cannon on MDP women's sit-down protest*, Minivan News, 6 March 2012, <http://minivannews.com/politics/security-forces-use-water-cannon-on-mdp-womens-sit-down-protest-32897>

22 HRCM press release no. PR-012/2012, dated 06 March 2012 [in Dhivehi only]

women's wing of the Maldivian Democratic Party (MDP), *Anhenunge Roohu*, visited the HRCM and submitted a letter in which they presented six issues which they called on the HRCM to recognise as violations of rights. These included a "request to recognise mass arrests of peaceful protestors of MDP, especially women without being given due reasons for the arrests" and a request for the HRCM to investigate the treatment of detainees. The letter alleged "unacceptable, unjustifiable court orders imposed upon detainees, such as house arrest from 830pm until 5am for two months. Protestors from [outside of the capital Malé], are summarily ordered to go back to their islands. We believe the HRCM should strongly condemn such wrongful violations of our basic Constitutional Rights and the Court's inappropriate treatment of innocent civilians wrongfully arrested."<sup>23</sup> According to *Anhenunge Roohu*, to date there has been no response from the HRCM to this letter.<sup>24</sup>

During increasingly turbulent times throughout 2012, on various occasions the HRCM denounced human rights violations occurring within the community, through press statements, which is a positive and constructive practice. Nevertheless, on many occasions, the absence of a timely response by the HRCM was notable. Moreover, the Commission appears unable to actively facilitate practical redress to victims, which result in the public perception that the Commission is less than effective in upholding its mandate.

The HRCM has thus far been reluctant to address certain issues that are difficult in the Maldives context. A high profile case in point is that of independent blogger Mr Hilath Rasheed; whom Amnesty International described as "a prisoner of conscience", following his arrest in December 2011 for participating in a "silent protest" advocating religious tolerance.<sup>25</sup> During that protest, Mr Rasheed was attacked and sustained physical injuries. A few months later in June 2012, an attempt was made on his life when his throat was slashed by unknown attackers.<sup>26</sup> Mr Rasheed subsequently gained recognition as a human rights defender internationally and was invited to address a side-event at the 21<sup>st</sup> Session of the UN Human Rights Council in September 2012.<sup>27</sup> Nevertheless, the HRCM has remained completely silent regarding the case of Mr Rasheed, having made no comment on the case to date. While the HRCM has a mandate to protect human rights defenders, it is evident that the Commission is limited in its capacity to uphold this challenging obligation in the Maldives context.

As noted previously, on 6 February 2012, a number of cases were submitted by the Torture Victims Association (TVA) for investigation by the HRCM, relating to allegations of torture

23 Letter to HRCM sent by MDP *Anhenunge Roohu* [*Trans: Women's Spirit*] (Women's Wing), 6 March 2012

24 Personal communication, Shiyama Ahmed, President of *Anhenunge Roohu*, MDP

25 *Maldives' police arrests campaigner seeking religious tolerance and allows his attackers impunity*, Amnesty International, ASA 29/001/2011, 21 December 2011, <http://www.amnesty.org/en/library/asset/ASA29/001/2011/en/2df2ad52-efec-4978-81b1-89adf2018a28/asa290012011en.html>

26 *Slashed journalist claims attack was targeted assassination by Islamic radicals*, Minivan News, 02 July 2012, <http://minivannews.com/society/slashed-journalist-claims-attack-was-targeted-assassination-by-islamic-radicals-40078>

27 *Self-exiled blogger speaks at UN Human Rights Council*, Minivan News, 16 September 2012, <http://minivannews.com/politics/self-exiled-blogger-hilath-speaks-at-un-human-rights-council-43905>

in detention between 1978 and 2008.<sup>28</sup> It is understood that the HRCM is attending to these investigations although there has been no visible progress on any of these cases to date. A report produced by the TVA and international anti-torture organisation, Redress, was submitted to the UN Human Rights Committee's 105<sup>th</sup> session in Geneva in July 2012. The Committee's subsequent Concluding Observations called on the Maldives to conduct investigations into these allegations.<sup>29</sup>

The case of former member of the Judicial Services Commission (JSC) Ms Aishath Velezinee is another high profile case in point where the HRCM has been silent. Ms Velezinee is a renowned whistle-blower on controversial issues surrounding the disputed constitutional transition process of the Maldivian judiciary in 2010, following the expiration of the interim transition period. Her efforts to disclose what she alleged to be serious irregularities within the JSC that contravened the Constitution led to her isolation and eventual dismissal from the JSC. In January 2011, Ms Velezinee was stabbed three times in the back while walking down a street in Malé one morning; an attack she attributes to have been carried out to silence her. The absence of any role by the HRCM to acknowledge, inquire, denounce or investigate the attack is open to negative interpretations about the Commission's effectiveness in supporting whistle-blowers such as Ms Velezinee. Following a recommendation made in the *2012 ANNI Report*<sup>30</sup>, it is noteworthy that the Commission informed the Maldivian Democracy Network (MDN) of its intention and efforts to introduce legislation on whistle-blowing. No progress on this is as yet evident.

More recently in February 2013, the high profile case of the conviction of a 15 year old girl who was a victim of rape and long term sexual abuse, for "fornication", which carried a sentence of flogging with 100 lashes was also an instance when the HRCM remained silent. The case received widespread international attention and condemnation, resulting in Amnesty International issuing a call for urgent action to pressure the government of the Maldives.<sup>31</sup> In March 2013, Avaaz.org launched a petition which has to date received over 2 million signatures from around the world to protest the sentence.<sup>32</sup> MDN notes that the HRCM was silent on this case, and the longstanding issue at its heart, until the August 2013 judicial overturning of the conviction. Announcing their role in the appeal of the sentence, the HRCM is reported to have said that the Commission had taken the "unprecedented tactic of braving the courts" as a third party representative in the case.<sup>33</sup> MDN commends

28 *TVA submits 25 cases of victims of torture by previous government for HRCM to investigate* [translated from Dhivehi], Haveeru Online, 06 February 2012, <http://www.haveeru.com.mv/dhivehi/news/116705>

29 Multiple documents available under Maldives, on UNOHCHR web-page of the 105<sup>th</sup> session, <http://www2.ohchr.org/english/bodies/hrc/hrcs105.htm>

30 *ANNI Report on the Performance and Establishment of NHRIs in Asia 2012*, Forum-Asia, 2012, p. 154

31 *Urgent Action : rape survivor found guilty of fornication*, Amnesty International, 28 February 2013, <http://www.amnesty.org/en/library/asset/ASA29/001/2013/en/6c2332f1-943d-4b05-b0a7-1316e381f71c/asa290012013en.pdf>

32 *Horror in Paradise*, Avaaz.org, 20 March 2013, [http://www.avaaz.org/en/maldives\\_global/](http://www.avaaz.org/en/maldives_global/)

33 *HRCM claims mandate pushed to limit over 15 year old's flogging sentence*, Minivan News, 22 August 2013, <http://minivannews.com/society/hrcm-claims-mandate-pushed-to-limit-over-15-year-olds-flogging-sentence-63134>

the Commission in its efforts, while observing that the Commission's mandate obligates it to pro-actively engage to prevent such injustices rather than waiting to be pushed into action by this level of international pressure, which every such case does not receive.

MDN's limited inquiries and attempts to obtain information from persons who had experienced human rights violations indicate that there is reluctance to submit complaints to the HRCM due to lack of both trust and confidence, especially where sensitive issues are concerned. This is clearly an area which the Commission needs to focus on strengthening.

It is important to acknowledge that during 2012, the HRCM issued several press statements denouncing various incidences of criminal behavior resulting in grave human rights violations. Nevertheless, the Commission's silence on major issues of rights violations and evident reluctance to address issues that may be perceived to be *difficult* in the Maldives context, does undermine the overall effectiveness of the Commission to uphold its mandate.

#### IV. Accountability

The HRCM produces an annual report detailing the various activities of the organization throughout the calendar year. The *2012 Annual Report* was published during the first quarter of 2013.<sup>34</sup> The 134 page report provides information relating to the institution's work over the year; including a summary of the human rights situation in the country. The report describes the year 2012 as a "historic year" which posed "challenges to citizens' civil and political rights" due to disturbances in the political arena. According to the report, 2012 presented the biggest challenges the institution has faced in its nine-year history.<sup>35</sup>

Some of the notable areas of work by the HRCM, documented in the annual report include:

- Strengthening the legal framework relating to human rights;
- Looking into complaints of human rights violations;
- Establishing a culture of respect for human rights;
- Monitoring and evaluating human rights related issues;
- Preventing human rights violations of persons in detention;
- Researching human rights related issues;
- Strengthen relations with State institutions and ensure accountability on human rights-related matters;
- Working with civil society actors.

According to information provided by the HRCM, every year the institution submits its annual report to the People's *Majlis*, following which the Majlis invites the Commission to answer questions relating to the report. At the time of writing, the HRCM had not

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34 HRCM Annual Report 2012, Human Rights Commission of the Maldives (Dhivehi only) <http://www.hrcm.org.mv/publications/annualreports/AnnualReport2012.pdf>

35 Ibid : o8

received such an invitation to discuss the *2012 Annual Report* with the *Majlis*. Therefore, the Commission is in the process of taking proactive action by requesting a meeting with the relevant committee of the *Majlis* to discuss the report.<sup>36</sup>

Between 1 January and 31 December 2012, 703 complaints were submitted to the HRCM and the Commission initiated investigations into 21 cases bringing the total number of cases to 724. Of these, 506 cases were reported to be ongoing, while 218 cases were concluded by the end of the year.<sup>37</sup>

In the Maldives, the HRCM is the designated National Preventive Mechanism (NPM) under the Optional Protocol to the Convention Against Torture (OPCAT). The Commission reports that in 2012, the NPM conducted visits to 21 places of detention.<sup>38</sup> These range from police stations, police custodial centers, prisons, a children's shelter, a children's residential educational facility, a residential facility for the disabled as well as drug rehabilitation and detoxification centers. The report provides some information on monitoring efforts by the NPM, such as the extent to which previous recommendations were implemented by some of the detention facilities. The report observes that ill-treatment of detainees is evident from accounts provided by detainees. However, there is an absence of information on any actions taken to investigate such violations by the Commission with a view to preventing recurrence.

The HRCM conducts a variety of advocacy activities across the country, including trainings, workshops, human rights "clinics" and observes a number of international human rights advocacy days. The Commission's *2012 Annual Report* outlines a series of advocacy and awareness activities conducted by the institution and provides details about the various international engagements and reporting obligations fulfilled by the Commission during 2012. The HRCM has been actively engaged in the UN Universal Periodic Review (UPR) process, as evident from its responses to an ANNI questionnaire discussed below.

## **V. Thematic Focus on Human Rights Defenders and Corporate Accountability**

The two thematic foci of the *2013 ANNI Report* are (i) the role of the NHRI as defender of human rights defenders and (ii) the role of the NHRI to ensure corporate accountability, specifically of transnational organizations.

Information from the HRCM on these two thematic areas was obtained using questionnaires that were prepared by the ANNI. In the following discussion, responses provided by the Commission are included within quotation marks. Any other sources quoted are indicated in footnotes. MDN acknowledges the cooperation of the HRCM in providing these inputs to the questionnaires.

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<sup>36</sup> Personal communication with HRCM official

<sup>37</sup> HRCM *Annual Report 2012* : 39

<sup>38</sup> *Ibid* : 79-80

## A. NHRIs – Role as defender of human rights defenders

In response to questions relating to the vulnerability of the HRCM to attacks, harassment, threats and intimidation, the Commission informs that both Commissioners and staff receive “verbal abuse, threatening phone calls/texts from various people”. However, the HRCM is unable to clarify if state or non-state actors are involved in this behavior.

While the HRCA 2006 in Article 27(a & b) provides immunity to safeguard Commission members and staff against forms of retaliation, the HRCM informs that “there are no specific mechanisms or channels available for staff to report or raise” such concerns. Currently, this is done through initial reporting to heads of departments in meetings, which may then be brought to the notice of the Secretary-General and thereon to Commissioners. The Commission acknowledges that although there is no threat and risk assessment plan or any resources available to provide protection if needed, there is a need to train and increase staff awareness about the potential risks involved in their work.

The “HRCM does not have a dedicated focal point or desk for HRD’s” although it has a hotline to which anyone can call and lodge a complaint. Currently, the Commission does not publish data on the numbers of calls received by its hotline, although such data is used for internal monitoring purposes. MDN considers it relevant that the HRCM publishes such data which would provide important information about the extent to which this service is both known and used by the public. MDN further notes that the establishment of a desk for HRDs is a recommendation of the *ANNI Reports* since 2011, which remains unrealized.<sup>39</sup>

In response to questions on formal complaints mechanisms and protection programs for human rights defenders, the HRCM informs that it is “mandated to find amicable solutions to infringement of human rights, through means of peaceful reconciliation between the victim and the perpetrator” although “if a solution is not met amicably, the HRCM can further refer the matter to the court on behalf of the complainant or victim”. According to the Commission, the lack of a Victim Protection Act in the Maldives “inhibits the HRCM to provide such assistance to the victims.” However, on this point, MDN notes that the Commission does have powers under the HRCA 2006, Article 31, to produce regulations that will facilitate the implementation of the Commission’s responsibilities under the law. To date, there are no regulations made in this area, although MDN is aware that the Commission is working to draft amendments to its enabling law, the details of which are not yet available.

According to the Commission, legal assistance is provided to those who seek it. HRCM also “counsels the victims and complainants on the different ventures [*sic*] that they can seek compensation or carry forward with their complaint.”

Unfortunately, information about the effectiveness of the HRCM's complaints-handling processes is lacking. As the Commission acknowledges in its response to feedback on complaints-handling: "there is no such survey conducted to check the effectiveness, responsiveness and transparency in the complaints-handling process". Nevertheless, the Commission says that it "adheres to the Paris Principles and has a broad mandate which specifically deals with the investigation process" and refers to the existence of standard operating procedures in investigations, which prioritizes confidentiality and anonymity.

The Commission also informs that it "acts hastily [*sic*] on violations of human rights by the gravity and enormity of certain complaints" indicating prompt attention to serious cases of rights violations. This statement however, is not consistent with MDN's observations in many cases, some of which have been noted above, under section III on the effectiveness of the NHRI.

According to the HRCM, "one of the main factors contributing to the ineffectiveness in speedily handling complaints is the lack of compliance given by relevant authorities." The Commission informs that it is trying to address this issue by conducting more meetings with relevant authorities. Although this is undoubtedly a relevant factor, it is important to note that the Commission does convey through its inaction in relation to certain sensitive cases, that there are other challenges that impede timely action.

The HRCM considers budgetary limitations to affect most of its work and informs that "neither the proposed budget nor the finalized budget ... reflects the extent of need on any area." Therefore, although there is no dedicated focus on supporting HRDs, the Commission reports that it faces challenges in obtaining the necessary finances overall.

In response to the status of the Commission's recommendations, the HRCM informs that "as far as the recommendations made by the NHRI to the Government and relevant authorities are concerned, they are of a persuasive nature in effect and carry no legal obligation." Additionally, the Commission publicizes such recommendations at their discretion when the "Commission deems it fit to do so, in consideration to the sensitivity of the issue and the parties involved ...". In order to strengthen their work, the Commission informs that "periodic meetings are held with government authorities to monitor progress of the recommendations" although more "cooperation and coordination" is needed from the authorities.

In response to questions on advocacy activities by the NHRI in favor of a conducive work environment for human rights defenders, the Commission responds that it provides "legal opinions and comments on the Bills from a human rights perspective to the government and the parliament" which are publicized on their website. Further, the Commission informs that it advocates to adopt international human rights instruments as well as make recommendations to incorporate these into domestic law.

However, to reiterate a point already noted, MDN is concerned about the selective nature of this advocacy based on what appears to be non-controversial and safe issues. The issues surrounding *sensitive topics* such as religious tolerance, the death penalty and those which

concern the judiciary are arguably given a wide berth by the Commission, despite the potency and pertinence of these issues in the current context.

In addition, while acknowledging the Commission's efforts, MDN notes with concern the lack of comprehensiveness and conceptual robustness of such opinions in some instances. A case in point is the Commission's concerns submitted to the President in January 2013, following the ratification of the controversial Right to Freedom of Assembly Act, where it fails to raise the serious issue of the limitation and prohibition in this law, of the right to assemble in resort islands.<sup>40 41</sup> The law undermines the basic Constitutional rights of workers in the largest industry in the country, the tourism sector (among others), to assembly and expression and the Commission remained silent on this critical point.

With reference to the HRCM's monitoring of the HRD legal framework, the Commission informs about the absence of legal instruments on HRDs, adding that "the HRCM makes every effort to provide assistance to local NGOs, associations, individuals and other legal entities in their own capacity and as HRDs, in functioning within the current legal framework." MDN is not aware of the work of the Commission in this respect and time constraints limit further scrutiny of this point at the time of writing. As noted previously, the HRCM's silence and absence of action in specific high profile cases remain relevant and lack of support to individual HRDs is quite evident. MDN notes the recent development whereby the Commission is beginning to engage with NGO HRDs on specific issues, although the scope for consistent and sustained engagement with civil society organizations is considerable and necessary in the country context.

In response to a question relating to the Commission's efforts to inform others about the HRDs and their work, the HRCM informs that it "conducts various awareness activities including training programs for Government and other state official on general human rights education including sensitization to the work of HRDs." MDN is once again, not privy to the extent of such sensitization and is unable to establish or comment on its effectiveness.

Regarding the NHRI's interaction with international and regional mechanisms, the HRCM submitted its report to the Universal Periodic Review in 2010 and "encouraged civil society organizations to submit their own report". As MDN is one of several NGOs involved in producing the NGO shadow report to the UPR in 2010, the HRCM's role and efforts are both acknowledged and commended. The Commission informs that in 2012, "HRCM participated in the treaty body session held in Geneva to review the State of Maldives regarding the implementation of the International Covenant on Civil and Political Rights. The HRCM was able to participate in both the closed door session and NGO/NHRI formal sessions." The Commission's active engagement in responding to treaty bodies is noted.

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<sup>40</sup> *HRCM's concerns to the Freedom of Peaceful Assembly Act passed by the Parliament, Submitted to the President's Office on 7 January 2013*, HRCM, 7 January 2013, [English translation of original Dhivehi paper provided by the HRCM],

<sup>41</sup> Right to Freedom of Peaceful Assembly Act, No. 1/2013, Article 24 (b) (7)

Responding to the question regarding the response of the HRCM in cases of rights violations, the Commission informed that “if there are incidences of human rights violations HRCM responds with a statement denouncing the violation or a press release addressing and condemning the incident. In addition, wider consultations are held in response to such incidences”. MDN observes that the HRCM did not respond to that section of the question which inquires whether the Commission acts in defense of human rights defenders. MDN is not aware of such an action by the HRCM at any time, where the Commission had intervened to defend or voice support, especially in support of an individual HRD.

The HRCM informs that it “conducts separate workshops and sessions for civil society actors on working as human rights defenders and the avenues that they have through HRCM in working to defend human rights. HRCM also has working sessions with civil society actors on other thematic issues.” While details are lacking, MDN is aware that the Commission seeks the opinion of select NGOs on specific concerns on an ad-hoc basis as MDN also participates in such meetings on occasion. These are notably infrequent. However, the extent to which HRCM works to educate civil society actors on working as HRDs is not known.

In response to the question on the admissibility of complaints, the Commission responded as follows.

“HRCM deems admissible all complaints alleging human rights violations. The investigations process is based on devising an investigation plan which includes acquiring information from the victim, perpetrator, witnesses and any available evidences (documents in relevance to the complaint). Further, the alleged violations are weighed with the rights stipulated in the Constitution and the Conventions the Maldives is party to, the balance of probability of the alleged violation is considered and a comprehensive report is put forward to the commission (referring to the Members of the HRCM) to decide whether the alleged violation has occurred or not and the next steps to be followed.”

While the Commission informs that it accepts all complaints relating to human rights violations, available information suggests that issues relating to trust and confidence somewhat inhibits individuals to lodge even serious human rights violations. Anecdotal information received by MDN is that some individuals feel that there is “no point” in lodging a complaint at the Commission. To reiterate the HRCM’s own observations noted earlier in this paper, the Commission’s “approval rating has declined” over the years.<sup>42</sup>

According to the HRCM, the Commission does not report on the situation of HRDs in its *Annual Report*. This can be interpreted as an indicator of the lack of attention the Commission has given to support individuals or other HRDs. MDN calls on the Commission to engage more closely with HRDs and provide the necessary practical and moral support to HRDs, as a primary state-level defender of HRDs.

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42 *The “Rights” Side of Life : Second Baseline Human Rights Survey, HRCM/UNDP, 2012, p. 1*

The HRCM is the NPM in the Maldives and the NPM conducts regular scheduled visits to places of detention including prisons, police custodial centers as well as various State care institutions. In response to questions asked in relation to visits to places of detention, the HRCM provided information that are cause for concern to MDN. The Commission informs that: "Although HRCM Act authorizes visits to places of detention without prior notification there have been incidences of delay in access to such institutions. For instance, there was over an hour and half delay in gaining access to prison facilities during a recent investigation into torture allegations." MDN commends the HRCM for publicly announcing via their website that the Commission is investigating three cases of torture allegations in Male' prison, following complaints put to the Commission by family members of one of the detainees. MDN has received anecdotal information of allegations of torture in detention within the past year, and it is constructive that the Commission has shared the challenges they face in accessing detainees, in this forum.<sup>43</sup> The fact that torture allegations are coming to the attention of both CSOs and the HRCM is indicative of serious issues that prevail within the custodial and detention system and the delays in access to detainees to the NPM is very disturbing. MDN acknowledges that the Commission continues to have challenges in obtaining the cooperation of authorities which inhibits the NPMs efficiency and effectiveness.

It is appropriate here to make reference to a general point regarding the NPM and its monitoring functions of places of detention. During 2009 and 2010, the NPM exercised a very transparent process of reporting on places of detention by publishing visit reports on the Commission's website. However, the Commission had stopped this practice during the last few years. This is a response to the negative image of the Commission among the public, who allege that the HRCM is more interested in protecting the rights of criminals; a finding also noted in the Commission's recent rights survey report.<sup>44</sup>

MDN is of the view that the Commission's strategy to stop publishing information about the NPM's work in this way is an unfortunate lost opportunity, as the negative feedback could be used as an advocacy opportunity to inform and educate the public on this very point. For instance, the UNHRC General Comment No. 21 on the CCPR specifies that Article 10, paragraph 1 "imposes on States parties a *positive obligation* towards persons who are particularly vulnerable *because of their status* as persons deprived of liberty" (emphasis added).<sup>45</sup> Moreover, "treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule."<sup>46</sup> Using every opportunity to advocate for these fundamental concepts and human rights principles is critical when the HRCM claims to actively work to foster a "culture of human rights" in the Maldives.

43 *HRCM investigating 3 cases of alleged torture in Male' custodial*, Minivan News, 13 July 2013, <http://minivannews.com/politics/hrcm-investigating-three-cases-of-alleged-torture-in-male-custodial-61049>

44 *The "Rights" Side of Life : Second Baseline Human Rights Survey*, HRCM/JUNDP, 2012, p. 7

45 General Comment No. 21, "Humane treatment of persons deprived of their liberty" (1992), UNHRC, CCPR, Forty-Fourth Session : point 3

46 *Ibid* : point 4

With reference to the provision of free legal assistance, the HRCM informs that as per the Commission's mandate, it "has taken the initiative and opened up the opportunity to the public to request free legal assistance." MDN understands that the free legal assistance that the Commission refers to is not publicized and the availability of it is known only through the case investigation route within the Commission. Additionally, no information on the demand and/or provision of this service is available.

Asked if HRDs can lodge a complaint if persecuted in relation to their work in defense of human rights, the HRCM informs that "NGOs, associations, individuals and other legal entities in their own capacity and as HRDs can notify HRCM" in such instances. Such complaints would be investigated through the Commission's regular complaints procedure as per HRCA 2006 Articles 20, 21 and 22.

With reference to conflict mediation, the HRCM informs that it "has intervened in resolving employment related human rights violations by mediating with relevant authorities and civil society organizations working for employee rights." This is another point where further details are needed to provide comment. Nevertheless, MDN understands from a leading employees' rights CSO that in its experience, cases lodged at the HRCM do not receive a satisfactory level of attention or resolution, indicating that difficulties exist in the Commission's effectiveness in dealing with such issues.

The response of the HRCM in connection with the question regarding efforts taken by the Commission to protect HRDs is somewhat misaligned. The Commission informs that it has made efforts to train NGOs and individuals as HRDs and provides no information on efforts to defend HRDs. MDN assesses this response as indicative of the HRCM's persistent difficulty in acknowledging and recognizing some individuals as HRDs due to issue sensitivity, as discussed previously. Additionally, considering that one of the objectives of the Commission in the HRCA 2006 is to "assist and support NGOs involved in the protection of human rights", the level of attention given to this objective by the Commission is regrettably unsatisfactory.<sup>47</sup>

## **B. Role of NHRI's to ensure Corporate Accountability**

With reference to the responses received from the HRCM on the thematic focus on the role of the Commission to ensure corporate accountability, specifically on transnational organizations, the overall response from the HRCM is that it is not actively working in this particular area. However, the Commission is engaged to a limited extent on indirectly related matters to do with business and human rights, specifically on raising awareness of employee rights and migrant worker rights. According to the HRCM, its education workshops "so far do not include separate information about business and human rights".

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47 HRCA 2006, Article 2(c)

It is notable that migrant worker rights is a key issue in the Maldives context as a migrant labor receiving country. While the national population stands at approximately 350,000, the documented migrant worker population is reported to be 111,000 and the undocumented number of workers is estimated at over 40,000.<sup>48</sup> MDN is currently researching the human rights situation of migrant workers and is aware of the seriousness of the issue. Issues ranging from human trafficking, exploitation and abuse of migrant workers are frequently reported in the Maldivian media. In this context, the HRCM has the challenging obligation to actively attend to the issue of business and corporate accountability. This is especially relevant in the recruitment and employment practices of migrant workers for various industries but also the migrant domestic worker sector, an area yet to be studied, and one of the most vulnerable social groups in the Maldives.

The Commission does not conduct any monitoring activities to audit or review human rights violations by businesses or TNCs. In terms of work on legislation that governs business conduct internally and extra-territorially, the Commission informs that it has provided comments to the draft seaman's agreement "to bring it in line with the international, regional and domestic human rights standards". Additionally, the Commission had "commented on draft legislation on the industrial relations act and conciliation."

The HRCM has a complaints-handling function as per its general mandate to inquire into, investigate and prevent human rights violations. Additionally, in response to questions, the Commission informs that "HRCM conduct field visits to places where infringement of human rights have occurred and has the legal authority to procure documents which are deemed necessary for the investigation." However, according to the Commission, it does not as yet have any monitoring or reporting initiatives to specifically address the issue of rights violations in the corporate sector, and does not have a database on the regulatory framework or available remedies. The HRCM informs that it does not currently utilize its existing complaints mechanism to monitor rights violations of TNCs.

In the Maldives, rights issues arising from the activities of large TNCs do not feature as a significant concern in the manner elsewhere in the region. Nevertheless, multi-national companies operate in the tourism industry in the Maldives, where serious issues relating to employees' rights and recruitment malpractices exist. These are intimately connected to the broader issues related to migrant worker rights, as discussed previously. MDN considers it necessary that the HRCM takes the initiative to begin addressing the issue of corporate accountability in the context of migrant workers, specifically in the tourism and construction industries. Additionally, the Commission is advised to focus attention on the domestic worker sector and play an active role in ensuring employer accountability in this area.

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48 *Rising migrant worker population threat to "Maldivianness, culture and nationhood" : President Waheed*, Minivan News, 13 January 2013, <http://minivannews.com/politics/rising-migrant-worker-population-threat-to-maldivianness-culture-and-nationhood-president-waheed-51088>

The HRCM informs that it “works closely with the judiciary to promote access to justice and other important matters related to the judiciary as a whole” through human rights awareness raising. The Commission reports that it has “drafted a paper on the role of public interest litigation in the work of NHRIs” which is awaiting the Commission’s formal endorsement. In its response, the HRCM added that “as of now, it is to be noted that the concept of public interest litigation has not been formally recognized by the courts in entertaining cases; although cases of this nature are on occasion pursued in the courts of law by the Commission; pursuant to its decisions.”

MDN acknowledges the HRCM’s efforts to engage with the courts and the challenges of such engagement with the judiciary given the serious structural and other key issues that exist in the justice sector as a whole, in the Maldives.<sup>49</sup>

Responding to the question relating to the HRCM’s engagement in mediation between various actors the Commission informed that :

“Upon receiving complaints, the HRCM seeks to find amicable solutions to violations of human rights. To achieve this, the HRCM engages in mediation between complaint(s) and victim(s) whose rights are infringed by different enterprises, governments and businesses. Victims of business related abuse mostly include resort workers teachers working in the private sectors and construction workers (among which majority of them are expatriate workers). The HRCM tries to mediate and reconcile such violations between the employer and the employee. Furthermore, if a state institution is deemed to violate a human right, the HRCM holds constructive dialogues with the state department(s) to find means to reach amicable long term solutions.”

The HRCM further informs that it assists victims of business-related abuse “to some extent” through its complaints-handling procedure and refers such cases to “the domestic jurisdiction and follows-up on the progress and redress afforded”. MDN is not able to comment on the effectiveness of the Commission’s performance in this area, in the absence of relevant information. Nevertheless, the fact that the HRCM informs that it is able to assist victims of business-related abuse “to some extent” indicates that significant room for improvement exists in this area.

The HRCM has not been advocating for the creation or amendment of laws identifying the obligation of business enterprises to respect human rights. However, the Commission informs that it has :

“advocated for the introduction of broad based and innovative sanctions on certain government institutions such as the Ministry of Human Resources Youth and Sports and the Labour Relations Authority based on the labour administration strategy, the draft

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49 See Maldives country visit report of the UN Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaut, 2013, UNOHCHR, [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-43-Add3\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-43-Add3_en.pdf)

of Maldives labour policy and the Principles on issuing permission to form Employment Agency, which gives details on the formation of Agencies. Mainly, the labour administration strategy includes the recommendations based on social security responsibilities, effective operations to ensure that the system is free and safe from corruption, conditions that should be met for a wage unit to be created, since the regulation and proper monitoring of the wage system is an important area through which worker and employer rights are maintained; since migrant workers are a highly vulnerable group whose human rights are at risk, to create a commitment that would represent their needs.

The draft of Maldives labour policy includes more steps be taken to improve the participation of persons with disabilities within the job market believing that governments should take an active role in encouraging affirmative action policies that enable people with disabilities to take part in the working sphere without obstacles. Since there is insufficient amount of information regarding sexual harassment at work places in the Maldives, this policy should identify areas needing further research, and launch ongoing research into these fields as this information would be very significant when drafting relevant policies. It also includes creating minimum standards required for hazard elimination and reduction in work environments, recommended the formation of regulations and policies to ensure the work places does not affect the environment.”

The Commission informs that it has made several recommendations to the labor policy including the “establishment of a tripartite wage board” and “a minimum wage for all workers in the country”. Further, it has recommended the capacity building of workers, employer forums and trade unions to “overcome obstacles”, improve working conditions and productivity. The Commission had recommended an amendment to the principles on issuing permits to create employment agencies. This is to increase the authorization fee from Maldivian Rufiyaa 30,000 to an amount greater than this. However, the Commission has not specified the higher amount.

According to the HRCM, it has been engaged in advocacy activities to endorse the ratification of the Convention on the Rights of Migrant Workers and their Families (CMW) with regional civil society organization Migrant Forum Asia. As part of its annual work plan to ensure the ratification of key treaties, the Commission informs that it has produced “a paper commenting on the reservations submitted by the government”. However, the HRCM informs that the Ministry of Foreign Affairs had notified the Commission that the Ministry of Gender, Family and Human Rights (created in 2012) “is handling the ratification of the CMW”, indicating this is no longer under the jurisdiction of the HRCM.

The HRCM informs that it provided its opinion to the parliament in 2011, on the ratification of the Rome Statue of the International Criminal Court. Additionally, “the Commission created a benchmark for the Convention on Domestic Workers (C189)”, among the eight core conventions of the International Labour Organization that the Maldives ratified in 2012.

According to the HRCM, the Commission is continuing to advocate for the National Human Rights Plan of Action. The HRCM is presently not actively engaged in monitoring the human rights impact of TNC activities and has not engaged in providing input towards policy or legislation in this area. Nor does it advocate TNCs and business enterprises to incorporate human rights impact assessment in their reporting regimes. The human rights impact of TNCs and businesses is not perceived as a “visible” issue in the Maldives context, which could explain the lack of attention in this area. However, the scope exists for much greater scrutiny and accountability of businesses operating in areas affecting the fragile ecosystems and natural environment of islands, which may have direct or indirect negative impacts on people’s health and livelihoods. This is particularly relevant in areas such as water and sanitation, solid waste management, land reclamation and harbor construction. For instance, the activities of large businesses can have direct negative impacts on the fragile natural reserves of island water sources, which can result in risk to health.

In relation to facilitating dialogue between various stakeholders in resolving issues, the HRCM informs that, “Should a violation of human rights related to business be lodged with the commission. HRCM facilitates constructive dialogue between all the relevant stakeholders, including the governments and business enterprises to find amicable solutions.”

Although the HRCM does not conduct audits of the enabling/disabling environment in which HRDs operate, the Commission informs that it has “advocated for appropriate protection of HRDs” through various means including press statements and through the complaints process. MDN’s view is that the Commission does not adequately advocate to protect HRDs, for the reasons already elaborated and discussed in this report.

The HRCM informs that the President of the Commission participated in the Asia-Pacific NHRI Conference on Business and Human Rights in 2011, and that information from this event was shared with staff.

MDN does not consider this an adequate level of capacity building in this area and urges the Commission to improve the institution’s knowledge and understanding of corporate business activity and human rights issues. MDN notes that in the Maldives, this is especially relevant in the area of environmental degradation and direct and indirect human rights violations linked to this. The Commission has thus far not undertaken any research to assess the impacts of business operations on communities or engaged in facilitating information to communities vulnerable to the negative impacts of activities conducted by businesses.

The HRCM responded positively to the question whether the Commission utilizes information obtained through review of domestic legislation and remedies, stating that, the “HRCM conducts policy reviews, handles complaints and also researches on various issues. After which follow up of reports, stakeholder meetings and constructive dialogues are done in order to promote awareness.”

With reference to the question regarding advocacy to include relevant human rights principles, norms and standards in training programs for relevant stakeholders, the Commission informs that "HRCM has so far not engaged specifically to include business related human rights standards in training programs of relevant stakeholders."

MDN appreciates the Commission's frank and direct responses to the questionnaires. With reference to responses to questions on the theme of corporate accountability, MDN notes that this is a new area for the Commission to engage. However, MDN is of the view that the Commission must include this area within its scope of work, specifically to address human rights violations of both individuals and communities due to business activity in the area of development and the natural environment.

## VI. Conclusion and Recommendations

Section I of this paper provided a very brief overview of the deeply concerning general human rights situation in the Maldives during the last year. A summary of a few elements relating to the independence of the HRCM is provided in section II, including the composition of the Commission where representation of civil society or human rights activists is not evident. In addition, it was noted that the appointment process of Commissioners need strengthening.

Section III provided commentary on the effectiveness of the Commission. Here, it was observed that a series of challenges and limitations exist, specifically in relation to the HRCM's ability to deal with sensitive issues in the country context and timely response to incidents involving serious violations. The accountability of the HRCM was discussed in section IV, largely focusing on the information provided in the Commission's *2012 Annual Report*.

It is evident that the Commission worked on a variety of areas over the year, but stressed that 2012 was the most challenging year in the Commission's history. It is notable that contrary to previous years, the People's *Majlis* has thus far not called on the HRCM to review its *Annual Report*. The Commission informs that it is in the process of pro-actively seeking this opportunity.

Section V discusses detailed information provided by the HRCM, on the two thematic focus areas of the *2013 ANNI Report*. MDN observes with appreciation and satisfaction that the Commission provided detailed and at times, frank responses to many of the questions asked. With reference to the first thematic area, MDN observes with regret, that the Commission falls short in carrying its mandate to perform the role of defender of HRDs. At the same time, MDN notes the encouraging recent developments where the Commission is taking some steps in the right direction to become a stronger advocate in addressing human rights issues. With regards to the second thematic area on monitoring corporate accountability, it is clear that the HRCM needs to put concerted effort into this "new" area to ensure that businesses are accountable for human rights violations resulting from business related activities.

While MDN is unable to establish the status of many of the recommendations made in previous *ANNI Reports* due to delay in receiving responses from the HRCM, it is evident that in general, several recommendations from the 2011 and 2012 *Reports* remain unchanged. In the above discussion also, some pending recommendations have been noted, such as the whistle-blowing legislation and the recommendation to establish a dedicated desk for HRDs at the Commission. Among other notable recommendations awaiting progress is the completion and publication of the assessment report on human trafficking, which is yet to be published. MDN hopes that an update of the status of previous recommendations will be forthcoming.

### **Recommendations to the People's *Majlis***

- MDN reminds and recommends the Independent Institutions Oversight Committee of the People's *Majlis* to scrutinize the *Annual Report* of the HRCM in a timely manner, to ensure that proper and essential oversight is afforded to support and oversee the Commission's work, by the Committee.

### **Recommendations to the Ministry of Home Affairs**

- MDN reminds the Ministry of Home Affairs (MoHA) and departments under the MoHA that the HRCM is provided legal powers to "without prior notice inspect any premises where persons are detained under a judicial decision or a court order".<sup>50</sup> Noting the very disturbing report of the failure of relevant authorities to recognize and observe this legal power of the HRCM in some instances, MDN strongly recommends the MoHA to fully respect and observe Article 21(c) of the HRCA 2006.

### **Recommendations to the Human Rights Commission of the Maldives**

- The Commission must significantly strengthen existing mechanisms to address rights violations cases involving sensitive issues that may be difficult to address in the existing country context, which increases the vulnerability of victims. MDN recommends the Commission to introduce ways and methods and/or seek necessary professional support and/or advice from available national and international sources to attend to such issues/cases effectively.<sup>51</sup>
- Engage pro-actively and much more closely with individual and associations of human rights defenders and provide practical and moral support to HRDs to encourage and foster an enabling environment that would nurture HRDs. The Commission is encouraged to adhere to and observe Article 2(c) of the HRCA 2006 much more actively than it does presently.

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<sup>50</sup> Article 21 (c), HRCA 2006

<sup>51</sup> MDN appreciates that complaints-handling and investigation are challenging areas and draw the Commission's attention to the July 2013 resource published by the Asia Pacific Forum entitled "Undertaking Effective Investigations". (<http://www.asiapacificforum.net/news/files/investigations-manual-for-nhris>)

- The Commission must make efforts to be much more assertive in acknowledging and recognizing HRDs as HRDs, regardless of the cultural/social/political sensitivity of the issue involved. The Commission is reminded that as defender of HRDs, the Commission's initiative in this regard is critical to provide an enabling environment for HRDs to be pro-actively involved in promoting and protecting fundamental freedoms and basic human rights, as provided in the Constitution.
- MDN recommends the Commission to be more assertive in fostering a culture of human rights. For instance, the Commission could use opportunities such as the "negative" public perception that the HRCM protects the rights of "criminals" as a result of the work of the NPM, to educate and inform the public on the State's responsibility to protect the rights and human dignity of those who have lost their liberty.
- MDN considers it necessary that the HRCM take the initiative to begin addressing the issue of corporate accountability in the context of migrant workers, specifically in the tourism and construction industries. The Commission is advised to focus attention on the domestic worker sector and play an active role in ensuring employer accountability in this area to protect the fundamental rights of vulnerable domestic workers.
- MDN recommends the Commission to increase its knowledge and understanding of the extent of human rights violations that occur due to business activities which degrade and destroy the natural environment. Further, that the Commission strengthen its capacity to advocate to protect human rights violations that result from corporate negligence in activities relating to the natural environment on which communities depend for habitation and livelihoods.

# Nepal: Yet to Rise to Post-conflict Challenges

Informal Sector Service Centre<sup>1</sup>

## I. General Overview

As recipient of 'A' status accreditation of the ICC in 2011, the National Human Rights Commission (NHRC) is challenged with continued monitoring of the human rights situation in Nepal as well as maintenance of its independence and effectiveness in the protection of human rights in this post-conflict period. The human rights of the people are at risk and the Commission is responsible for making sure that the government pays heed to its recommendations to improve the situation of human rights in the country.

The year 2012 witnessed the non-promulgation of the Constitution; dissolving of the Constituent Assembly (CA); and political parties urging for fresh elections. These political ups and downs have hindered the peace process. The inability of the Constituent Assembly (CA) to promulgate a new Constitution raised serious implications in Nepal. Following the Supreme Court decision on the non-extension of the CA tenure, the nation witnessed the serious absence of the 'Separation of Powers' between the three branches of government; and 'checks and balances' in state administration after the Chief Justice, Honorable Khil Raj Regmi, was appointed as the Chairperson of the Cabinet of Ministers and the *de facto* Prime Minister of Nepal.<sup>2</sup>

The formation of the Truth and Reconciliation Commission also remained undone in 2012. The rights of the victims seeking for justice from the 10 year long conflict remained unanswered. Though the Truth and Reconciliation Ordinance was adopted in 2013, various complaints to the Supreme Court of Nepal of it being incompatible with international human rights principles stalled its operation. The National Human Rights Commission also expressed its concern over the non-compliance of the Act with human rights principles.

However, one of the positive achievements despite the Constitution writing failure was the re-integration of the Maoist ex-combatants. About 10 percent of the verified Maoist combatants expressed their willingness to join the Nepal Army. On 25 November 2012, 1,460 of them joined the training under Nepal Army. Also, the government provided the relief amount for those who opted for voluntary retirement ranging from NR 500,000 to 800,000.<sup>3</sup> However, those former combatants who have been tagged "disqualified"

<sup>1</sup> Prepared by Bijaya Raj Gautam, Executive Director of INSEC, Nepal

<sup>2</sup> March 2013

<sup>3</sup> Nepal Human Rights Yearbook 2013, INSEC, p. 8

knocked at the door of NHRC, expressing their grievances and the humiliation they have faced being tagged as “disqualified”.<sup>4</sup>

Along with the wide range of political instability in Nepal, the nation also faced various other rights violations including impunity<sup>5</sup> and the withdrawal of the cases of non-political nature<sup>6</sup>, increased number of Violence Against Women (VAW) cases, and the “Occupy Baluwatar”<sup>7</sup> movement as a response to VAW; the arrest of Colonel Kumar Lama<sup>8</sup> in England; attacks on human rights defenders<sup>9</sup> like journalists, etc.

The Commission involved itself in urging the concerned governmental and non-governmental agencies to stop the activities that violate the human rights of the citizen. It also expressed its concern over the issues of impunity, security, transitional justice, equality etc. The Commission has made efforts writing to the government on the issues of the case withdrawal, violence against women, truth and reconciliation, relief to the victims of conflict, consumer rights and many others.

The Commission adopted the Exhumation Guidelines on 1 June 2012 which is a milestone of human rights endeavors in transitional and other post-conflict situations. The NHRC said the Guideline was issued in order to investigate into the bodies buried after extrajudicial killing and to provide justice to the families of the victims.<sup>10</sup>

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4 Press Release of 18 September 2012. 2012 available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/PR-2069-06-02-MB-combat-eng.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/PR-2069-06-02-MB-combat-eng.pdf)

5 In one case, Bal Krishna Dhungel, who was serving as Constituent Assembly member, was convicted of murder of Ujjan Kumar Shrestha by the Supreme Court and sentenced to life in prison but the government recommended to the President for his pardon without him being arrested. The President said he would decide on the matter later creating a stalemate and Dhungel continues to walk free

6 In the Comprehensive Peace Agreement, both sides have agreed to have the cases of political nature to be investigated by Truth and Reconciliation commission. However, this provisions have been misused by the governments to provide impunity to the cadres of political parties. Many convicts were released or accused remained free by the government agencies just because they were affiliated to the political parties. This has created a culture of impunity where being close to a political party means exemption from regular criminal justice procedures. (Serious crimes, <http://www.ekantipur.com/the-kathmandu-post/2011/06/23/oped/serious-crimes/223221.html>)

7 Baluwatar is the official residence of the Prime Minister

8 Colonel Lama, 46, was arrested in East Sussex, England on the charge of inflicting severe torture on Janak Bahadur Rawat and Karam Hussain during custody between April and October in 2005 when he was in charge of the Nepal Army's Goringhe barracks in Kapilvastu district. This is the first case in Nepal's history wherein a serving security officer has been arrested in a foreign land for human rights violation under universal jurisdiction

9 Rights of a total of 264 human rights defenders were violated in 2012 among them out of which five lost their life. Nepal Human Rights Yearbook 2013. INSEC. pp 109-118

10 Press Release, 27 June, 2012, [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/Press%20note%20-%20exhumation%20guidelin.JPG](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/Press%20note%20-%20exhumation%20guidelin.JPG)

## I. Independence

### A. Law or Act?

The National Human Rights Commission (NHRC) of Nepal was established in 2000 as per the Human Rights Commission Act 1997. The Interim Constitution of Nepal of 2007 upgraded it as a constitutional body making a new Act necessary to meet the new status. Part 15, Article 131 of the Constitution notes that there shall be a National Human Rights Commission in Nepal consisting of one retired Supreme Court justice as the Chairperson and four others from amongst persons who have provided outstanding contribution, being actively involved in the field of protection and promotion of human rights or social work.

The National Human Rights Commission has received a shot in the arm by retaining its 'A' status in its accreditation with the International Coordination Committee of the National Human Rights Institutions (ICC).<sup>11</sup> Remaining in stalemate for a long time, the NHRC Bill was enacted by the Constituent Assembly in the capacity of the Legislature-Parliament pursuant to Article 83 of the Interim Constitution of Nepal, 2007. The Bill was originally tabled four years ago but passed only in January 2012. Media reports said that the International Coordinating Committee for National Human Rights Institutions was going to conduct a 'special review' of Nepal's National Human Rights Commission in the context of implementation of new NHRC Act 2012 as per the ICC statute provision of review as to whether the circumstances of the Act in any way may affect its compliance with the Paris Principles. However, the review has been rescheduled for 18-22 November 2013 in Geneva.

In the process of the drafting of the Act, NHRC held a consultation meeting on 31 July 2007<sup>12</sup> where different stakeholders representing different organizations participated. The Drafting committee comprised of the representatives from the Office of the Prime Minister, Ministry of Law and Justice, Legal Officer of NHRC. The consultative meeting emphasized the inclusion of the best practices of other NHRIs, providing fullest strength for its functioning and its incorporation as per the Interim Constitution of Nepal 2007. However, on the other hand, donors and civil society activists claim that the Act was made without public consultation.<sup>13</sup>

The Paris Principles require NHRIs to have financial independence as well. The Nepali provision runs contrary to that principle as the Act prescribes the approval of the Finance Ministry for budgetary matters.<sup>14</sup> The Asia Foundation, a US-based donor agency to the NHRC, observed the lack of independence of the Commission as the rights body has to seek approval from the government to issue cheques, alter the budget, and all the financial

<sup>11</sup> NHRC e-Bulletin, Vol. 6. Issue 12, June 2011

<sup>12</sup> NHRCE-Bulletin, Vol. 5, No. 6, p. 1, 2007, [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/E-bulletin-Vol5-6.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/E-bulletin-Vol5-6.pdf).

<sup>13</sup> Government Hobbles Human Rights Commission, IRIN, 18 October 2012, <http://reliefweb.int/report/nepal/government-hobbles-human-rights-commission>

<sup>14</sup> Section 20 (2)

matters are controlled by the government.<sup>15</sup> The financial dependence of the Commission upon the government challenges the autonomy of the NHRC.

The NHRC is authorized to recommend changes in Nepalese laws to make them compatible with international human rights standards; or to recommend the government to be a state party to any state mechanism.<sup>16</sup> It may recommend the government to make new laws or make amendments to the law that are not human rights friendly and also may recommend the government to ratify the international human rights law. It can also provide advice to the government if it seeks to become party to any international/regional human rights treaty, pursuant to sub-article 5 of the enabling law.

However, the role of the National Human Rights Commission is not visible during the time when its effective functioning is required. The Act is silent about its increased responsibility during a state of emergency. The absence of legal mandate of monitoring human rights during the state of emergency, where human rights are at greater risk, has de-valued the essence of the Act and the existence of NHRC.

However, the NHRC is mandated to receive and review complaints that have been lodged at the Commission. This mandate of the Commission provides room for victims to lodge complaints against human rights violations that occurred even during the conflict. The NHRC counters this point stating that even the previous Act was silent about the state of emergency but that did not stop the rights body from raising voices against the human rights violation occurred during the state of emergency and the direct rule of the king.<sup>17</sup>

Statutory limitation is imposed on the Commission to prevent it from intervening in the cases of human rights violations if they are not reported within six months of occurrence<sup>18</sup> which discourages the victim to fight for justice. A writ has been filed in the Supreme Court against the government demanding that the new National Human Rights Commission Act be scrapped for contravening the constitutional and international legal provisions. The writ challenges the time limitation clause, the provision which states the set-up of the organizational structure by the government to implement the NHRC and other agencies' recommendations.<sup>19</sup>

The internal problems among the NHRC members have greatly affected the performance. As two out of five members are not cooperating in the functioning of the rights body, the body has, effectively, incomplete composition. Two dissenting members, Leela Pathak and KB Rokaya have also accused the other members and the Secretary to the Commission of corruption.<sup>20</sup> Such situation has not given a unified voice of the NHRC.

15 Abrahams, Pemba. New Act a Blow to Human Rights in Nepal. <http://asiafoundation.org/in-asia/2012/03/14/new-act-a-blow-to-human-rights-in-nepal/>

16 Section 6 of the NHRC Act, 2012, [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/1220248844\\_National+Human+Rights+Commission+Act.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/1220248844_National+Human+Rights+Commission+Act.pdf)

17 NHRC letter to INSEC, 15 August 2013 commenting on a draft version of this report

18 Section 10 (5), [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/1220248844\\_National+Human+Rights+Commission+Act.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/1220248844_National+Human+Rights+Commission+Act.pdf)

19 Writ in SC challenging the provisions in NHRC Act available at <http://www.ekantipur.com/the-kathmandu-post/2012/04/01/top-story/writ-in-sc-challenging-provisions-in-nhrc-act/233317.html>

20 NHRC members seek CIAA help. The Kathmandu Post. <http://www.ekantipur.com/the-kathmandu-post/2012/04/20/nation/nhrc-members-seek-ciaa-help/233985.html>

## A. Relationship with the Executive, Legislature, Judiciary, and other specialized institutions in the Country

The Commission can itself initiate the investigation/inquiries to instances of violation or abetment of violation of human rights of any person or group pursuant to article 132(2) (a) of the Interim Constitution of Nepal. NHRC also has the right of full cooperation of the public authorities and generally that happens in practice too. NHRC can visit any place without any prior notice where some kind of violation is occurring or has the potential of occurring.

Constitutionally and legally, NHRC has free access to detention centers and other government institution. In practice, though, sometimes some trifle frictions occur, but that is mainly due to personal and technical difficulty and not at the policy level.

Nepal's Army Act of 2007 has barred NHRC from intervening in the jurisdiction of Army court. Article 132 of the Interim Constitution of Nepal also mentions that the matters falling within the jurisdiction of Army Court cannot be reviewed by the NHRC. However, the NHRC has stated in a letter to INSEC that the Constitution allows it to cross the line if there is a systematic nature or practice of human rights violation.<sup>21</sup>

The Commission was directed to submit a written explanation by the Supreme Court for the allegation made by the Nepal Army Major Prajwal Basnet for failing to protect and promote his human rights. The petitioner made a complaint to the court as the Commission refused to conduct an investigation into his complaint, stating that the Commission does not have any jurisdiction over Nepal Army. The SC directive has come after a writ was filed in the SC demanding a mandamus to make NHRC investigate the cases of rights violations in the Nepal Army (NA).<sup>22</sup> Maj Basnet was court martialled on disciplinary action. He claims that he was wronged by Army Court and has moved court for justice. NHRC claims that the demand for restoration of his job and promotion made by Basnet is a legal matter and can be realized if the SC issues a writ of Certiorari.<sup>23</sup>

Pursuant to Article 133 (1) of the Constitution, the Commission is required to submit its *Annual Report* to the President, and the President through the Prime Minister shall submit the report to the Legislature-Parliament. Article 132 (2) confers the right to the Commission to forward its recommendation to the concerned authority to take departmental action against who is responsible for human rights violation. The Commission can lodge a petition in the court, and exercise the same power as the court<sup>24</sup> to appear before the Commission for recording their statement and information or examining them, receiving and examining the evidence, ordering for the production of physical proof. It may also order compensation for victims of human rights violations.

21 NHRC response to the draft 2013 ANNI Report prepared by INSEC, dated 15 August 2013

22 SC seeks NHRC's explanation available at <http://www.ekantipur.com/the-kathmandu-post/2012/02/17/nation/sc-seeks-nhrCs-explanation/231674.html>

23 That is, an administrative law remedy to speeden the proceedings. NHRC response to the draft 2013 ANNI report prepared by INSEC dated 15 August 2013

24 Article 133(3) of the Interim Constitution of Nepal 2007

The 2012 *Annual Report* of the Commission accused the government of not taking its recommendations with regard to the protection of human rights seriously.<sup>25</sup>

Recently, the Supreme Court has decided a case which has scrapped some sections in the National Human Rights Commission Act that calls for reporting of conflict era cases within six months of the incidence and the authority given to the attorney general to decide on initiating cases. The decision now allows the Commission to initiate the case without the approval of the Attorney General.<sup>26</sup> It is important to now know what would be the next step of the NHRC in rendering justice to past complainants against human rights abuses where the statutory limitations stopped the NHRC from investigation of the abuses. And also what would be the mechanism to address the concern of the victims who came to the NHRC when the case was under consideration of the Court.

## B. Membership and Selection

The Commissioners of NHRC are appointed by the Constitutional Council and there is no public calling for the applications. The Constitutional Council recommends to Parliament the names of the Commissioners. NHRC Commissioners are appointed for six years of tenure. Their condition of services is equal to the judges of the Supreme Court. They are appointed by the head of state on the recommendation of the Constitutional Council. Their appointment would be confirmed after the parliamentary hearing; and there is no direct role of the government officials in their appointment. In case of serious misconduct, they can be removed through the impeachment by two-thirds majority of the Parliament as equal to the judges of the Supreme Court.

The Constitution prescribes the inclusion of people from all fields including women.<sup>27</sup> The present composition of Chief Commissioner and four members is satisfactory. Justice Kedar Nath Upadhyaya, formerly the Chief Justice of the country heads the Commission. Justice Ram Nagina Singh, Mr. Gauri Pradhan, Dr. Leela Pathak, and Dr. K.B. Rokaya are the current Commissioners.

The Chief Commissioner or the members can be removed from their offices on the same ground and manner as has been set forth for removal of a Judge of the Supreme Court.<sup>28</sup> According to Article 105 (1), the removal of the chief commissioner or the members should be like the removal of a Judge of the Supreme Court. The constitutional provision for removal of the Supreme Court Judge is that either the Chief Justice submits his/her resignation to the Council of Ministers or a Judge submits his/her resignation to the Chief Justice; or he/she attains the age of 65; or the Legislature-Parliament passes a resolution of impeachment; or if he/she dies.

25 Impunity worries rights commission, see <http://thehimalayantimes.com/fullTodays.php?headline=Impunity+worries+rights+commission&NewsID=356982>

26 NHRC can now Probe, file rights cases on its own available at <http://www.ekantipur.com/the-kathmandu-post/2013/03/06/top-story/nhrc-can-now-probe-file-rights-cases-on-its-own/246060.html>

27 Article 131 (2) of the Interim Constitution of Nepal 2007

28 Article 131 (4) of the Interim Constitution of Nepal 2007

Under Article 105 (2), a proposal of impeachment may be presented before the Legislature-Parliament against the Chief Justice or any other Judges on the ground that they are unable to perform their duties for the reasons of incompetence, misbehavior, failure to discharge the duties of his/her office in good faith, physical or mental condition, and if by a two-thirds majority of the total number of its members existing for the time being passes the resolution, he/she shall *ipso facto* be relieved from his/her office. Clause (3) of same Article says that the Chief Justice or the Judge, against whom impeachment proceedings are being initiated pursuant to clause (2) above, shall not perform the duties of his/her office until the proceedings are final.

The tenure of the current Chief Commissioner and the Commissioners ends on September 2013. Thus, if the transparency in nomination and appointment of the NHRC membership and selection is to be ensured the calling of the open application, public hearings etc. should commence as early as possible. This would ensure that no positions are left vacant, which would adversely affect the functioning of the Commission and create a situation where the human rights of the citizen are at greater risk of lack of protection.

### C. Resourcing

The Government is the source of finance for the Commission. The Secretary of the Commission can prepare the annual budgets that are required for the functioning of the Commission<sup>29</sup> but again the approval of the budget of the NHRC is done by the Ministry. Also, it requires the approval of the government if it wishes to accept grants from external agencies.

Bilateral and multilateral aid is crucial for the NHRC in Nepal, as the government has not provided enough resources.<sup>30</sup> Since the approval from the Ministry of Finance is required for the travel and investigation expenses, the shortcomings in resourcing is a negative aspect of the Commission.

There are 5 regional offices of the Commission and 3 sub-regional offices. The Strategic Plan of 2011-2014 has included a plan to add three more sub-regional offices within the period.

## II. Effectiveness

Complaints-handling remains as the primary activity of the NHRC. The Act in Section 10 requires the complaint to be registered within the six months of the violation of the human rights or abetment, verbally or in any other manner. Thereafter the Commission may start the preliminary investigation and if the violation of the human rights or its abetment is seen, then the Commission can request the concerned agency to stop such act.<sup>31</sup> Appointment of the investigating officer or team can be done if the preliminary investigation shows

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29 Section 28 (5) (b)

30 Sian Herbert, Aid to National Human Rights institutions, Helpdesk Research Report (19 April 2013), GSDRC available at <http://www.gsdrc.org/docs/open/HDQ928.pdf>

31 Section 11

there has been violation of human rights or abetment. Such team is required to submit the report to the Commission, and if necessary the Commission shall seek expert service and collect evidence and go through the public hearings.<sup>32</sup> If the complaint is seen to be baseless then the Commission may keep the complaint on hold or dismiss it and it is to be notified within fifteen days.<sup>33</sup>

A total of 276 complaints related to killing, disappearance, abduction, torture, threat and arbitrary arrest were received by NHRC during the year 2012. Complaints were also received on the issues related to property capture, internal displacement, discrimination, extortion, social and economic rights, women and children's rights and rights of indigenous people.

As per the proof received after monitoring and investigation under protection of human rights, NHRC has recommended the government for action against the accused, relief and reparation to the victim. During the year 2012, NHRC had monitored 212 cases of human rights violation. NHRC had given its decisions on 394 complaints. As in previous years, NHRC as the office of the national rapporteur, carried out a study related to current situation of human trafficking, challenges and necessary coordination for combating the issues.

Over the issues related to killing, explosion, disappearance, displacement, torture, threat, detainees' rights, child rights, women rights and the rights of the minority groups, NHRC decided to suspend, end, and keep on hold, 370 complaints. Of them, 320 complaints were concluded, 45 were annulled and five remained pending. Recommendation has been made on 104 complaints after investigation and policy level recommendation has been made in 35 complaints. NHRC is also carrying out promotional activities for the development of human rights culture. Interaction, workshops and discussion programs were organized among political parties, civil society, journalists, human rights activists, teachers, students and professional organizations over the issues of human rights.

In 2012, NHRC organized 312 programs. Among them, 246 programs were organized by NHRC and 66 others were organized in coordination with other organizations. Of them, 74 were interactions, 57 were trainings, 18 orientations, 15 day celebrations, workshops 24, sports 3, blood donation 2, peace rallies 8, discussion 33, meetings 68 and two programs each related to dialogue, awareness and debate.<sup>34</sup>

In the fiscal year 2068/69 (July 2011-July 2012), the Commission registered 276 complaints of human rights violation at various departments.<sup>35</sup> The complaints were related to death, displacement, property encroachment, torture, abduction/kidnapping etc. The following chart displays the status of complaints received by the NHRC and recommendations made by it:

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32 Section 12

33 Section 13

34 Pradhan, Gauri. Nepal Human Rights Yearbook 2013. INSEC. pp. 458-460

35 Annual Report of NHRC, 2068-2069, p. 46

| Fiscal Year | Complaints Received | Recommendations for compensation or other proceeding | Decisions |          |           | Re-follow up (related to threat) | Policy Recommendations |
|-------------|---------------------|--|-----------|----------|-----------|----------------------------------|------------------------|
|             |                     |  | Hold      | Finality | Dismissal |                                  |                        |
| 2011-2012   | 276                 | 104  | 4         | 320      | 45        | 18                               | 35                     |

Complaints were received in various regional and sub-regional branch offices of NHRC. The Central region received 94 complaints; Mid-Western received 38 complaints; 14 and 9 complaints were received from Western and the Far West respectively and 46 and 28 complaints were received from the two regional offices in eastern region.<sup>36</sup> A total of 212 monitoring visits were made by the Commission in this fiscal year<sup>37</sup> which were done on the issues of Strikes, Detention centers, Women Rights, Rights of the disabled people; health rights etc.

394 investigations were made by the Commission which were mostly related to the incidents of the 10 year long conflict.<sup>38</sup> Complaint handling and Compensation Determination Regulation, 2069 (2013) and Complaint Handling Guidelines, 2013 has also been adopted.

The *Annual Report* of the Commission has itself identified that the limitation of filing the complaints of violation within six months' time, non-existence of strong mechanism for judicial proceedings in the reported cases; absence of effective implementation of the recommendations made by the Commission; and the absence of financial and administrative autonomy, has challenged the continuous effective functioning of the Commission.

NHRC hosted the International Conference on Cooperation between the NHRIs for the Protection and Promotion of Human Rights of the Migrant Workers on 26-27 November 2012. The conference adopted Kathmandu Resolution 2012<sup>39</sup> that stressed the combined effort of the NHRIs in ensuring the human rights of the migrant workers and their families. The Office of the Special Rapporteur on Trafficking of women and children (OSRT) was established in 2002 at the Commission. It submitted its first report on 2002 and now OSRT has recently published its national report on the Trafficking in Persons especially women and children.<sup>40</sup>

The Commission has also recommended the government to ratify the Convention on the Rights of the Migrant Workers and their families (CRMW).

<sup>36</sup> Ibid.

<sup>37</sup> Annual Report of NHRC, 2068-2069, p. 47

<sup>38</sup> Ibid.

<sup>39</sup> Available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/1309479207Migrant%20Workers%20Kathmandu%20Resolution%202012.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/1309479207Migrant%20Workers%20Kathmandu%20Resolution%202012.pdf)

<sup>40</sup> Trafficking in Persons especially women and children, National Report 2011, Prepared by OSRT on December 2012, NHRC Nepal, see [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/National%20Report%20on%20Trafficking%20in%20Persons%20%20Especially%20%20on%20women%20and%20Children%20in%20Nepal%20-%202012.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/National%20Report%20on%20Trafficking%20in%20Persons%20%20Especially%20%20on%20women%20and%20Children%20in%20Nepal%20-%202012.pdf)

The Commission in the year 2012 expressed its concern over consumer rights after adulteration of products, artificial price hikes etc. were rampant in the market. The Commission emphasized the necessity of a fast track court on consumer rights. A series of interaction programs were held by the Commission. The Commission endorsed the Protection and Promotion of Human Rights of Consumers and Monitoring Guidelines – 2068 (2012 AD) which has also duly incorporated the issues regarding the protection of human rights of consumers within their jurisdiction.<sup>41</sup>

The withdrawal of the case of criminal nature<sup>42</sup> by the government has remained as a striking issue for NHRC. The Commission expressed its concern over the decision of the government to withdraw the cases.

### III. Consultation and Cooperation with Civil Society

Even though there is no special provision in the law of the Commission that strictly requires it to work with civil society organizations, the NHRC being involved in advocacy for the protection and promotion of human rights; the working domain of civil society organizations and the NHRC overlap. The CSOs and the NHRC jointly organize programs at the central as well as local level. The Commission involves the CSOs during any kind of consultations, programs or the trainings. For instance, in the training held by NHRC on 22-24 March 2012, on the theme "Investigation and Monitoring of the cases related to Transitional Justice", the representatives of CSOs also participated along with the National Women's Commission, Office of the Attorney General, Bar Council etc.<sup>43</sup>

The special mission from the central office that accomplished the investigation of backlog complaints met the Civil Society Organization for the consultation in the issue.<sup>44</sup> Civil Society Organizations participated in the Workshop on Transitional Justice that was held between 9-11 December 2012 along with the human rights activists, lawyers, journalists including the conflict victim and their families.

The Commission is merely engaged in attending as the guests in various programs and inviting the civil society in its programs. It can submit its findings and recommendations to the government; however, the government is limited to delivering assurances on adherence to findings and recommendations. The NHRC has been complaining about lack of implementation of its recommendations. If it decides to take the support of the civil society to exert pressure on the government and other government authorities to implement its recommendations, then the government might bow down.

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41 Press Release of 14 March, 2013 available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/PR-Consumer%20Rights%20Day%20Eng%2015-03-2013.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/PR-Consumer%20Rights%20Day%20Eng%2015-03-2013.pdf)

42 Case Withdrawal And Its Consequences, [http://www.gorkhapatra.org.np/rising.detail.php?article\\_id=53339&cat\\_id=7](http://www.gorkhapatra.org.np/rising.detail.php?article_id=53339&cat_id=7).

43 Available at [http://nhrcnepal.org/nhrc\\_activities\\_details-20.html](http://nhrcnepal.org/nhrc_activities_details-20.html)

44 NHRC, Human Rights e-newsletter, Issue 1, volume 9, January 2013

Similarly, NHRC has also introduced Guidelines<sup>45</sup> to coordinate with the Civil Society Organization (CSO) has made it more complicated for the CSO's to collaborate with NHRC.<sup>46</sup> The Guidelines make an instruction for written consent of the NHRC before planning any activity or project. If any work is conducted without such consent, the NHRC does not recognize such activity. The long format to be used by the Civil Society Organization proposing for cooperation makes it a cumbersome process, thus decreasing such joint work.

The Commission is also highly concerned about the rights of the Human Rights Defenders. Though there is no formal desk on the Human Rights Defenders at the NHRC, the Commission has expressed its concern over the rights and duties of the human rights defenders. Coinciding with International Human Rights Defenders Day, the regional office of the commission jointly with INSEC and Education Club Pokhara held an interaction program on the rights and duties of the Human Rights Defenders.<sup>47</sup> A conference of Human Rights Defenders was also held between 8 and 9 October 2012. The Human Rights Defenders Directive, 2069 in Section 11 provides for the role of the responsibility of the NHRC for strengthening the role of defenders and making them accountable and transparent.<sup>48</sup>

## IV. Conclusion and Recommendations

The NHRC in Nepal is established by the law and has been reduced to an administrative arm of the executive from an independent constitutional body because of the lack of financial and administrative autonomy. Adequate funding and autonomous management of the financing is utmost requirement for the Commission. The functioning of the Commission itself is hampered by its internal conflicts related to the non-participation of two sitting Commissioners in the meetings and consultation and the alleged irregularities within the organization. Also, the non-implementation of the recommendations made by the concerned agencies is another biggest challenge of the Commission in ensuring rule of law and fighting against the culture of impunity. Strong cooperation and collaboration with rights based organizations to pressurize the government in implementation of the recommendations is necessary.

### Recommendations to the Government of Nepal

- Take human rights seriously and do not compromise with the political parties' demand for impunity to those guilty of violations;
- Respect the recommendations of the NHRC and execute them;
- Ensure the policy and financial independence of the Commission.

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45 RastriyaManav Adhikar Aagoydwara ParitManav Adhikar Sambandhi Nirdeshikaharu, [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/HR%20Defender%20Guideline-Nep2069.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/HR%20Defender%20Guideline-Nep2069.pdf) pg. 21-36

46 NHRC staff who requests anonymity

47 NHRC, Human Rights e-newsletter, December 2012, Volume 8, Issue 6, p. 5

48 Directive No. 11, Human Rights Defender Directive, 2012

## **Recommendations to the National Human Rights Commission of Nepal**

- Be more demanding to the government for implementation of decisions;
- Keep raising voice against government decisions that go against the spirit of human rights justice;
- Have more engagement with the NGOs.

# Pakistan: Delay and Uncertainty in Establishing the National Commission for Human Rights

Potohar Organization for Development Advocacy (PODA)<sup>1</sup>

## I. General Overview

Pakistan's human rights situation has been steadily deteriorating over the past decade. In 2010, Human Rights Watch (HRW) declared that it had been the worst year for Pakistan in preserving human rights, citing the increasing levels of enforced disappearances and attacks on religious minorities by religious extremists.<sup>2</sup> In its *2012 Report*, the Human Rights Commission of Pakistan (HRCP), a non-governmental and leading human rights organisation in Pakistan, described the situation as "murky".<sup>3</sup> Sectarian violence, rise of religious extremism and increase in terrorist attacks against civilian, police and military personnel in Pakistan are some of the most prominent issues seen over the past several years in the country. Cases of violence against women and attacks on journalists also increased in recent years and Amnesty International has highlighted the issue of extra-judicial killings and enforced disappearances as a major concern in Pakistan.<sup>4</sup>

On 31 May 2012, president Asif Ali Zardari of Pakistan signed the 'National Commission for Human Rights Act 2012',<sup>5</sup> beginning the process for the establishment of a national human rights institution in the country.<sup>6</sup> Unfortunately, the progress has been very slow and marred by political uncertainty. The general elections were announced in 2012 and most decisions were deferred to the new government.

Since supporting the UN General Assembly Resolution on the Paris Principles, Pakistan has been slow to fulfil its obligation to establish a national human rights institution. The Pakistani government has been discussing plans for establishing the Pakistan National Commission for Human Rights (PNCHR) since 2004; and even presented a draft to the Parliamentary Committee on Law, Justice and Human Rights in February 2005.<sup>7</sup> These attempts, however, were not very successful and the issue was side-lined.

1 Prepared by Sachchal Ahmad, Researcher at PODA.

2 Express Tribune. "National Commission for Human Rights: Bill Approved to Create Independent Rights Body". 28 January 2011

3 Human Rights Commission of Pakistan. *State of Human Rights in 2012*. March 2013, p. 1

4 Amnesty International. *Annual Report 2012*, Available at: <http://goo.gl/muqCae>

5 Full text of the Act is available at: <http://goo.gl/yQfu5p>

6 Express Tribune, Pakistan. "Zardari endorses formation of National Human Rights Commission", 30 May 2012

7 Asia Pacific Forum. *Report of the APF Technical Assistance Mission to Pakistan on the Development of a National Human Rights Institution*. October 2005, p. 4

A reworked version of that Bill was presented after recommendations made during Pakistan's Universal Periodic Review (UPR) by the UN Human Rights Council in 2008. Pakistan stated during the UPR that work on establishing national commission was underway and assured the Council that a Commission would be set up soon.<sup>8</sup> On 17 December 2008, a draft Bill was presented in the National Assembly and referred to the Assembly's Standing Committee on Human Rights for review. However, the Committee was only able to present its report on the bill two years later, on 4 January 2011.<sup>9</sup> The Bill was eventually passed by parliament on 9 March 2012, months before the next UPR was to be held.<sup>10</sup>

The revised Bill (compared to the 2005 version) brought in clauses to improve the selection process, making it subject to the decision of a parliamentary committee rather than direct appointment by the president. Membership criteria previously required the inclusion of members of parliament as Commissioners, but the later bill, on recommendations made by various commentators<sup>11</sup>, removed this and opened membership to all qualified candidates as chosen by a cross-parliamentary committee.<sup>12</sup> <sup>13</sup> Another significant change was the inclusion of clauses that prescribed special mode of investigation for the armed forces, and excluded intelligence agencies from the purview of the Commission.

Since the signing of the Bill there has been little progress on the task of establishing the Pakistan National Commission for Human Rights, a fact also highlight by the non-governmental HRC in its annual human rights report.<sup>14</sup> Doubts have been expressed over the state's commitment to establishing an independent and effective human rights commission. The manner in which the promulgation and implementation of the bill is being handled as well as the statements of objectives and reason within the Bill indicate that the government does not truly believe in the necessity of such an institution for the betterment of human rights in Pakistan.

For instance, the 2012 Bill's statement of objects declares: "The formation of the National Commission for Human Rights would not only fulfil the international obligation of establishment of such a Commission it shall also serve as driving force for negating the propaganda of human rights violations in Pakistan."<sup>15</sup> A similar statement was also made a year earlier by advisor to the Prime Minister (and de facto minister) on Human Rights, Mr. Mustafa Nawaz Khokhar, who said that Pakistan's human rights status is suffering due to absence of credible image building measures.<sup>16</sup> The Asia Pacific Forum (APF) took note of this as early as 2008 and commented in its recommendations:

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8 *Report of the Working Group on the Universal Periodic Review: Pakistan (A/HRC/8/42)*, UN Human Rights Council, 4 June 2008

9 PILDAT. *The National Commission for Human Rights Bill 2008*. Legislative Brief No.13, April 2011

10 Express Tribune, Pakistan. "Unanimous approval: Senate passes Human Rights Bill 2012", 9 March 2012

11 Commonwealth Human Rights Initiative (CHRI). *Analysis of the Pakistan Commission for Human Rights Bill, 2005*. June 2005

12 Daily Times. "View: Pakistan's Quest for a National Human Rights Commission", 6 March 2012

13 Asia Pacific Forum. *National Commission on Human Rights Bill (Pakistan): Summary of Key Issues*, 2008

14 Human Rights Commission of Pakistan. *State of Human Rights in 2012*. March 2013, p. 16

15 Full text of the Bill as passed by the Senate of Pakistan is available at: <http://goo.gl/eyaxlm>

16 Pakistan Observer. "Independent Human Rights Commission Coming Up", 2 August 2011

“It is the role of the Government to address spurious allegations about the country. This reference should be deleted as it may impact on the perceived independence of the Commission and on its accreditation internationally.”<sup>17</sup>

However, these clauses were present in the final draft passed by the Parliament in 2012.<sup>18</sup>

Following the passage of the Bill, a parliamentary committee was set up consisting of 4 members of parliament, 2 from the national assembly and 2 from the senate (giving equal representation to the government and opposition benches). The parliamentary committee is tasked with reviewing the list of candidates approved by the Ministry, confirming a list of nominees for the position of Chairperson and members of the NHRI and then sending the names to the president for appointment.

In March 2013 the national assembly completed its term and fresh elections were held on 11 May, leaving the parliamentary committee without two of its members. While the Act provides for such a scenario, no progress has been seen on the issue since the dissolution of the national assembly. No new appointments have been made to the committee since the formation of Pakistan Muslim League-N (PML-N) government in the centre.

In July 2013, the new government of PML (N) downgraded the Ministry of Human Rights to a wing of the Ministry of Law and Justice.<sup>19</sup> This caused alarm throughout civil society and in the opposition benches, resulting in pleas that the government retract this decision. At the same time, the government has reduced the budget for human rights from Rs. 126 million (USD 1,238,000) to Rs. 78 million (USD 746,852) for fiscal year 2013-2014.<sup>20</sup> Similarly, in the provincial budget for the Punjab, where the PML-N has also formed a government, the allocation for human rights and minority affairs is lower than that made last year.<sup>21</sup> The human rights related budget provisions in the other three provinces are not known as yet.

So far the Prime Minister has neither been able to appoint members to the Parliamentary Committee on the National Commission for Human Rights, nor pushed for further action on the issue.

## II. Independence

### A. Relationship with the Executive, Judiciary, and Parliament

The Pakistan National Commission for Human Rights (PNCHR) is established by the National Commission for Human Rights Act, 2012. The current Bill was tabled by advisor to the prime minister for Human Rights (and *de facto* Minister for Human Rights) Mr. Mustafa

17 Asia Pacific Forum. *National Commission on Human Rights Bill (Pakistan): Summary of Key Issues*, 2008

18 This draft can be viewed at: <http://goo.gl/eyaxlm>

19 The News. “HR Ministry being reduced into a wing”, 16 July 2013

20 Ministry of Finance. *Budget in Brief 2013-14*. 12 June 2013

21 Pakistan Today. “Work on human rights and minority affairs shelved by Punjab budget”. 20 June 2013

Nawaz Khokhar and was passed unanimously by the parliament in March 2012. According to the bill, the PNCHR is to be an independent body that can take *suo moto* action or act on a petition against violations or negligence in prevention of a violation (by a public servant). The PNCHR is also empowered to make itself a party to any ongoing proceeding involving “any allegation of violation of human rights pending before a court...” (Section 9 (b)).

Under the current law (Section 14), the Commission is prescribed a separate procedure when dealing with complaints against the armed forces. Section 14 (a) states that, in dealing with instances of suspected violations involving members of the armed forces, “it [the PNCHR] may either on its own motion or on receipt of a petition, seek a report from the Federal Government on complaint or violation”. Following the receipt of the report, the Commission has the option to “either not proceed with the complaint or, as the case may be, make its recommendations to the Federal Government” (Section 14 (b)). This restricts the mandate of the Commission to requesting a report from the Federal Government.

Further still, the law provides total exemption from inquiry to the intelligence agencies. Section 15 of the 2012 Act reads, “the functions of the Commission do not include inquiring into the act or practice of intelligence agencies and where a complaint is made to the Commission alleging an act or practice of such an agency is inconsistent or contrary to any human right, the Commission shall refer the complaint to the competent authority concerned.”

Much criticism of these clauses was voiced by international and local commentators. Forum-Asia and Pakistani CSOs, in a joint statement, said: “we are apprehensive that the enabling legislation for the National Commission for Human Rights (NCHR) of May 2012 falls short of international standards.

We urge the government to revisit section 15 of the Act to ensure that NCHR is mandated over the full law enforcement apparatus of the country, including intelligence agencies.”<sup>22</sup> Other organisations, such as ANNI and Human Rights Watch, criticized these clauses by stating that these clauses left the law to be viewed as a “halfway measure”<sup>23</sup> and that they are contrary to the Paris Principles. Human Rights Watch went so far as to urge the president not to sign the Bill, with its Asia Director, Brad Adams, saying: “President Zardari should tell parliament he will only sign the bill when it gives the commission authority over abuses by the military and intelligence agencies.”<sup>24</sup>

Accusations were also levelled against the government of intentionally ignoring violations by armed forces. In light of the sections exempting the armed forces and the intelligence agencies, the Asian Human Rights Commission questioned the efficacy of the Commission

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22 Forum Asia. *Oral Statement Delivered by Ms. Naumana Suleman on behalf of Asian Forum for Human Rights and Development (Forum-Asia)*. 22<sup>nd</sup> Regular Session of the UNHRC, UPR Plenary on Pakistan, 13 March 2013

23 ANNI. *Pakistan: ANNI welcomes the bill passed by the Senate for establishing the National Commission for Human Rights (NCHR)*, 18 May 2012

24 HRW. *Pakistan: Revise National Human Rights Commission Law*, 17 May 2012

as a whole, saying: "In fact, the government has turned a blind eye time and time again to the arrogance of the police and armed forces in their blatant refusal to comply with the orders of the courts. Despite the fact that the higher courts are independent, the officers of these institutions regularly fail to attend hearings...This Commission is likely to prove a futile exercise and place more burdens on the exchequer."<sup>25</sup>

On a more positive note, the law does have some more effective provisions. For instance, the PNCHR is to be deemed to a civil court and will be able to exercise all the powers associated with that designation, such as subpoena and summoning witnesses and individuals, ability to request reports/public records from government departments or ask for any other relevant materials. Furthermore, compliance with the Commission's inquiries is enforced (and non-compliance punished) via the provisions for civil courts contained in the Pakistani Penal Code (Act XLV of 1860). This helps assure that individuals and entities are required to cooperate with the Commission and are obligated to provide the information and access necessary for it to complete the investigation.

Also strengthening the Commission's ability to investigate, section 17 states: "...the Commission may, for the purpose of conducting an investigation into a matter which is the subject of a complaint, requisition the services of any officer or investigation agency of the Federal Government or a Provincial Government with their concurrence". The Bill goes on to specify that the summoned officer or agency, under direction and control of the commission, shall assist the Commission's activities and: "a) summon and enforce attendance of any person and examine him or her; b) require the discovery and production of any document; c) requisition any public record or copy thereof from any office" (Section 17 (2)).

## **B. Selection Process of Members**

According to the legislation passed by the parliament, the Commission is to be a nine member body, selected through a multi-stage selection process. The first step in the selection of Commissioners is a public call for nominees for the posts of Chairman and members of the Commission. Following scrutiny of the list of nominees by the Ministry of Human Rights, the ministry is to submit a list of persons to the Prime Minister and the Leader of the Opposition in the National Assembly. In consultation the two are to shortlist and "forward three names for each post to a Parliamentary Committee [Parliamentary Committee on the National Commission for Human Rights] for hearing and confirmation of any one person for each post" (Section 4 (2)). As mentioned earlier, the Parliamentary Committee is to be constituted by Speaker of the National Assembly, consisting of four members (two from the Senate and two from the National Assembly). Furthermore, two of the members of the Committee are to be from the Treasury (government) benches and two from the Opposition.

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<sup>25</sup> Asian Human Rights Commission. *The State of Human Rights in Pakistan in 2012*, December 2012

The Act also provides for a scenario in which the National Assembly is dissolved, in which case, "the total membership of the Parliamentary Committee shall consist of members of the Senate only...". This is the stage at which the status of the Pakistani NHRI stands at the moment. Finally, the Parliamentary Committee, on finalisation of the list of nominees for the Commission, is to forward it to the President for appointment.

Various clauses designed to ensure that the Commission is ethnically, gender-wise and regionally representative of Pakistan are also present in the act. The law mandates that there be a member from each of Pakistan's provinces as well as one representing the Federation. It also demands that there be two reserved seats for women, one for the Chairperson of National Commission on the Status of Women (NCSW) and one other nominee. Similarly, a seat is reserved for minority religious communities. The act further requires that no member of the Commission be younger than 40 years of age.

Through these clauses, the Act aims to meet the international standards for representativeness of minorities and women and pluralism in the country. However, as APF pointed out, these clauses do not ensure pluralism but rather require the presence of women and minorities only.<sup>26</sup> Instead it would have been more effective to word clauses so that they mandate the composition of the Commission to at all times ensure the equal representation of women, an equitable representation of religious minorities, and maintain parity in the representation of provinces.

While the selection method is good in that it provides a possibility for the involvement of civil society in the process during the public call and requires a bi-partisan effort in the parliament, the selection criteria for the Chairman and Commissioners neglects to prescribe an explicit role for civil society. The criteria given in the act also describes the Chairperson as an individual "who has been, or is qualified to be, a judge of the Supreme Court or a person having demonstrable knowledge of, or practical experience in, matters relating to human rights" (Section 3 (2)). An issue arises in the fact that this criteria equates the status of a Supreme Court judge with adequate knowledge and experience pertaining to human rights issues. Similarly, the criteria for members of the Commission states that they must "also having demonstrable knowledge of, or practical experience in, matters relating to human rights" (Section 3 (2)).

The Paris Principles state that the procedure for selection of the Commission members shall afford "all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of: (a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists; (b) Trends in philosophical or religious thought; (c) Universities and qualified experts; (d) Parliament; (e) Government departments (if these are included,

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<sup>26</sup> Asia Pacific Forum. *National Commission on Human Rights Bill (Pakistan): Summary of Key Issues*. 2008.

their representatives should participate in the deliberations only in an advisory capacity)".<sup>27</sup> Unfortunately, neither the selection process nor the criteria for the eligibility of the Chairman and members, as described in the Bill, make direct mention of civil society as described in the Paris Principles.

Each member and the Chairperson of the Commission are to hold office for a four-year term, which may be renewed once. In a clause aiding the Commission in maintaining greater independence and freedom, the removal procedure of the Commissioners is the same as that prescribed for Supreme Court judges under Article 209 of Constitution of Pakistan. The Act also states that the Commission and its staff shall "function without political or other bias or interference and shall...be independent and separate from any government, administrations, or any other functionary or body directly or indirectly representing the interests of any such entity." Furthermore, a section outlines the terms for disclosing conflicts of interest and non-disclosure to be treated as misconduct on the behalf of the offending member.

### C. Resourcing of the NHRI

The Act specifies that a fund, known as the National Commission for Human Rights Fund, be established in order to be used by the Commission to meet the costs associated with its functions. The law states that the fund shall consist of money appropriated directly by the parliament as well as grants and endowments and income. The Commission is also able to accept unconditional grants or contributions from donors and non-governmental organizations in a "transparent manner" (Section 25). However, the Commission is barred from accepting contributions from a foreign source, private or governmental, except after approval from the Federal Government.

According to the Act, the NHRI enjoys financial freedom in using the resources allocated to its fund for the duties outlined in Section 24. Section 27 states: "The Government shall allocate specific amount of money for the Commission in each financial year and it shall not be necessary for the Commission to take prior approval from the Government to spend such allocated money for the approved and specific purposes." It is also specified that the Commission is to be audited by the Auditor-General of Pakistan.

## III. Effectiveness

### A. Protection

The Act describes a wide mandate for the PNHRI and contains some effective provisions which will act to strengthen the body's role. As per law, the Pakistan National Commission for Human Rights has the power to take *suo moto* action as well as receive complaints and petitions. The law broadly defines the nature of the complaints against which the NHRI is to take action as "(i) violation of human rights or abetment thereof; or (ii) negligence in the prevention of such violation, by a public servant" (Section 9 (a)). However,

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<sup>27</sup> UN General Assembly. *Resolution 48/134: 'Principles Relating to the Status of National Institutions*, 20 December 1993.

a major omission is evident in that no mechanism is outlined through which the Commission may receive complaints and petitions.

On their own initiative, Commission members or authorized persons may visit any place of detention or institution or where government institutions and agencies detain individuals. This comprehensive definition allows for the Commission to have access to a wide range of places of detention, such as hospitals, orphanages, prisons, jails, etc. The 2008 draft of the Bill included a very vague and limited jurisdiction in this regard, making mention only of jails.<sup>28</sup>

The Commission is also able to “review the safeguards provided by or under the Constitution of the Islamic Republic of Pakistan or any other law for the time being in force for the protection of human rights and recommend adoption of new legislation, the amendment of existing laws and the adoption or amendment of administrative measures for their effective implementation” (Section 9 (d)). The government may also consult with the Commission for its opinion on any legislation to guarantee compliance with human rights standards. The Commission is also able to review treaties and other international instruments on human rights and reports submitted by the government and make recommendations (Section 9 (f)).

One of the most important roles discussed in the law is the power to direct investigation and inquiry into any incident of violation of human rights. For this purpose, the Commission has subpoena powers similar to those possessed by civil courts under the Code of Civil Procedure, 1908 and enforcement backed by the Pakistan Penal Code. These powers are explicitly outlined in Section 13 of the Act.

Furthermore, for the hearing of inquiries into human rights violations, the Commission may declare certain Courts of Sessions to be the human rights court of that district. After completing its inquiry, the Commission may recommend to the Government or authority to initiate proceedings of prosecution or any other actions. Alternatively, the court may recommend to the government to provide immediate relief to the victims or family members.

## **B. Promotion**

Other duties of the Commission described in the 2012 Act include the promotion of human rights in the country, spreading human rights literacy and awareness, developing a national plan of action and submitting annual and special reports to the government. Section 9 (g) states that the Commission is to “undertake and promote research in the field of human rights, maintain database on the complaints on violence of human rights received and development of human rights norms”.

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<sup>28</sup> Asia Pacific Forum. *National Commission on Human Rights Bill (Pakistan): Summary of Key Issues*. 2008

The PNCHR is also mandated to “spread human rights literacy among various sections of the society and promote awareness of the safeguards available for the protection of these rights through publications, print and electronic media, seminars and other available means in all major languages of the country” (Section 9 (h)). Finally, a rather open-ended clause states that the Commission may also engage in “such other functions as it may consider necessary for the promotion of human rights” (Section 9 (l)). This suggests that the law provides a fair amount of independence to the Commission for the promotion of human rights, but it remains to be seen how this will translate into practice, in the process of implementation.

The Act also places the Commission in an advisory role for the government which can review legislation and treaties and issue recommendations to the government to help make its actions more compliant with human rights laws and norms. A duty that will be particularly helpful in promotional activities is the preparation of independent reports which the Commission will submit to Parliament. Section 28 states, “The Commission shall prepare an annual report at the end of the financial year and may at any time prepare special reports on any matter which in its opinion is of particular urgency or importance.” The reports can serve to highlight important and/or urgent human rights crises and their location and bring them to the public eye and in the government’s notice. Reports will also be a major aid to organisations and human rights defenders in assessing the government’s activities towards the promotion of human rights and helping them align their own activities accordingly.

In light of these clauses the Commission has a broad mandate for the promotion of human rights in Pakistan. Combined with the financial autonomy provided to it, the PNCHR is well placed to invest in work with civil society and government departments to improve awareness of human rights issues and norms. In particular, trainings (for public and private officials) on international human rights standards with an emphasis on awareness would be a logical avenue for the Commission to explore.

#### **IV. Potential Cooperation/Engagement between the NHRI and the NGO**

As discussed before, the Act is lacking in mentioning the explicit role that civil society may play in the process of composition of the NHRI. ANNI commented on this on the passing of the Act saying, “the draft bill is silent on the explicit role of the civil society to contribute in the selection procedure as manifested in the UN Paris Principles”.<sup>29</sup> Similar criticism can be made on the lack of due attention given to the possibility of the PNCHR’s collaboration with civil society in the protection and propagation of human rights.

One explicit mechanism for civil society to assist and work with the Commission directly is through advisory committees. Section 11 states:

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<sup>29</sup> ANNI. *Pakistan: ANNI welcomes the bill passed by the Senate for establishing the National Commission for Human Rights (NCHR)*, 18 May 2012

“The Commission may constitute an advisory committee consisting of human rights activists, civil society organizations, members of bar associations, members of press clubs and such other representatives of the Federal and Provincial Governments as may be concerned with the functions of the Commission...”.

Nevertheless, the public call for nominees enables civil society to play a part in the initial nomination of candidates for the posts of Chairperson and Commissioners. There is also the hope that civil society members and activists with the appropriate experience of human rights work will become part of the Commission, as was seen in the recent appointment of a seasoned women’s rights expert Mrs. Khawar Mumtaz as chairperson of the National Commission on the Status of Women (NCSW).

## V. Conclusion and Recommendations

The process of the formulation of the Pakistani NHRI has now been underway for almost 10 years. Political uncertainties caused the progress to be slow and inconsistent. The new government has abolished the Ministry of Human Rights in Pakistan in July 2013. Civil society in Pakistan has vociferously condemned the new government’s decision to eliminate the Ministry of Human Rights and relegate it to the status of a wing of the Law and Justice ministry.<sup>30</sup> In August 2013, the government advertised for nominations of new members of PNCHR.

A major problem area in PNCHR is the lack of an explicit role for civil society in its selection process (as mentioned in the Paris Principles) and activities. Aside from a rather vague provision for the establishment of advisory committees, the inclusion and support for civil society in working together with the NHRI is left unspecified. Another key flaw is lack of a procedure by which public can send complaints to the commission to request investigations of human rights violations.

Still, the Human Rights Commission Act does have some positive elements that deserve mention. The selection process and the clauses regarding representation are generally encouraging and the provisions for the inclusion of provincial and gender representation are welcomed. The clauses granting the PNCHR the status of a civil court will also help in giving the institution some teeth and help ensure cooperation and compliance with its actions. Similarly, the wide mandate for protection and promotion leaves the Commissioners with considerable room to implement an agenda for furthering human rights in Pakistan. It is also heartening to see that the clauses restricting the Commission’s financial autonomy seen in early drafts have been relaxed to give it more fiscal freedom.

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<sup>30</sup> Asian Human Rights Commission. *Pakistan: The Government of Nawaz Sharif has decided to do Away with the Ministry of Human Rights*, 5 August 2012

**Recommendations:**

- A most urgent recommendation to the government of Pakistan is to restore and strengthen the Ministry of Human Rights. This is essential for the independent working of the Commission and for the task of setting up the Pakistani NHRI and its effective performance as the ministry will be the first line and base of support for the Commission. The Ministry and its standing committees can act as the best liaison between civil society and the parliament in pushing the cause of the establishment of the PNCHR. Therefore, the role of such a ministry in future matters regarding the PNCHR Act and institution itself is critical.
- The government of Pakistan is a signatory to the Paris Principles that require that no institution or entity in a country be allowed to operate with impunity. It is essential that the PNCHR be able to take up complaints and investigations against all institutions of the state if human rights are to be safeguarded in the country. The government should work towards the amendment of the Act and help ensure equality of all institutions as well as assure due recourse to victims of all human rights violations regardless of the concerned perpetrator.
- The government should develop a more solid framework both through changes to the law and through setting up standard procedures and rules that accommodate civil society participation in the proceedings and workings of the NHRI. For instance, a mechanism could be set up which ensures that the secretary of the PNCHR may be approached by civil society for information or the Commission be required to form an advisory committee of civil society members for each case.
- The parliament is urged to appoint members to the parliamentary committee on the National Commission on Human Rights immediately or to push the two senate members of the committee to resume the process. The establishment of the PNCHR has been stalled for far too long and the parliamentary committee has not been able to push the issue forward with just the senate members. Either way, the parliamentary committee must finalise its selection of the members of the Commission on an urgent basis so that PNCHR can be constituted and begin functioning.

# Pakistan: Delay and Uncertainty in Establishing the National Commission for Human Rights

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## I. General Overview

Pakistan's human rights situation has been steadily deteriorating over the past decade. In 2010, Human Rights Watch (HRW) declared that it had been the worst year for Pakistan in preserving human rights, citing the increasing levels of enforced disappearances and attacks on religious minorities by religious extremists.<sup>2</sup> In its *2012 Report*, the Human Rights Commission of Pakistan (HRCP), a non-governmental and leading human rights organisation in Pakistan, described the situation as "murky".<sup>3</sup> Sectarian violence, rise of religious extremism and increase in terrorist attacks against civilian, police and military personnel in Pakistan are some of the most prominent issues seen over the past several years in the country. Cases of violence against women and attacks on journalists also increased in recent years and Amnesty International has highlighted the issue of extra-judicial killings and enforced disappearances as a major concern in Pakistan.<sup>4</sup>

On 31 May 2012, president Asif Ali Zardari of Pakistan signed the 'National Commission for Human Rights Act 2012',<sup>5</sup> beginning the process for the establishment of a national human rights institution in the country.<sup>6</sup> Unfortunately, the progress has been very slow and marred by political uncertainty. The general elections were announced in 2012 and most decisions were deferred to the new government.

Since supporting the UN General Assembly Resolution on the Paris Principles, Pakistan has been slow to fulfil its obligation to establish a national human rights institution. The Pakistani government has been discussing plans for establishing the Pakistan National Commission for Human Rights (PNCHR) since 2004,<sup>7</sup> and even presented a draft to the Parliamentary Committee on Law, Justice and Human Rights in February 2005.<sup>7</sup> These attempts, however, were not very successful and the issue was side-lined.

A reworked version of that Bill was presented after recommendations made during

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1 Prepared by Sachchal Ahmad, Researcher at PODA.

2 Express Tribune. "National Commission for Human Rights: Bill Approved to Create Independent Rights Body". 28 January 2011

3 Human Rights Commission of Pakistan. *State of Human Rights in 2012*. March 2013, p. 1

4 Amnesty International. *Annual Report 2012*, Available at: <http://goo.gl/muqCae>

5 Full text of the Act is available at: <http://goo.gl/yQfu5p>

6 Express Tribune, Pakistan. "Zardari endorses formation of National Human Rights Commission", 30 May 2012

7 Asia Pacific Forum. *Report of the APF Technical Assistance Mission to Pakistan on the Development of a National Human Rights Institution*. October 2005, p. 4

Pakistan's Universal Periodic Review (UPR) by the UN Human Rights Council in 2008. Pakistan stated during the UPR that work on establishing national commission was underway and assured the Council that a Commission would be set up soon.<sup>8</sup> On 17 December 2008, a draft Bill was presented in the National Assembly and referred to the Assembly's Standing Committee on Human Rights for review. However, the Committee was only able to present its report on the bill two years later, on 4 January 2011.<sup>9</sup> The Bill was eventually passed by parliament on 9 March 2012, months before the next UPR was to be held.<sup>10</sup>

The revised Bill (compared to the 2005 version) brought in clauses to improve the selection process, making it subject to the decision of a parliamentary committee rather than direct appointment by the president. Membership criteria previously required the inclusion of members of parliament as Commissioners, but the later bill, on recommendations made by various commentators<sup>11</sup>, removed this and opened membership to all qualified candidates as chosen by a cross-parliamentary committee.<sup>12 13</sup> Another significant change was the inclusion of clauses that prescribed special mode of investigation for the armed forces, and excluded intelligence agencies from the purview of the Commission.

Since the signing of the Bill there has been little progress on the task of establishing the Pakistan National Commission for Human Rights, a fact also highlight by the non-governmental HRC in its annual human rights report.<sup>14</sup> Doubts have been expressed over the state's commitment to establishing an independent and effective human rights commission. The manner in which the promulgation and implementation of the bill is being handled as well as the statements of objectives and reason within the Bill indicate that the government does not truly believe in the necessity of such an institution for the betterment of human rights in Pakistan.

For instance, the 2012 Bill's statement of objects declares: "The formation of the National Commission for Human Rights would not only fulfil the international obligation of establishment of such a Commission it shall also serve as driving force for negating the propaganda of human rights violations in Pakistan."<sup>15</sup> A similar statement was also made a year earlier by advisor to the Prime Minister (and de facto minister) on Human Rights, Mr. Mustafa Nawaz Khokhar, who said that Pakistan's human rights status is suffering due to absence of credible image building measures.<sup>16</sup> The Asia Pacific Forum (APF) took note of this as early as 2008 and commented in its recommendations:

8 *Report of the Working Group on the Universal Periodic Review: Pakistan (A/HRC/8/42)*, UN Human Rights Council, 4 June 2008

9 PILDAT. *The National Commission for Human Rights Bill 2008*. Legislative Brief No.13, April 2011

10 Express Tribune, Pakistan. "Unanimous approval: Senate passes Human Rights Bill 2012", 9 March 2012

11 Commonwealth Human Rights Initiative (CHRI). *Analysis of the Pakistan Commission for Human Rights Bill, 2005*. June 2005

12 Daily Times. "View: Pakistan's Quest for a National Human Rights Commission", 6 March 2012

13 Asia Pacific Forum. *National Commission on Human Rights Bill (Pakistan): Summary of Key Issues*, 2008

14 Human Rights Commission of Pakistan. *State of Human Rights in 2012*. March 2013, p. 16

15 Full text of the Bill as passed by the Senate of Pakistan is available at: <http://goo.gl/eyxlm>

16 Pakistan Observer. "Independent Human Rights Commission Coming Up", 2 August 2011

“It is the role of the Government to address spurious allegations about the country. This reference should be deleted as it may impact on the perceived independence of the Commission and on its accreditation internationally.”<sup>17</sup>

However, these clauses were present in the final draft passed by the Parliament in 2012.<sup>18</sup>

Following the passage of the Bill, a parliamentary committee was set up consisting of 4 members of parliament, 2 from the national assembly and 2 from the senate (giving equal representation to the government and opposition benches). The parliamentary committee is tasked with reviewing the list of candidates approved by the Ministry, confirming a list of nominees for the position of Chairperson and members of the NHRI and then sending the names to the president for appointment.

In March 2013 the national assembly completed its term and fresh elections were held on 11 May, leaving the parliamentary committee without two of its members. While the Act provides for such a scenario, no progress has been seen on the issue since the dissolution of the national assembly. No new appointments have been made to the committee since the formation of Pakistan Muslim League-N (PML-N) government in the centre.

In July 2013, the new government of PML (N) downgraded the Ministry of Human Rights to a wing of the Ministry of Law and Justice.<sup>19</sup> This caused alarm throughout civil society and in the opposition benches, resulting in pleas that the government retract this decision. At the same time, the government has reduced the budget for human rights from Rs. 126 million (USD 1,238,000) to Rs. 78 million (USD 746,852) for fiscal year 2013-2014.<sup>20</sup> Similarly, in the provincial budget for the Punjab, where the PML-N has also formed a government, the allocation for human rights and minority affairs is lower than that made last year.<sup>21</sup> The human rights related budget provisions in the other three provinces are not known as yet.

So far the Prime Minister has neither been able to appoint members to the Parliamentary Committee on the National Commission for Human Rights, nor pushed for further action on the issue.

## II. Independence

### A. Relationship with the Executive, Judiciary, and Parliament

The Pakistan National Commission for Human Rights (PNCHR) is established by the National Commission for Human Rights Act, 2012. The current Bill was tabled by advisor to the prime minister for Human Rights (and *de facto* Minister for Human Rights)

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17 Asia Pacific Forum. *National Commission on Human Rights Bill (Pakistan): Summary of Key Issues*, 2008

18 This draft can be viewed at: <http://goo.gl/eyaxlm>

19 The News. “HR Ministry being reduced into a wing”, 16 July 2013

20 Ministry of Finance. *Budget in Brief 2013-14*. 12 June 2013

21 Pakistan Today. “Work on human rights and minority affairs shelved by Punjab budget”. 20 June 2013

Mr. Mustafa Nawaz Khokhar and was passed unanimously by the parliament in March 2012. According to the bill, the PNCHR is to be an independent body that can take *suo moto* action or act on a petition against violations or negligence in prevention of a violation (by a public servant). The PNCHR is also empowered to make itself a party to any ongoing proceeding involving “any allegation of violation of human rights pending before a court...” (Section 9 (b)).

Under the current law (Section 14), the Commission is prescribed a separate procedure when dealing with complaints against the armed forces. Section 14 (a) states that, in dealing with instances of suspected violations involving members of the armed forces, “it [the PNCHR] may either on its own motion or on receipt of a petition, seek a report from the Federal Government on complaint or violation”. Following the receipt of the report, the Commission has the option to “either not proceed with the complaint or, as the case may be, make its recommendations to the Federal Government” (Section 14 (b)). This restricts the mandate of the Commission to requesting a report from the Federal Government.

Further still, the law provides total exemption from inquiry to the intelligence agencies. Section 15 of the 2012 Act reads, “the functions of the Commission do not include inquiring into the act or practice of intelligence agencies and where a complaint is made to the Commission alleging an act or practice of such an agency is inconsistent or contrary to any human right, the Commission shall refer the complaint to the competent authority concerned.”

Much criticism of these clauses was voiced by international and local commentators. Forum-Asia and Pakistani CSOs, in a joint statement, said: “we are apprehensive that the enabling legislation for the National Commission for Human Rights (NCHR) of May 2012 falls short of international standards.

We urge the government to revisit section 15 of the Act to ensure that NCHR is mandated over the full law enforcement apparatus of the country, including intelligence agencies.”<sup>22</sup> Other organisations, such as ANNI and Human Rights Watch, criticized these clauses by stating that these clauses left the law to be viewed as a “halfway measure”<sup>23</sup> and that they are contrary to the Paris Principles. Human Rights Watch went so far as to urge the president not to sign the Bill, with its Asia Director, Brad Adams, saying: “President Zardari should tell parliament he will only sign the bill when it gives the commission authority over abuses by the military and intelligence agencies.”<sup>24</sup>

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22 Forum Asia. *Oral Statement Delivered by Ms. Naumana Suleman on behalf of Asian Forum for Human Rights and Development (Forum-Asia)*. 22<sup>nd</sup> Regular Session of the UNHRC, UPR Plenary on Pakistan, 13 March 2013

23 ANNI. *Pakistan: ANNI welcomes the bill passed by the Senate for establishing the National Commission for Human Rights (NCHR)*, 18 May 2012

24 HRW. *Pakistan: Revise National Human Rights Commission Law*, 17 May 2012

Accusations were also levelled against the government of intentionally ignoring violations by armed forces. In light of the sections exempting the armed forces and the intelligence agencies, the Asian Human Rights Commission questioned the efficacy of the Commission as a whole, saying: "In fact, the government has turned a blind eye time and time again to the arrogance of the police and armed forces in their blatant refusal to comply with the orders of the courts. Despite the fact that the higher courts are independent, the officers of these institutions regularly fail to attend hearings...This Commission is likely to prove a futile exercise and place more burdens on the exchequer."<sup>25</sup>

On a more positive note, the law does have some more effective provisions. For instance, the PNCHR is to be deemed to a civil court and will be able to exercise all the powers associated with that designation, such as subpoena and summoning witnesses and individuals, ability to request reports/public records from government departments or ask for any other relevant materials. Furthermore, compliance with the Commission's inquiries is enforced (and non-compliance punished) via the provisions for civil courts contained in the Pakistani Penal Code (Act XLV of 1860). This helps assure that individuals and entities are required to cooperate with the Commission and are obligated to provide the information and access necessary for it to complete the investigation.

Also strengthening the Commission's ability to investigate, section 17 states: "...the Commission may, for the purpose of conducting an investigation into a matter which is the subject of a complaint, requisition the services of any officer or investigation agency of the Federal Government or a Provincial Government with their concurrence". The Bill goes on to specify that the summoned officer or agency, under direction and control of the commission, shall assist the Commission's activities and: "a) summon and enforce attendance of any person and examine him or her; b) require the discovery and production of any document; c) requisition any public record or copy thereof from any office" (Section 17 (2)).

## **B. Selection Process of Members**

According to the legislation passed by the parliament, the Commission is to be a nine member body, selected through a multi-stage selection process. The first step in the selection of Commissioners is a public call for nominees for the posts of Chairman and members of the Commission. Following scrutiny of the list of nominees by the Ministry of Human Rights, the ministry is to submit a list of persons to the Prime Minister and the Leader of the Opposition in the National Assembly. In consultation the two are to shortlist and "forward three names for each post to a Parliamentary Committee [Parliamentary Committee on the National Commission for Human Rights] for hearing and confirmation of any one person for each post" (Section 4 (2)). As mentioned earlier, the Parliamentary Committee is to be constituted by Speaker of the National Assembly, consisting of four members (two from the Senate and two from the National Assembly). Furthermore, two of the members of the Committee are to be from the Treasury (government) benches and two from the Opposition.

The Act also provides for a scenario in which the National Assembly is dissolved, in which case, "the total membership of the Parliamentary Committee shall consist of members of the Senate only...". This is the stage at which the status of the Pakistani NHRI stands at the moment. Finally, the Parliamentary Committee, on finalisation of the list of nominees for the Commission, is to forward it to the President for appointment.

Various clauses designed to ensure that the Commission is ethnically, gender-wise and regionally representative of Pakistan are also present in the act. The law mandates that there be a member from each of Pakistan's provinces as well as one representing the Federation. It also demands that there be two reserved seats for women, one for the Chairperson of National Commission on the Status of Women (NCSW) and one other nominee. Similarly, a seat is reserved for minority religious communities. The act further requires that no member of the Commission be younger than 40 years of age.

Through these clauses, the Act aims to meet the international standards for representativeness of minorities and women and pluralism in the country. However, as APF pointed out, these clauses do not ensure pluralism but rather require the presence of women and minorities only.<sup>26</sup> Instead it would have been more effective to word clauses so that they mandate the composition of the Commission to at all times ensure the equal representation of women, an equitable representation of religious minorities, and maintain parity in the representation of provinces.

While the selection method is good in that it provides a possibility for the involvement of civil society in the process during the public call and requires a bi-partisan effort in the parliament, the selection criteria for the Chairman and Commissioners neglects to prescribe an explicit role for civil society. The criteria given in the act also describes the Chairperson as an individual "who has been, or is qualified to be, a judge of the Supreme Court or a person having demonstrable knowledge of, or practical experience in, matters relating to human rights" (Section 3 (2)). An issue arises in the fact that this criteria equates the status of a Supreme Court judge with adequate knowledge and experience pertaining to human rights issues. Similarly, the criteria for members of the Commission states that they must "also having demonstrable knowledge of, or practical experience in, matters relating to human rights" (Section 3 (2)).

The Paris Principles state that the procedure for selection of the Commission members shall afford "all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of: (a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists; (b) Trends in philosophical or religious thought; (c) Universities and qualified experts; (d) Parliament; (e) Government departments (if these are included,

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<sup>26</sup> Asia Pacific Forum. *National Commission on Human Rights Bill (Pakistan): Summary of Key Issues*. 2008.

their representatives should participate in the deliberations only in an advisory capacity)".<sup>27</sup> Unfortunately, neither the selection process nor the criteria for the eligibility of the Chairman and members, as described in the Bill, make direct mention of civil society as described in the Paris Principles.

Each member and the Chairperson of the Commission are to hold office for a four-year term, which may be renewed once. In a clause aiding the Commission in maintaining greater independence and freedom, the removal procedure of the Commissioners is the same as that prescribed for Supreme Court judges under Article 209 of Constitution of Pakistan. The Act also states that the Commission and its staff shall "function without political or other bias or interference and shall...be independent and separate from any government, administrations, or any other functionary or body directly or indirectly representing the interests of any such entity." Furthermore, a section outlines the terms for disclosing conflicts of interest and non-disclosure to be treated as misconduct on the behalf of the offending member.

### C. Resourcing of the NHRI

The Act specifies that a fund, known as the National Commission for Human Rights Fund, be established in order to be used by the Commission to meet the costs associated with its functions. The law states that the fund shall consist of money appropriated directly by the parliament as well as grants and endowments and income. The Commission is also able to accept unconditional grants or contributions from donors and non-governmental organizations in a "transparent manner" (Section 25). However, the Commission is barred from accepting contributions from a foreign source, private or governmental, except after approval from the Federal Government.

According to the Act, the NHRI enjoys financial freedom in using the resources allocated to its fund for the duties outlined in Section 24. Section 27 states: "The Government shall allocate specific amount of money for the Commission in each financial year and it shall not be necessary for the Commission to take prior approval from the Government to spend such allocated money for the approved and specific purposes." It is also specified that the Commission is to be audited by the Auditor-General of Pakistan.

## III. Effectiveness

### A. Protection

The Act describes a wide mandate for the PNHRI and contains some effective provisions which will act to strengthen the body's role. As per law, the Pakistan National Commission for Human Rights has the power to take *suo moto* action as well as receive complaints and petitions. The law broadly defines the nature of the complaints against which the NHRI is to take action as "(i) violation of human rights or abetment thereof; or (ii) negligence

27 UN General Assembly. *Resolution 48/134: 'Principles Relating to the Status of National Institutions*, 20 December 1993.

in the prevention of such violation, by a public servant" (Section 9 (a)). However, a major omission is evident in that no mechanism is outlined through which the Commission may receive complaints and petitions.

On their own initiative, Commission members or authorized persons may visit any place of detention or institution or where government institutions and agencies detain individuals. This comprehensive definition allows for the Commission to have access to a wide range of places of detention, such as hospitals, orphanages, prisons, jails, etc. The 2008 draft of the Bill included a very vague and limited jurisdiction in this regard, making mention only of jails.<sup>28</sup>

The Commission is also able to "review the safeguards provided by or under the Constitution of the Islamic Republic of Pakistan or any other law for the time being in force for the protection of human rights and recommend adoption of new legislation, the amendment of existing laws and the adoption or amendment of administrative measures for their effective implementation" (Section 9 (d)). The government may also consult with the Commission for its opinion on any legislation to guarantee compliance with human rights standards. The Commission is also able to review treaties and other international instruments on human rights and reports submitted by the government and make recommendations (Section 9 (f)).

One of the most important roles discussed in the law is the power to direct investigation and inquiry into any incident of violation of human rights. For this purpose, the Commission has subpoena powers similar to those possessed by civil courts under the Code of Civil Procedure, 1908 and enforcement backed by the Pakistan Penal Code. These powers are explicitly outlined in Section 13 of the Act.

Furthermore, for the hearing of inquiries into human rights violations, the Commission may declare certain Courts of Sessions to be the human rights court of that district. After completing its inquiry, the Commission may recommend to the Government or authority to initiate proceedings of prosecution or any other actions. Alternatively, the court may recommend to the government to provide immediate relief to the victims or family members.

## **B. Promotion**

Other duties of the Commission described in the 2012 Act include the promotion of human rights in the country, spreading human rights literacy and awareness, developing a national plan of action and submitting annual and special reports to the government. Section 9 (g) states that the Commission is to "undertake and promote research in the field of human rights, maintain database on the complaints on violence of human rights received and development of human rights norms".

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28 Asia Pacific Forum. *National Commission on Human Rights Bill (Pakistan): Summary of Key Issues*. 2008

The PNCHR is also mandated to “spread human rights literacy among various sections of the society and promote awareness of the safeguards available for the protection of these rights through publications, print and electronic media, seminars and other available means in all major languages of the country” (Section 9 (h)). Finally, a rather open-ended clause states that the Commission may also engage in “such other functions as it may consider necessary for the promotion of human rights” (Section 9 (l)). This suggests that the law provides a fair amount of independence to the Commission for the promotion of human rights, but it remains to be seen how this will translate into practice, in the process of implementation.

The Act also places the Commission in an advisory role for the government which can review legislation and treaties and issue recommendations to the government to help make its actions more compliant with human rights laws and norms. A duty that will be particularly helpful in promotional activities is the preparation of independent reports which the Commission will submit to Parliament. Section 28 states, “The Commission shall prepare an annual report at the end of the financial year and may at any time prepare special reports on any matter which in its opinion is of particular urgency or importance.” The reports can serve to highlight important and/or urgent human rights crises and their location and bring them to the public eye and in the government’s notice. Reports will also be a major aid to organisations and human rights defenders in assessing the government’s activities towards the promotion of human rights and helping them align their own activities accordingly.

In light of these clauses the Commission has a broad mandate for the promotion of human rights in Pakistan. Combined with the financial autonomy provided to it, the PNCHR is well placed to invest in work with civil society and government departments to improve awareness of human rights issues and norms. In particular, trainings (for public and private officials) on international human rights standards with an emphasis on awareness would be a logical avenue for the Commission to explore.

#### **IV. Potential Cooperation/Engagement between the NHRI and the NGO**

As discussed before, the Act is lacking in mentioning the explicit role that civil society may play in the process of composition of the NHRI. ANNI commented on this on the passing of the Act saying, “the draft bill is silent on the explicit role of the civil society to contribute in the selection procedure as manifested in the UN Paris Principles”.<sup>29</sup> Similar criticism can be made on the lack of due attention given to the possibility of the PNCHR’s collaboration with civil society in the protection and propagation of human rights.

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29 ANNI. *Pakistan: ANNI welcomes the bill passed by the Senate for establishing the National Commission for Human Rights (NCHR)*, 18 May 2012

One explicit mechanism for civil society to assist and work with the Commission directly is through advisory committees. Section 11 states:

“The Commission may constitute an advisory committee consisting of human rights activists, civil society organizations, members of bar associations, members of press clubs and such other representatives of the Federal and Provincial Governments as may be concerned with the functions of the Commission...”.

Nevertheless, the public call for nominees enables civil society to play a part in the initial nomination of candidates for the posts of Chairperson and Commissioners. There is also the hope that civil society members and activists with the appropriate experience of human rights work will become part of the Commission, as was seen in the recent appointment of a seasoned women’s rights expert Mrs. Khawar Mumtaz as chairperson of the National Commission on the Status of Women (NCSW).

## V. Conclusion and Recommendations

The process of the formulation of the Pakistani NHRI has now been underway for almost 10 years. Political uncertainties caused the progress to be slow and inconsistent. The new government has abolished the Ministry of Human Rights in Pakistan in July 2013. Civil society in Pakistan has vociferously condemned the new government’s decision to eliminate the Ministry of Human Rights and relegate it to the status of a wing of the Law and Justice ministry.<sup>30</sup> In August 2013, the government advertised for nominations of new members of PNCHR.

A major problem area in PNCHR is the lack of an explicit role for civil society in its selection process (as mentioned in the Paris Principles) and activities. Aside from a rather vague provision for the establishment of advisory committees, the inclusion and support for civil society in working together with the NHRI is left unspecified. Another key flaw is lack of a procedure by which public can send complaints to the commission to request investigations of human rights violations.

Still, the Human Rights Commission Act does have some positive elements that deserve mention. The selection process and the clauses regarding representation are generally encouraging and the provisions for the inclusion of provincial and gender representation are welcomed. The clauses granting the PNCHR the status of a civil court will also help in giving the institution some teeth and help ensure cooperation and compliance with its actions. Similarly, the wide mandate for protection and promotion leaves the Commissioners with considerable room to implement an agenda for furthering human rights in Pakistan. It is also heartening to see that the clauses restricting the Commission’s financial autonomy seen in early drafts have been relaxed to give it more fiscal freedom.

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<sup>30</sup> Asian Human Rights Commission. *Pakistan: The Government of Nawaz Sharif has decided to do Away with the Ministry of Human Rights*, 5 August 2012

## Recommendations:

- A most urgent recommendation to the government of Pakistan is to restore and strengthen the Ministry of Human Rights. This is essential for the independent working of the Commission and for the task of setting up the Pakistani NHRI and its effective performance as the ministry will be the first line and base of support for the Commission. The Ministry and its standing committees can act as the best liaison between civil society and the parliament in pushing the cause of the establishment of the PNCHR. Therefore, the role of such a ministry in future matters regarding the PNCHR Act and institution itself is critical.
- The government of Pakistan is a signatory to the Paris Principles that require that no institution or entity in a country be allowed to operate with impunity. It is essential that the PNCHR be able to take up complaints and investigations against all institutions of the state if human rights are to be safeguarded in the country. The government should work towards the amendment of the Act and help ensure equality of all institutions as well as assure due recourse to victims of all human rights violations regardless of the concerned perpetrator.
- The government should develop a more solid framework both through changes to the law and through setting up standard procedures and rules that accommodate civil society participation in the proceedings and workings of the NHRI. For instance, a mechanism could be set up which ensures that the secretary of the PNCHR may be approached by civil society for information or the Commission be required to form an advisory committee of civil society members for each case.
- The parliament is urged to appoint members to the parliamentary committee on the National Commission on Human Rights immediately or to push the two senate members of the committee to resume the process. The establishment of the PNCHR has been stalled for far too long and the parliamentary committee has not been able to push the issue forward with just the senate members. Either way, the parliamentary committee must finalise its selection of the members of the Commission on an urgent basis so that PNCHR can be constituted and begin functioning.

# Sri Lanka: the National Human Rights Commission Marionette of the State

Law & Society Trust<sup>1</sup>

## I. General Overview

Sri Lanka in 2012 witnessed a number of people's movements against prevailing state policies, reflective of public dissention against a growing list of human rights violations;<sup>2</sup> breakdown in rule of law and impunity;<sup>3</sup> suppression of freedom of expression including violence against media personnel<sup>4</sup> and institutions;<sup>5</sup> blocking all efforts to enhance transparency of public authorities;<sup>6</sup> continued misuse of the Prevention of

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- 1 Prepared by Miyuru Gunasinghe, Senior Researcher of the Economic, Social and Cultural Rights (ESCR) programme at the Law & Society Trust, Sri Lanka. The guidance received from B. Skanthakumar, the support of my colleague Anushaya Collure and the contribution of Ruki Fernando have been of immense assistance in compiling this report and are gratefully acknowledged.
  - 2 See: UN OHCHR Annual Report, *Report of the Office of the United Nations High Commissioner for Human Rights on advice and technical assistance for the Government of Sri Lanka on promoting reconciliation and accountability in Sri Lanka*. [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-38\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-38_en.pdf), Amnesty International, *Sri Lanka's Assault on Dissent*, [http://www.amnesty.org/en/library/asset/ASA37/003/2013/en/338f9b04-097e-4381-8903-1829fd24aabf/asa370032013\\_en.pdf](http://www.amnesty.org/en/library/asset/ASA37/003/2013/en/338f9b04-097e-4381-8903-1829fd24aabf/asa370032013_en.pdf), Human Rights Watch, *Sri Lanka in 'World Report 2012*, New York, 2012, <http://www.hrw.org/world-report-2012/world-report-2012-sri-lanka> and Human Rights Watch, *Sri Lanka in 'World Report 2013*, New York 2013, <http://www.hrw.org/world-report/2013/country-chapters/sri-lanka?page=1>, Amnesty International, *Annual Report 2012*, Sri Lanka chapter, <http://www.amnesty.org/en/region/sri-lanka/report-2012>, US Department Country, *Country Reports for Human Rights Practices 2012: Sri Lanka*, Washington DC 2013, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper>,
  - 3 *Report of the Office of the United Nations High Commissioner for Human Rights on advice and technical assistance for the Government of Sri Lanka on promoting reconciliation and accountability in Sri Lanka*, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, Human Rights Council 22<sup>nd</sup> Session, [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-38\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-38_en.pdf)
  - 4 'Uthayan office attacked', *Ceylon Today*, 03 April 2013, <http://www.ceylontoday.lk/16-28923-news-detail-uthayan-office-attacked.html>
  - 5 *Sri Lanka's Assault on Dissent*, Amnesty International, 2013, <http://www.amnesty.org/en/library/asset/ASA37/003/2013/en/338f9b04-097e-4381-8903-1829fd24aabf/asa370032013en.pdf>
  - 6 A right to information Bill presented by the main opposition party was defeated by the ruling party in June 2012 - 'Sri Lanka: Right to Information draft bill defeated by the ruling party lawmakers', *Asian Tribune*, 22 June 2012, <http://www.asiantribune.com/news/2011/06/21/sri-lanka-right-information-draft-bill-defeated-ruling-party-lawmakers>

Terrorism Act (PTA) to repress dissenters;<sup>7</sup> arbitrary detention policies;<sup>8</sup> internal displacement and forced relocation due to state land acquisition for development and military occupation especially in the North and East<sup>9</sup> leading to loss of homes and livelihoods;<sup>10</sup> military mechanisms overrule local administrative structures in previously conflict affected areas and regulate civilian lives;<sup>11</sup> unresolved cases of involuntary or enforced disappearances;<sup>12</sup> repressive economic policies which penalize the poor,<sup>13</sup>

- 7 Publicly reported incidents of misuse of the PTA include but are not limited to: the unlawful arrest and detention of opposition parliamentarian Azath Salley - 'The arrest and release of Azath Salley', *Ceylon Today*, 12 May 2013, <http://www.ceylontoday.lk/59-32130-news-detail-the-arrest-and-release-of-azath-salley.html>; 'Sri Lanka: the arrest and detention of Azath Salley', *Asian Human Rights Commission*, 6 May 2013, <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-087-2013> and the arrest and detention of 4 Jaffna university students - 'Two Jaffna university students released on President's orders', *Colombo Page*, 13 February 2013, [http://www.colombopage.com/archive\\_13A/Feb13\\_1360744791CH.php](http://www.colombopage.com/archive_13A/Feb13_1360744791CH.php)
- 8 'The government acknowledged in November (2012) that 876 adults remained in administrative detention under the PTA; 845 were Tamil men and 18 were Tamil women. These detainees were among nearly 12,000 alleged LTTE members who surrendered or were captured by the army and then detained for months or years without charge in the aftermath of the conflict.' stated Amnesty International in its *Annual Report 2012*, Sri Lanka chapter, <http://www.amnesty.org/en/region/sri-lanka/report-2012>
- 9 For an overview of issues of post war land issues, military occupation, state development policies and politics in the Northern Province See *Land in the Northern Province: Post-War Politics, Policy and Practices*, Center for policy Alternatives (CPA), Colombo 2011, <http://www.cpalanka.org/wp-content/uploads/2011/12/Land-Issues-in-the-Northern-Province-Post-War-Politics-Policy-and-Practices-.pdf>
- 10 Jaffna landowners to file more than 1000 cases against military 'land grab', *Sunday Times*, 05 May 2013, <http://www.sundaytimes.lk/130505/news/jaffna-landowners-to-file-more-than-1000-cases-against-military-land-grab-43152.html>
- 11 Security forces engage in livelihood and infrastructure development activities under the aegis of the all powerful Ministry of Defence and Urban Development and excess produce sold at local markets, prevention of locals from accessing hereditary farming and fishing areas, have deprived many of their traditional livelihoods and way of life. International Crisis Group, *Sri Lanka's north II: rebuilding under the military*, Asia Report No. 220, 16 March 2012, p.15-24, <http://www.crisisgroup.org/-/media/Files/asia/south-asia/sri-lanka/220-sri-lankas-north-ii-rebuilding-under-the-military.pdf>. Further, community-based organizations and former LTTE cadres continued to complain of close surveillance of all activities including visits and interrogations by intelligence personnel – as gathered from personal interviews
- 12 The International Committee of the Red Cross (ICRC), *Annual Report 2011 – Sri Lanka*, Geneva 2012, p.256, <http://www.icrc.org/eng/assets/files/annual-report/current/icrc-annual-report-sri-lanka.pdf>, state that 15,780 tracing cases were still being handled by the end December 2011. 'Report of the Working Group on Enforced or Involuntary Disappearances', UN Human Right Council 22<sup>nd</sup> Session, January 2013, P98-102, [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.45\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.45_English.pdf) which states that of the cases in Sri Lanka reported to the Working Group, 5,671 cases were outstanding at the start of the period under review (November 2011- November 2012) with 5,676 outstanding at the end of the review period. The HRCSL has issued a statement expressing concern against continued cases of disappearances but there is insufficient information on action taken. 'Human Rights Commission of Sri Lanka concern about disappearances', 18 April 2012, <http://hrsl.lk/english/?p=1940>
- 13 Continuous reductions in welfare allocations in each national budget – especially in the education and health sectors – albeit Sri Lanka being a welfare state, lead to country wide protests by trade unions of university and school teachers. The national budget allocation for education in 2012 was approximately 4% of the total budget (health sector also received 4%) even as the budget allocations for defense continues to increase four years after the war and remained at 10% of the total budget for 2012 which is a clear indication of the priorities of the government. See LST website for: *ACDN Briefing Paper No 4: Budget 2013 (January 2013)* [http://www.lawandsocietytrust.org/PDF/CAFOD\\_BP\\_4\\_English.pdf](http://www.lawandsocietytrust.org/PDF/CAFOD_BP_4_English.pdf); *ACDN Briefing Paper No 3: Budget 2013 - Citizens' Proposals (September 2012)* [http://www.lawandsocietytrust.org/PDF/resource/Pre-budget%20Advocacy%20Document\\_English.pdf](http://www.lawandsocietytrust.org/PDF/resource/Pre-budget%20Advocacy%20Document_English.pdf); *ACDN Briefing Paper Paper No. 02: Budget 2011 (April 2012)* [http://www.lawandsocietytrust.org/PDF/resource/ACDN\\_Briefing\\_Paper%202\\_e.pdf](http://www.lawandsocietytrust.org/PDF/resource/ACDN_Briefing_Paper%202_e.pdf)

leading to further protests;<sup>14</sup> anti-Muslim propaganda by the state sponsored Sinhala Buddhist supremacists<sup>15</sup> of *'Bodu Bala Sena (BBS) (the Buddhist Army);*<sup>16</sup> and continuing issues of accountability under international laws relating to the final stages of the war in 2009.

Excessive use of force by police against peaceful protesters caused the death of a fisherman in February 2012 during a protest against the rising cost of fuel;<sup>17</sup> police and STF commandos conducting an operation in July 2012 to rescue three jailors held hostage by prisoners – including former LTTE cadres – in the Vavuniya prison caused injury to twenty two prisoners and one death;<sup>18</sup> clashes between Special Task Force (STF) police commandos and

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- 14 Lack of access to education and health facilities marginalizes rural populations even further, increases regional gaps and denies the rural populace of equal opportunities and consequently equal rights. The Federation of University Teachers Associations (FUTA) launched a protest and public awareness campaign in July 2012, demanding that the government increase education allocations to 6% of GDP (only 1.9% of GDP had been allocated for education in 2011) in which nearly 5,000 academics stopped work for a period of 3 months from July 2012. 'Futa vows to continue strike: Mammoth rally in Colombo', *The Island*, 23 August 2012, [http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=59891](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=59891). This was the largest people's movement witnessed by the country in the past decade or more and consequently the President of FUTA Dr, Nirmal Ranjith Devasiri received repeated death threats - 'Death threats on FUTA President', *Ceylon Today*, 21 September 2012, <http://www.ceylontoday.lk/51-13159-news-detail-death-threats-on-futa-president.html>; 'FUTA President gets another threat', *Sunday Leader*, 24 June 2012, <http://www.thesundayleader.lk/2012/06/24/futa-president-gets-another-threat/>
- 15 'Sri Lanka Muslims decry radical Buddhist mosque attack', *BBC News Asia*, 23 April 2012, <http://www.bbc.co.uk/news/world-asia-17816285>. In 2013 the BBS began targeting Halal certification by the All Ceylon Jamiyyathul Ulama (ACJU) claiming it to be unnecessary and a profit making venture - 'Rumpus over Halal', *Ceylon Today*, 24 February 2013, <http://www.ceylontoday.lk/59-25159-news-detail-rumpus-over-halal.html> which swiftly grew into an anti Muslim propaganda- 'BBS's latest target – Muslim dress code', *Colombo Telegraph*, 24 March 2013, <http://www.colombotelegraph.com/index.php/bbs-latest-target-muslim-dress-code/>, and eventually resulted in Muslim shops being attacked and property damaged by mobs lead by monks, although BBS claimed not to have any part in it- 'Racially Provocative', *Ceylon Today*, 31 March 2013, <http://www.ceylontoday.lk/59-28585-news-detail-racially-provocative.html>
- 16 'Gotabhaya Rajapaksa and his Bala Sena', *Colombo Telegraph*, 14 March 2013, <http://www.colombotelegraph.com/index.php/gotabhaya-rajapaksa-and-his-bala-sena/>
- 17 A rise in fuel prices lead to a series of protests especially by local fishing communities. Police opened fire on protestors killing one and wounding others. 'Protesting fisherman shot dead', *BBC Sinhala.com*, 15 February 2012, [http://www.bbc.co.uk/sinhala/news/story/2012/02/120215\\_oil.shtml](http://www.bbc.co.uk/sinhala/news/story/2012/02/120215_oil.shtml). The incident was reminiscent of police using live ammunition in 2011 on a protest by free trade zone (FTZ) workers causing the death of one FTZ worker and wounding over two hundred protesters- 'Fear and fury', Aftermath of FTZ worker's killing', *The Sunday Times*, 05 June 2011, [http://sundaytimes.lk/110605/News/nws\\_10.html](http://sundaytimes.lk/110605/News/nws_10.html). Although a formal complaint was lodged with the HRCSL against the incident and the continued harassment of FTZ workers by security forces, and a brief inquiry conducted, no report on the findings was made public.
- 18 'TNA alleges Vavuniya prisoners abused', *Colombo Gazette*, 8 July 2012, <http://colombogazette.com/2012/07/08/tna-alleges-vavuniya-prisoners-abused/>; 'Vavuniya Prison Saga', *Ceylon Today*, 01 July 2012, <http://www.ceylontoday.lk/59-8808-news-detail-vavuniya-prison-saga.html>. The Vavuniya HRCSL regional coordinator revealed in an interview that although he had attempted to investigate the incident at the time, prison authorities had not allowed him access to speak to the prisoners. There is no further information on any action HRCSL may have taken subsequently

prison inmates at the Welikada prison<sup>19</sup> in November 2012 left twenty seven inmates dead and forty three persons injured;<sup>20</sup> on 27 November 2012 Jaffna university students holding a candle lit vigil to commemorate war heroes day<sup>21</sup> were attacked by police and four students arrested by the Terrorism Investigation Division (TID);<sup>22</sup> in March 2013, police in Vavuniya forcibly detained and prevented approximately six hundred family members of disappeared persons<sup>23</sup> from travelling to Colombo to hand over a petition to the UN Mission;<sup>24</sup> police and members of *Bodu Bala Sena (BBS)* forcibly dispersed a crowd conducting a candle-lit vigil on 12 April 2013 against BBS and arrested at least five protestors without charge.<sup>25</sup>

The breakdown in the rule of law and a culture of impunity and violence culminated in two UN Human Rights Council (UNHRC) resolutions against the GoSL at the 19<sup>th</sup> Session<sup>26</sup> in

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- 19 'Welikada Prison Riots', *Ceylon Today*, 09 November 2012, <http://www.ceylontoday.lk/27-1929-news-detail-welikada-prisoners-riot.html>; 'Sri Lanka's prison clash a massacre', *BBC News Asia*, 11 November 2012, <http://www.bbc.co.uk/news/world-asia-20289609>
- 20 Although two inquiries were commissioned, neither report has been made public. 'Two prison probes tackle reasons for riot', *Sunday Times*, 18 November 2012, <http://www.sundaytimes.lk/121118/news/two-prison-probes-tackle-reasons-for-riot-21052.html>
- 21 War heroes day was traditionally commemorated by the LTTE each year to remember fallen LTTE cadres which necessarily comprised of family members of civilians in the North and East
- 22 On 27 November, police also made an unannounced raid on the women's hostel in Jaffna and on 28 November, hundreds of Jaffna university students undertook a protest march against these attacks. These peaceful protestors were also attacked by riot police – 'Police baton charge university students', *Daily Mirror*, 28 November 2012, <http://www.dailymirror.lk/caption-story/23833-police-baton-charge-jaffna-students-.html>. The four students arrested by the TID on 30 November remained in detention until 22 January when two students were released. The students had been forced to undergo 'rehabilitation' at a military camp in Welkanda and later in Vavuniya. On 12 February 2013, the President in reply to appeals by the parents of the two students in continued detention ordered their immediate release; a predictably populist action – 'Two Jaffna university students released on President's orders', *Colombo Page*, 13 February 2013, [http://www.colombopage.com/archive\\_13A/Febr13\\_1360744791CH.php](http://www.colombopage.com/archive_13A/Febr13_1360744791CH.php), 'President orders release of Jaffna university students', *Colombo Gazette*, 12 February 2013, <http://colombogazette.com/2013/02/12/president-orders-release-of-jaffna-students/>. There was outrage by human rights activists at the arbitrary arrest and detention over a period of several months of these students as well as their forced rehabilitation without evidence, charge or due legal process
- 23 'Stopped en route', *Ceylon Today*, 10 March 2013, <http://www.ceylontoday.lk/59-26484-news-detail-stopped-en-route.html>
- 24 The government refused to investigate this absolute violation of fundamental constitutional rights to free movement, assembly, expression and protest - 'Govt. hedges over stoppage of protestors in Vavuniya', *Daily FT*, 08 March 2013, <http://www.ft.lk/2013/03/08/govt-hedges-over-stoppage-of-protestors-in-vavuniya/>, even amidst strong protests by local and international human rights groups with the US embassy issuing a statement expressing its growing concern regarding both the incident and the lack of a genuine effort on the part of the government to implement LLRC recommendations to investigate into cases of disappearances. See - 'US alarmed by peaceful protestors' detention', *Colombo Telegraph*, 06 March 2013, <http://www.colombotelegraph.com/index.php/u-s-alarmed-by-peaceful-protestors-detention/>
- 25 'Video: Police and BBS block anti-BBS vigil in Colombo', *Colombo Telegraph*, 12 April 2013, <http://www.colombotelegraph.com/index.php/video-police-and-bbs-block-anti-bbs-vigil-in-colombo/>
- 26 The Sri Lankan government delegation was accused of harassing local HRDs at the 19<sup>th</sup> session forcing the UN High Commissioner to give due warning against harassment of HRDs. 'UN High Commissioner Pillay speaks out against harassment of Sri Lankan HRDs during the Council in Geneva', *Protection Line*, 23 March 2012, <http://protectionline.org/2012/03/30/navi-pillay-un-high-commissioner-for-human-rights-speaks-out-against-harassment-of-sri-lankan-hrds-during-council-in-geneva/>

Geneva 2012 A/HRC/RES/19/27 and the 22<sup>nd</sup> Session in 2013<sup>28</sup> A/HRC/22/L.1/Rev.13.<sup>29</sup> The Resolutions were viewed with some disappointment by the human rights community due to the diluted nature of the recommendations which merely urged the government to effectively implement recommendations of the Lessons Learnt and Reconciliation Commission (LLRC) and offered technical expertise and assistance. The GoSL developed a National Action Plan<sup>30</sup> to implement LLRC<sup>31</sup> recommendations which does not include many critical recommendations,<sup>32</sup> nor are those included being effectively implemented.<sup>33</sup> There is a severe lack of information publicly available relating to the status of implementation of recommendations by the various institutional stakeholders identified in the National Action Plan which disallows public participation in the state reconciliation process.

The controversial '*Divi Neguma Bill*'<sup>34</sup> introduced in August 2012<sup>35</sup> was vehemently opposed and twelve petitions<sup>36</sup> filed in the Supreme Court challenging its constitutionality.<sup>37</sup>

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- 27 See Office of the High Commissioner for Human Rights website - <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G12/126/71/PDF/G1212671.pdf?OpenElement> - HRC Resolution A/HRC/RES/19/2 of 2012 calls upon Sri Lanka to ensure accountability for alleged human rights violations under international law and requesting the government to implement the recommendations of the Final Report of the Lessons Learnt and Reconciliation Commission (LLRC)
- 28 The first resolution urged the GoSL to implement the Lessons Learnt and Reconciliation Commission (LLRC) recommendations whilst the second cited inadequacy of implementation initiatives and continued concerns regarding HR violations in the country. See: UNHRC Resolution A/HRC/22/L.1/Rev.13 on '*Promoting reconciliation and accountability in Sri Lanka*' <http://daccess-dds-ny.un.org/doc/RESOLUTION/LTD/G13/122/61/PDF/G1312261.pdf?OpenElement>
- 29 *Report of the Office of the United Nations High Commissioner for Human Rights on advice and technical assistance for the Government of Sri Lanka on promoting reconciliation and accountability in Sri Lanka* [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-38\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-38_en.pdf) and Amnesty International Annual Report 2013 on Sri Lanka, <http://www.amnesty.org/en/region/sri-lanka/report-2013>
- 30 National Action Plan to implement LLRC recommendations: [http://www.priu.gov.lk/news\\_update/Current\\_Affairs/ca201207/20120726national\\_plan\\_action.htm](http://www.priu.gov.lk/news_update/Current_Affairs/ca201207/20120726national_plan_action.htm)
- 31 See LLRC Report and Annexes at Presidential Secretariat website - [http://www.presidentsoffice.gov.lk/index.php?option=com\\_content&view=article&id=54:llrc-report&catid=53:nomenuarticles&Itemid=290](http://www.presidentsoffice.gov.lk/index.php?option=com_content&view=article&id=54:llrc-report&catid=53:nomenuarticles&Itemid=290)
- 32 Gnana Moonesinghe, 'Sri Lanka's national plan of action vis-a-vis Reconciliation', *Groundviews*, 12 February 2013, <http://groundviews.org/2013/02/12/sri-lankas-national-plan-of-action-vis-a-vis-reconciliation/>
- 33 The Social Architects, 'The numbers never lie; a comprehensive assessment of Sri Lanka's LLRC progress', *Groundviews*, 14 March 2013, <http://groundviews.org/2013/03/14/the-numbers-never-lie-a-comprehensive-assessment-of-sri-lankas-llrc-progress/>
- 34 See full text of Divi Neguma Bill at: [http://documents.gov.lk/Bills/2012/Divineguma-Bill/Divineguma\(E\).pdf](http://documents.gov.lk/Bills/2012/Divineguma-Bill/Divineguma(E).pdf)
- 35 'Divineguma facilitates the concentration of power', *The Sunday Times*, 30 September 2012, <http://www.sundaytimes.lk/120930/columns/divineguma-facilitates-the-concentration-of-power-14510.html> and 'What's wrong with the Divineguma Bill?', *Asian Tribune*, 18 October 2012, <http://www.asiantribune.com/news/2012/10/18/what%E2%80%99s-wrong-divineguma-bill>
- 36 'More petitions against Divineguma Bill', *Daily FT*, 24 October 2012, <http://www.ft.lk/2012/10/24/more-petitions-against-divi-neguma-bill/>
- 37 The petitions questioned the constitutionality of passing the Bill in the absence of a Northern Provincial Council (PC) and the authority of the Governor of the Northern Province in approving it in the absence of a Northern Provincial Council – See: 'Petition against Divineguma', *Ceylon Today*, 18 August 2012, <http://www.ceylontoday.lk/16-10944-news-detail-petition-against-divineguma.html> and 'Petitions filed in apex court over Sri Lanka's controversial Divineguma Bill postponed', *The Colombo Page*, 15 October 2012, [http://www.colombopage.com/archive\\_12A/Oct15\\_1350314597CH.php](http://www.colombopage.com/archive_12A/Oct15_1350314597CH.php)

The Bill amalgamates three development authorities for poverty alleviation amounting to nearly Rs.80 billion under the Ministry of Economic Development and encroaches on the powers of the Provincial Councils. The case was presided over by a three judge panel headed by then Chief Justice Dr. Shirani Bandaranayake.<sup>38</sup> The Panel determination<sup>39</sup> was viewed with public disfavor by the government. The timing of this process was markedly concurrent with the government's impeachment motion against Dr. Bandaranayake, the first female Chief Justice of Sri Lanka<sup>40</sup> to be conducted by a Parliamentary Select Committee (PSC)<sup>41</sup> comprising of eleven members of parliament – seven from the ruling coalition and four from opposition parties, appointed by the Speaker.<sup>42</sup> The PSC was expected to submit a report in thirty days on all fourteen charges, automatically rendering the process superfluous.<sup>43</sup>

38 - 'Divineguma needs two thirds majority and referendum to be passed in present form: SC', *Daily FT*, 07 November 2012, <http://www.ft.lk/2012/11/07/divi-neguma-needs-two-thirds-majority-and-referendum-to-be-passed-in-present-form-sc/>. The Ruling was based upon Constitutional provisions for amendments relating to Provincial Councils but viewed with public disfavor by the government. See: Chapter XVII A, Art.154 (G) 2 and 154 (G) 3, the Constitution of Sri Lanka 1978, [http://www.priu.gov.lk/Cons/1978Constitution/Chapter\\_17A\\_Amd.html](http://www.priu.gov.lk/Cons/1978Constitution/Chapter_17A_Amd.html)

39 The Panel determined on 5 November 2012 that the Bill would need to be referred to all nine Provincial Councils (including the Northern PC) for approval or a two third majority obtained in Parliament to be enacted into law; the Bill was easily passed into law using the two thirds majority the government has in Parliament.

40 The impeachment contained 14 charges including corruption against Dr. Bandaranayake was tabled in Parliament on 6 November 2012 - 'Impeachment motion against CJ tabled', *Daily Mirror*, 6 November 2012, <http://www.dailymirror.lk/news/23264-impeachment-motion-against-cj-tabled.html>

41 The Parliamentary Select Committee comprising of 11 members of parliament – with 7 from the ruling party coalition and 4 from the opposition - appointed by the Speaker under Standing Order 78A of Parliament commenced hearings on 23 November 2012 and on the 3<sup>rd</sup> hearing on 6 December, the Chief Justice walked out claiming an unfair trial. See: 'CJ walks out of PSC', *Daily Mirror*, 6 December 2012, <http://www.dailymirror.lk/news/24066-cj-walks-out-of-psc.html>

42 The impeachment motion was also preceded by an assault on the Secretary of the Judicial Services Commission Manjula Thilakarathna on 07 October 2012 after a statement issued by him alleging interference by the executive on judicial matters. See: 'Secretary Of The Judicial Services Commission Was Assaulted By A Group Of Unidentified Men', *Colombo Telegraph*, 07 October 2012, <http://www.colombotelegraph.com/index.php/secretary-of-the-judicial-services-commission-was-assaulted-by-a-group-of-unidentified-men/> and 'Judicial Services Commission Secretary says danger to their security', *Sri Lanka Brief*, 29 September 2012, <http://www.srilankabrief.org/2012/09/judicial-service-commission-secretary.html>. To date, no perpetrators have been arrested and there is no active investigation into the matter

43 The CJ requested an extension of time stating that she had been given inadequate time to prepare her defense and cross-examine witnesses which was refused The CJ was in fact given 7 days to submit her written defense and following the second session, another 7 days to send further observations, documents etc. The 4 opposition MPs in the PSC also walked out of the proceedings in protest of the alleged verbal degradation and unfair treatment meted out to the CJ on the 3<sup>rd</sup> session. 'Government PSC Members insulted CJ and she walked out', *Colombo Telegraph*, 6 December 2012, <http://www.colombotelegraph.com/index.php/government-psc-members-insulted-cj-and-she-walked-out/>

Petitions<sup>44</sup> were filed against the constitutionality of the process<sup>45</sup> in the Court of Appeal and the Supreme Court, and the Supreme Court quashed the PSC report, ruling that the PSC had no legal authority.<sup>46</sup> Parliament however overruled the Supreme Court violating the customary structure of separation of powers and the impeachment was ratified on 13 January 2013 by the President amidst country wide protests by BASL members.<sup>47</sup>

Some of these violations were brought to the direct notice of the HRCSL including: acts of violence and intimidation against religious minorities by the *Bodu Bala Sena*, land-grabbing especially in the North, riots in both Welikada and Vavuniya prisons. A formal complaint against the *BBS* is now under inquiry at the HRCSL but the commission has not made clear representations or recommendations to government to stop unlawful or irregular activities by *Bodu Bala Sena* or similar such groups inciting discrimination and violence against ethnic and religious minorities. The HRCSL made public recommendations on detention arrangements of prisoners in Welikada but there is no accessible report of its findings regarding the incident which left twenty seven prisoners dead.

The HRCSL draft *Annual Report* for 2012 incorporates an overview of the status of human rights in Sri Lanka which highlights issues and makes recommendations relating to: *the need to uphold the Rule of Law* focusing mainly on the impeachment process of the Chief Justice, which it claims 'violates all norms of natural justice' and denies the right to a fair trial, the attack on the judicial services commissioner and undermining of judicial authority by the executive, in contravention of the separation of powers; *the right to dissent* – the Commission states that 'dissent - especially political dissent- is under siege' and even extends to judicial judgments which contradict government policy; *need for pluralism and inclusivity* – highlighting the attack on and arrest of Jaffna university students by the police and TID and the visibly large presence of the army in the North and their imposition

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44 This included a petition by the CJ challenging the report of the PSC which conducted the impeachment process, citing 13 respondents including – 'Breaking News: Chief Justice Filed Action Against PSC Report: Full Text Of The Petition', *Colombo Telegraph*, 19 December 2012, <http://www.colombotelegraph.com/wp-content/uploads/2012/12/CJ-Petition-pdf.pdf>

45 Article 4(c) of the Constitution states: "*the judicial power of the people shall be exercised by Parliament through courts, tribunals and institutions... except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members...*" Therefore, the only instances in which Parliament can exercise judicial power is in regard to its own privileges, immunities and powers. Further, although Article 107 of the Constitution provides that "*Parliament shall by law or by Standing Order provide for all matters relating to an address of parliament on the removal of a judge, including investigation and proof*", this was arguably not meant to include trial by a Parliamentary Select Committee. Also, such a process would entail the Parliament acting as judge and jury of its own cause

46 The Supreme Court ruled that "the PSC has no legal power or authority to find a Judge guilty because Standing Order 78A is not a law." 'Impeachment: Full Text Of the Supreme Court Determination Today', *Colombo Telegraph*, 3 January 2013, <http://www.colombotelegraph.com/index.php/impeachment-full-text-of-the-supreme-court-determination-today/> Ruling was based on "*the sole and exclusive jurisdiction of the Supreme Court to determine questions relating to interpretation of the Constitution...*" as established in Article 125 (1) of the Constitution

47 'Stop Debating The Impeachment' – Bar To Strike For Two Days', *Colombo Telegraph*, 09 January 2013, <http://www.colombotelegraph.com/index.php/stop-debating-the-impeachment-bar-to-strike-for-two-days/>, 'Sri Lankan lawyers go on strike over CJ's impeachment process', *The Hindu*, 12 December 2012, <http://www.thehindu.com/news/international/sri-lankan-lawyers-go-on-strike-over-cjs-impeachment-process/article4191692.ece>

upon civilian structures; *de-politicization of law enforcement* – the Commission criticizes the politicization of the police service and recommends that the police be detached from the Ministry of Defence; *need for civilian administrators* – the HRCSL stresses that the North and East need to revert to civilian administration which it lacks at present, citing as example ex-security services commanders who have been appointed governors in the two provinces; *disappeared and missing persons* – the HRCSL highlights the lack of information relating to missing and disappeared persons, condemns extra-judicial arrests and abductions and stresses state responsibility to investigate allegations and ensure the safety of those taken into custody by governmental authorities.

Although the HRCSL has accurately, if too briefly, highlighted a few areas of human rights violations in the country and made recommendations to the state on remedial measures, it makes no mention of its own responsibilities, duties and actions in relation to investigating and addressing these violations. This observation is especially relevant to the direct role imposed upon the HRCSL to protect those arrested under the PTA, which bears no mention within this account. Further, Commissioner Mahanamahewa has in fact upheld the very process of impeachment which the HRCSL condemns in its *Annual Report*.<sup>48</sup>

The fact that the Commission recognizes the gravity of the prevailing human rights situation in the country but continues to do nothing of significance to address these issues demonstrates a lack of will or true authority and autonomy from the state which continues to stunt the performance of the HRCSL. The ineffectiveness and lack of independence of the HRCSL<sup>49</sup> has been highlighted through its silence in the face of ongoing human rights violations of forced disappearances, extra-judicial killings, illegal detention and torture, excessive use of police powers, mass land grabbing, hate speech and racial intolerance, and a severe breakdown in the rule of law in the country including during the period under review.<sup>50</sup> The HRCSL in addressing human rights violations of its own motion, confines itself to issuing statements regarding violations of a serious nature,<sup>51</sup> conducting inquiries into issues where its findings remain obscure,<sup>52</sup> and shows public support for certain controversial government policies with flagrant disregard for the escalating culture of impunity in the country.

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48 See 'Process is constitutional', *Daily News*, 21 November 2012, <http://www.dailynews.lk/2012/11/21/newso1.asp>. He further commented that the Parliament was supreme but that the President's decision on the impeachment was final – See 'PCS has full powers to issue ex parte decision against CJ', *Daily News*, 08 November 2012, <http://www.dailynews.lk/2012/12/08/news11.asp>

49 For a comprehensive analysis of the progress and functioning of the HRCSL 2008-2012 see: B. Skanthakumar, *Neither Restrain nor Remedy; The Human Rights Commission of Sri Lanka*, Law & Society Trust, Colombo 2011, <http://www.lawandsocietytrust.org/> containing reports on the HRCSL from 2008 to 2011

50 "Commissioners nominated for Sri Lanka Human Rights Commission: Independence of HRC under scrutiny", *The Nation*, [www.nation.lk/2011/02/20/newsfe1.htm](http://www.nation.lk/2011/02/20/newsfe1.htm)

51 'The HRCSL's statement on religious tension that has arisen in the country', 25 March 2013, HRCSL website - <http://hrctl.lk/english/?p=2099>

52 'HRCSL team to probe Welikada incident', *Daily Mirror*, 13 November 2012, <http://www.dailymirror.lk/news/23429-hrcsl-team-to-probe-welikada-incident.html>: The HRCSL merely stated that prison authorities are responsible for the safety of the prisoners under their care, condemned the overcrowding of prisons and recommended that prisoners convicted of serious crimes should be held separately which is absolutely insufficient in an incident which cost the lives of 27 people

## Methodology

The Sri Lanka country report for the Asian NGOs Network on National Human Rights Institutions (ANNI) regional publication is based upon the guidelines for 2013 issued by ANNI. The sources for the report include; annual reports, statements, verbal and written responses and information provided by the members and senior staff of the HRCSL in Colombo and coordinators of HRCSL regional offices in 2012; information available on the HRCSL website; newspaper articles; information provided by civil society organizations and activists; and findings in previous ANNI reports. Information was requested from the commission regarding the progress of the HRCSL in 2012 especially due to the lack of a published Annual Report for 2012 as at June 2013. Questionnaires prepared by ANNI were also sent to the commission focusing on the HRCSL work relating to the chosen thematic areas of the 2013 report. A draft annual report for 2012 was sent by the HRCSL nearly 60 days after the request was made, upon its receipt of the first draft of the ANNI Report. There was however no response to the ANNI questionnaires.

## II. Independence

Although National Human Rights Institutions (NHRIs) – also known as National Institutions (NIs) or Human Rights Commissions as in the case of Sri Lanka – are established and financed by the state, they are required to be independent of the state. The *Paris Principles (Principles Relating to the Status of National Institutions)*<sup>53</sup> contain provisions to establish guarantees of independence and pluralism of National Institutions (NI) through: transparent procedures for composition and appointment of members who are representative of society and independent of state; institutional structure and funding which allows autonomy from the state; a broad mandate which allows credible investigations and effective remedial measures; and sufficient immunity from persecution for its staff. Statutory or constitutional provisions establishing NIs are expected to reflect these priorities of independence and pluralism.

The *Human Rights Commission of Sri Lanka Act No. 21 of 1996*,<sup>54</sup> an Act of Parliament established the HRCSL as a statutory institution and regulates its performance. It provides that the commission shall consist of five members from among persons 'having knowledge of or experience in matters relating to human rights' with one member nominated as Chairman. The lack of a mechanism for determining or setting the standards regarding the knowledge and experience of chosen members remains a serious inadequacy. There is a vague, broad requirement for 'minorities' to be represented within this selection but no prerequisite for gender based representation.<sup>55</sup> There is no provision for inclusion of members of civil society within the ranks of commission members. Members can hold office

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53 Paris Principles (Principles Relating to the Status of National Institutions) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>

54 Human Rights Commission of Sri Lanka Act No. 21 of 1996: <http://hrctl.lk/english/ACT/english.pdf>

55 Art. 3 (3) HRCSL Act No. 21 of 1996 - <http://hrctl.lk/english/ACT/english.pdf>

for a period of three years (Article 3 (5) HRCSL Act). The superseding provision<sup>56</sup> however remains that members of the commission shall be appointed by the President,<sup>57</sup> on the recommendation of the Constitutional Council<sup>58</sup> as established by the 17<sup>th</sup> Amendment to the Constitution. The 17<sup>th</sup> Amendment attempts to provide for seven independent commissions and remove the absolute discretion of the President to appoint members to specified commissions providing that persons may be appointed by the President only upon the recommendation of the Constitutional Council which was itself a more democratically elected and representative body.<sup>59</sup>

The enactment of the 18<sup>th</sup> Amendment to the Constitution in 2010 as an 'urgent bill' and passed in parliament using the two thirds majority commanded by the government, makes such safeguards wholly redundant. The 18<sup>th</sup> Amendment abolishes the Constitutional Council and establishes a Parliamentary Council<sup>60</sup> which is primarily comprised of members of the ruling coalition, with little authentic power and the President is only required to 'seek its observations' in appointing Members. Appointments are therefore politicized, unilateral and dependent on a powerful Executive President as created under the Constitution of 1978,<sup>61</sup> further empowered by the 18<sup>th</sup> Amendment which removes the two term limit for election and in theory secures indefinite continuity in the office.<sup>62</sup> Removal of members as

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- 56 Art. 3 (2) Human Rights Commission of Sri Lanka Act No. 21 of 1996: <http://hrcls.lk/english/ACT/english.pdf>
- 57 Article 41 (B) 17th Amendment: 'No person shall be appointed by the President as the Chairman or a member of any of the Commissions specified in the Schedule to this Article, except on a recommendations of the Council'. The persons appointed through nominations are required to be persons of eminence and integrity who have distinguished themselves, who are not members of any political party and nominated to represent minority interests
- 58 The Constitutional Council comprised of the Prime Minister, the Speaker, the Leader of the Opposition in Parliament, one person appointed by the President, five persons appointed by the President, on the nomination of both the Prime Minister and the Leader of the Opposition, and one person nominated upon agreement by the majority of the Members of Parliament belonging to political parties or independent groups other than those to which the Prime Minister and the Leader of the Opposition belongs and appointed by the President – See 17<sup>th</sup> Amendment to the Constitution of the Democratic Socialist Republic of Sri Lanka 1978, <http://www.priu.gov.lk/Cons/1978Constitution/SeventeenthAmendment.html>
- 59 Article 41B (1) 17<sup>th</sup> Amendment - No person shall be appointed by the President as the Chairman or a member of any of the Commissions specified in the Schedule to this Article, except on a recommendation of the Constitutional Council- <http://www.priu.gov.lk/Cons/1978Constitution/SeventeenthAmendment.html>
- 60 The Parliamentary Council comprising primarily of members drawn from government and ruling coalition members of parliament of: the Prime Minister, the Speaker, the Leader of the Opposition, a nominee (who is an MP) of the Prime Minister, and a nominee (who is an MP) of the Leader of the Opposition – Article 41 (A) of the 18<sup>th</sup> Amendment to the Constitution of the Democratic, Socialist Republic of Sri Lanka, [http://www.priu.gov.lk/Cons/1978Constitution/18th%62oAmendment%62oAct\(E\).pdf](http://www.priu.gov.lk/Cons/1978Constitution/18th%62oAmendment%62oAct(E).pdf)
- 61 The Executive President has blanket immunity - 'While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity' – Art.35 (1) The Constitution of Sri Lanka 1978, [http://www.priu.gov.lk/Cons/1978Constitution/Chapter\\_07\\_Amd.html](http://www.priu.gov.lk/Cons/1978Constitution/Chapter_07_Amd.html). The President is also not subject to any effective impeachment process
- 62 The 18<sup>th</sup> Amendment to the Constitution removes the two-term limit on the President allowing an incumbent President to continue indefinitely, thereby enjoying greater legal immunity for actions committed while in office, which previously he/she could be subjected to upon the end of the two term period - Transparency International, *Sri Lanka Governance Report 2010*, TI Sri Lanka, See Chapter 1, *Empowering an already all-powerful Executive: the impact of the 18<sup>th</sup> Amendment*, J.C. Weliamuna, p. 19

per Article 4 of the HRCSL Act may be carried out by an order of the President if supported by a majority in parliament on grounds of proved misbehavior or incapacity, which in light of the impeachment of the Chief Justice of Sri Lanka becomes a mere formality.<sup>63</sup> This makes members vulnerable to arbitrary removal by an Executive President who enjoys absolute power and immunity and further diminishes the prospect of effective and independent action by the Commission.

### A. Resourcing

Resourcing of the commission is also dependent upon allocations by the Treasury with the President holding the portfolio of Minister of Finance.<sup>64</sup> The HRCSL regional offices protest inadequacy of funding, their absolute dependency on the head office for finances and the resultant delays in obtaining urgently required finances due to the bureaucratic processes in place. Regional offices also lack adequate human resources to deal with the volume of complaints received causing heavy delays in obtaining resolutions. The regional offices lack staff in cadres including investigations officers, legal officers, education officers and other administrative staff, as well as those who are adequately bilingual. Conversely however, many of the HRCSL regional offices do not appear to consider human rights organizations in their locale as resources to be utilized in their work, or as a source of information on human rights violations in the area. This is in spite of some organizations offering human resources and transport facilities to the Commission.

It is understandable that regional offices which are required to cover large numbers of police stations and wide geographical areas on meager fuel allowances and inadequate numbers of investigations officers would find it difficult to conduct these visits on a regular or frequent basis. However, the visible presence of the HRCSL especially in areas which have a large military presence and regular visits to local police stations act as a deterrent against some of the more severe violations and provide some level of relief to locals. It is therefore less understandable why some of the HRCSL offices would rather neglect their duties than work with grassroots organizations and networks in ensuring the protection of the rights of people in their respective areas.

### B. HRCSL joint project with UNDP

The United Nations Development Program (UNDP) in Sri Lanka has provided additional financial support to the HRCSL for at least five years to enhance capacity building and facilitate increased liaison with civil society.<sup>65</sup> However a lack of adequate, results oriented monitoring and evaluation by the UNDP has generated a situation where many of the regional offices are materially resourced by the UNDP, but without the requisite staff appointed or transferred internally and finances issued by the HRCSL head office, to

63 Article 4 (1) (b) of the HRCSL Act <http://hrctl.lk/english/ACT/english.pdf>

64 According to the draft HRCSL *Annual Report* for 2012, the total income for the year was Rs. 140,221,629 with Rs. 535, 254 of the total being a foreign grant from UNFPA

65 HRCSL Website: *Projects – Joint Programme on Human Rights, UNDP* - [http://hrctl.lk/english/?page\\_id=232](http://hrctl.lk/english/?page_id=232)

implement stated objectives. According to regional staff of the HRCSL<sup>66</sup> although the UNDP has provided resources such as office equipment and vehicles, lack of human resources, inadequate fuel allowances and long delays in obtaining funding from the head office have prevented them from conducting frequent or emergency inspections of police station, sufficient awareness raising at village level, immediate investigations of alleged infringements, or even regular consultations with local civil society.

The UNDP project office based within the HRCSL premises to coordinate and monitor joint activities, should more actively recommend the Commission to; create an ongoing dialogue between HRCSL and human rights organizations especially at national level, sensitize HRCSL staff about the role and issues of human rights defenders, adequately enhance staff knowledge and understanding of international obligations. Although the UN office representing UN OHCHR in Colombo has organized a few meetings<sup>67</sup> with a select group of national level civil society organizations and activists to obtain recommendations and understand some of the obstacles relating to the HRCSL, the meetings do not include the UNDP/HRCSL project consultant. This is a considerable deficiency as any recommendations or issues raised by participants should be addressed by and information exchanged with the UNDP consultant in a transparent manner. At present, the outcomes of these meetings remain unclear. If a key purpose of the UNDP joint project with the HRCSL is to build its capacity to improve effectiveness and promote increased accessibility and mutual cooperation with civil society, its success in achieving these objectives is highly debatable.

Indeed, the Commission has failed to demonstrate any independence from the state on critical issues such as abuses committed under the Prevention of Terrorism Act (PTA) and its non-conformity with international human rights standards as well as mounting state control of right to freedom of expression, assembly and association. The HRC Chairman has in fact expressed support for state policies at international forums<sup>68</sup> whilst Commissioner Mahanamahewa is a predictable champion of the government.<sup>69</sup> Some of the members

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66 Between 2008 – 2012 interviews have been carried out with selected staff from all ten regional offices to obtain requisite information for the ANNI Report on the HRCSL

67 Meetings usually include a few chosen civil society organizations and activists known to both the HRCSL and the UNDP

68 "No basis for human rights violations accusations made by the international community", *Dinamina*, 05 March 2011 (in Sinhala); "No abuse of emergency regulations: HRC Chairman", *Daily Mirror* 11 June 2011, <http://print2.dailymirror.lk/opinion1/46603.html>

69 'Sri Lanka's HR record improved in 2012 – Dr. Mahanama Hewa', *Sunday Observer*, 28 April 2013, <http://www.sundayobserver.lk/2013/04/28/new04.asp>

of HRCSL including the Chairman have shown willingness to liaise with civil society on selected issues such as infringements of the trilingual policy<sup>70</sup> but remain inaccessible regarding more serious violations involving state and military institutions and actors.

### C. Membership and Selection Process

HRCSL members nominated by the Parliamentary Council and appointed by the President with effect from 18 February 2011 are: retired Supreme Court judge Justice Priyantha Perera – Chair of the Commission; Mr. T.E. Anandarajah, former Inspector-General of Police; Dr. Bernard de Zoysa, private Medical Practitioner; Dr. Ananda Mendis, former Government Analyst; (*Deshabandu*) Mrs. Jezima Ismail, former Chancellor of South Eastern University. The nomination process lacked transparency, with no consultations with civil society regarding the final selection.<sup>71</sup>

The process was viewed with dismay by both the local and international human rights communities as it spells the end of a democratic process of selection through a Parliamentary committee, sets precedence for politically motivated appointments and wholly undermines the independence of the HRCSL.<sup>72</sup> The process is in direct contradiction to the standards required by the Paris Principles in the appointment of its members, "... whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human

70 The GoSL through the Ministry of National Languages and Social Integration declared 2012 as a 'Trilingual Year' as part of its reconciliation efforts to promote all Sri Lankan citizens to learn all three languages of Sinhala, Tamil and English – 'Sri Lanka declares 2012 as 'Trilingual Year' to unify the Nation', *Colombo Page*, 21 January 2012, [http://www.colombopage.com/archive\\_12/Jan21\\_1327158055CH.php](http://www.colombopage.com/archive_12/Jan21_1327158055CH.php). According to the Sri Lankan Constitution, Sinhala and Tamil are the National Languages, whilst 'the official language of Sri Lanka is Sinhala; and Tamil shall also be an official language.' English shall be the link language. Chapter IV - Language, The Constitution of Sri Lanka 1978, [http://www.priu.gov.lk/Cons/1978Constitution/Chapter\\_04\\_Amd.html](http://www.priu.gov.lk/Cons/1978Constitution/Chapter_04_Amd.html). The GoSL also formulated a 'Ten Year National Plan for a Trilingual Sri Lanka 2012-2021, 22 June 2012, [http://www.priu.gov.lk/news\\_update/Current\\_Affairs/Ten%20Year%20National%20Plan%20-%20English.pdf](http://www.priu.gov.lk/news_update/Current_Affairs/Ten%20Year%20National%20Plan%20-%20English.pdf). The trilingual policy is to be compulsorily implemented by government stakeholders in their work, information and service provision to the public in order to make goods, information and services accessible in all three languages. Breaches of this policy by public officials or institutions can be reported to the Official Languages Commission of Sri Lanka (under the Ministry of National Languages) which is mandated to address such complaints - <http://lanintegmin.gov.lk/institutions/official-languages-commission/>. However, the HRCSL was able to successfully address complaints which had been closed off by the Languages Commission without resolution when they were redirected to the HRCSL.

71 The main opposition, United National Party (UNP) rejected the nominations which were allegedly finalised without due consultation with opposition Parliamentary Council members. In protest of the 18<sup>th</sup> Amendment, both the Opposition leader Ranil Wickremesinghe and UNP parliamentarian D. M. Swaminathan who were members of the Parliamentary Council boycotted the meeting to discuss nominations of members to the HRC. 'UNP rejects SLHRC', *News Now.lk*, 14 February 2011, <http://www.newsnow.lk/latest-news/unp-rejects-slhrc>

72 See Concluding Observations of the Committee Against Torture (CAT): Sri Lanka, 47<sup>th</sup> Session (31 October – 25 November 2011), CAT/C/LKA/CO/3-4, 8 December 2-11, Para 17, p. 7, [http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.LKA.CO.3-4\\_en.pdf](http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.LKA.CO.3-4_en.pdf) which express concern that the new appointment process set out by the 18<sup>th</sup> Amendment to the Sri Lankan Constitution (September 2010), which ends Parliament's role in approving appointments, undermines the independence of the HRCSL.

rights...".<sup>73</sup> The nominations however were drawn completely from within the ranks of retired or active government servants with the exception of Dr. de Zoysa, a private medical practitioner.

In examining the human rights expertise of elected members in accordance with the HRCSL Act, the Chairman Justice Perera beyond adjudicating in fundamental rights cases has no known experience in addressing human rights violations. Mr. Anandarajah has no record of human rights work and has instead been a figure of some debate.<sup>74</sup> Further, the appointment of a former IGP despite the large proportion of complaints lodged against police excesses may lead to loss of public confidence. Dr. Bernard de Zoysa, a medical doctor and owner/chairman of a nursing home, has no experience in the field of human rights and has proved elusive in engaging with civil society or the media. Indeed the logic behind his appointment remains a mystery. There is no established procedure for ensuring familiarity of elected members with national and international human rights standards or set standards for practical experience in the area of human rights.

Mrs. Jezima Ismail, the only female commissioner, has some expertise as a member of civil society,<sup>75</sup> in inquiring into complaints – although there is insufficient information regarding practical on the ground experience in protecting human rights – having served as a member / chairperson on numerous government-appointed committees including those on 'serious violations of human rights'.<sup>76</sup> This makes her reticence in the face of grave human rights violations extremely disappointing. Dr. Ananda Mendis resigned a year after his appointment in February 2012 citing weaknesses, inefficiencies and interference within the HRCSL.<sup>77</sup> Dr Mendis had been visibly active in engaging with civil society and made several recommendations for improving the workings of the commission including a change of premises in order to better provide for both complainants and members of staff.

73 *Paris Principles*, Composition and appointment of members - <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>

74 'IGP gets extension amid row', *Front Page – Sunday Times Online*, 12 October 2003, <http://sundaytimes.lk/031012/front/igp.htm>. After the Sri Lankan Bribery Commission ceased to function from 15 December 2004, the Constitutional Council at the time recommended Mr. Anandarajah to be elected as a member of the Commission but his name was rejected by the then president, Chandrika Bandaranaike Kumaratunga presumably due to such unresolved allegations and controversies attached to his conduct – 'Bribery piling up', *Sunday Observer online*, 27 March 2005, <http://www.sundayobserver.lk/2005/03/27/new24.html> and 'CC withdraws nomination of Anandarajah to Bribery Commission', *The Island Online Edition*, <http://www.island.lk/2005/03/12/news23.html>

75 Ms Ismail is the President and Founder, of the Sri Lanka Muslim Women's Conference (SLMWC) - Sri Lanka Muslim Women's Conference (SLMWC) has a stated goal to empower Muslim women in the country - 'Sri Lanka: More power to Muslim Women – That's Jezima's Promise', *Women's Feature Service*, 18 October 2010, <http://www.faqs.org/periodicals/201010/2192414001.html#ixzz1EZQC1QmD>; She is also a founder of the Muslim Women's Research and Action Forum (MWRAF) - *Muslim Women's Research and Action Forum* (MWRAF) – which conducted a country wide research study on gender based violence in the Muslim community. MWRAF also organizes capacity-building workshops for representatives of judges, in collaboration with Judicial Service Commission, the Muslim Judges Forum and the Chairman of the Board of Judges 'I leave the HRC with a clear conscience', 05 February 2012, *Ceylon Today*

76 The committees included those which inquired into 'serious violations of human rights' and rights of women and children and Ms. Ismail even received the *Deshabandu* – Presidential Award for National Service in 1989 for her work in the area of promoting human rights especially of women

77 'I leave the HRC with a clear conscience', 05 February 2012, *Ceylon Today*

The vacancy was almost immediately filled by the appointment of Dr. Prathiba Mahanamahewa. There are grave concerns about the conduct of Dr. Mahanamahewa as Commissioner of HRCSL which will be given special emphasis in this year's report.

Dr. Mahanamahewa is the Dean of the Faculty of Law at General Sir John Kotelawala Defence University<sup>78</sup> and has proved a most controversial choice, frequently appearing on popular media defending government policy decisions.<sup>79</sup> His involvement in the field of human rights is primarily as a lecturer and trainer, especially for the armed forces, and is necessarily of a more academic nature than experience based on practice and practical experience of protecting human rights.<sup>80</sup> He is a senior lecturer at the University of Colombo but is also a visiting lecturer in human rights law at the Sri Lanka Police Academy, Sri Lanka Navy Academy, Sri Lanka Police Training College, and Special Task Force Training Center which creates a significant conflict of interest in investigating violations in which the alleged perpetrators are members of the police and armed forces whereby professional judgment or actions regarding one area of interest will be unduly influenced by a secondary interest.

Dr. Mahanamahewa was voluble in condemning both UNHRC Resolutions and called for a counter resolution by Sri Lanka,<sup>81</sup> accused the UNHRC of going against its basic principles<sup>82</sup> and acting contrary to the UN mandate.<sup>83</sup> He observed that the second resolution was dangerous<sup>84</sup> because it urges Sri Lanka to allow an opportunity for UN Rapporteurs to make observations regarding violations; a startling observation for a Commissioner of the HRCSL whose primary duty is to support any measures which address human rights violations and act upon relevant findings in an unbiased manner.<sup>85</sup> The Commissioner's stance indicates a conviction that the role of the HRCSL is to protect the human rights record of the government rather than act as a human rights watchdog. The HRCSL has not retracted or revised these statements, effectively rejecting the authority of the UN Office of the High Commissioner for Human Rights. As an 'independent' institution the Human Rights Commission should maintain an independent and impartial position on matters relating to state rather than defending its actions at the expense of victims of human rights abuses.

78 Kotelawala Defence University is a military academy primarily established for officer cadets to pursue graduate and post-graduate qualifications and consequently raises the issue of independence of the Commissioner from the conduct of the armed forces

79 It would be of relevance to understand whether Dr. Mahanamahewa is the official spokesperson of the HRCSL or if the role is self-appointed

80 HRCSL website on Members of the Commission - [http://hrctl.lk/english/?page\\_id=475](http://hrctl.lk/english/?page_id=475)

81 'Counter Resolution from Sri Lanka to the UNHRC', *Sri Lanka Mirror Archives*, 11 March 2012, <http://english.srilankamirror.com/2012/03/counter-resolution-from-sri-lanka-to-the-unhrc/>

82 'UNHRC goes against its basic principles - Dr. Prathibha Mahanamahewa', *Sunday Observer*, 03 March 2013, <http://www.sundayobserver.lk/2013/03/03/fea09.asp>

83 'UNHRC Resolution against SL soft but dangerous', *Daily Mirror*, 25 March 2013, <http://www.dailymirror.lk/news/27150-unhrc-resolution-on-sl-soft-but-dangerous.html>

84 'UNHRC Resolution against SL soft but dangerous', *Daily Mirror*, 25 March 2013, <http://www.dailymirror.lk/news/27150-unhrc-resolution-on-sl-soft-but-dangerous.html>

85 Areas under scrutiny include: freedom of expression, independence of judiciary, abductions, disappearances and women's rights 'Resolution both toothless and dangerous: Human Rights Commissioner', *Daily FT*, 25 March 2013, <http://www.ft.lk/2013/03/25/resolution-both-toothless-and-dangerous-human-rights-commissioner/>

The Commissioner also rejected the US State Department's Human Rights Report 2012 on Sri Lanka<sup>86</sup> and avowed that Sri Lanka's human rights record had in fact improved.<sup>87</sup> This was proved to be a deliberate mis-statement of affairs as he subsequently observed that most allegations of violations relate to measures taken under the Prevention of Terrorism Act – PTA (active) and Emergency Regulations (repealed).<sup>88</sup> This implies conscious acceptance by the HRCSL of the potential for impunity under these laws and its calculated inactivity. Arrests and detention under the PTA should be informed to the HRCSL<sup>89</sup> which maintains a registry of detention, but many such arrests are either not reported to the HRCSL or not communicated until later or unless the Commission specifically requests such information. The HRCSL therefore has a direct role in ensuring the rights of those arrested under the PTA. The detention of four Jaffna university students in a rehabilitation camp over a period of months – despite repeated public appeals for their release - without cause or due process is but one example of the inadequacy of the HRCSL especially in ensuring protection relating to measures taken under anti-terrorism regulations.

Commissioner Mahanamahewa was also a strong supporter of the farcical impeachment process against the Chief Justice Dr. Shirani Bandaranayake<sup>90</sup> and hailed it as constitutional even as the Supreme Court ruled it unlawful and the Bar Association of Sri Lanka (BASL) rejected it on legal grounds. A Commissioner of an independent National Institution should never have issued public statements and media interviews supporting the government - ergo rejecting a ruling of the Supreme Court of law in Sri Lanka and criticizing the Bar Association in relation to an absolutely politicized process of impeachment which deposed the separation of powers. The HRCSL should in fact have acted with diligence and urged the government to uphold the rule of law in the country and act in an ethical manner, instead of publicly supporting measures which undermined the very foundations of democracy.

Is this acceptable or ethical conduct from a Commissioner of an independent National Institution? How does the public place its faith in the impartiality of this Commission?

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86 Sri Lanka 2012 Human Rights Report, US State Department Country Reports on Human Rights Practices for 2012, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper>

87 'Sri Lanka's HR record improved in 2012 - Dr. Mahanama Hewa', *Sunday Observer*, 28 April 2013, <http://www.sundayobserver.lk/2013/04/28/new04.asp>

88 Although the Emergency Regulations have been repealed, the PTA is very much in action and incorporates many of its provisions and is prone to abuse – especially in an environment where independent institutions such as the HRCSL have been made more dependent upon the Executive through the repeal of the 17<sup>th</sup> Amendment which sought to retain their independence. See: 'Abuse of Power under PTA?', *Colombo Gazette*, 19 May 2013, <http://colombogazette.com/2013/05/19/abuse-of-power-under-pta/>

89 Arrests and detention under the PTA should be informed to the HRCSL – S. 28 (a) HRCSL Act: <http://hrctl.lk/english/ACT/english.pdf>

90 The impeachment of Sri Lankan Chief Justice Shirani Bandaranayake in January 2013 ignoring rulings by both the Supreme Court and Court of Appeal and calls by the Bar Association of Sri Lanka (BASL) to stop the impeachment process which it claimed was in violation of the Sri Lankan constitution, was upheld by commissioner Mahanamahewa whilst dismissing complaints by the Asian Human Rights Commission and other national and international bodies against the process of impeachment – See 'Process is constitutional', *Daily News*, 21 November 2012, <http://www.dailynews.lk/2012/11/21/news01.asp>. He further commented that the Parliament was supreme but that the President's decision on the impeachment was final – See 'PCS has full powers to issue ex parte decision against CJ', *Daily News*, 08 November 2012, <http://www.dailynews.lk/2012/12/08/news11.asp>

Commissioner Mahanamahewa's statements implicitly condemn transparent mechanisms to address human rights violations, disregard Sri Lanka's international obligations and demonstrate an abject misapprehension of the role and mandate of the HRCSL.<sup>91</sup> The Commissioner's visible efforts to vindicate the government in relation to human rights violations in the country stemming from state policy, anti-terrorism regulations and executive misdemeanors have further damaged the reputation of the HRCSL in the public arena. Dr. Mahanamahewa for his efforts in supporting the government – reported by mainstream media as being '*known for his strong defence of the Mahinda Rajapaksa administration on its human rights record*'<sup>92</sup> – was even nominated for election as Vice Chancellor of the University of Colombo.<sup>93</sup> The media reports that the (ruling) Sri Lanka Freedom Party university trade union had approached the powerful Secretary of the Ministry of Defence to lobby the election of Dr. Mahanamahewa as the VC of the University of Colombo.<sup>94</sup> The nominations which were criticized for their political overtones and the unsuitability of candidates were protested vehemently by academics and civil society alike and Dr. Mahanamahewa failed to procure the requisite number of votes.

Prominent members of civil society have made both verbal and written submissions to the HRCSL expressing serious consternation regarding Commissioner Mahanamahewa's public expressions of support for the government. As one lawyer and human rights defender Mr. Lakshan Dias appealed in an email (dated 22 November 2012) to the Chairman, "*The commission does not belong to its commissioners and staff. It belongs to the public. Therefore we expect the chairman and commissioners to behave impartially and independently and practice it visibly... It is really disturbing to see commissioners making statements on political issues... The NHRC needs to maintain an impartial position on every issue*" and requested that a code of ethics be formulated and practiced by the commissioners and staff of HRCSL.

Even though every individual has a constitutional right to freedom of expression, those holding public offices need to maintain a disciplined and impartial position in public and not allow private affiliations to affect professional judgment. The HRCSL has not contradicted or restrained Commissioner Mahanamahewa which insinuates complicity or submissiveness on its part in acquiescing to government agenda, reaffirming its lack of independence from the state, ineffectiveness in performing its duties, disregard of its mandate and abuse of its powers.

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91 The appointment of Dr. Mahanamahewa clearly highlights the dangers of unsuitable appointments by the President, in a unilateral manner under the 18<sup>th</sup> Amendment and their direct negative impact and implications upon the effectiveness and independence of the HRCSL

92 'Politicking for Colombo VC post', *Ceylon Today*, 7 April 2013, <http://www.ceylontoday.lk/27-29221-news-detail-politicking-for-colombo-vc-post.html>

93 'The collapse of institutions', *Colombo Telegraph*, 17 March 2013, <http://www.colombotelegraph.com/index.php/the-collapse-of-institutions/>

94 'A Gota loyalist to be appointed as VC of University of Colombo – university teachers to take trade union action', *Colombo Telegraph*, 4 April 2013, <http://www.colombotelegraph.com/index.php/a-gota-loyalist-to-be-appointed-as-the-vc-of-university-of-colombo-university-teachers-to-take-union-action/>

### III. Effectiveness

The effectiveness of the HRCSL continues to be dismal in addressing allegations of grave human rights violations. It is a silent spectator though having a broad mandate to inquire *Suo Moto* into infringements of fundamental rights,<sup>95</sup> advise government in formulating national legislation in accordance with international human rights standards, make recommendations to government on the need to accede to human rights treaties. The HRCSL rarely uses *Suo Moto* powers<sup>96</sup> to investigate violations considered politically sensitive<sup>97</sup> but instead is pleased to publicly investigate issues such as accidental deaths due to unprotected railway crossings.<sup>98</sup> Results of inquiries voluntarily undertaken by the HRCSL remain undisclosed to the public.<sup>99</sup> Further, although the Commission has submitted annual reports of its work and progress, it does not apply its mandate to make 'special or periodic reports in respect of matters referred to the Commission and any action taken by it' which would add considerable authority and value to urgently address unresolved or ongoing violations of human rights.<sup>100</sup>

According to the HRCSL draft *Annual Report* for 2012 received in response to a request by the Law & Society Trust (LST), a total provisional number of 8,482 complaints were received for 2012 with 4,726 complaints received in Colombo and 3,756 total complaints received in the regional offices of the HRCSL. This shows an increase in numbers of complaints from 2011 with a total of 7,475 complaints received at the head office and regional offices.<sup>101</sup>

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95 Article 14 HRCSL Act refers to infringement or imminent infringement of fundamental rights by executive or administrative action or as a result of an act constituting an offence under the Prevention of Terrorism Act No. 48 of 1979, committed by any person - <http://hrcls.lk/english/ACT/english.pdf>. Fundamental rights are guaranteed in the Constitution of Sri Lanka (art.10 – 14) of: freedom of thought, conscience and religion, freedom from torture, right to equality, freedom from arbitrary arrest, detention and punishment, and prohibition of retro -active penal legislation, freedom of speech, assembly, association, movement etc. Right to life is however not an expressed fundamental right. Constitution of Sri Lanka 1978 - <http://www.priv.gov.lk/Cons/1978Constitution/CONTENTS.html>

96 Art. 14 Human Right Commission of Sri Lanka Act No.21 of 1996, <http://hrcls.lk/english/ACT/english.pdf> states that the Commission may, on its own motion...investigate an allegation of a infringement or imminent infringement of the fundamental right of a person or group

97 The Commission continued to remain silent and ineffective in the face of even publicly vilified violations such as abusive arrests and detention the Prevention of Terrorism Act; violence against free media; excesses by the police; state sponsored fanaticism such as Bodu Bala Sena as detailed under the country review

98 'HRCSL to probe train accidents', *Daily Mirror*, 30 June 2013, <http://www.dailymirror.lk/news/31664-hrcsl-to-probe-train-accidents.html>. See also - HRCSL website - <http://hrcls.lk/english/?p=2156>

99 For example –inquiry into the deaths of 27 inmates at Welikada prison; although Commissioner Mahanamahewa is reported in mainstream media as having expressed criticism of those in charge and made recommendations - 'HRCSL team to probe Welikada incident', *Daily Mirror*, 13 November 2012, <http://www.dailymirror.lk/news/23429-hrcsl-team-to-probe-welikada-incident.html> and inquiry into the rights of Member of Parliament Mr. Azath Salley upon his unlawful arrest and detention. See HRCSL website on the visit conducted by an HRCSL delegation lead by Dr. Mahanamahewa to meet Mr. Azath Salley in hospital <http://hrcls.lk/english/?p=2129>. However, the HRCSL does not appear to have taken any action regarding the nature of his arrest without clear charges and the HRCSL website gives no information on the findings of these inquiries

100 Art. 30, Human Right Commission of Sri Lanka Act No.21 of 1996, <http://hrcls.lk/english/ACT/english.pdf>

101 *Annual Report 2011*, Human Rights Commission of Sri Lanka, Colombo 2012, p.3-4, [http://hrcls.lk/PFF/annual\\_report\\_2011/english.pdf](http://hrcls.lk/PFF/annual_report_2011/english.pdf)

There has been a decline in number of complaints regarding disappeared or missing persons from 230 cases reported in 2011 to 126 cases in 2012. There has however been an increase in cases of arrest and (wrongful) detention from 581 complaints in 2011 to 675 complaints in 2012. This appears to fall in line with the findings of the commission in its visits to police stations including cases of arrest without prior investigation, lack of charges relating to persons taken into custody and assault whilst in custody.

A total of 3,372 complaints were concluded in 2012 which included 1,439 complaints relating to former years and 1,933 complaints received in 2012. The categorizations for termination of inquiries include: no FR violation (1125); not interested (466); recommendation (141); settlement (168); relief granted (281); withdrawn (167); referred to other authorities (251); directives given (94); pending court cases (171); not within mandate (467); time barred (41). A glance at Table 1 below gives an overview of how the complaints were 'concluded' and how many actually relate to the year under review. This can hardly be extolled as an effective performance by the HRCSL for 2012.

**Table 1: Conclusion of Complaints by HRCSL in 2012<sup>102</sup>**

|   |              |  |              |  |              |
|---|--------------|--|--------------|--|--------------|
| Total complaints concluded by the HRCSL in 2012 | <b>3,372</b> | Concluded complaints relating to 2012                            | <b>1,933</b> | Complaints relating to previous years                | <b>1,439</b> |
|   |              | Termination of inquiries without further action by HRCSL in 2012 | <b>1,804</b> | Complaints acted upon by HRCSL in 2012               | <b>1,568</b> |
|   |              | Complaints acted upon and relating to 2012                       | <b>808</b>   | Complaints acted upon and relating to previous years | <b>760</b>   |

The work of the Commission is hampered to some extent due to its powers of inquiry limited to infringements of fundamental rights and the only available measure against those institutions or individuals that disregard its recommendations or inadequately implement them is for the Commission to present a report of the matter to the President who shall place it before Parliament.<sup>103</sup> This would of necessity cause considerable delays and pose practical difficulties of providing requisite information to the entire parliament in all official languages for every such occurrence and is an implausible method of ensuring swift and satisfactory resolution.

<sup>102</sup> Data extracted from the draft HRCSL *Annual Report 2012*

<sup>103</sup> Article 15 (8) Human Right Commission of Sri Lanka Act No. 21 of 1996, <http://hrctl.lk/english/ACT/english.pdf>

However, a person who fails without reasonable cause to appear before the Commission, refuses to be sworn or affirmed or having done so fails to respond to its queries, refuses or fails to comply without cause with a notice or written order/ direction issued to him by the Commission, refuses or fails to produce relevant and critical documentation, or by act or omission disrespects its authority may be considered in contempt and the matter can be referred to and punishable by the Supreme Court as though it were an offence of concept committed against or in disrespect of the authority of the Supreme Court.<sup>104</sup>

The current Chairman – who is himself a former Supreme Court judge – has attempted to address this situation by initiating a process of summoning parties who have failed to implement recommendations for a negotiated resolution, failing which the Commission would issue an ‘order’ for the recommendation to be implemented. If the parties act in violation of the order, the commission has the authority to report this to the Supreme Court as a matter of contempt.<sup>105</sup> This option appears to have strengthened the position of the HRCSL as evidenced by the implementation of recommendations relating to approximately twenty-two instances of violations of the trilingual policy by a number of public institutions directed to the commission by a civil society organization, the Center for Policy Analysis (CPA), which continues to be monitored by the Commission.

The HRCSL is presently inquiring into a complaint<sup>106</sup> against harassment of peaceful protestors<sup>107</sup> by the *Bodu Bala Sena* (BBS) and unlawful arrests by police.<sup>108</sup> The complainant had called the HRCSL hotline at the time of the incident on 12 April 2013 but the Commission had refused to intervene; which effectively defeats the purpose of a hotline.<sup>109</sup> A formal written complaint in email form was then sent to the Chairman on 17 April 2013 detailing the incident whereby a group of peaceful protestors holding a candle-lit vigil against various discriminatory activities of the *Bodu Bala Sena* which is accused of inciting and unleashing hate speech and even violence against religious and ethnic minorities, especially Muslim communities, were accosted by a group of persons and Buddhist monks claiming to be from BBS whilst the police looked on. The police at the scene of the incident are accused of aiding the BBS members to forcibly disperse the peaceful protestors despite the fact that the officer in charge of the relevant police station and the police intelligence unit of

104 Art. 21 Human Right Commission of Sri Lanka Act No.21 of 1996, <http://hrcls.lk/english/ACT/english.pdf>

105 “No abuse of emergency regulations: HRC Chairman”, *Daily Mirror* 11 June 2011, <http://print2.dailymirror.lk/opinion1/46603.html>

106 Complaint No – HRC 1548/13 by Mr. Ruki Fernando of INFORM Human Rights Documentation Center v Inspector General of Police, Colombo.

107 Article 14(1)(b) of the Sri Lankan constitution guarantees right to freedom of peaceful assembly to every person whilst article 15(3) of the constitution states that restrictions on the exercise and operation of this right can only be “as may be prescribed by law, <http://www.priu.gov.lk/Cons/1978Constitution/CONTENTS.html>

108 ‘Sheep no more’, *Groundviews*, 13 April 2013, <http://groundviews.org/2013/04/13/sheep-no-more/>

109 The HRCSL had refused to intervene at the time of the incident despite their mandate to inquire into allegations of *imminent* infringements of fundamental rights – article 14 HRCSL Act - <http://hrcls.lk/english/ACT/english.pdf>

Colombo had been informed of the protest beforehand. The police had in fact arrested at least 5 persons without citing charges although the Sri Lankan Constitution establishes that 'no person may be arrested unless according to established procedure and they shall be informed of the reason for their arrest'.<sup>110</sup>

The inquiring officer – a retired appeal court judge – had challenged the right of third parties to make complaints even though it is clearly established in the HRCSL Act.<sup>111</sup> Since his appointment, the Chairman who headed the Retired Judges Association at the time of his appointment to the HRCSL in 2011 has employed retired members of the judiciary in conducting inquiries including addressing a severe backlog from the period in which there was no properly constituted Commission. Although this has proved an easily accessible and valuable resource, it is crucial that such inquiring officers have a thorough knowledge of the mandate of the Commission and are sensitized on conducting inquiries which provide relief and redress for victims of human rights violations and put measures in place to avoid future infringements, rather than punish perpetrators. It is also important that the Commission extends the right of complainants to be represented by a lawyer or other appointee, especially as this privilege is usually provided to executive and administrative respondents.

The former Director of Inquiries and Investigations, Ms. Samantha Jayamanna is now the secretary of the HRCSL and has consequently become inaccessible to civil society, refusing to communicate without permission from the Chairman.<sup>112</sup> Although relevant questionnaires were directed to the HRCSL requesting information for the ANNI report, response is also dependent on the secretary and has not been forthcoming. The HRCSL fails to understand that engagement with civil society continues to be ineffectual due to lack of genuine information sharing, transparency regarding its work, and the cavalier attitudes of some senior staff members.

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110 Article 13 (1) of the Sri Lankan Constitution of 1978, <http://www.priu.gov.lk/Cons/1978Constitution/CONTENTS.html>

111 Art.14 HRCSL Act – 'The Commission may on its own motion or on a complaint made to it by an aggrieved person or group of persons or *a person acting on behalf of an aggrieved person or group of persons* investigate an allegation at the infringement or imminent infringement of a fundamental right of such person or group of persons...caused by executive or administrative action...' <http://hrsl.lk/english/ACT/english.pdf>. The HRCSL should ensure that its inquiring officers – in this case, a retired Appeal Court judge - are familiar with the provisions of the Act, its mandate and authority to prevent miscarriage of justice, especially in relation to complainants who are wholly unaware of their rights or the workings of the law

112 An acting director overlooked the work of the inquiries unit as a result, which can hardly improve the questionable effectiveness of the inquiries division

The HRCSL has however instructed all regional offices to conduct unscheduled inspections on police stations;<sup>113</sup> carried out a prisoners' rights initiative;<sup>114</sup> inquired into issues of detainees under Immigration laws;<sup>115</sup> made recommendations for implementation of the trilingual policy; established a focal point on labor migration during 2012/13.<sup>116</sup> The Monitoring and Review unit is to be commended for working closely with members of civil society on issues regarding international labor migration<sup>117</sup> and language rights.<sup>118</sup> The HRCSL consulted government and other stakeholders on Universal Periodic Review recommendations<sup>119</sup> and submitted its own report to the UPR (second cycle) in 2012.<sup>120</sup>

The HRCSL is in the process of amending its Act to strengthen its mandate and authority and extend the tenure of the Commission. The amendments will enable the commission to file contempt of court cases before High Courts against public officers who do not comply with its recommendations, blacklist such offenders and issue declaration orders against them, extend its mandate to include all human rights and not be limited to violations of fundamental rights as at present, extend the present three year tenure of the Commission to five years.<sup>121</sup> The HRCSL engaged with civil society in 2013 to obtain their recommendations through a consultative process prior to finalizing amendments to the HRCSL Act. However, although strengthening the Commission is a welcome initiative, extension of tenure of unilaterally appointed members cannot be considered a positive development. The Commission should also put in place guaranteed methods of measurement regarding the 'knowledge and practical experience in matters relating to human rights' of members, an express requirement for representation of civil society

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- 113 'HRCSL starts unannounced checks on police abuses', *Sunday Times*, 11 November 2012, <http://www.sundaytimes.lk/121111/news/hrcsl-starts-unannounced-checks-on-police-abuses-20197.html>
- 114 In 2012 the HRCSL had inspected abusive prison conditions and FR violations of those held in detention without indictment or charges for a period of over 3 years, and called for a report from the Commissioner General of Prisons, conducted a study and shared some of the findings at a government/civil society conference
- 115 The HRCSL made 5 observations to improve the conditions of foreign detainees including the relocation of the center, and a consultation held with Ministry of Defence, Controller Immigration and Dept of Police to ensure implementation.
- 116 'HRCSL establishes a new focal point on migration', <http://hrcsl.lk/english/?p=1989#>
- 117 The HRCSL Chairman Justice Priyantha Perera issued 7 comprehensive guidelines on labour migration to the Ministry of Foreign Employment – See HRCSL website: <http://hrcsl.lk/english/?p=1989>. The Monitoring & Review unit under the guidance of its Director, Ms. Thusitha Samarasekara has of its own motion inquired into issues of migrant workers. The HRCSL signed an MOU with the Qatar HRC but there is insufficient liaison between the NIs– 'Qatar HRC, Lankan human rights body signs MOU', *Sunday Times*, 16 December 2012, <http://www.sundaytimes.lk/121216/business-times/qatar-hrc-lankan-human-rights-body-sign-mou-24309.html>
- 118 The Monitoring & Review unit had also undertaken cases of language rights violations by state institutions directed to the HRCSL by the Center for Policy Alternatives (CPA) The unit had identified over 22 instances of violations by state institutions and had conducted inquiries, issued recommendations and followed up on their implementation. 'Language policy implementation monitored', <http://hrcsl.lk/english/?p=1897>
- 119 United Nations Office of the High Commissioner for Human Rights – Universal Periodic Review, 13 May 2008 [http://lib.ohchr.org/HRBodies/UPR/Documents/Session2/LK/A\\_HRC\\_8\\_46\\_SriLanka\\_E.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session2/LK/A_HRC_8_46_SriLanka_E.pdf)
- 120 B. Skanthakumar, *Neither Restraint nor Remedy: The Human Rights Commission of Sri Lanka* – pp. 144 & 145 of *Embedded in the State*, Law & Society Trust, Colombo, December 2012
- 121 'Human Rights Commission to amend its Act', *Daily FT*, 27 June 2013, <http://www.ft.lk/2013/06/27/human-rights-commission-to-amend-its-act/>

members within the Commission, prohibitions regarding Commission members or staff acting in a manner which compromises the independence of the Commission. Even with a stronger mandate, the HRCSL will continue to lack effectiveness as long as its members are appointed unilaterally, in a politicized process and act as an extension of the state.

At the time of writing, the Human Rights Commission has announced its intention to conduct a National Inquiry on the practice of human rights in the country and obtain the opinions of the general public on human rights issues.<sup>122</sup> This appears to be a direct result of a training workshop conducted for nearly fifty HRCSL staff on how to conduct national inquiries organized and funded by the Commonwealth Secretariat and has a stated goal of upgrading the HRCSL to 'A' status.<sup>123</sup> The Commonwealth Secretariat has pledged further technical, financial and oversight support to the HRCSL as part of the agreement. In light of the human rights context of Sri Lanka and ongoing violations which have resulted in successive UN Human Rights Council resolutions against the government, disastrous international relations and severe criticism by local and international human rights communities, a national inquiry on the human rights situation in the country is the most farcical measure yet to be proposed by the commission in its desperate attempts to regain 'A' status. It is also further evidence of the lack of recognition by the Human Rights Commission of existing serious human rights violations in the country as already identified by the Lessons Learnt and Reconciliation Commission and supported by credible documentation and complaints submitted by the human rights community. That the Commonwealth Secretariat should encourage and facilitate such a charade is disappointing in the extreme.

#### IV. Thematic Focus

The thematic focus of the 2013 ANNI report includes: (a) NIs as human rights defenders (HRDs) based on the report of the UN Special Rapporteur on Human Rights Defenders 2013,<sup>124</sup> and (b) Advisory Council of Jurists reference of National Institution (NI) and its efforts in Corporate Accountability. Questionnaires prepared by ANNI were sent to the HRCSL regarding its work in the chosen thematic areas but the commission failed to respond up to a month later.

The primary focus of the report of the UN Special Rapporteur (SR) on HRDs is the role of National Institutions as human rights defenders but also their role in protecting other human rights defenders. The SR observes that NIs are human rights defenders, being mandated to protect and promote human rights and recommends that they should work

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122 'HRCSL and rights in the national arena', *Daily News*, 20 July 2013, <http://www.dailynews.lk/?q=features/hrcsl-and-rights-national-arena>

123 'Commonwealth facilitates Sri Lanka human rights training', *News.lk*, 8 July 2013, <http://news.lk/news/sri-lanka/5820-commonwealth-facilitates-sri-lanka-human-rights-training>

124 *Report of the UN Special Rapporteur on the situation of human rights defenders*, Margaret Sekaggya, presented to the UN Human Rights Council at the 22<sup>nd</sup> Session, 16 January 2013, UN Office of the High Commissioner for Human Rights, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/101/79/PDF/G1310179.pdf?OpenElement>

in tandem with other human rights defenders to assess the human rights situation on the ground, ensure accountability and prevent impunity.<sup>125</sup> The HRCSL is yet to internalize the concept of a HRD as defined in the *UN Declaration on the Rights of Human Rights Defenders* which clearly states that 'everyone has the right individually and in association with others to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels'.<sup>126</sup> The regional staff lack adequate knowledge and understanding on human rights defenders and their role which is reflected in the lack of complaints from and regarding HRDs reported in the *HRCSL Annual Report 2011*, although there were many instance of such violations<sup>127</sup> and insufficient attention given regarding threats to HRDs in 2012.<sup>128</sup> The HRCSL members and staff need to also recognize the commission as the primary human rights defender in the country which would perhaps sensitize them to the common goals, risks and obstacles facing other human rights defenders and the legitimate need to protect them.<sup>129</sup>

Margaret Sekaggya recommends the following measures by any NHRIs to ensure the protection of HRDs. Protection constitutes a wide range of possible measures and interventions, including formal complaints mechanisms and protection programs; advocacy in favor of a conducive work environment for defenders; public support when violations against defenders are perpetrated; visits to defenders in detention or prison and provision of legal aid in this context; mediation when conflicts occur between defenders and other parts of society; and strengthening of the capacity of defenders to ensure their own security. In tandem with the SR's recommendations, the HRCSL should take measures to, raise awareness and sensitize staff on HRDs and the protection afforded under international laws, disseminate the UN Declaration on HRDs in local languages, establish a focal point for HRDs who are particularly at risk and a mechanism to guarantee their protection which is widely known and easily accessible, exchange critical information and work in close collaboration with human rights defenders.

125 See recommendations by the SR to member states and NHRIs, *Report of the UN Special Rapporteur on the situation of human rights defenders*, p.20-21, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/101/79/PDF/G1310179.pdf?OpenElement>

126 Article 1, *Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, UN GAR A/ RES/ 53/144, 8 March 1999, <http://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>

127 See: B. Skanthakumar, *Neither Restraint Nor Remedy, The Human Rights Commission of Sri Lanka*, Law & Society Trust, Colombo, December 2012, *Embedded in the State* p.141-144, <http://www.lawandsocietytrust.org/>. Also see – HRCSL Annual Report 2011, HRCSL website: [http://hrctl.lk/PFF/annual\\_report\\_2011/english.pdf](http://hrctl.lk/PFF/annual_report_2011/english.pdf)

128 For example: death threats received by the President of FUTA Dr, Nirmal Ranjith Devasiri during the FUTA campaign for increased allocations for education: 'Death threats on FUTA President', *Ceylon Today*, 21 September 2012, <http://www.ceylontoday.lk/51-13159-news-detail-death-threats-on-futa-president.html>; 'FUTA President gets another threat', *Sunday Leader*, 24 June 2012, <http://www.thesundayleader.lk/2012/06/24/futa-president-gets-another-threat/>.

129 *Report of the UN Special Rapporteur on the situation of human rights defender*; The Role of National Human Rights Institutions in the protection of Human Rights Defenders, p.15-19, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/101/79/PDF/G1310179.pdf?OpenElement>

The Advisory Council of Jurists (ACJ) reference on NIs and corporate accountability issued at the 13<sup>th</sup> APF Annual Meeting in July 2008 takes into account the extent to which transnational corporations impact the political and social dimensions of a country, the basis for attributing human rights responsibilities to these corporations under international human rights law and the obligations of a state to regulate corporations regarding human rights violations by such corporations within its territorial jurisdiction and outside.<sup>130</sup>

In considering the impacts – both positive and negative – of transnational corporations, the ACJ recommends that NHRIs also have a role to play in monitoring violations by corporations, advocacy and complaints handling, and raising awareness regarding human rights obligations of the state and the business community. The ACJ recommends that NHRIs review domestic legislation regarding establishment and conduct of corporations; reviewing existing grievance mechanisms; monitoring human rights violations and assist civil society to do so; advocate to government to develop laws which reflect international best practices; developing education programs for corporations, the business community and vulnerable groups on rights and remedies. However, this area of NHRI responsibility will not be discussed in detail in the report due to non-implementation of the recommendations by the HRCSL and the more serious and urgent state policies and actions which categorically violate people's rights which need to be addressed as a priority by the Human Rights Commission of Sri Lanka.

## V. Conclusion and Recommendations

The present Human Rights Commission is due to complete its tenure in February 2014 and many of its members and staff have shown willingness to engage in dialogue with civil society, including in drafting the HRCSL report to the UPR and amending its Act; provided information on its activities through its website; established focal points on labor migration issues; issued statements on certain violations; and in general have strived to establish greater rapport with other institutions working on issues of human rights. This is however also largely attributable to their publicly expressed desire for reaccreditation as an 'A' status national institution. However, on review of the issues underlined by the International Coordinating Committee's Sub Committee on Accreditation which lead to the downgrading of the HRCSL in 2007 to status 'B' as lacking compliance with the *Paris Principles* – a decision which was reconfirmed in 2009, it becomes apparent that the Commission is yet to effectively address the Sub Committee's concerns and recommendations.

In the appointment and selection of members, the 18<sup>th</sup> Amendment to the Constitution now guarantees unilateral appointments by the President in a highly politicized process without any guarantees of transparency or inclusion of civil society in the final selection – in direct contravention to the principle of independence and plural representation including human rights defenders as required by the *Paris Principles*. The Sub Committee

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<sup>130</sup> Asia Pacific Forum, See *ACJ Reference on Human Rights, Corporate Accountability and Government Responsibility*, The 13<sup>th</sup> Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, Malaysia, 27-28 July 2008, p.13-19, [www.asiapacificforum.net/support/issues/acj/references/corporate-accountability](http://www.asiapacificforum.net/support/issues/acj/references/corporate-accountability)

also observed that the previous commission did not take adequate measures to ensure its independent character and political objectivity. The present Commission has in fact made public declarations of support for government policies and defended the state's human rights record both nationally and internationally.

Although the Emergency Regulations have now been repealed, many of its provisions remain active through the Prevention of Terrorism Act (PTA) which does not conform to international human rights standards. The Commission has made no discernible representations, recommendations or reports to the government to address the continued implementation of draconian anti-terrorism regulations directly resulting in severe human rights abuses, even four years after the end of the civil war. The Commission appears to fear confrontation with political and military institutions regarding more serious human rights abuses and subsequently there are no accessible reports by the Commission on abductions, disappearances, illegal arrests and detentions, torture and killings which have taken place since its appointment.

Even in relation to those inquiries conducted by the HRCSL into public incidents of human rights violations such as the Welikada prison riots, findings have not been made public. Some public investigations instigated by the HRCSL – especially those involving military or executive actors – grind to a halt pending official reports from the same institution which committed the violation in the first place or outcomes of discussions between state and other stakeholders;<sup>131</sup> findings are undisclosed to the public and results indiscernible. In fact, the HRCSL for all intents and purposes gives the impression that it is awaiting the official turn of events to complete and conclude its investigations accordingly.

The Commission has attempted to establish relations with civil society but this appears to be limited mostly to engagement at public forums organized by the Commission and has not expanded to include consultations with human rights defenders during inquiries, exchange of information in a transparent manner, and support for civil society advocacy to the government on human rights issues. The Commission has addressed the need to publish annual reports on its work and progress but the report for 2012 is yet to be published

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<sup>131</sup> This was manifestly evident in the inquiry initiated by the HRCSL into the killing of three unarmed civilian protestors by the Sri Lanka army during a public protest demanding clean water in Weliweriya, Rathupaswala, (See 'Woes of Weliweriya water war', *The Sunday Times*, 4 August 2013, <http://www.sundaytimes.lk/130804/news/woes-of-weliweriya-water-war-55854.html>). The HRCSL first announced its intention to carry out a probe into the incident and then announced it was halting the inquiry pending the outcome of a meeting between the President and relevant stakeholders, see 'HRC temporarily halts Rathupaswala probe', *Daily Mirror*, 17 August 2013, <http://www.dailymirror.lk/news/33970-hrc-temporarily-halts-rathupaswala-probe.html> When there has been a clear violation of basic human rights in evidence, what reason can there possibly be for the Human Rights Commission to halt its inquiry and wait for other discussions to be concluded? They have both a duty and a mandate to carry out direct and immediate investigations and make recommendations to provide relief and redress. Their blatant dependency on the final outcome or verdict of government inquiries and discussions merely proves their incapacity and lack of independence from the state even further

as at July 2013. Further, the absence of any complaints from human rights defenders in the *Annual Report* for 2011 illustrates gaps in knowledge and action by the HRCSL with relation to a particularly vulnerable group and leads to speculation about the accuracy of the data provided.

The Commission has shown itself to be increasingly willing to establish dialogue with civil society, address backlogs and complaints more effectively, amend the HRCSL Act to strengthen its mandate, and implement mechanisms which override certain limitations in mandate to effectively address human rights violations. However, the Human Rights Commission of Sri Lanka needs to amend not only its mandate but its internal policy and perspective to better understand and implement its role as prescribed by the *Paris Principles* which primarily emphasizes independence from the state, effectiveness and objectivity in addressing human rights violations, and consistent relations with civil society. The HRCSL cannot hope to regain its status 'A' accreditation as long as it continuously fails to fulfill these provisions.

The Commission needs to make genuine, conscientious and transparent efforts to work independently of the state; address human rights violations even when they ensue from state policy or military action, which may bring the Commission into conflict with state and military institutions; make recommendations to government on amending national laws in line with international standards and the ratification of international conventions; provide special or periodic reports to Parliament on matters referred to the Commission which may be especially urgent due to the seriousness or ongoing nature of violations; instill an internalized code of ethics to be followed by all Commissioners and staff to maintain the independence and integrity of the Commission; sensitize Commission staff on the role and work of human rights defenders and acknowledge common objectives and risks and provide them adequate protection as a vulnerable group; be accessible and amenable to working with civil society as a policy rather than on a few chosen, ad hoc initiatives. Until it implements these changes to policy and action, the Human Rights Commission of Sri Lanka will continue to be both loyalist and marionette of the state.

# Japan: Positive Abroad but Negative at Home on Establishing an NHRI

Citizen's council for Human Rights in Japan<sup>1</sup>

## I. General Overview

### A. Hate Speech

One of the emerging human rights problems in Japan over the past few years is hate speech. Precisely speaking, the hate speech in Japan is an expression of "Koreanophobia" (that is, xenophobia against ethnic Koreans who are settled in Japan for generations).

The "Koreanophobic" demonstration have been held frequently in mainly Korean Towns, where the demonstrators shouted such discriminatory expressions as: "Go Back to Korean Peninsula," "Tsuruhashi<sup>2</sup> Massacre" or "Kill both Good and Bad Koreans", without hesitation.

As the situation could no longer be overlooked, a Diet Member<sup>3</sup> only recently took up the issue at the Standing Committee on Judicial Affairs; and the Prime Minister and the Justice Minister made comments disallowing those demonstrations.

In Japan, however, opinions like "even hate speech should be respected in light of the freedom of expression" are still overwhelming — thus no effective legislation, administrative restrictions nor counter-measures have yet been taken.

### B. Exclusion of Korean High Schools from free tuition system

On 31 March 2010, the then ruling party, Democratic Party of Japan, brought an "Act on free tuition at public high schools and high school enrolment support fund" and enacted it on the following day. The main purpose of the Act is "to contribute to equal opportunity through easing family educational expenses in upper secondary education (Article 1)". A ministerial order was separately specified to include high schools other than the public high schools.

However, Korean High Schools were withheld the payment from the very beginning of the enactment on the ground that North Korea delivered rocket missiles against the UN

1 Prepared by Shoko Fukui, member of the Joint Movement for NHRI and Optional Protocols which works to establish an NHRI in Japan in compliance with the Paris Principles.

2 Tsuruhashi is a well known Korean town in Osaka.

3 The National Diet is Japan's bicameral legislature.

Security Council Resolutions, or “political reasons” such as unresolved abduction issues.<sup>4</sup> The (then Opposition) Liberal Democratic Party (LDP) was against inclusion of the Korean High Schools under the Act, thus on 20 February 2013, after taking back governmental power, the LDP revoked the relevant ministerial order.

### C. Setagaya Ward Established Child Human Rights Protection Institution

On 10 December 2012, Setagaya Ward, Tokyo, amended an Ordinance on children to establish the Child Human Rights Protection Institution. This is the institution for “being consulted, advising on human rights violations against children and supporting them, as well as for working on resolving problems by receiving petitions for individual remedies, conducting investigations, reconciling the relevant parties in collaboration and cooperation with the germane authorities.”

In addition to above mentioned tasks, it could recommend some countermeasures for the public organizations of the Ward (private organizations could be *requested* to take countermeasures). The Institution has just been set up, so it is too early to evaluate its effectiveness; however it is worth paying attention to, as one of the unique efforts in human rights protection by local government.

### D. The Act on Elimination of Discrimination against the Disabled

On 19 June 2013, the Act on Elimination of Discrimination against the Disabled was passed in the Diet; which prohibits the discriminatory treatment of the disabled as well as requires the administrative agencies and private enterprises for ‘reasonable accommodation’.<sup>5</sup> Private enterprises only have to “endeavor to” provide ‘reasonable accommodation’, although they are required to report to the competent ministers, on measures undertaken.

The Act is the fruit of efforts by the Working Group on Prohibition of Discrimination of Committee on the Disabled Policy set up under the Cabinet Office. They have been working to ratify the Convention on the Rights of Persons with Disabilities since 2010.

### E. Submission of the Human Rights Commission Establishment Bill

On 9 November 2012, DPJ submitted the Human Rights Commission Establishment Bill to the House of Councilors, but the bill was scrapped due to the dissolution of the House of Representatives on 16 November.

<sup>4</sup> North Korean authorities had abducted some Japanese nationals in the 1970s and 1980s. This is one of the serious diplomatic problems between North Korea and Japan.

<sup>5</sup> “Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. (Convention on the Rights of Persons with Disabilities, Article 2)

## II. Independence<sup>6</sup>

### A. Status of the Commission

The bill stated that the Commission was to be established as an affiliated agency of the Ministry of Justice (MOJ) based on Article 3 of the National Government Organization Act. Instead of establishing a new Human Rights Commission, the Civil Liberties Bureau — an internal department of the MOJ — was supposed to be abolished. The administrative work of the Commission was planned to be delegated to the Legal Affairs Bureau or Regional Legal Affairs Bureau, that is, local organizations of the MOJ.

The Interim Report announced by Justice Minister, Justice Vice Minister and a Parliamentary Secretary in June 2010 stated that the Commission would be established under the Cabinet Office, however, the Basic Policy announced in August 2011 stated it would be established under the MOJ. The 2012 Bill also stated that the new Human Rights Commission would be established under the MOJ.

The Legal Affairs Bureau and Regional Legal Affairs Bureaus would conduct the investigation as necessary “with instructions by the Commission”, and judge whether the human rights were violated or not. So it was insisted that this arrangement would safeguard the independence of the Commission.

Having said that, a big doubt was left unanswered as to whether — if the status of the Commission is only an affiliated agency of the Ministry of Justice — such a Commission could possibly investigate the human rights violations of state agencies in a fair manner. For instance, if those violations were perpetrated by public bodies such as other Ministries or Agencies; or happened in detention facilities administered by sections or departments of the same MOJ?

### B. Mandate of Commission

The Commission’s jurisdiction is specified to include remedies and prevention of human rights violations, human rights promotion, international co-operation regarding such affairs, and others.

So as to be acknowledged as acts of human rights violation, such acts must violate human rights “illegally”. That is, if such acts are not illegal in the context of the existing laws, the Commission would not respond to the relevant complaints.<sup>7</sup> This means that the Commission would judge whether they respond to complaints based on the existing laws, not on human rights standards.

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6 The section on Independence and Effectiveness are based on an analysis of the Draft Bill which was scrapped due to the General Elections of 16 December 2012.

7 The same problematic issue was previously discussed in the 2012 ANNI Report: ‘Japan: Limited Mandate in Sight for Japan’s Human Rights Commission’, on p. 118.

Another problematic matter is that the actions at issue must “publicly show information which easily indicates person’s descent or other discriminatory aspects,” with a view to promote unjustifiable discriminatory treatment against them, such as race or ethnicity. In other words, discriminatory words or expressions such as hate speech are not regarded as “publicly showing information which easily indicates person’s descent or other discriminatory aspects,” and therefore will not be handled by Commission.

At present, there is an institution which responds to illegal acts, which are the courts of law. If the Commission could only respond to the illegal acts, there is less necessity to establish a new institution other than the courts. What is currently required is an alternative dispute resolution system that ensures easier access than the courts, as well as monitors the state’s human rights policies and makes proposals on such issues.

Regarding the function of NHRIs in making proposals to state authorities on human rights, the 2012 Bill only states that it “could submit opinions ... to the Prime Minister, the head of the relevant administrative authorities ... or to the Diet” (Provision 19), but not mention at all whether the party who received such opinions are obliged to respond or take any measures to the opinions. If such is the case, there is a possibility that the opinions are only listened to, but not responded to at all.

### C. Selection of Commissioners and Civil Liberties Volunteers<sup>8</sup>

The Bill provided the requirements for the Commissioners as “persons of integrity, having profound insight into human rights, being able to make fair and impartial judgment to conduct affairs under the jurisdiction of the Human Rights Commission” and did not mention their nationality. However, the MOJ referred to “a matter-of-course doctrine”<sup>9</sup> to note that the Chairperson and the Commissioners must be Japanese nationals.

Under the Bill, it is the officials of Human Rights Protection Bureau (HRPB) of the MOJ and Civil Liberties Volunteers (CLVs) who will actually respond to the complaints lodged to the Commission. For example, when someone lodged a complaint of human rights violation to HRPB, a CLV or an official of Legal Affairs Bureau or Regional Legal Affairs Bureau under HRPB would listen to him/her story as the first contact.

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8 Civil Liberty Volunteers are volunteers whose roles are defined as enlightening on human rights, promoting human rights protection activities in the private sector, or investigating or collecting information on human rights violation cases in order to take appropriate measures. However it is often said that the officials of the HRPBs, not CLVs, actually respond to the complaints, on the grounds that such complaints are sometimes too complicated for only volunteers to deal with, beyond their powers — actually CLVs do not have any binding powers — or some other reasons. About 14,000 such volunteers are currently appointed and do their work in their local areas. In 2012, the HRPBs received more than 22,000 complaints and most complaints were related to the bullying cases at schools, corporal punishments at schools by teachers, and assaults or abuses to children.

9 This “doctrine” was devised in 1953 by Cabinet Legislation Bureau with regard to employing foreign nationals as public servants, saying “there is no specific law clause on this issue, however, as a matter-of-course doctrine regarding public servants, Japanese nationality must be required to be employed as public servants who exercise public power or participate in developing the policy of the state”.

The CLVs are volunteers for HRPBs and appointed by the Minister of Justice from among the local residents who have a voting right to elect city, town or village assembly members, thus foreign nationals who do not have such rights will not be the CLVs. Compared with the 2002 Bill<sup>10</sup> which made it possible for foreign nationals to become the CLVs, the 2012 Bill is certainly a huge setback.

Considering that their main task should protect human rights, and that minorities — including foreign nationals living in Japan who now number a little over 2 million and account for 1.6 percent of the population — are more vulnerable<sup>11</sup> to human rights violations; doesn't it lack persuasiveness to limit only Japanese nationals as CLVs? Would it not be more advantageous to deal with human rights violations from the viewpoint of persons who are vulnerable to such violations?

CLVs are certainly engaged in investigations but these are "only voluntary investigations conducted in cooperation with relevant parties, and far from so-called compulsory investigations like police officers or prosecutors conduct"<sup>12</sup>. In other words, these have nothing to do with exercising public power or participating in developing the policy of the state<sup>13</sup>. If such is the case, there is no rationality to exclude foreigners arbitrarily.

### III. Effectiveness

#### A. Defects in utilizing the existing system

According to the 2012 Bill, the Commission was supposed to utilize the existing CLV System which is under HRPB.

There are some human rights violation cases that were successfully resolved with the work of HRPB. However, human rights violations become "the most serious when it is perpetrated by the government".<sup>14</sup> The system is not effective enough in addressing human

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10 LDP, the then ruling party, submitted a Bill to provide remedies to the human rights violation victims in 2002. The Bill allowed the Commission to investigate specified serious violations with stronger mandatory powers, and if the perpetrators refused the investigation, they would be charged for an administrative penalty. It also had a so-called media clause that is discussed in section three below.

11 According to an NGO which have supported foreigners living in Japan since the Great Hanshin Earthquake in 1995, foreigners living in Japan are not necessarily the socially weaker people but they would face more difficult situation than Japanese when they experience another "risk" such as the unemployment or divorce along with their vulnerability. Their vulnerability consist of three elements; (i) do not understand Japanese and Japanese customs, thus they are not assured access to information, public education and employment, (ii) inadequate social support system such as learning Japanese, public information is not always provided in other languages, and they are not obliged to have their children attend schools, (iii) prejudice in Japanese society such as that the public security have deteriorated due to foreigners coming to Japan.

12 Quoted from the website of the MOJ Human Rights Protection Bureau <[http://www.moj.go.jp/JINKEN/jinken02\\_00009.html](http://www.moj.go.jp/JINKEN/jinken02_00009.html)>, accessed on 20 July 2013.

13 Please see footnote 6 above: "Exercising public power or participating in developing the policy of the state" is referred in the "matter-of-course doctrine" about employing foreign nationals as public servants.

14 Quoted from Q&A material prepared by MOJ to solicit the understanding of the general public <<http://www.moj.go.jp/content/000106060.pdf>> accessed on 20 July 2013.

rights violations caused by public institutions, laws and legislations, or public figures. The new Commission would neither be an effective nor helpful one if it only utilizes the current less effective HRPB.

For example, in summer of 2012, regarding exclusion of Korean High Schools from the free tuition system, a parent of a Korean student made a complaint to HRPB for remedies, insisting that the exclusion of the Korean High School from the free tuition system and the removal of subsidies<sup>15</sup> by Tokyo metropolitan government was a human rights violation. Four months later, the parent received the response from the HRPB that stated only “no facts are acknowledged as human rights violations.” According to the parent, they were not interviewed by HRPB, and the reason for this judgment was not mentioned on the notice.

When the writer asked a senior official at the HRPB regarding this case, he only said that “the Bureau responded the matter in proper way in line with the rules,” and further that, “we cannot disclose the details of investigations into the human rights violations given that its details may be a part of a party’s privacy, also can not disclose the internal discussions and considerations in order not to obstruct future investigations.”

When the present writer further asked whether the Bureau really considers they “respond the matter in proper way” – even if they only convey the decision on admissibility of the complaint but not its grounds to the petitioner, and whether the Bureau is concerned if the petitioner is dissatisfied with the decision – the official only repeated that the HRPB can not disclose any details.<sup>16</sup>

## **B. Acts of the Media Excluded**

The 2002 Bill included an exceptional clause on the acts of the mass media (so-called ‘mass media clause’). The clause stipulated that when your privacy was invaded or defamed by the media reports, or when the media bombard someone for an interview, the targeted persons could file the complaints to the Commission for remedies. The Commission might order the media to stop excessive requests for interview, to redress the damage, or publicize the Commission’s order. However, it was unclear what would be “excessive” interview requests, thus the Commission’s judgments might violate the freedom of the media or the right to know. Such criticism was so strong that the 2012 Bill did not include such provision at all.

However, it does not mean the media was left outside of the jurisdiction of the Commission. As the 2012 Bill did not refer the human rights violations conducted by the media, such abuses would not be subjected to the “redress” by the Commission. However, it naturally would be subjected to “complaints handling” by the Commission.

<sup>15</sup> Tokyo metropolitan government provided subsidies to Korean Schools in Tokyo. However, the metropolitan government stopped the payment since 2010 fiscal year for the reason that the abduction issues have not been resolved and other reasons.

<sup>16</sup> This communication was on the occasion of exchanging views in May 2013 between the relevant government ministries and civil society organizations regarding the last recommendations by the UN Committee on the Elimination of Racial Discrimination.

### C. Consultations with Civil Society Organizations

The 2012 Bill stipulates that the HRC might organize public hearings if they think it's necessary for their mandates. However, reflecting on similar public hearings held so far on other issues, these were only hollow shell opportunities, indicating that it is unlikely that the authorities intended to listen to civil society voices.

Several NGOs including Joint Movement for NHRI and Optional Protocols (JM for NHRI) constitute a network calling for establishing an NHRI in compliance with the Paris Principles. These NGOs all agree that the desirable NHRI must have a capacity to deal with human rights violations by state actors, central and local government, governmental agencies, as well as individual public figures. Such human rights violations should include discriminatory verbal abuse, and any abuses of groups of people or collective rights, because there are currently no available remedies for these two types of abuses.

However, some NGOs and scholars of constitutional law strongly insist that freedom of speech should be prioritized over such verbal abuses and must be inviolable. The NHRI which such people would agree with would be the NRHI that does not have powers to deal with such verbal abuses including hate speech.

Another idea is that the first thing is to establish an NHRI even if its mandate is limited. Some NGOs and the Members of Parliament who have worked on establishing an NHRI insist that you would be able to add to the mandate or improve the basic law afterwards. This is quite controversial as other NGOs consider that it might be too difficult, almost impossible, to amend the laws. For this reason, NGOs including JM for NHRI were not entirely in agreement with the provisions of the 2012 Bill.

## IV. Conclusion and Recommendations

Following the Universal Periodic Review of Japan held in February 2012, in the mid-term progress report submitted by the Japanese Government in March 2013, it is clearly stated that the Government is willing to follow recommendations to establish a National Human Rights Institution according to the Paris Principles.

However the LDP stated that they are "strongly against the HRC Establishment Bill proposed by DPJ" and willing to promote human rights remedies "through enactment of individual specific remedial laws".<sup>17</sup> In fact, on 17 May 2013, HRPB stated that "the relevant parties have so far discussed from a wide range of viewpoints with taking into account opinions by UN Human Rights Treaty Bodies about how human rights remedial system should be established. We have been currently examining it appropriately based on such earlier discussions. We are currently not in a position to mention a future schedule." They even do not mention if they have any intention to establish an NHRI.<sup>18</sup>

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17 Quoted from LDP's policy book "j-file 2013" issued on 20 June 2013.

18 This was the response to the writer's question asked on the occasion of exchanging views of the relevant government ministries and agencies and civil society organizations on the last recommendations made by Committee on the Elimination of Racial Discrimination.

On 18 June 2013, the Japanese Government endorsed a written reply at the Cabinet meeting about the Government's response to the Conclusions and Recommendations adopted by the UN Committee Against Torture. The written reply says "[the Conclusions and Recommendations] are not legally binding nor oblige the State Party to comply with it." That is, the Government expressed its intention not to take up the recommendations by the Treaty Body.

There is a good example that shows the gap between the government's negative attitudes towards human rights protection domestically, and the positive attitude it exhibits internationally. At the 22<sup>nd</sup> session of the UN Human Rights Council held in February 2013, a representative of the Japanese Government stated, "Japan is making sincere efforts for the effective implementation of the treaties we have concluded. Japan shall continue earnestly to address recommendations by human rights treaty bodies and suggestions from the international community, and thereby protect and promote all forms of human rights."

If Japan does not have the will to conform to recommendations by the Treaty Bodies, it should resign from membership of the UN Human Rights Council.

Under the current LDP government, there seems to be little hope to establish the Commission. However, it was the LDP that submitted the 2002 Bill to establish an NHRI, in response to a report submitted in 2001 by the Provisional Council on Human Rights Protection and Promotion.

The report noted that the CLVs practically had limitations, and the judicial remedy and the alternative dispute resolution system also had some limitations. Thus the report recommended that Human Rights Remedial Institution which is independent from the government is necessary and that such Institution must respond to issues that any of the individual specialized remedy institutions could not resolve.

All these things considered, the LDP government should take responsibility to enact not individually specific laws for human rights protection and promotion, but rather, the comprehensive Human Rights Remedial System of a national human rights institution based on the 'Paris Principles'.

### **Recommendations to the Government of Japan**

- To recognize that Japan stated clearly to the international community that she take recommendations by the international human rights mechanisms in a serious manner and promote all the human rights, and to take concrete measures with a time schedule in order to realize such recommendations.
- To recognize that human rights violations become the most serious ones when caused by the State, and to have a political will to establish a National Human Rights Institution which make recommendations on comprehensive human rights policies from the independent standpoint as an institution outside of the Ministry of Justice and other governmental agencies.

### **Recommendations to the Diet of Japan**

- To encourage the Government to accept recommendations on human rights from the international community in a serious manner.
- To propose concrete processes with clear cut time schedule toward establishing a National Human Rights Institution.
- To make the human rights standards of the international human rights treaties into reality by ensuring that a National Human Rights Institution interprets its mandate based on such treaties.
- To ensure that a National Human Rights Institution has a function to make comprehensive recommendations on human rights policies from an independent standpoint as an institution outside of the Ministry of Justice and other governmental agencies.

### **Recommendations to the United Nations Human Rights Council**

- To point out repeatedly that it is an obligation of the member states of the United Nations to respond seriously to recommendations by UN human rights agencies, and to realize such recommendations in their own territory.
- To support and encourage Japan in a concrete manner to establish a National Human Rights Institution in compliance with the Paris Principles in consultation with the Office of the United Nations High Commissioner for Human Rights.

### **Recommendations to the Asia-Pacific Forum of National Human Rights Institutions**

- To support and encourage the Government of Japan and the relevant governmental agencies in a more concrete manner to establish a National Human Rights Institution in compliance with the Paris Principles.
- To share information to a wider range of civil society organizations if, for example, the Japanese Government approaches APF on the establishment of a NHRI or any other push from the Government to APF, so that CSOs could take advantage of such strategic opportunities in the timing of their advocacy.
- To encourage the Government of Japan and the relevant governmental agencies to collaborate with civil society organizations in order to establish a National Human Rights Institution.



# Mongolia: Moving towards Greater Effectiveness

Centre for Human Rights and Development<sup>1</sup>

## I. General Overview

This report is an assessment of the performance of the National Human Rights Commission (NHRC) of Mongolia in the protection and promotion of human rights, mainly between January to December 2012 and including events and highlights of mention in the first half of 2013. The report draws attention to selected issues on independence and effectiveness of the NHRC and examines its full compliance with the international standards for national human rights institutions: the 'Paris Principles'. This report is divided into 2 parts. Firstly, it looks at the general human rights situation of the country and the NHRC's role in addressing the human rights situation. Secondly, it makes an assessment of the NHRC's independence and effectiveness in the context of its performance in protecting and promoting human rights.

2012 and 2013 were important years in the political and economic life of the country. The parliamentary election in 2012 and the presidential election in 2013 resulted and affirmed the victory of the Democratic Party, which now controls the Parliament, the Government /Executive and the Presidency.

The 2012 parliamentary election was special as it was conducted by a new election law with new election system (a combination of the majority and proportional system of voting). An electronic voting system was used for the first time; although small political parties were not satisfied and made allegations of election fraud. For the first time, Mongolian citizens living overseas had opportunities to vote; and a quota system was introduced to ensure that no less than 20 per cent of the candidates are women.

The economy is marked by the mining boom bringing great wealth to the country. However, it has caused human rights violations in different ways, challenged the weak legal and justice system and resulted in deepening social inequalities while contributing greatly in destruction of the natural environment. The wealth has not been distributed evenly across the country to the population. Lack of transparent system in governance at all levels and accountability of government officials resulted in wide spread corruption.

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<sup>1</sup> Jointly prepared by Alistair Rooms, intern at CHR; Mandkhaitsetsen Urantulkhuur, Program Coordinator on Community Based Development at CHR; and Urantsooj Gombosuren, Chairperson of CHR.

According to the 2013 Global Corruption Barometer, released by Transparency International, Mongolia is one of the most corrupt countries in the world, followed by Liberia. This report says that 86 percent of respondents/population believe corruption in the public sector is a very serious problem in Mongolia.

Since 2012, the Parliament adopted new laws on information transparency and right to information, law on conflicts of interest to strengthen anti-corruption law, budget law which provides greater opportunity for local public administration, and most importantly for citizen participation in budget planning.

Currently fundamental reforms in judicial system, law enforcing mechanism, and in regulation of legal professionals' activities are taking place in the country. The government pays more attention to recommendations of UN human rights bodies and expressed its interest to apply for membership in the UN Human Rights Council.

The terms of two of the three members of the National Human Rights Commission expired in 2012. Following this, the Great State Khural (parliament) adopted Resolution 14 on the appointment of new Commissioners for the term 2013-2019. Mrs. Oyunchimeg Purev was re-appointed as a Commissioner and Mr. Ganbayar Nanzad became a newly appointed Commissioner.

This new leadership for the NHRCM has many issues to tackle during its time in office. Election promises must be fulfilled if we are to see improvements in human rights for many Mongolian citizens. The main issue will be protecting the rights of herders from large mining companies and ensuring the natural wealth of Mongolia is sustained.

Poverty as cause and consequence of human rights violations is not decreasing but deepening. The right to adequate standard of living including the right to decent labor has been seriously violated for major part of population estimated as 30-40 percent living in poverty. Furthermore there is much work to be done on gender equality and combating domestic violence as violations still remain high, the issue of human trafficking is also one that must be high on the agenda. With 82 people being trafficked in 2012 (official figure – the actual number is expected to be much higher) there must be a coherent strategy to combat this human rights tragedy. Finally, the issue of penal reform is also one of great importance as currently the detention centers across Mongolia do not comply with the UN standards.

## **II. Independence**

### **A. Law**

The law on the NHRCM has not been changed since its adoption although many voices call for its reform. There have been some unsuccessful initiatives to change the law, firstly made by a working group set up by the deputy prime minister which included a Commissioner and NGOs who had proposals for changes in the law. In 2010 the parliament subcommittee also set up another working group to look into the issue, this also included one NGO and

one of the Commissioners. However, the working group has not functioned at all. The most recent development is that the NHRC has developed a new draft law and agreed to submit it from the Presidential office to the Parliament. The draft has not been shared with the public, including concerned NGOs, up till now.

The current law has a special provision (3.3) which states “The NHRCM will comply with the principle of independence as well as transparency”. This law alone is not enough to ensure the principle of independence is in place, as there are no safeguards in place to ensure the Commission stays independent. Furthermore there are no sanctions spelling out the consequences if the Commission was to break the principle of independence. This report urges the following problems to be rectified and there be an amendment of the enabling law to ensure the independence of the Commission.

### **B. Relationship with the executive, legislature, judiciary and other specialized institutions in the country**

The NHRCM holds the ability to make recommendations to the Great State Khural (parliament), both in its *Annual Report on Human Rights Status* and when it thinks necessary action is needed on an issue. However the Commission has not been able to include all key human rights issues mainly because of its weak capacity in resource, knowledge and expertise especially in development policies. According to the 10<sup>th</sup> Report on human rights and freedoms in Mongolia by the Commission, from a total of 143 recommendations in the previous nine reports on human rights and freedoms in Mongolia, only 41 recommendations (28.6%) were fully implemented; 45 (31.4%) were partly implemented; and 57 (39.6%) were never implemented.<sup>2</sup>

Nevertheless, as a result of the effort by the National Human Rights Commission of Mongolia encouraging the State Great Khural and the Cabinet to improve the implementation of the recommendations, this year the Standing Committee on Legal Affairs of the State Great Khural released Resolution No 13 (annexed below) complimenting the 10<sup>th</sup> report of the Commission and giving guidance to the Cabinet to resolve the major human rights problems. Nevertheless, the fact that only 28.6 percent of the Commission’s recommendations have been implemented in the past 10 years needs to be seriously considered. This certainly shows the weakness of the NHRCM and results from its lack of full independence.

In accordance with the law the NHRCM must submit an *Annual Report on Human Rights Status* to the Great State Khural (parliament) within the first quarter of the year. *Annual Reports on Human Rights Status* of the NHRC have been submitted to parliament and discussed by the Legal Standing Committee but without serious follow-up by the Committee. However, 2013 was a remarkable welcome departure from usual practice.

This year, for the first time, the *Annual Report on Human Rights Status* of the NHRCM was

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2 10<sup>th</sup> Annual Report on Human Rights Status in Mongolia by NHRC of Mongolia, p.102

discussed at an extended meeting of the Legal Standing Committee with the participation of government and non-government organizations on the initiative of the NHRC. At this meeting senior level officials from most of ministries and agencies and quite a number of human rights NGOs working on different issues participated.

As result, Legal Standing Committee issued Resolution No. 13 of 3 July 2013 which assigns the Prime Minister to develop a plan of action to implement all unfulfilled recommendations which have been made in *Annual Reports on Human Rights Status* of the NHRCM as well as to report to Parliament on implementation of all recommendations made to the Mongolian Government by UN human rights bodies on a half-year basis. The resolution also assigned the Government to include salaries of representatives of the NHRC working in all 21 *aimags* (or provinces) in the 2014 national budget. This development is seen by human rights communities in Mongolia as an important action to strengthen the effectiveness of the NHRC of Mongolia and as well as procedurally important step if it becomes regular practice. NHRCM needs to make efforts to formalize this process and institutionalize it through its law.

For the last two years NHRC has been active in making statements on issues of human rights violations especially when children were victimized in domestic violence, lost their life in horse races, and on the rights of mining affected rural communities. The NHRCM also made recommendations to the Ministry of Justice on issues of purchase and use of more than 400 chairs for custodial interrogation (that is, instruments of torture), resulting in the decision of the Ministry of Justice to revoke this purchase and to hold accountable those in the General Police Office who made the decision to acquire them.

### C. Membership and Selection

Although the NHRCM has been granted 'A' status by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC)<sup>3</sup>; the selection process is not rigorous or transparent enough to guarantee full independence. The fact that candidates are nominated by "the Speaker of the State Great Khural (Parliament) on the basis of proposals by the President" and "the Parliamentary Standing Committee on Legal Affairs and the Supreme Court"<sup>4</sup> leads us to call into question the transparency in the nomination process. An open system of participatory nomination of members of the NHRCM by the Ex-Officio Council (described below) and which could be viewed by the general public, would be a much more effective process as it would ensure full independence of Commissioners.

The current system allows the State Great Khural (Parliament) and the president to exert influence over who is nominated for the position, therefore there is likely to be a degree of political motivation for appointing certain Commissioners. Furthermore it is the Ex-Officio Council members who will work with the Commissioner and are therefore in the best position to nominate or help choose candidates for the position.

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3 <http://www.mn-nhrc.org/eng/main/1/>

4 <http://www.mn-nhrc.org/eng/main/1/>

The law defines the exact qualifications necessary for the Commissioners, as being “citizens of high legal and political qualification, with appropriate knowledge and experience in human rights”. While it is necessary for Commissioners to hold sufficient experience in human rights law, the fact they should have sufficient political qualification means it is likely they have held public office which would suggest bias to certain political parties. They are required by law to suspend membership of all political parties. However, having held public office, it is certain they will have been part of a political party; even though their membership of this party may end, their affiliations and biases towards it will not. It is highly likely that this will influence their decisions.

Furthermore, new Commissioners are required to be nominated by parliament and if nominated by a political party they are likely to feel loyal to that party, especially if they were a member of the party before being appointed. Commissioners are also expected to avoid or at least declare outside interests such as major civil society organizations and private interests. Having declared outside interests it is expected that the Commissioners will not act with their own interests in mind as it would be clear for the members of the Ex-Officio Council and others to see and would leave them open to criticism. However, there is no official check on whether the Commissioners are acting with other interests in mind.

The plurality of the 21 Ex-Officio Council members is of a good standard with representatives from a diverse range of backgrounds and a large number of different NGOs such as Amnesty International and the Mongolian Women’s Association and other such-like institutions. Furthermore this Council has a fairly equal balance of male and female members despite women’s high representation in human rights NGOs. In a recent development, the NHRC has initiated amendments of the by-law of its ex-officio council and is soliciting opinions of council members on these changes.

The law on appointing Commissioners does not require gender balance or a pluralistic selection of Commissioners. While currently one out of the three Commissioners is female if gender balance was enshrined in the articles of the Commission it would guarantee women’s representation in the future too. The Commissioners hold office for 6 years and are allowed to be re-appointed for a second term. The law has a provision for the removal of Commissioners if they are implicated in a criminal offence or elected to another official position.

There is little guidance for the Commissioners to act independently; merely a few rules and regulations to do with the appointment of Commissioners. They do not receive training on how to act independently towards human rights defenders and the citizens of Mongolia.

Since the law on NHRCM has not been adequately amended, criticism on the process of nomination and appointment of commissioners continues. The appointment of Commissioner Mr. Ganbayar Nanzad was criticized and a petition was submitted to MPs by civil society. Their criticism was based on the conclusion of the *Tsets* (Constitutional Court of Mongolia) on violation of the Constitution made in 1994 by Mr. Ganbayar Nanzad when he was state general prosecutor.

## D. Resourcing of the NHRCM

The budget of the NHRCM is approved by parliament and then channeled to the NHRCM through the Ministry of Finance. The law on public budget organizations management and finance states that the NHRCM must report on the state of its finances to the Ministry of Finance. The budget is not legally protected from interference and reductions; therefore it is possible for a ruling political party to severely affect the Commission's day-to-day functioning by reducing the budget. By the budget law of 2013, NHRCM has 574,9mln MNT (which is approximately US\$383,000). This budget has increased significantly from previous years, but is still far from adequate.

Since 2012 NHRC of Mongolia has been receiving funds from UNDP Mongolia to implement a three year project on strengthening national human rights mechanisms.<sup>5</sup> With this financial support NHRC has conducted much research, many trainings, organized conferences, workshops and discussions, and even supported local NGOs with funds. However, it is important for NHRC while receiving the UNDP support, to be creative in building its capacity and legal grounds for getting enough public funds annually to continue its full operations. Otherwise when UNDP support ends, it will have to face the previous years funding scarcity.

It is accepted policy that the NHRCM should inform the Government Service Council of vacancies and they will select appropriate staff to fill the vacancies. Therefore staff of the NHRC is regarded as public servants. This also leads to doubts whether this process of seconding staff can nurture a human rights culture in the NHRCM.

## III. Effectiveness

The NHRCM has a complaints handling department and Article 9.1 of the National Human Rights Commission Act states "Citizens of Mongolia, either individually or in a group, shall have the right to lodge complaints to the Commission in accordance with this Law, in case of violations of human rights and freedoms, guaranteed in the Constitution of Mongolia, laws and international treaties of Mongolia, by business entities, organizations, officials or individual persons."<sup>6</sup> Complaints can be sent in writing, orally at the offices of the NHRCM, or by email through the NHRCM website. However, many citizens in rural areas do not have access to the internet, therefore the lack of centers in which complaints can be lodged inhibits the Commission's effectiveness in receiving complaints.

Complainants must write his/her name, residential and postal address and have signed the complaint. They must also indicate, which rights and freedoms guaranteed in the Constitution of Mongolia, laws and international treaties of Mongolia, have been violated.

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5 Although the NHRCM is an important component in the national human rights mechanism, it cannot represent the whole national mechanism for human rights in Mongolia.

6 <http://www.unhcr.org/refworld/category,LEGAL,,,MNG,474d2e802,0.html>

A complainant shall lodge a complaint within one year from the date on which his/her rights and freedoms were violated or from the date on which he/she came to know about such violation. The Commission shall give a reply within 30 (thirty) days from the date of receipt of a complaint, and if there is need for additional fact-finding and inquiry required, the Chief Commissioner may extend it up to 60 (sixty) days.<sup>7</sup> The Commission has a range of options that it can choose to use to deal with legitimate complaints, for example they can choose to “demand organizations or officials to stop activities which violate human rights and freedoms, or which create conditions for such violations; or to decide the issues by way of conciliation of the parties. Alternatively they can pass the issue onto a criminal court if the matter falls under the jurisdiction of a criminal case.

There have been a number of cases, in which with the help of the NHRCM, the rights of citizens have been successfully defended. In one case during 2012 Citizen “T” had been wrongfully implicated of abusing an official. The case was heard at Khan Uul district court and lasted 18 months. As a result of the allegations against citizen “T” he was fired from his work, he lost his property, he had his reputation ruined, he was left with emotional damage and his health deteriorated. J. Dashdorj, a member of the National Human Rights Commission of Mongolia reported on the issue and ultimately helped citizen “T” win the case. The damage done to citizen “T” was estimated as 11.844.000 Tugrik and citizen “T” was compensated 3,454,000 Tugrik.

Citizen “H” was wrongfully accused of defrauding in an investigation that lasted 10 months. The result of this case was that his health deteriorated, he was emotionally damaged and as a result lost his property in 2012. He reported his complaint to the commission and P. Oyunchimeg, Commissioner, reported on and helped to deal with the issue. The estimated damage done was 6.885.800 Tugrik and he was compensated 2.885.800 Tugrik.

Citizen “N” was wrongfully implicated in a crime of thieving; the case was heard at the primary court of Orkhon province. He was kept in detention for 330 days and as a result he got psychological problems, lost 70 percent of his employment, his health deteriorated and a considerable amount of emotional damage was done. J. Dashdorj of the NHRCM helped him after he made a complaint to the Commission and he was eventually compensated 41,131,060 Tugrik.

There were 311 complaints received in 2012. 292 cases were concluded. However, it is so far unclear from the information provided by the Commission exactly how many of these cases were dismissed and how many led to convictions. If there were under 20 complaints dismissed for various reasons, this shows that the Commission is fairly effective at dealing with complaints as they have a good record for taking them seriously and getting results.

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7 <http://www.unhcr.org/refworld/category,LEGAL,,,MNG,474d2e802,o.html>

## IV. Consultation and Co-operation with Civil Society

As stated in the Law on National Human Rights Commission of Mongolia, since 2006 the Commission has a number of ex-officio council members who are all active members of differing civil society organizations (CSOs) who are linked to or are involved in the human rights field. For the last two years the number of ex-officio council members increased. It reached 21 involving representatives of diverse human rights NGOs including sexual, national minorities, disabled and religious groups. Meetings of the council have been more regular and take place at least 2-3 times a year. At the meetings members discuss strategies, plan and activities of the NHRC and share with information. These meetings further can be effective venues for NHRC and council members to coordinate and complement their activities for rights promotion and protection.

Furthermore, as stated above, some CSOs are invited into specific consultations on conducting research, organizing conferences, developing policy recommendations on human rights situation. The NHRCM has organized at least 2-3 meetings with civil society organizations annually for the last two years to present its activities and receive feedback from CSOs. The NHRC entered a Memorandum of Understanding with the Confederation of Trade Unions and expanded its cooperation with civil society organizations. It implements joint projects and research with civil society organizations. This kind of cooperation with CSOs needs to be continued and intensified.

## V. Thematic Issues

### A. Penal institutions and Human Rights

The conditions of most penal institutions throughout Mongolia do not meet the specified UN standards, rules, regulations, agreements or conventions. Both the "Standard Minimum Rules for the Treatment of Prisoners" and the "Basic Principles for the Treatment of Prisoners" have been adopted by the UN of which Mongolia is a member.

The Mongolian Constitution states that "Mongolia shall fulfill in good faith its obligations under international treaties to which it is a party. The international treaties to which Mongolia is a party shall become effective as domestic legislation upon the entry into force of the laws and the ratification of their accession."

Article 15 of the "Law on court decision enforcement" guarantees by law several rights to prisoners such as the right to seek medical services, right to education, right to make requests and complaints, right to legal assistance, right to be provided with food of nutritional value, right to be provided with clothing and bedding, right to receive relatives for long visits and all other persons for short visits. The Mongolian institutions therefore have an obligation to uphold these international agreements and abide by the regulations. There are numerous cases in which these rights have been violated. Often the necessary equipment or personnel are not in place in many of these institutions, making it impossible for some prisoners to receive many of these basic rights.

The procedure for “providing medical care to persons under custody, treating them in medical facilities and visits by medical staff to police detention centers” was put in place as part of a joint decree issued on 25 March 2005 by the Minister for Justice and Home Affairs and the Minister for Health. The purpose of the decree was to specifically provide medical examination by specialists to suspects and the accused while they reside in custody in police detention centers. It is important to note accused persons have often yet to be tried and so are neither guilty nor innocent at this early stage. These medical checks on suspects or accused persons are often necessary at the time of admitting, re-admitting after interrogation, and at the time of dismissal from institutions. The NHRCM have recorded instances, while monitoring detention houses in the countryside, where prisoners required medical services because they were physically assaulted by detention house personnel.

In a recent case a lieutenant was found to have assaulted a prisoner at pre-trial detention centre 0461, as a consequence of the lieutenant’s behavior he received disciplinary action but no criminal case was brought against him. He had seriously infringed the prisoner’s human rights but had merely been disciplined; therefore the NHRCM commenced criminal proceedings against the lieutenant. The Commission is to be praised for starting criminal proceedings in this case; in addition to the important role of the Minister for Justice and Home Affairs and the Minister for Health for implementing the law on medical checks.

Although Mongolia is party to the “Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment”, some parts of the Convention still need to be enshrined in law. For example, the “Code of Conduct” for Law Enforcement Officials allows offenders to slip away with disciplinary action even though they have infringed on potentially innocent people’s human rights. The “Code of Conduct” for law enforcement officials should therefore be amended so that law enforcements officials who infringe on people’s human rights through “threat, violence, torture, humiliation, deception or other illegal methods” are brought to justice and have a criminal case brought against them.

Seven suits have been filed against correctional facility workers under Articles 99 and 151 of the Special Part of the Criminal Code. Of these cases, one has led to a conviction; three have been dismissed because the period of prescription for filing a suit had expired; and three more are currently under investigation. Officials are therefore able to get away with charges brought against them if the case is brought against them after the prescribed time and can be sentenced lightly for their actions, stricter action must therefore be taken in future against officials who cause bodily injury to prisoners. If the “Code of Conduct” for law enforcement officials was amended to close this loophole, Mongolia’s laws would comply with the “Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment”. This would also mean fewer law enforcement officials could escape criminal cases if they infringed upon the human rights of suspects. The Memorandum of Understanding the NHRC entered into with 5 state organizations involved in criminal investigations<sup>8</sup> in 2009 has the potential to assist in the prevention of torture.

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8 State Investigation Office; General Authority of Court Decision Implementation; Investigation Department of Anti Corruption Agency; Investigation Department of General Intelligence Office; and Investigation Department of General Prosecutor Office

Article 15 of the “Law on court decision enforcement” states that prisoners have a right to seek medical assistance, also the decree issued on 25 March 2005 by the Minister for Justice and Home Affairs and the Minister for Health states that every detention house must have one doctor and one medical practitioner.

Although medical assistance is stipulated in both documents, as of 4 April 2012 five detention houses<sup>9</sup> had no medical personnel whatsoever and nine detention houses<sup>10</sup> had only a medical practitioner and no doctor. Therefore, only twelve of the twenty five detention houses across the country could provide medical assistance to their prisoners, and the remaining detention houses violate the human rights of all prisoners who are residing in them.

During 2011, 20 prisoners died in correctional facilities due to disease. Had they been able to seek medical assistance, it is almost certain that number would have been much lower. This is a clear violation of prisoners rights to seek medical assistance. When questioned on this the General Department for Court Decision Enforcement stated, “it is hard to find doctors with qualifications and persons willing to work permanently”. This is understandable as the wages of medical personnel working in detention houses are set lower than medical personnel working in hospitals. There is therefore an urgent need for the government to allocate more resources to provide all prisoners in detention houses with medical care as well as a need to increase the pay of medical personnel working in detention houses in line with the medical personnel who work in hospitals.

CCTV is a key tool used throughout the world to protect prisoners human rights, however only one detention facility in Mongolia has enough CCTV cameras installed to document the whole detention house. The other penal institutions are therefore not doing enough to prevent prisoners from harming one another, ensuring and protecting the safety of detention house staff, and preventing prisoners from being harmed by detention house staff. Five of the twenty five detention houses have no CCTV cameras installed whatsoever, sixteen of the twenty five detention houses have some CCTV installed but the CCTV does not meet the required standards due to the systems being partly broken or not covering all of the necessary areas, only four of the twenty five detention houses have enough CCTV cameras installed to meet the required standards.

Although the new purpose built detention house in Ulaanbaatar city meets international standards for the amount of natural light and space for prisoners, it is one of the only detention houses in Mongolia to do so. The detention houses in rural areas are much poorer equipped as they were often originally built as hospitals or garages as opposed to detention houses. There are even a number of detention houses which are located in the basements of police stations; and because of their location there is no way they can have windows. Often the ventilation in these *Aimags* (provinces) is also poor leading to the spread of infectious diseases and ultimately endangering the inmates lives.

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9 Numbers 409, 411, 419, 435 and 457

10 Numbers 403, 415, 417, 425, 431, 433, 437 and 441

Furthermore in 6 detention houses<sup>11</sup> across the country there are no separate cells to house juveniles and women prisoners separate from the men, and in some cases accomplices of the same crime are held in the same cell. In the remaining 19 *Aimags* although women and children are housed separately, defendants who are waiting for court orders do not have a separate cell from convicted prisoners, infringing on the human rights of the untried prisoners. Although article 3.1 of the Criminal Code states that prisoners sent to detention facilities will be kept in individual cells, this is rarely the case. The international requirement of space for prisoners has been set at 2.5 square meters per cell; as of 17 January 2012 it was found that 3 detention houses did not meet these international standards. The NHRCM also found that the detention center of UVS *Aimags* had been confining detainees for more than 10 days without a court order for prolongation of detention of suspected and accused persons. Furthermore, record keeping and safe storage of detainees property has been extremely poor among many detention centers with many items going missing or being switched, this infringement has the possibility to violate prisoners ownership rights.

Although the detention house in the capital city meets required standards, these same standards are not upheld throughout the country and in rural areas there are a number of violations of prisoners' human rights. Therefore detention houses in rural areas must be renovated, extended, and the day-to-day running must be evaluated so that it is in line with international standards. The government must provide the resources and financing to allow these reforms to take place.

Article 12.1 of the Law on Court Enforcement stipulates if a prisoner works during their time at a correctional facility "convicted persons will be paid due to his/her ability in quantitative and qualitative terms". Moreover, the head of the General Department for Court Decision Enforcement issued an order stating that when convicted persons are employed on the basis of contract by domestic industry, an individual or legal entity, they will get paid a minimum salary set by the government. There have however been a number of cases in which prisoners have not been paid their wages even though they have worked a considerable number of hours. For example, Prisoner "O" who was serving a sentence from 2000-2004 worked by contract in Buyan LLC. She was housed at the company's factory, however she wasn't paid any wages and there was no evidence of a deduction being made from her for misconduct or damages.

Out of the 25 correctional facilities throughout Mongolia, prisoners only have the provision to work in 15 of them, the other prisons simply do not provide employment opportunities. The opportunities that are available are limited and often the amount of work available is low leading to unequal distribution of work opportunity among prisoners. There is therefore a need to industrialize these prisons to provide work opportunities for prisoners and begin to decrease the re-offending rate.

The flaws in the penal institutions of Mongolia are clearly outlined above and the human rights of thousands of Mongolian prisoners are violated on a daily basis. Therefore this

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11 Kharkhorin Soum, Bulgan, Umnugovi, Dundgovi, Tuv Aimags, Selenge Aimag

report urges the government to provide more resources to these institutions so that they can be brought in line with international standards. At the moment, people who are on the fringes of society are being marginalized to an even greater extent, and this must stop.

## B. Mining and Human Rights

Mongolia has a rich tradition of herders living and migrating around Mongolia and living as nomads, this tradition goes back thousands of years and this tradition is truly ingrained in Mongolian culture. Nearly 40 percent of Mongolian people live this nomadic lifestyle<sup>12</sup> and are therefore dependent on the land to graze their animals. However, the recent mining boom throughout Mongolia has begun to threaten this traditional way of life. Mongolia has one of the largest mineral reserves in the world and estimates for Mongolia's mineral wealth range from \$1.3 trillion to \$2.75 trillion in the 10 biggest mines – and those amounts reflect just the 27 percent of the country that geologists have mapped so far.<sup>13</sup> While it is important that some of this mineral wealth is harnessed and Mongolian people see economic and social development, and a rise in the average Mongolian income; it is also vital that during the mining boom Mongolians do not have their human rights infringed.

This is especially important because the herders lifestyle is so dependent on grazing land for their cattle. It is the responsibility of the government to ensure that the large mining companies do not harm the inalienable rights of Mongolia's herders, and that the local people are consulted before a mining license is granted. Although there is provision for this within the law titled "Decision of issuing Mining License should be based on Participation of Local Communities", 44 percent of 50 herdsman interviewed said that this legal provision is not enforced and 38 percent stated that they did not even know about this provision.<sup>14</sup>

There are a number of negative effects of mining and these must be minimized in order to protect the human rights of ordinary citizens. Some of the negative effects of mining include: soil erosion and contamination, water deficiency and dust-related air pollution. These effects have already affected citizens rights to a healthy and safe environment, their right to own and use land, to own property and have their health protected. There are over 30 laws in Mongolia which aim to protect the right to a safe environment including the Constitution, the law on environmental protection, the law on specially protected areas, and laws on water, air and mineral resources, as well as the law on environmental impact, to name but a few.

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12 <http://www.newsecuritybeat.org/2012/07/in-mongolia-climate-change-and-mining-boom-threaten-national-identity/#.UUAgajfleTg>

13 <http://www.newsecuritybeat.org/2012/07/in-mongolia-climate-change-and-mining-boom-threaten-national-identity/#.UUAgajfleTg>

14 "Mining Impacts of Human Rights" Study Report, NHRCM, 2012

The Great Khural (parliament) adopted the law on Mineral Resources in 2006: this allows the government to regulate how many mining operations take place throughout Mongolia and therefore protect the nomadic way of life. There are currently 3,765 licenses for mineral resources covering 23 million hectares of land. Due to this vast mining operation, the number of herders in Tsogttsetsii, Khanbogd and Gurvantes *Soums* (districts) have decreased by 56 percent in the last 7 years<sup>15</sup>. Consequently, it would seem that the government is not regulating the amount of mining licenses granted, it must start to do this if the nomadic way of life is to be protected.

The NHRCM recently conducted an investigation into a range of companies to check if local citizens were having their right to live in a healthy and safe environment upheld. Along the roads of Ulaanbaatar-Mandalgobi-Dalanzadgad, Gobisumber-Tsogttsetsii *soum* and Tavantolgoi-Tsagaan-Had Gashuun Sukhait, locals complained that the number of 100 ton trucks transporting resources by the roads had led to the escalation of dust and erosion of pastureland which is the main source of their livelihood. Most of these roads are dust roads except from one 245km stretch of road which companies must have relevant agreements and pay fees to use; many companies still use off-roads due to their belief that the road fee is too high and the fact they have no contract to use it.

The result of an inspection throughout ten provinces concluded that 200,000 tons of waste including mercury and cyanide has been left in 120 places after gold mining activities.<sup>16</sup> Companies are supposedly responsible for restoring the natural landscape after the completion of a mining operation; in reality this is not happening. District governors are responsible for implementing this law; however, clearly it has not been implemented correctly. This is entirely unacceptable therefore this report suggest there should be compulsory inspection of mining companies following the completion of a mining operation to ensure these dangerous substances do not endanger the health of local citizens. The government must compel the mining companies who obtain licenses, to fund more paved roads so that soil erosion and dust do not continue to be a problem for nomadic herdsman.

At the meetings of Khanbogd *soum* of Umnugobi many people reported an increase in their living conditions due to the creation of some jobs but a larger rise in gastrointestinal diseases due to a shortage and poor quality of drinking water. Furthermore they also complained of a drastic upsurge in respiratory diseases among the local people especially children due to air pollution and dust. In 2012 average volume of dust was found to be 45 times higher and dust with small particles 34-35 times higher than allowed by the 'air quality and general technical criteria'<sup>17</sup> which is set by the General Agency for Specialized Inspection 2012. Coal transportation has caused many branch roads to link to these roads however these were created by drivers who chose to drive straight across pastureland directly affecting the lives of herdsman and causing further soil erosion and dustiness.

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<sup>15</sup> Statistical division of Umnugovi province, social and economic indicators 2012

<sup>16</sup> Environmental report of Mongolia, for 2008-2010, Ministry of Environment and Tourism

<sup>17</sup> Official letter no.4/2056 by General Agency For Specialized Inspection 2012

There are a number of herders who live in mine-affected areas and there are a number of issues concerning their resettlement and compensating them. The following account was given by a local herdsman at Manlai *Soum* "greenery ceases to grow due to truck dust ... if pastureland is gone how shall we live ... Herders health has deteriorated, drinking water has become too hard leading to liver and bladder damage". This herder's right to live in a safe environment has been denied.

Furthermore, according to the water quality test in places such as Shivee Khuren, Khermen Tsav, Derengiin Us, and Khadan Us, volumes of nickel and cadmium in the water were discovered to be three times the limit recommended by the World Health Organization. Another instance which has a detrimental effect on herders lives is the fact that often smaller mining companies wash gold in local rivers which are used for drinking water further downstream. Many of the herders understand that this water is not safe to drink but are left with no choice as water resources in mined areas have decreased with springs and wells drying up. Due to this irresponsibility from the mining companies many herders actually live in a highly dangerous environment.

Sadly, the herders who have acted as stewards on the land for thousands of years are now the vulnerable party. The land they once cared for and looked after has now become a source of profit for foreign companies. Although many of the herders are angry about this, the court they would have to travel to is in Ulaanbaatar city which can be hundreds of miles from where they are residing. They have the option of complaining to the NHRCM but many of them do not have access to the internet. Therefore often their complaints are not heard. Even if they wanted to file a case against mining companies the stamp tax is often extremely expensive; and often they are not familiar with the court process and so would not know how to go about this. This often means the atrocities continue against little opposition.

The settlement of Khanbogd *soum* which is located 35km from the Gashuun Sukhait border port was not arranged as an administrative unit and therefore laws and state regulations are almost all completely ignored. There is no minimum hygiene standard in disorderly crowded *gers* (yurts or tents), with no public lavatories. Furthermore it has become common for many minors and young women to become sex-workers in the area leading to the spread of sexually transmitted diseases such as syphilis. The heavy transport coal trucks have no designated parking places and so are often parked on pastureland once again slowly ruining the lives of many herdsman. There have been many cases of alcoholism in the area with many drunken drivers being known to run over herders houses and *gers*, directly threatening their livelihoods and lives. This high level of alcoholism in the area has led to 28 road accidents leading to the death of 13 people between 2009 and September 2011 in the area.

The shortage of drinking water in local wells has pushed many local people to buy poor quality drinking water from Gashuun Sukhait port for 30 Tugrugs a liter; causing an increase in stomach diseases in the area. The only public services in the settlement are the tax collectors; therefore locals are not able to call on the help of the authorities to solve the problems. Even if they are angry about their right to live in a safe environment they are powerless to solve their problems.

Between 120-130 trucks wait to cross into the Gashuun Saikhait border port, due to the excessive dust and coal loading there is limited visibility, the level of dust is several times higher than is legally allowed for a safe environment and has caused respiratory diseases to increase two-fold. One of the managers of Tav Tolgoi JSC commented that "There is no environmental inspector. Those who seriously violate laws gain some money here...if you diligently follow the law and ask the governor for some land it will never succeed." Clearly there are a number of direct threats to the safe environment in which the herders used to live and it is now impossible for many of them to live there and graze their cattle in the area. The area needs entire restructuring by the government or must be removed altogether and a new settlement must be arranged with the involvement of an administrative unit and the involvement of public services.

Article 12.1.3 of the law on mineral resources states local administrative and self governing bodies "are fully entitled to monitor special license holder's compliance with their obligations to protect and rehabilitate the environment, protect local population's health and pay the relevant fees to the local budget". However, this provision in the law is not enough to ensure local populations are protected and some the provisions of the law have not even been fully implemented. It is therefore imperative that the government provide the necessary means for local authorities to do this by perhaps creating a role within the local administration for a government official to check that companies are adhering to the set standards and do not infringe on the local population's right to a healthy living environment. If the local official had the power to revoke a company's mining license until it stopped violating local people's human rights then this kind of human rights violation would stop.

On 10 and 11 October 2012 the NHRCM held a conference titled "Mining and Human Rights in Mongolia" with the support of the United Nations Development Program, the Secretariat of the Asia Pacific Forum of National Human Rights Institutions and the Swiss Agency for Development and Cooperation. Around 200 people attended the conference, including representatives from government, local administrations, civil society organizations (such as Amnesty International) and human rights academics among many others. The aim of the conference was to maximize the positive impacts on mining such as the wealth that could be created for Mongolia and to ensure this wealth reached as many Mongolians as possible; while minimizing the negative impacts such as the pollution and loss of locals rights to live in a safe environment.

The conference therefore developed a range of recommendations made to the state, mining organizations and to civil society about what must be changed in order to protect the human rights of local herdsman. These recommendations included all parts of the *Aarhus Convention*<sup>18</sup>; a medium for public consultation at many levels before a mining

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<sup>18</sup> Firstly, the right of everyone to receive environmental information that is held by public authorities; the right to participate in environmental decision-making, arrangements are to be made by public authorities to enable the public affected and environmental non-governmental organizations to comment on, proposals for projects affecting the environment, these comments to be taken into due account in decision-making; and finally, "the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general.

license is granted; creating enforceable regulation on mining companies to ensure that they restore the areas they have mined and do not damage the areas through soil erosion etc; creating consequences such as the removal of mining licenses for companies that do not comply with these regulations; ensuring there are enough good roads so that trucks need not travel over pastureland and cause soil erosion; strengthen accountability mechanisms to ensure mining companies are held to account over their shortcomings so they must pay compensation etc; assign a local representative from the NHRCM to deal with all complaints and human rights violations promptly; close down Tsaagan Khad coal transportation terminal and stop similar places being built; ensure mining companies do not contaminate water sources and ensure all mining companies dispose of dangerous chemicals responsibly and ensure companies are punished should they not adhere to these rules. There are also a number of other recommendations<sup>19</sup>. One of them is the recommendation to the Mongolia parliament to establish legal environment for protection, promotion human rights defenders. If the government were to accept these proposals the mining sector would become a lot more sustainable and would no longer continue to escape with blatant human rights violations. It is now vital that the government implement these proposals.

Before the election the Democratic Party of Mongolia (now the ruling party) promised that: "while issuing mineral licenses the principle of getting opinion of local citizens and establishing agreement will be implemented". They also promised that "significant environmental damage will be prohibited", and that "environmentally friendly technology will be introduced into mining production, counting of damaged areas finished, rehabilitation done by the guilty party and in the future rehabilitation expenses will be placed in state budget account".

However, these promises were merely empty ones with no policy backing up these promises. Nine months on from the party's election victory these promises have not been enshrined into law, there is no greater environmental protection for local herdsman and they are consulted just as less as they were under the previous government. These promises undoubtedly helped the party gain power as the issue of mining was the largest talking point of the June 2012 election. It is vital that the Democratic Party of Mongolia stick to their election promise of prohibiting significant environmental damage, as well as holding the guilty parties responsible for the damage. The ruling party now has an obligation to the people of Mongolia to protect their environmental rights and to consult them on the issues as they had promised.

The Centre for Human Rights and Development urges the government to reassess their current position on the issue and stick to their election promises which brought hope to so many people about the future of Mongolia. Ideally the government should adopt all the proposed changes from the NHRCM's report on Mining and Human Rights in Mongolia.

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<sup>19</sup> <http://www.mn-nhrc.org/eng/main3/120/58-recommendations-from-international-conference-mining-and-human-rights-in-mongolia.html>

If these promises are eventually kept by the government and they adhere to the *Aarhus Principles* then we may begin to see a positive restructuring of the mining sector with local people placed at the centre of discussions as well as seeing them benefit economically for example through the creation of jobs. However, there is also a grave danger that the promises will not be kept; and we could see the slow but inevitable demise of a way of nomadic life that has been present in Mongolia for thousands of years, while foreign companies benefit hugely from Mongolia's mineral resources.

## VI. Conclusion and Recommendations

The capacity of the NHRC and its resources have increased significantly in the last two years due to UNDP funding support and increase in the public budget allocation and lead to more active cooperation with CSOs. The budget increase is expected to continue in 2014 as resourcing of local representatives of the NHRCM in 21 *aimags* will be included in public budget. In this regard, the recommendations of the previous ANNI reports have been implemented.

The effectiveness of NHRCM work will be improved as well if Resolution 13 of the Parliament Legal Standing Committee is implemented. Therefore the NHRCM needs to be proactive to use opportunities to persistently engage the parliament in getting its support in reminding and demanding the government and its relevant bodies fulfill their human rights obligations and promises.

The NHRCM should cooperate more effectively with NGOs and utilize its ex-officio council better through initiating its by-law amendments. The next step of the NHRCM should target approval of its new law which ensures its independence and strength in human and financial resources with adequate country-wide operational structure.

### Recommendations to the Government of Mongolia:

- The enabling law of the National Human Rights Commission of Mongolia should be amended to ensure greater independence of the Commissioners from the government; greater participation and scrutiny of candidates in the appointment process including by Ex-Officio Council members; and a clause providing for gender balance within the Commission should be included to ensure gender balance in membership remains in the future. Public funding of the NHRCM and full independence on use of financial resources needs to be guaranteed by amendments in its enabling law.
- The Government should undertake necessary actions to implement all recommendations by the NHRCM's Conference on Mining and Human Rights in October 2012 to ensure mining and human rights begin to work hand in hand and Mongolia's rich tradition of nomadic lifestyle is not ruined forever. One of these recommendations includes stationing a local representative of the NHRCM in every province to ensure mining companies are adhering to regulations. As well as this it should be possible for this representative to receive complaints from locals living in the area as they may not have internet access and the office in Ulan Bator may be too far to travel. This will improve the effectiveness of the Commission.

- Introduce international standards in protecting human rights of herders considering them as indigenous population carrying traditions of nomadic lifestyle which has protected the sustainable use of the natural environment.

### **Recommendations to the National Human Rights Commission of Mongolia:**

- NHRCM should intensify its activities for amending its enabling law, organizing public and NGO discussion on its draft law, getting their support for amendments make appointments of new Commissioners independent from government influence and the appointment system is open, transparent and participatory and the views of the Ex-Officio Council members are taken into account.
- NHRCM should build strong capacity and legal grounds to be funded annually by public funds, while getting support from UNDP for its activities.
- NHRCM should continue and intensify its advocacy activities to make all detention centers in line with the international standards outlined in the 'Standard Minimum Rules for the Treatment of Prisoners' and the 'Basic Principles for the Treatment of Prisoners' which have been adopted by the United Nations of which Mongolia is a member. It should focus on ensuring centers in rural areas are of the same standard as urban areas and ensuring all medical centers have one member of medical staff and one doctor, as well as the appropriate use of CCTV.
- NHRCM should continue its work to enshrine the 'Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment' into law completely, such that the 'Code of Conduct' for Law Enforcement Officials is amended to ensure that officials who subject prisoners to degrading treatment are brought to justice as opposed to escaping with disciplinary action.
- NHRCM needs to strengthen further cooperation with Ex-Officio Council members and CSOs to get their support and expertise for effective human rights protection in the country.
- NHRCM should work persistently for fulfillment of the recommendations of the conference "Mining and Human Rights in Mongolia" including the recommendation on establishing legal protection and promotion of human rights defenders.

### **VII. ANNEX: Resolution 13 by the Standing Committee of the State Great Khural** (Translation made by the National Human Rights Commission of Mongolia)

03 July 2013 No 13 Ulaanbaatar City

**On certain measures to be taken in connection with the consideration of the "Report on Human Rights and Freedoms in Mongolia"**

The Standing Committee on Legal Affairs of the State Great Khural considered “the 12<sup>th</sup> Report on Human Rights and Freedoms in Mongolia” (‘Report of the Commission’) in its sessions on 24 April 2013 and 22 May 2013 and organized a public discussion on the Report in the State Building on 21 May 2013.

The Report of the Commission was developed on the basis of inquiries and monitoring projects conducted by government organizations, civil society organizations, and the National Human Rights Commission of Mongolia, the recommendations of the Commissioners, activity reports delivered by various organizations, news released by the media, and complaints lodged by individuals, and submitted to and considered by the State Great Khural in order to have certain decisions released by the State Great Khural as stated in the Clause 13.1 of Article 13 of the Law on the National Human Rights Commission of Mongolia.

Based on Clause 21.5 of Article 21 of the Law on the State Great Khural, Clause 47.6 of Article 47 of the Law on Session Procedure of the State Great Khural, suggestions by members of the Standing Committee on Legal Affairs of the State Great Khural, and recommendations included in the report of the Commission, the Standing Committee on Legal Affairs resolves:

- 1) To compliment the proposals and recommendations submitted within the report.
- 2) To order the Government (Altankhuyag Norov) to take the following measures with reference to the report of the Commission:
  - To develop a detailed plan for implementing the unfulfilled recommendations mentioned in the previous reports on human rights and freedom in Mongolia and ensure their fulfillment;
  - To create a mechanism for the cabinet to hear and discuss on an annual basis the implementation of recommendations given by the UN human rights bodies and to report to relevant authorities;
  - To strengthen the accountability mechanisms for those special license holders who failed to complete technical and environmental restoration work in extraction areas and provide civil society organizations the opportunity to carry out independent monitoring over the extraction and restoration process;
  - To develop and submit a proposal for license regulations that need to ensure that infrastructure problems including, railway or local road issues, have been fully resolved to the satisfaction of local residents, prior to the exploitation of large scale mineral resources such as coal and iron ore. In particular, roads must have sufficient load-bearing capacity to allow mining trucks and all related transport to operate without damage to the surrounding environment;
  - To accede to the 176<sup>th</sup> International Labor Organization Convention on Safety and Health in Mines, which aims at preventing workers in the mining sector from

injuries, accidents, and diseases, improving the quality of and accessibility to medical treatments, and ensuring safety at work places, and create legal mechanism for compensation in case of loss of life and injury caused by mining;

- To accede to the Convention on Access to Information, Public Participation, in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention.) Create domestic legal framework that allows meaningful and active participation of the Governors of the Province, the Soum, the Citizen's Representative Khural, and the public;
  - To accede to the Third Optional Protocol to the United Nations Convention on the Rights of the Child;
  - To carry out analysis of the legislation protecting the rights of the child, improve the legislation to fight against and prevent from ignorance for and violence against children, and ensure the implementation of "Requirements for the protective clothing and safety kit used in national horse racing events" standard (MNS 6264-2011), adopted the Resolution 28 of the National Board of Standardization;
  - To establish secondary schools in each region both a general-standardized general curriculum alongside religious studies in order to improve school enrolment for children;
  - To improve physical accessibility of schools and provide learning equipment and tools that meet the needs of children with disabilities. Establish new kindergartens, dormitories and secondary schools, vocational training centers nation-wide to meet the special needs of students with disabilities, and take effective measures to ensure quality of education, social life, hygiene, and safety;
  - To take effective measures to implement the recommendations related to the rights of gay, lesbian, bisexual, and transgender people (LGBT) provided by the United Nations Human Rights Council, the Committee against Torture, and the Human Rights Committee;
  - To submit the laws stated in this resolution and other relevant draft decisions of the State Great Khural to the State Great Khural within 2013;
  - To include within the 2014 Consolidated State Budget the funding necessary for expenses of wage and communication work of 21 full-time officers of the National Human Rights Commission of Mongolia who shall work in each province.
- 3) To order the Standing Committee on Legal Affairs (Tuvdendorj Sharavdorj) to take responsibility for supervision over the fulfillment of this resolution.

- 4) To order National Human Rights Commission (Byambadorj Jamsran) to assess the implementation of the recommendations included in the 12<sup>th</sup> report on the human rights and freedoms in Mongolia annually and specially present on relevant organizations and officials who didn't implement the recommendations to the State Great Khural along with the next annual report on human rights and freedom in Mongolia.

Tuvdendorj Sharavdorj  
Chairman of the Standing Committee on Legal Affairs

# South Korea: More Concern than Hope

## Korean House for International Solidarity (KHIS)<sup>1</sup>

### I. General Overview

Democracy can support human rights and human rights can strengthen democracy. Since June 1987, the time of a national pro-democratic resistance movement, Korea gradually developed through a long journey to democratization. By 2001, it created the National Human Rights Commission of Korea (NHRCK) as an institutional symbol of human rights. Despite its belated establishment in the Asia-Pacific region, the NHRCK achieved rapid growth to become an example to other regional commissions. This was due to the capabilities and experiences of Korean civil society, the positive will of the democratic governments, and support and cooperation from international human rights institutions.

In 2008, Korean society encountered a crucial challenge to the continued optimism about the improvement of human rights conditions and the progress of the national human rights institutions. The new government that was elected in 2007 was not familiar with free civil society and democratic communication. By downsizing the NHRCK, the government weakened the NHRCK's capacity to monitor government activities related to human rights. By appointing to the position of chair, a non-expert who blindly followed government policies, the government prevented the Commission's dedication to protecting and promoting of human rights.

Since then, the NHRCK has gone from being a role model among Commissions in the Asia-Pacific region to becoming a questionable institution. Its independent status, which is a crucial condition for its candidature as the chair of the International Coordinating Committee of National Institutions (ICC), is in dispute. Even in 2012, Korean society and the NHRCK remain in a long, dark, tunnel.

After the 2012 election, the new government that took office in 2013 was put to the test with regard to its dedication to, and action on, human rights. The new government has promised to improve economic and social rights and to strengthen social security for marginalized social groups. It is a chance for Korea's democratization and the NHRCK to turn back from regressing.

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1 Prepared by Mikyung Choe, Executive Director, Korean House for International Solidarity, and supported by assistant leader Dayeh Yu, graduate student, and assistants Nari Shin, Jinsil Lee, Kyoung Sul, students at Sook Myung Women's University, translated by Sahng-ah Rhee, Heewon Chun, Suji Park, Sungae Choi, and proof-read by Esther Choi.

But the new government has demonstrated its belief in the principle of 'economic development first', which dominated Korea from 1960 to 1980 and has disregarded human rights. As a result there is much more concern than hope for the future of human rights in Korea and the status and role of the NHRCK under the new government.

### A. Human rights situation of South Korea

There is a gap between Korea's economic and international status and the status of its human rights. South Korea has the world's 12<sup>th</sup> largest Gross Domestic Product and is a member of the UN Security Council and Human Rights Council. Meanwhile, the status of civil, political, economic, social and cultural rights is much poorer than other comparable country. Even though the state of human rights in Korea has surely improved since the days of military rule, civil and political rights have not been sufficiently ensured; and the rights of freedom of speech, assembly and association are often under serious threat or violation by law enforcement agencies. Also, following the two periods of economic crisis since the 1990s, the welfare of social minorities has been forced to the periphery, and the country's social safety nets are failing to properly protect them.

At the 2012 Universal Periodic Review (UPR) by the UNHRC, South Korea was advised to reform its obsolete systems which violate human rights. The systems include the death penalty, National Security Act (NSA), criminal penalty against conscientious objectors, absence of general prohibition on discrimination, and discrimination and human rights violations against migrant workers.

In May 2013, the UN Special Rapporteur on the situation of Human Rights Defenders (UN SR on HRDs) visited Korea and pointed out that the government has seriously threatened or violated human rights in Korea, especially freedom of expression, assembly and association as summarized below.<sup>2</sup>

**Freedom of expression:** There are serious challenges to guaranteeing this right in practice. The criminalization of defamation leads to considerable limitations on the exercise of the fundamental right to freedom of expression; and the NSA still appears to be a serious impediment on the exercise of the freedom of expression.

**Freedom of peaceful assembly:** The fundamental right to peaceful assembly has been unduly restricted. The prior notification procedure of public gatherings seems to have turned into a de facto authorization system; and the police have resorted to excessive use of force when handling protests. The UN SR on HRDs recommended that excessive use of force by the police and private security firms against participants of peaceful assembly be restricted to meet international human rights standards. Above all, effective dialogue and participation of residents should be ensured in places where large-scale protests are happening, such as in Jeju and Miryang.

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2 Statement by the United Nations Special Rapporteur on the situation of human rights defenders at the end of her visit to the Republic of Korea (29 May-7 June 2013) English version: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13423&LangID=E> Korean version: <http://www.ohchr.org/Documents/Issues/Defenders/EndMissionStatementKoreanVersion.pdf>

**Freedom of association and labor rights:** The existing legal framework places important limitations on the right to form trade unions. The right to strike is unduly restricted and often criminalized; prosecution is often accompanied by heavy claims for damages by companies and provisional seizures of property.

Direct and significant human rights violations by government agencies had continued to decrease but have recently re-emerged. Powerful governmental authorities organized special groups to carry out long-term illegal surveillance of political opponents or critics. Moreover, when such cases were revealed, the government tried to illegally destroy the evidence. Employees of National Intelligence Service, who are not allowed to participate in domestic political activities, were systematically engaged in influencing the presidential election through Social Network Services (SNS). A high-ranking commanding officer of the police was caught trying to conceal the case, when he was supposed to be investigating it. He became the object of investigation by the National Assembly.

Furthermore, there were a number of cases where regular citizens were convicted of and penalized for illegal activities when they merely expressed their political ideas. In 2012, political rights that should be fully protected in Korea are being violated, and the exercise of such rights has been reduced. This threatens the fundamental conditions of democracy.

These threats against human rights and democracy lead to a series of strikes by journalists, defending freedom of speech. The previous government appointed or helped bring into office pro-government personnel as the president of the media so that they could promote news that favorably reflected the government. Severe encroachment on the independence of the media and the fairness and objectivity of news led to an unprecedented long-term, large scale strike by media workers.

Typical examples are the strikes by MBC (largest commercial broadcasting corporation), which went on strike for 170 days (January-July 2012), and KBS (largest public broadcasting company), YTN (24 news channel on digital broadcasting system), and Yonhap News (largest news agency in Korea). A large number of journalists who participated in the strikes experienced unfair discipline or dismissal.

Workers during the former government faced job insecurity, underemployment, and violations of labor rights by the company. Many workers in Korea are facing chronic intimidation of disguised redundancy or layoff, and low wages and job insecurity through the illegal dispatch system. Repressive measures were also instituted to stop the association of workers.

Hyundai Motors, the leading global automobile company of Korea, did not fulfill the order of National Labor Relations Commission (NLRC) based on the judgment of the Supreme Court to reinstate dismissed workers. SJM, an automobile parts company, employed a private security enterprise to exercise direct violence against the union members.

The number of migrant workers in Korea is increasing and they play an important part in the industries of Korea. However, faced with poor and insecure labor conditions, their fundamental

human rights and three primary labor rights, including the freedom of contract and the freedom of choice to workplace, are not properly protected.<sup>3</sup>

## B. Responses of the NHRCK on Human Rights issues in Korea

The National Human Rights Commission of Korea (NHRCK), since its establishment in 2001, had been strengthening its capacity under four commissioners over seven years until 2008. During that time, the NHRCK, as an independent national human rights institution, monitored government activities and led to improvement of the law and order system. NHRCK had effectively organized itself and properly selected and trained its staff to continue improving its ability to challenge and provide effective remedy for pending human rights issues.

A big change occurred when the new Chairperson was appointed in 2008. Led by Byung Chul Hyun, who was nominated by the president of the previous administration, the NHRCK has continued dealing with daily human rights issues using its previously established capacities. However, it no longer monitors and criticizes the government, responds to social issues, or communicates with civil society. In 2012, Byung Chul Hyun was reappointed as the chairperson by the same president. The NHRCK, under Hyun, deals in routine human rights work but ignores or downplays serious human rights violations in Korea.

In 2012, NHRCK demonstrated some outcomes in less-controversial human rights issues. It aimed to improve human rights issues in military camps; the rights of the socially marginalized such as migrants, elders, children, and inmates of prison, and address the discrimination against these groups. However, as mentioned by the UN Special Rapporteur on the situation of Human Rights Defenders, it did not challenge or act upon threats or violations against human rights such as freedoms of expression, assembly, association, and other key issues. Its *2012 Annual Report* acknowledges this fact. The report states that "NHRCK drew some significant recommendations for improvement of various pending human rights issues and rights of the people in places where there are no human rights but did not actively respond to issues regarding civil and political rights such as freedom of expression."<sup>4</sup>

A typical example of the NHRCK's dilution and abdication of its responsibility to address pending human rights issues is its silence regarding unlawful surveillance of civilians by governmental institutions. Under the previous administration, the government illegally watched a number of civilians and politicians. People who posted video clips criticizing the government and the president were under observation, and civilians who sustained a loss of their fortunes filed complaints to NHRCK in 2010.

The Commission refused the complaints saying it could not examine cases that are being dealt with by the State prosecution. The request for an ex-officio investigation on the alleged surveillance of civilians (including politicians) by the government agencies was raised within the Commission. However, it was rejected and Hyun played a crucial role in this decision.

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3 Human rights situation in Korea is mainly based on *2012 Korea Human Rights Report* by MINBYUN-Lawyers for a Democratic Society

4 NHRCK. 2012 Annual Report

Some Commissioners stated that “[Hyun’s] decision was based on checking with the views of the president,” and the NHRCK union criticized him for “abandoning the responsibility of

the commission.”<sup>5</sup> Moreover, the NHRCK turned down or ignored many other issues such as the rail company and military information agency’s surveillance of union members, and the National Intelligence Service’s surveillance of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression during her country visit.<sup>6</sup>

Surveillance of civilians by government agencies was the key human rights issue of the time involving state power. The media reported its illegality; the prosecution re-launched the investigation; and the victims whose petitions were rejected filed civil actions in court. It was not until 2012, when there was a high probability that the officers involved would be found guilty, and the civil actions would win, that the NHRCK planned its ex-officio investigation. The decision was made in January 2013. The Commission stated that the President should “take credible action,” the Chairman of the National Assembly should “take measures of legislation if necessary,” and the Prime Minister should “formulate guidelines that are known to the public.”<sup>7</sup>

This conduct and decision shows that the Commission has abandoned its responsibility to provide appropriate support to victims of human rights violation. With no concrete but only abstract recommendations, NHRCK tried to avoid criticism about its lack of response and lessen the burden on government agencies.

One of the key human rights issues during the first half of 2013 in Korea was the closure of a public medical center. Located in a medium-sized city where private medical services are poor, the local government targeted the medical center (Jinju Medical Center) for closure because of its financial deficit and militant union. Nearing the closing date in March 2013, the Korea Health and Medical Workers’ Union (KHMU), along with patients of Jinju Medical Center and their families, filed complaints to NHRCK regarding human rights violation, such as coercive discharge from the center, and asked for a stringent remedy. The Commission rejected the request for a remedy and postponed the complaint process. The postponement was criticized as a step to avoid burdening the ruling party during the parliamentary investigation that was to be held soon after the decision.<sup>8</sup>

The respondent local government announced the closure of the hospital on May 29<sup>th</sup> and 22 patients who had been hospitalized around the date were tallied to die. On July 22<sup>nd</sup>, about two months after the closure of the hospital, the NHRCK made a decision that the coercive discharge from the public medical center was an infringement on human rights.

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5 The Kyunghyang Shinmun, 7 April 2012 [http://news.khan.co.kr/kh\\_news/khan\\_art\\_view.html?artid=201204071014381&code=940100](http://news.khan.co.kr/kh_news/khan_art_view.html?artid=201204071014381&code=940100)

6 MBC NEWS. 17 May 2010. [http://imnews.imbc.com//replay/nwdesk/article/2624650\\_5780.html](http://imnews.imbc.com//replay/nwdesk/article/2624650_5780.html)

7 NHRCK. 28 January 2013. 12-ex officio-0000500(Ex officio investigation of the illegal surveillance by the Prime Minister’s Office’s ethics office)

8 YonhapNews. 26 June 2013 <http://www.yonhapnews.co.kr/bulletin/2013/06/25/0200000000AKR20130625218800004.HTML?input=1179m>

NHRCK gave up its right to recommend a stringent remedy that would protect victims of urgent human rights violations; and by making a decision on the closure of the hospital after the event happened, it made its recommendation ineffective. In this way, the Commission created an alibi for the state authorities, central and local government by absolving them of responsibility for human rights,<sup>9</sup> while protecting itself by responding to the violation in an ineffective manner.

In contrast, the NHRCK under Hyun shows such great interest in North Korea's human rights issues that it is mockingly called the 'North Korean Human Rights Commission'. 'Promoting human rights of North Koreans' is selected as the special activity of the South Korean Commission. The NHRCK conducts all kinds of ineffective events and activities regarding North Korean human rights. For three consecutive years, the 'Korea Human Rights Award,' which is supposed to be given to organizations that improve domestic human rights, was given to organizations related to work on North Korean human rights.

The NHRCK's activities regarding North Korea are for show and wholly ineffective as violations in North Korea are outside the Commission's authority, role and jurisdiction. It has been criticized as "illogical for the human rights commission in South Korea to focus not on North Korean defectors but North Koreans in general."<sup>10</sup> The Blue House (Office and Official Residence of the South Korean President) says that Hyun was appropriate as the chairperson because he turned North Korean human rights issues into an international issue. It is deeply concerning that the NHRCK is not independent from political authority but is politicizing human rights in collaboration with the president and the ruling party.<sup>11</sup>

## II. Independence

In accordance with the National Human Rights Commission Act enacted by the National Assembly, the NHRCK was established in 2001. It was established based on the 'Paris Principles' on national human rights institutions. The Act sets out the Commission's composition and operation, work and authority, and powers of investigation of human rights violation; and remedies available to victims. Its subsidiary statute on operational matters of the NHRCK was decreed by the president, titled National Human Rights Commission and its extension agency.

The status of NHRCK is guaranteed by the Act and the Chairperson and Commissioners are appointed and expected to operate according to the Act. However, there was a unilateral amendment of the subsidiary statute by the administration to downsize the NHRCK in 2008, which undermined its independence, and an unqualified chairperson was appointed by presidential authority by the Act. These events show that the National Human Rights Commission Act, based on the Paris Principles, is not a sufficient but minimum condition for the NHRCK's independence.

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9 The Hankyoreh. 22 July 2013

10 The Hankyoreh. 11 June 2012. [http://www.hani.co.kr/arti/society/society\\_general/537149.html](http://www.hani.co.kr/arti/society/society_general/537149.html)

11 The Hankyoreh. 11 June 2012. [http://www.hani.co.kr/arti/society/society\\_general/537149.html](http://www.hani.co.kr/arti/society/society_general/537149.html)

### **A. Composition, appointment process, and tenure**

The NHRCK consists of one Chairperson and 11 Commissioners. The tenure of a commissioner is three years and limited to one consecutive term. Even though the Act orders the appointment of at least four female Commissioners, diversity of members is not sufficiently guaranteed by the Act. Just conventionally one or two religious figures had been appointed as members. Most of the members are judges, lawyers and professors in law, with the exception of several people from private sector organizations. In fact, there were seven jurists and professors, one religious figure, and one with a private sector background among the 11 Commissioners in 2012.

This composition indicates that NHRCK is only willing to follow positivist legal approaches instead of fulfilling real expectation of human rights protection and promotion. For instance, Nam Geun Yoon, a non-standing Commissioner and former judge, is known to have said, at the general meeting in September 2012, that “the current Korean criminal law could cover most of the conditions and situations” when the UN Committee Against Torture recommended revising or amending Korean criminal law because the regulations related to torture are not adequate to the international human rights obligations.<sup>12</sup> Additionally, he said: “I wonder how she could ask for drinking water and a phone battery while she was illegally occupying the company,” referring to Jin Suk Kim’s sit-in protest on a crane at the shipyard against Hanjin heavy industries.<sup>13</sup> Human rights organizations have criticized him for judging cases only through legalistic perspectives.

### **B. Nomination and appointment of the chairperson and commissioners**

Four of the NHRCK Commissioners are nominated by the President of the Republic of Korea, four by the National Assembly, three by the Chief Justice of the Supreme Court, and the appointments are made by the President. According to the Korean political system and convention in the National Assembly (legislature), the ruling party nominates 2 people. Therefore, based on this selection process, the six members appointed by the president and the ruling party have a controlling majority on the NHRCK. The major reason for the decline of the Commission after 2008 is the nomination or selection process provided by the Act. In particular, the President has the power to appoint the Chairperson from among the Commissioners. The Chair is the central authority related to decision-making and operation. The Commission’s situation in 2012 is evidence of the negative effects of the NHRCK’s composition.

### **C. Qualification of chairperson, and the selection procedure**

According to the National Human Rights Commission Act, the qualifications of the chairperson are knowledge and experience with issues related to human rights and the ability to work fairly and independently to improve human rights. However, there is no way to stop the nominator from designating someone who is unqualified. If an

<sup>12</sup> Human Rights Oreum No.315. 19 Sept 2012. <http://hr-oreum.net/article.php?id=2203>

<sup>13</sup> The Hankyoreh. 20 Sept 2011. [http://www.hani.co.kr/arti/society/society\\_general/497016.html](http://www.hani.co.kr/arti/society/society_general/497016.html)

unqualified person is appointed as the Chairperson, he undermines the professionalism and independence of NHRCK. In fact, Byung Chul Hyun, current Chairperson since 2008, is such a case. When ex-president Myeong Bak Lee decided to appoint him, Korean civil society disagreed with his decision because Hyun had no experience related to human rights; which is one of the pre-requisites for being a Chairperson. The worries of civil society became a reality and have been elaborated in previous *ANNI Reports*.

The case of Byung Chul Hyun called the public's attention to the harmful effects of the President's arbitrary authority to appoint, and led to criticism from civil society and the national assembly. Finally, the Act was amended in order to require a confirmation hearing for the candidate. In 2012, the first confirmation hearing was conducted when Byung Chul Hyun was reappointed as a Chairperson of NHRCK, and this new process proved to be very effective in demonstrating the candidate's lack of qualification.

Throughout the hearing, he was shown to be unethical and unqualified to deal with human rights issues. Before his appointment, he had committed plagiarism in his thesis and had never participated in any activities related to human rights. Various statements and evidence were provided which allege he has violated human rights during his three-year tenure since 2008. Human rights organizations publicized through the media<sup>14</sup> instances of him prohibiting the operation of the heating system and elevator during a protest by disabled people in the winter;<sup>15</sup> and blocking the Bill related to the Yongsan case.<sup>16</sup>

Even though the confirmation hearing showed he was unqualified, it did not have any legal power to challenge the president's authority to appoint. In fact, the president designated an unqualified person in spite of the result of confirmation hearing. This proved the limits of the hearing process and that it is highly necessary to establish a system which prevents abuse of authority to appoint.

#### **D. Diversity and Professionalism**

According to the National Human Rights Commission Act, the institutional guarantee for diversity is only applied with regard to appointing women. In contrast, the Act allows establishment of an advisory body with an advisory committee and expert committees to ensure diversity in the composition of the Commission. In 2009, the advisory committee and expert committees faced a huge change. Many expert committee members resigned, after human rights experts and civil society organizations declared non-cooperation with the Commission headed by Byung Chul Hyun. The vacuum was filled with people who were pro-government and authoritarianism, without sufficient experience related to human rights.

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<sup>14</sup> Press release by Urgent Action network to oppose reappointment of Byung Chul Hyun, a Chairperson of NHRCK, and reform NHRCK. 19 July 2012

<sup>15</sup> A disabled activist who went into a sit-in demonstration in NHRCK building died of acute pneumonia after the heating was discontinued in December 2010 by the management

<sup>16</sup> Yongsan case: Evicted residents from dwellings to be demolished who had resisted compensation plan of redevelopment in Yongsan-Gu, Seoul claimed reasonable compensation. While they occupied Namildang building which was located in Yongsan-Gu in 19 Jan 2009 and stood against the police, a fire broke out in the building. 6 people died and 24 were injured

In 2007, before Hyun was appointed, the advisory committee consisted of 34 people. The number increased to 38 in 2012. It was not only the number of members but also the composition of the advisory committee that changed much between 2007 and 2012. In 2012, five members were high-ranking members of the army, two were high-ranking members of the national police agency and three were professors of a university where Hyun had worked before being nominated as the Chairperson. Most of them are not professionals, nor do they have sufficient experience in human rights. In other words, the advisory committee became a place where high-ranking state officials and previous co-workers of Hyun received senior positions.<sup>17</sup>

As of December 2012, NHRCK's expert committee has 96 members and addresses six human rights areas, including economic, social and cultural rights; human rights education; international human rights, civil and political rights; discrimination remedy; and disability rights. The conciliation committee has 14 members and addresses four areas: conciliating discrimination; sexual discrimination; disability discrimination; and human rights violations.

In comparison, as of December 2007, the expert committee had 101 members and dealt with 14 areas: economic, social and cultural rights; rights of children; international human rights; investigation of police and prosecution; rights of soldiers, correctional institution; care facilities; discrimination; sexual discrimination; disability discrimination; rights of foreigners; school human rights education; public and civil rights education; and persons with mental illness. The conciliation committee had 38 members and dealt with four areas: discrimination; sexual discrimination; disabilities discrimination; and human rights violations.

In the five years between 2007 and 2012, the total size of the expert committee has stayed almost the same but the areas of specialization were reduced. The conciliation committee's areas of specialization has remained the same; but the number of members has decreased significantly.

The composition of the expert committee and conciliation committee has changed significantly after critical civil society's declaration of non-cooperation with the Commission in 2009. Particularly, a number of professors of Hanyang Academy, where Byung Chul Hyun had worked, were appointed as expert committee members and conciliation committee members. For the expert committee, the number of members has doubled (from four to eight) in 2012 compared to 2007; and three out of the eight are professors of Hanyang Cyber University, where Hyun was the former Dean. For the conciliation committee, even though the total number of members decreased by 63 percent, the number of members who were professors of Hanyang Academy increased from one to two. In 2012, among the two members of the conciliation committee belonging to Hanyang Academy, one is a professor of Hanyang Cyber University.

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17 NHRCK. 2012 Annual Report. May 2013, p. 301; NHRCK. 2007 Annual Report 2007. June 2008. p. 343

The composition of the conciliation committee and expert committee reveals typical cronyism. Byung Chul Hyun, as an unqualified chairperson, is ignoring or weakening the NHRCK role of monitoring and criticizing the government and undermining the professionalism of the NHRCK committees by cronyism.

This observation is supported by the deliberation of the Korean state report in the 81<sup>st</sup> session of the UN Committee on the Elimination of Racial Discrimination (held in August 2012); where the final recommendations for Korea emphasized the independence and specialized competence of the NHRCK, and recommended that the state party ensure the independence of NHRCK and appoint human rights experts with sufficient experience.<sup>18</sup>

### **E. Government representatives on NHRCK and staffing by secondment<sup>19</sup>**

As of July 2013, there were four seconded staff from government among 187 workers in NHRCK: which accounted for two percent of the total number. Among the four individual seconded to the Commission, three are deputy directors and account for 3.3 percent of the total number of deputy directors (86). When seconded staff are appointed, each department provides a two day-training. The information about appointments of seconded staff is available to all staff of the NHRCK.

The recruitment policy of NHRCK is to preserve diversity through a variety of ways; such as open, competitive employment and career competitive employment. To enhance the specialized capabilities of its staff, the NHRCK recruits people who have field work experience, research experience or related qualifications such as legal expertise. NHRCK prohibits any kind of discrimination against women and persons with disabilities in the recruitment process.

As public officials, Article 7 of the Constitution and Article 68 of the National Public Service Law guarantee the status of workers of NHRCK. However, in April 2012, it was revealed that the Blue House had sent a black list which analyzed the ideological tendencies of NHRCK employees (saying that some of employees were left-leaning) to the secretary-general of the NHRCK in October 2009.<sup>20</sup> In other words, the Blue House intervened in the personnel administration in order to control the NHRCK. This case shows that there is a huge gap between law and practice.

Additionally, activities of the NHRCK during a state of emergency are highly important, considering the experience of the pro-democracy movements in the Middle East and North Africa ('Arab Spring'). Therefore, immunity and laws that protect activities of the NHRCK from threat during emergency conditions are necessary.

18 CERD/C/KOR/CO/15-16, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fKOR%2fCO%2f15-16&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fKOR%2fCO%2f15-16&Lang=en)

19 This part is based on an official response from the NHRCK (dated 18 July 2012) to KHIS's inquiries

20 Ohmynews. 9 April 2012 [http://www.ohmynews.com/NWS\\_Web/View/at\\_pg.aspx?CNTN\\_CD=A0001719290&CMPT\\_CD=P0001](http://www.ohmynews.com/NWS_Web/View/at_pg.aspx?CNTN_CD=A0001719290&CMPT_CD=P0001)

Several cases of human rights violations within the NHRCK came to the fore in 2012. Some workers sexually humiliated a female journalist but they were only punished with a cut in their salaries for one month.<sup>21</sup>

### III. Effectiveness

#### A. 2012 Amendment of Enabling Act

The NHRCK law was amended in 2012 to expand and consolidate its effectiveness. Before this amendment in March 2012, there were only powers of recommendation but no obligation or compulsion for institutions to follow recommendations from the NHRCK. According to the amended Act, the organization should notify implementation of a plan to implement NHRCK recommendations within 90 days; and the organization should notify the NHRCK of the reason when it cannot implement its plan.

The second meaningful revision of the law was the expansion of subjects of investigation. According to Clause 30 of Article 1 in the National Human Rights Commission Act, the NHRCK can investigate even private schools and nongovernmental public service-related organizations.

Before the amendment, NHRCK rejected some petitions based on the fact that the NHRCK could not investigate allegations of all kinds of human rights violations in public organizations. The NHRCK could investigate only allegations of discrimination. But with the amendment of the Act in 2012, NHRCK finally has legislative requirement for investigating all kinds of schools and public service-related organizations.

NHRCK can respond to violations by submission and expression of opinion and advice on policy.

First, NHRCK can submit opinions about specific cases to courts or the Constitutional Court. The NHRCK submitted opinions about six cases in 2008, three in 2009, four in 2010, two in 2011, and none in 2012. Considering that there has been an increase in the number of cases of people being accused of defamation when they expressed political opinions and criticized the government over this period, it seems the NHRCK is trying to decrease its submissions of opinion about defamation cases related to government criticism.

Second, the NHRCK can express its opinion if a governmental organization requests to do so. The NHRCK expressed its opinion on 28 cases in 2008, 29 in 2009, 17 in 2010, 20 in 2011, and 18 cases in 2012. The number of requests from governmental organizations is decreasing. There are two possible reasons: either the human rights cases that governmental organizations deal with are decreasing; or, the governmental organizations are disregarding NHRCK and requesting its opinion less.

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21 Newsis.2 Jan 2012 [http://www.newsis.com/ar\\_detail/view.html?ar\\_id=NISX20120102\\_0010119266&clD=10201&pID=10200](http://www.newsis.com/ar_detail/view.html?ar_id=NISX20120102_0010119266&clD=10201&pID=10200)

Third, NHRCK can give recommendation about laws and policies related to human rights. In contrast to the number of cases of submitting and expressing opinion, the number of recommendations from NHRCK has been increasing. Recommendations in 2012 focused on improving institutionalized practices and technical actions such as procedure of criminal cases, immigrants, the disabled, and the military. In other words, there were no detailed and hard-hitting recommendations which reflect the most critical human rights issues in Korea.

The actual practices of NHRCK are passive. The NHRCK tends to manage cases in a way that does not antagonize the president and his administration. It usually deals with simple cases which will not create social controversy, and tries to avoid utilizing stringent remedy. Furthermore, NHRCK does not make efforts to reflect what it has learned from past petitions in current policies.

Additionally, not many recommendations of NHRCK are accepted. According to statistics published by NHRCK in January 2013, NHRCK gave 2,768 recommendations from 2001 to 2012 and only 1904 recommendations (68.7 percent) were accepted. The police have received the most recommendations (688) and accepted 392 (58.6 percent). The police rejected 14.3 percent of recommendations and in the remainder, accepted them only in part.<sup>22</sup>

Considering that the NHRCK's bad reputation has been growing, and that human rights organizations have stopped supporting it, it does not seem that the government and public service-related organizations are mindful of the recommendations of NHRCK.

## **B. Case Study: Asiana Airlines**

One of the cases that the NHRCK has dealt with in a positive way, was the petition regarding compulsory wearing of skirt uniforms by female flight attendants. The labor union of Asiana Airlines filed the petition in June 2012, and the NHRCK said that it was obvious sexual discrimination for Asiana Airlines to require female flight attendants wear skirts and have a specific hair style. The NHRCK added that this regulation on uniform implied discrimination against women. The NHRCK judged, "wearing skirts can cause difficulties in case of an emergency and considering that other domestic airlines have allowed wearing of trouser-pants, the degree of regulation is excessive."<sup>23</sup>

Asiana Airlines accepted advice from NHRCK and announced that they would allow female attendants to wear trousers. But actually, many female attendants continue to wear skirts only. The airline allegedly put pressure on female attendants to wear skirts and it became an issue once again after the landing accident at San Francisco airport (in the USA) in 2013.<sup>24</sup> After the accident, people criticized the fact that all the female flight

22 The Kyunghyang Shinmun. 29 Jan 2013 [http://news.khan.co.kr/kh\\_news/khan\\_art\\_view.html?artid=201301290903441&code=940100](http://news.khan.co.kr/kh_news/khan_art_view.html?artid=201301290903441&code=940100)

23 NHRCK. 16 Jan 2013. 12 Petition 0415100

24 Ohmynews. 11 July 2013 [http://www.ohmynews.com/NWS\\_Web/View/at\\_pg.aspx?CNTN\\_CD=A0001884798&CMPT\\_CD=P0001](http://www.ohmynews.com/NWS_Web/View/at_pg.aspx?CNTN_CD=A0001884798&CMPT_CD=P0001)

attendants were wearing skirts, which was inappropriate for safety, and demanded the airline to allow female attendants to wear trousers and sports shoes.

A staff of NHRCK who has dealt with the petition regarding Asiana Airlines' female flight attendants uniform commented that "Asiana Airline outwardly accepts our advice, but it seems that their internal conventions inhibits female attendants from wearing pants" and "because the problems in wearing pants keep happening, (we) are closely monitoring."

This case shows us well that additional measures such as institutional methods and publicity are needed to enforce recommendations even after NHRCK points out human rights violations and gives advice.

### C. Case Study: North Korean Human Rights Center

The NHRCK established a reporting center for North Korean human rights violations in March 2011. In May 2011, Byung Chul Hyun acting as chairperson sent letters to 15,000 North Korean defectors to encourage them to submit petitions. The letter said that NHRCK would investigate human rights violations in North Korea, in order to improve the situation there. A total of 80 petitions were accepted by the violation reporting center for North Korean human rights. However, subsequently the NHRCK said that investigation into cases of human rights abuse in North Korea was impossible and they couldn't investigate a case nor give advice to North Korean authorities, making the whole affair inconsequential.

The abusers identified by victims in these cases were officers and employees of North Korean authorities like the Political Prison Camp, State Political Security Department and Labor Training Camp, so the investigation was impossible from the outset. In 2006, when Professor Kyong Whan Ahn was the Chairperson, "The stance of NHRCK on human rights in North Korea" stated that "Article 3 of the Constitution states Korean Peninsula includes North Korea as Korean territory. But the status of North Korea as a sovereign state and a member nation of the U.N. can't be denied," and concluded that "the cases of human rights abuse or violation in North Korean territory, where South Korea government can't exercise jurisdiction, can't be admitted into the NHRCK's investigation list."<sup>25</sup>

Despite this reasonable interpretation by the NHRCK, Byung Chul Hyun, the NHRCK's current Chairperson, urges filing of petitions against North Korea's human rights abuses and is criticized internally for wanting to "leave a legacy of achievements on the plea of human rights abuse in North Korea."<sup>26</sup> A staff of NHRCK stated, "This is utterly nonsensical that he promised by letter to investigate thoroughly and only within a year turned it down as it's not on the investigation list," and sarcastically commented "He's going to be re-appointed with this being recognized as his best achievement!"<sup>27</sup>

25 NHRCK's decision. 11 Dec 2006. [http://www.humanrights.go.kr/o3\\_sub/bodyo2\\_2\\_v.jsp](http://www.humanrights.go.kr/o3_sub/bodyo2_2_v.jsp)

26 The Hankyoreh. 18 Jun 2012. [http://www.hani.co.kr/arti/society/society\\_general/538198.html](http://www.hani.co.kr/arti/society/society_general/538198.html)

27 The Hankyoreh. 18 Jun 2012. [http://www.hani.co.kr/arti/society/society\\_general/538198.html](http://www.hani.co.kr/arti/society/society_general/538198.html)

## IV. Thematic Focus on Human Rights Defenders

Human rights defenders are people who act to promote or protect human rights, and they must accept the universality of human rights as defined in the Universal Declaration of Human Rights and take actions in peaceful ways in the arena of human rights. They collect and disseminate information on human rights violations, and support, educate and train victims of the violations. Not only those who defend human rights through professional activities being paid or voluntarily, but also those who are not a specialist in human rights but active in human rights area are also considered human rights defenders. For example, human rights defenders may include a student who organizes other students to campaign for an end to torture in prison; or a farmer who organizes protest to resist environmental pollution.<sup>28</sup>

The international human rights community has asserted that national human rights institutions (NHRIs) can and should play a core role in protecting human rights defenders.<sup>29</sup> NHRIs have to protect and support human rights defenders who are subject to human rights violations themselves, directly and indirectly, in the process of responding to human rights violations of others.

This section considers the National Human Rights Commission of Korea's measures to protect human rights defenders in South Korea.<sup>30</sup>

**Prohibition of Disadvantage and Support:** In the National Human Rights Commission Act ('NHRC Act'), there is no clause which directly addresses the protection of human rights defenders. The NHRCK, however, says: "according to Article 55 (of the NHRC Act, that is 'Prohibition of Disadvantage and Support') prescribes that no one should be disadvantaged in her/his status and treatment for the reason of filing a petition, making a statement, presenting materials, and responding to the NHRCK". The NHRCK claims that "it is the intent of Article 55 to protect human rights defenders who raised issues related to human rights violations and discrimination by helping lift the veil [on abuses and violations]."

**Focal-Point/Task Force/Help-Desk:** According to the NHRCK, the Communication and Cooperation Division within the Commission is the focal-point for relations with civil society organizations (in compliance with Paragraph 5, Article 8 of 'Organizing NHRI and affiliated organizations' of the NHRCK law). Therefore, it can be said that there is no focal-point or help-desk specifically for the protection of the rights of human rights defenders. The NHRCK's support for group and individual activities for defending and promoting human rights is through grant-making and offering space at the NHRCK for public debates or academic seminars to strengthen cooperation with human rights organizations.

28 Who is a defender. <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx>

29 <http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx>; <http://www.asiapacificforum.net/news/nhris-must-support-human-rights-defenders.html>

30 The information in this section is based on an NHRCK response (dated 18 July 2012) to KHIS's inquiries for information

**Special Trainings:** In 2012, the NHRCK organized two events for human rights defenders in Busan and Daegu Office of Human Rights; and supported two programs for human rights defenders through cooperation with human rights organizations. The programs in 2012 in cooperation with human rights organizations include: 'I am a proud activist for ending prostitution' and 'Education program for development of agenda regarding human rights of women with disabilities.' Also, there were case presentations and workshops for leaders of organizations affiliated to a human rights counseling network and a human rights leadership workshop for activists in Daegu.

**Public Statements:** According to the NHRCK, decisions and results regarding human rights violations, discrimination, improvement of laws, policies and systems are made and announced usually through deliberation of the Commission composed of human rights commissioners. Only when there is a "special case" do they take measures such as public statements. The only statement regarding human rights defenders released by the NHRCK in 2012 was for North Korean human rights activist Young Hwan Kim when he was being captured and tortured in China. Considering the numerous instances of severe human rights violations in 2012, it is puzzling as to the NHRCK's definition of "special case". Its silence has only raised suspicions as to whether the NHRCK does not wish to be seen as anti-government.

**Public Activities:** In Korea in 2012, there were many acute and significant incidents related to human rights defenders. Surveillance of 4 major rivers (4 daegang) activist by the Prime Minister Office; protest against construction of the naval base in Jeju island; sit-in protest on a steel tower against Hyundai Automobile in Ulsan; and protest against the building of power transmission towers in Miryang are the emblematic examples.<sup>31</sup>

The 'Jeju Kangjung Incident' is the biggest issue among those. According to the Ministry of Justice, 649 people were arrested by the police; and 473 people were under indictment from 2007 until December 2012. Not only that, Samsung C&T Corporation as construction company of the naval base, demanded compensation for the delay; which put the right to indemnity of the protesters at risk.

In May 2012, a joint letter from 3 UN Special Rapporteurs on freedom of expression, freedom of assembly and human rights defenders, was sent to the Korean government expressing their concern on human rights violated in Kangjung village in Jeju island.<sup>32</sup>

What were the NHRCK's measures on the Jeju case? The Commission dispatched its staff to Jeju island to stop and mitigate the violent confrontations between the residents and the police. It requested an emergency remedy to allow activists access to drinking water. It also pledged to inquire into activists detained without charge; and urged authorities to prepare countermeasures to safeguard protesters while dispersing public assemblies. On

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<sup>31</sup> Human Rights NGOs in Korea. 2013 Human Rights Defenders' Situation report in Korea.

<sup>32</sup> The Hankyoreh. 13 Sept. 2012. [http://www.hani.co.kr/arti/society/society\\_general/551650.html](http://www.hani.co.kr/arti/society/society_general/551650.html)

the other hand, the NHRCK Commissioners rejected an investigation on video-camera surveillance by the police on residents.<sup>33</sup> The Commission has been criticized for its delay in processing 60 percent of the complaints within the due date. Won-shik Woo, a national assembly member (legislator) issued a press release strongly criticizing the NHRCK's neglect of human rights violations in Kangjung<sup>34</sup>. The measures and remedies from the NHRCK are inadequate for the severity of the range of violations associated with this incident. The NHRCK's activities were ineffective in mitigating violence and human rights violations against human rights defenders by the police.

## V. Thematic Focus on Business and Human Rights

The National Human Rights Commission of Korea is known to conduct researches, workshops and provide remedies for discrimination related to business and human rights. However, Korean civil society is not satisfied with the activities of the NHRCK regarding business and human rights. In March 2012, there is a positive change that the NHRCK Act was revised for NHRCK to investigate public [state-owned] companies, which widened the NHRCK's scope of protection. But there are many doubts whether the current NHRCK will utilize this positive legal change.

**Investigations and Legal Reform proposals:** The NHRCK has investigated complaints of violations of human rights by businesses and recommended legislative changes related to business and human rights. On legislative improvement related to business in 2012, the NHRCK recommended the Ministry of Labor that, in relation to compensation insurance system of industrial accident, the burden of proof on the cause of the industrial accident is shared by the employer or the state and not the sole responsibility of the victim. Also, the NHRCK received and investigated complaints concerning accessibility of persons with disabilities to the website of a broadcasting company; accessibility of persons with disabilities when boarding an airplane; discrimination against the visually-impaired when they seek insurance coverage, and so on.

**Business and Human Rights conference of NHRIs in the Asia Pacific Region:** Human rights organizations in Korea were highly critical of the hypocrisy of the NHRCK in hosting an international conference regarding business and human rights in Seoul in October 2011, when it has ignored the rights violations of workers of Hanjin Heavy Industries and Construction. In other words, the NHRCK takes up 'soft' issues in business and human rights through promotional activities such as workshops, while avoiding or delaying on 'hard' issues in sensitive cases where it neglects its role in protecting human rights from abuse.

**Human Rights Violations by Domestic Corporations Abroad:** As foreign investment by Korean corporations and capital expands with the emphasis on diplomatic relations for resource-extraction during Myung Bak Lee administration, the human rights violations by Korean companies in other countries were revealed as were the absence of countermeasures.

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33 Newsis. 14 Jan. 2013. [http://article.joins.com/news/article/article.asp?total\\_id=10417366&ctg=1200](http://article.joins.com/news/article/article.asp?total_id=10417366&ctg=1200)  
 34 Jejudominilbo. 29 Oct. 2012. <http://www.jejudomin.co.kr/news/articleView.html?idxno=36169>

The NHRCK dismissed a petition involving Korea Gas Corporation (KOGAS), a state-owned company in Korea, and a private company Daewoo International in Burmese gas development and human rights violations jointly filed in April 2008 by Korean House for International Society (KHIS), Korean Public Interest Lawyers Group Gong-Gam, Burmese organizations in Korea, and the International Human Rights Clinic in Harvard Law School.<sup>35</sup>

Disappointed with the passive attitude of the NHRCK in not doing anything about human rights violations by corporations, civil society organizations have given up filing any complaints at the moment.<sup>36</sup>

The NHRCK which strives for international exchange and cooperation can shine in the field of business and human rights so it must devote itself to policy research, advocacy with corporations, and monitoring their human rights obligations. If it fails to do so, it not only cannot avoid non-cooperation from the companies but will also be ignored by them.

## VI. Cooperation with Civil Society Organizations

According to the Principles relating to the Status of National Institutions ('Paris Principles'), National Human Rights Institution (NHRI) should cooperate with civil society.<sup>37</sup> This is reflected in the NHRCK Act (Article 19.8) that states the Commission will cooperate with organizations and individuals engaged in any activity for the protection and promotion of human rights.

This clause recognizes that the Commission needs the collaboration of civil society to create the environment for the NHRI's recommendations or decisions to be better known and achieve acceptance in society.

Nobody can deny the fact that civil society struggled strongly for years to establish the NHRCK. Also civil society strongly criticized the government's downsizing of the NHRCK in 2009.

The relationship between the NHRCK and civil society has been distant since 2008. If the NHRCK continue to ignore political or sensitive human rights issue, the situation will become worse.

Also, if the NHRCK appoints former military and police officers as advisory committee members; then the message from the NHRCK is that it is disinterested in consultations with civil society. It is only when the NHRCK demonstrates in practice that it recognizes and upholds the role of national human rights institutions in the protection of human rights defenders; that the channels of communication and cooperation with human rights organizations can re-open.

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35 Full text of the petition: [http://www.law.harvard.edu/programs/hrp/documents/Shwe%20Complaint%20\(Final\)%20\(Public%20Version\).pdf](http://www.law.harvard.edu/programs/hrp/documents/Shwe%20Complaint%20(Final)%20(Public%20Version).pdf)

36 Interview with human rights activist A in May 2013

37 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>

## VII. Conclusion and Recommendations

Professor Kyong Whan Ahn, former Chairperson of the NHRCK says: "by nature and by definition, human rights are universal values that transcend politics, national border, and even ideology. However, in reality, they could easily be entangled with politics. The case of NHRCK shows an example how the public perception and protection mechanism of human rights can fluctuate depending on the changes in the political environments."<sup>38</sup> This reflection by a former leader of the Commission reflects the concerns in Korean society that the NHRCK has become an 'alibi' institution: making excuses for the government and manipulated by the government to conceal its human rights record.

The effectiveness and quality of investigation and remedial procedures are based on the devotion of the Chairperson, Commissioners and staff to human rights protection and promotion and their years of experience and competence. However, after the 2009 reorganization and downsizing of the Commission, its competence has virtually decreased and it became vulnerable to politicization.

Its lack of competence leads the NHRCK to outsource its activities; which then results in failing to accumulate internal competence.<sup>39</sup> In the area of business and human rights, the NHRCK needs to seriously prepare to equip itself to deal with the ongoing and future human rights violations by private companies and overseas companies.

Only after the NHRCK gains moral leadership based on human rights vision and principles can its activities be effective. When everyone in the NHRCK including its Chairperson fulfills that role, the Commission can stand upright and be respected by government departments, corporations, and the people.

### Recommendations to the Government of South Korea:

- Ensure full independence and effectiveness of the National Human Rights Commission of Korea;

### Recommendations to the National Assembly:

- Nominate only qualified persons who are human rights experts to the Commission;
- Amend the enabling law of the NHRCK to ensure the selection of Commissioners is based upon human rights expertise;

<sup>38</sup> Kyong Whan Ahn. The National Human Rights Commission of Korea: A Decade of Glories and Disgraces (2001-2011). [http://www.taiwanhrj.org/admin/uploadfiles/thrj\\_2\\_1\\_ahn.pdf](http://www.taiwanhrj.org/admin/uploadfiles/thrj_2_1_ahn.pdf)

<sup>39</sup> Interview with human rights expert B in May 2013

## Recommendations to the National Human Rights Commission of Korea:

- Ensure timely interventions and responsiveness to human rights issues in line with international human rights norms and standards;
- Ensure active engagement and consultation with all groups of human rights defenders;
- Ensure the recruitment of staff based upon their human rights consciousness;
- Guarantee the rights of its own staff, including their freedom of association, assembly and expression.

### **ANNEX: Extract on the National Human Rights Commission of Korea from statement by the United Nations Special Rapporteur on the situation of human rights defenders<sup>40</sup>**

Established in 2001 as a body independent from the government and accredited “A” status from the ICC in 2004, the mandate of the institution is broad as it receives individual complaints, carries out human rights education programs and issues policy recommendations which are, nevertheless, not binding. When I visited Gwangju, I was pleased by the activities carried out by the local branch of the NHRCK in disseminating information on human rights issues to the public.

However, during the reaccreditation process of the NHRCK, a number of issues of concern have been raised regarding the appointment process of its Chairperson and Commissioners, consultation and participation of civil society as well as budgetary cuts. According to information I have received, the NHRCK has lost the confidence of many national stakeholders, including defenders and it is no longer seen as a key player in the promotion and protection of human rights in the country.

In order for the NHRCK to regain the confidence of human rights defenders, it must be able to work independently and professionally with members and staff who can exercise integrity and impartiality and offer trust to the Korean people and its institutions.

## Recommendations

- Implement the recommendations of the Sub-Committee on Accreditation of the International Coordinating Committee of National Human Rights Institutions in order to strengthen the independence and effectiveness of the institution;
- Ensure timely interventions, responsiveness and accessibility of the institution to all citizens and actively engage with all groups of human rights defenders.

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<sup>40</sup> Statement by the United Nations Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, at the end of her country visit to the Republic of Korea (29 May-7 June 2013) English version: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13423&LangID=E> Korean version: <http://www.ohchr.org/Documents/Issues/Defenders/EndMissionStatementKoreanVersion.pdf>

# Taiwan: a Fresh Opportunity to Establish an NHRI?

Taiwan Association for Human Rights<sup>1</sup>

## I. General Overview

Turning to the 21st century, Taiwan has experienced the first political power transition in 50 years. The newly elected President claimed human rights would be at the center of government policy. In addition to institution building, human rights protection and promotion also includes the introduction of UN human rights conventions. Both norms and institutions are consistent, complementary and indispensable to a sound human rights environment.

From 2007 to 2009, Taiwan government did achieve some progress in treaty ratification and introduced CEDAW, ICCPR, ICESCR into the domestic legal system. While Taiwan signed the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1967, its exclusion from the United Nations in 1971 means that it cannot officially ratify any of these Covenants. In March 2009, with the support of both government and legislature, Taiwan ratified the two Covenants and passed the Covenants Enforcement Act, which took effect in December 2009. Because Taiwan is not able to go through the report reviewing process within UN treaty committee, it became a major challenge for Taiwan to develop an alternative model.

### A. Unique Experience of Human Rights Review

Article 6 of the Covenants Enforcement Act said that: "Government is required to establish a reporting system in accordance with the HR treaties." The Presidential Office Human Rights Consultative Committee (POHRCC) decided to set up a Taskforce for the deliberation of a review procedure. Following successfully lobbying by NGOs, the Taskforce convinced the Taiwan Government to refer to the United Nations human rights report review process and to make necessary adjustments to the domestic procedure in compliance with international practice. This Taskforce also bridged communication among the 10 invited international experts<sup>2</sup>, Taiwan government, and active NGOs.

The unprecedented human rights review was scheduled from 25 February to 01 March 2013. There were three-day review meetings by two separate committees composed of five international experts each. During the meeting, committees listened to the issues raised

<sup>1</sup> Prepared by Tsai Chi-Hsun, Secretary-General of TAHR

<sup>2</sup> ICESCR: Philip G. Alston (Australia), Theodoor Cornelis van Boven (Netherlands), Virginia Bonoan-Dandan (Philippines), Eibe Riedel (Germany), Heisoo Shin (Korea) ICCPR: Nisuke Ando (Japan), Jerome A. Cohen (USA), Mary Shanthy Dairiam (Malaysia), Asma Jahangir (Pakistan), Manfred Nowak (Austria).

from NGOs delegates and then questioned the government officers. After three days of intensive work, the reviewing committee soon drafted the Concluding Observations and presented this document to the Taiwan authorities. In the Concluding Observations, the experts clearly highlight some important human rights violations and advised the Taiwan government on the necessary reforms.

It was a successful campaign to make this review process come true in Taiwan; but more effort still is needed for the follow-up, especially the urgency to build a national human rights institution. So far the responses from government are very limited. For instance, the authorities reactivated the death penalty in March 2010 after Taiwan went three years without any executions. The local human rights groups argued that the state has seriously violated the death row inmates' rights since Taiwan has yet to frame a sound procedure for them to seek amnesty, pardon or commutation, which is listed in section 4 of ICCPR Article 6. Taiwan was criticized by the experts for illegal executions in their Concluding Observations.

In respect to social and economic rights, the flaws of the Urban Renewal Act and Land Expropriation Act arouse some serious disputes between ordinary people and local government authorities in Taiwan recently. Some civil groups also tried to use the ICESCR to argue the failure of state obligations. These reflect a huge gap between provision and enforcement. Most politician support the human rights conventions only as lip service and governmental agencies are lacking in awareness of, and respect to, essential human rights norms.

## **II. Assessment of Existing Human Rights Mechanisms**

### **A. Presidential Office Human Rights Consultative Committee**

In 2010, the Presidential Office Human Rights Consultative Committee (POHRCC) was re-established under the Presidential Office following the effectiveness of two Covenants. The mandate of POHRCC is to advise the President on human rights policies and assist the government to draft the first national report on the two Covenants.

The Vice-President acts as the convener of POHRCC and summons meetings every three months. There are three official representatives, the VP of different government branches, Executive Yuan (Administrative Branch), Judicial Yuan (Judicial Branch) and Control Yuan (Ombudsmen System). The other 13 members, all from civil society, are just part-time advisors. After the initial state report review, the POHRCC has formed further three working groups on rules and laws reviewing; education and training; and evaluation, as a reaction to the Concluding Observations. (There is another 5 member working group on establishment of the national human rights institution which is described in detail in the next section). Three non-official members of POHRCC would act as the conveners in the working groups, and hold group meetings one or two months periodically. The members of the groups include external experts, such as the members of human rights committee within three government branches.

However, there is strong criticism of the POHRCC's efficiency and transparency. Without an independent budget and personnel, its operation largely relies on the government bureaucracy. Recent developments in the human rights situation have disappointed most activists. Taking the instances of death penalty, land grabbing, and right to housing, the government hardly refers to the opinions of POHRCC.

It is thus clear that Taiwan government has not yet a well-defined human rights policy. Therefore, the POHRCC seems to be more a showcase than a useful mechanism through which the government could formulate a comprehensive human rights policy in the future.

### **III. Establishing an NHRI in Taiwan**

Rome wasn't built in a day and it takes a lot of time to demand the state fulfill its human rights obligations. Now the question is how could NGOs strategically adopt the recommendations of the international experts in their advocacy. In the Concluding Observations, international experts have prioritized the establishment of an independent and autonomous National Human Rights Commission in line with the Paris Principles.

Now we somehow see the government has slightly moved on this matter. In the POHRCC meeting this April, a resolution was adopted to appoint 5 members to form a working group on NHRI. This working group is going to draft a proposal on establishing a NHRI in Taiwan. Under the support of Ministry of Justice, the five members would convene a series of working meetings monthly and consult external experts and NGOs in this process.

They will take 12 month to develop an assessment for NHRI building:

- First period: an overview of the necessity to establish NHRI, including legal statutes, mandates and role in present government structure.
- Second period: proposing a scheme which evaluates all options, including their pros and cons.
- Third period: organizing a steering committee to discuss the practice of NHRI's, such as its personnel, budget and operations.

The working group has to present its draft to POHRCC and then formulate a comprehensive proposal to the President. If their proposal is approved by the President, the Executive Yuan would take over the duty in the law-making procedure of establishing a NHRI in Taiwan.

### **IV. Conclusion and Recommendations**

After Taiwan 'ratified' UN covenants four years ago, NGOs underwent different challenges in engaging the government on human rights norms. Initiating the first national human rights reports, advocating a reporting system, and coming out with Concluding Observations by 10 independent experts, these achievements reflect the energy and creativeness of civil society in Taiwan. After these processes, activists also realize the urgency to establish a national and independent human rights body. Institution-building of an NHRI would take

forward the implementation of human rights treaties in domestic level and continuously advocate for the protection and promotion of human rights. If the government wants to fulfill its human rights obligation, the action to establish a NHRI would be the best sign to demonstrate government's determination. Nevertheless, it faces diverse obstacles, such as the disputes among different government agencies, frustrations in the legislative process, or even constitutional arguments.

Since late 1990s, civil society has formed a coalition to promote NHRI and some of their recommendations are still very valuable now. Based on previous lesson of NHRI campaigns, the civil society groups had learned that no matter NHRI is a new body or the transformation of an existing government agency, either would likely be stuck and no benefit to the substantive work. Therefore, when TAHR prepared a new draft legislation for establishment of the NHRI in 2008, it focused on the appointment procedure for the commissioners and required qualifications. The diversity of NHRI members is particularly emphasized in this draft bill.

Another key issue is the mandate of the NHRI and ensuring its independence and accountability. Consensus has to be reached on these key points in the first place because diversity and independence are two critical principles to make sure that the NHRI could operate efficiently and effectively in practice. Thereafter consensus on other issues, such as the organogram, since it requires constitutional reform or the modification of the Government Organization Act.

### **Recommendations to the Government of Taiwan:**

- The working group should engage with civil society and learn from their experience and expertise. This consultation would speed up the process and help to identify the core arguments for and obstacles to establishment of a NHRI in Taiwan.
- Develop a national human rights action plan and integrating the establishment of NHRI as a specific goal and measures to be taken in a clear timeframe.

### **Recommendations to Taiwanese Civil Society:**

- NGOs in Taiwan should work with international and regional networks to continuously lobby politicians and administrators, giving policy recommendations at every available opportunity.
- Engaging with the POHRCC recognizing Taiwan's urgent need to build human rights knowledge while maintaining the longer-term intention to mandate the institution with investigative powers.
- Inviting international experts to Taiwan to conduct lectures, training and dialogue sessions with high-level officials; and in particular to collaborate with the Asia-Pacific Forum (APF) programs helping countries in the region without an NHRI to establish one.



ANNI is a network of human rights organizations and defenders engaged with national human rights institutions in Asia to ensure the accountability of these bodies for the promotion and protection of human rights.

The ANNI members are:

- ADVAR – Iran;
- Ain o Salish Kendra (ASK) – Bangladesh;
- All India Network of NGOs and Individuals Working With National and State Human Rights Institutions (AiNNI) – India;
- Asian Forum for Human Rights and Development (FORUM-ASIA);
- Cambodian League for Promotion and Defence of Human Rights (LICADHO) – Cambodia;
- Cambodian Working Group for the Establishment of an NHRI (CWG) – Cambodia;
- Centre for Human Rights and Development (CHRD) – Mongolia;
- Commission for Disappearances and Victims of Violence (KontraS) – Indonesia;
- Defenders of Human Rights Centre – Iran;
- Education and Research Association for Consumer Education (ERA Consumer) – Malaysia;
- Hong Kong Human Rights Monitor (HKHRM) – Hong Kong;
- Human Rights Forum (HRF) – Bangladesh
- Human Rights Organization of Kurdistan;
- Indonesian Human Rights Monitor (IMPARSIAL) – Indonesia;
- Indonesian NGO Coalition for International Human Rights Advocacy (HRWG) – Indonesia;
- Informal Sector Service Centre (INSEC) – Nepal;
- Institute for Policy Research and Advocacy (ELSAM) – Indonesia;
- International Campaign for Human Rights in Iran – Iran;
- Joint Movement for NHRI and Optional Protocols – Japan;
- Judicial System Monitoring Program (JSMP) – Timor Leste;
- Justice for Peace Foundation (JPF) – Thailand;
- Korean House for International Solidarity (KHIS) – South Korea;
- Law and Society Trust (LST) – Sri Lanka;
- Lawyers' League for Liberty (LIBERTAS) – Philippines;
- Maldivian Democracy Network (MDN) – Maldives;
- Odhikar – Bangladesh;
- People's Watch (PW) – India;
- Philippine Alliance of Human Rights Advocates (PAHRA) – Philippines;
- Suara Rakyat Malaysia (SUARAM) – Malaysia;
- Taiwan Association for Human Rights (TAHR) – Taiwan;