

2017 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia

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Foreword

We are extremely happy to present before you the 2017 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia. I would like to thank all 36 member-organizations of ANNI for their continued advocacy towards the establishment and strengthening of national human rights institutions (NHRIs) in Asia. The publication is the fruit of their untiring work. We would also like to extend our sincere appreciation and thanks to the NHRIs that have contributed in various ways to the publication.

As in the last years, the 2017 ANNI Report is based on country reports with analysis of national developments throughout 2016 in each of the countries included in the publication. Significant developments of the first quarter of 2017 have also been captured in the analysis. The country reports have been structured in accordance with ANNI Reporting Guidelines that were collectively discussed and formulated by the ANNI members present at the 10th Regional Consultation of ANNI held in Seoul, South Korea in 7-8 March 2017.

The 2017 ANNI Report includes in its analysis independence and effectiveness of the NHRIs, and the trend and level of engagement of the NHRIs with other stakeholders, such as civil society and parliament. Central to the analysis is to highlight positive developments and explore ways to enhance constructive engagement between NHRIs and other stakeholders.

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

We would like to sincerely acknowledge the contribution of all friends and colleagues to the publication of this Report; namely Andi Muttaqien, Sekar Banjaran Aji, Muhammad Hafiz, Ardi Manto Ardiputra, and Putri Kanesia (Indonesia), Chew Chuang Yang (Malaysia), Aung Khaing Min, Alex Moodie, and Bochen Han (Burma/Myanmar), Chalida Tajaroensuk (Thailand), Jose Pereira and Jose Moniz (Timor Leste), Sazzad Hussain (Bangladesh), Mathew Jacob and Rajavelu K. (India), Ahmed Naaif Mohamed (Maldives), Bijay Raj Gautam (Nepal), Naumana Suleman and Haroon Baloch (Pakistan), Uween Jayasinha and Widya Kumarasinghe (Sri Lanka), Law Yuk Kai and Claudia Yip (Hong Kong), Tumenbayar Chuluunbaatar and Urantsooj Gombosuren (Mongolia), Hyun-pil Na (South Korea), and Yibee Huang, Song-Lih Huang, Eeling Chiu, and Yi-Hsiang Shih (Taiwan).

Our thanks are also due to Agantaranansa Juanda, former ANNI Programme Coordinator, and Shanna Priangka Ramadhanti, ANNI Fellow for technical inputs and coordination of the entire publication. Chutamas Wangklon, Angkana Krabuansaeng and other colleagues who have been part of the process both directly and indirectly deserve special thanks. We would also like to thank Yap Swee Seng for editing the Report. Finally, we would like to acknowledge the financial support from the European Union in the publication of this Report.

A handwritten signature in blue ink, appearing to be 'JS', with a long horizontal line extending to the right.

John Samuel
Executive Director
Asian Forum for Human Rights and Development (FORUM-ASIA)
Secretariat of ANNI

Notes from Editorial Committee¹

In these uncertain times, human rights movements need stronger allies in order to address the evolving problems that confront the world. During the writing process of the 2017 ANNI Report alone for example, we found that authors needed more time because at the same time they had to deal with many emerging challenges to human rights on a daily basis. Attacks against human rights movements continue to be widespread everywhere in the world at an alarming extent.

The importance of independent NHRIs can no longer be ignored, particularly by human rights defenders themselves. The annual ANNI Report has again been compiled this year in the spirit of strengthening and supporting establishment of independent NHRIs. With the aim of building constructive cooperation, human rights defenders (HRDs) who wrote this year's ANNI Report genuinely intend to support the work of NHRIs in their countries, or the establishment of NHRIs in countries/regions where they do not currently exist, for greater promotion and protection of human rights. This should be reflected in the recommendations given in each chapter of the 2017 ANNI Report.

Efforts have also been taken by writers to seek feedback from NHRIs or related stakeholders; although in some cases they had to take different approach when access to reach NHRIs was absent. Nonetheless, the information gathered and the recommendations given by HRDs through the 2017 ANNI Report should always be regarded as the voices of the voiceless, of the victims of human rights violations in many parts of Asia.

ANNI Report 2017 highlights opportunities for NHRIs to advocate for full compliance with the Paris Principles. There is no common thematic focus for ANNI report this year, compared to the focus of protection of HRDs in last year's ANNI report. The chapters in this year's report therefore may provide broader contextual issues of human rights in their countries/regions.

At this time of challenges, the need for independent and effective NHRIs for the promotion and protection of human rights is becoming more relevant, not only in Asia but also globally.

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INDONESIA: UNCERTAIN TIMES, URGENT REFORMS NEEDED

*ELSAM, HRWG, Imparsial and KontraS*¹

1. Introduction

As mandated by *Law Number 39 of 1999 on Human Rights (Law No. 39/1999)*, the National Commission on Human Rights (Komnas HAM) has the authority to perform assessment, research, counseling, monitoring and mediation functions on human rights.² Furthermore, *Law Number 26 of 2000 on Human Rights Court (Law No. 26/2000)* gives the authority to Komnas HAM to investigate serious human rights violations.³ With such vast powers and important responsibilities, it is unfortunate that Komnas HAM is increasingly becoming an ineffective institution with declining performance. This is most visible during the 2012-2017 period.

There are two factors that caused this decline in performance, namely internal factors and external factors. Internal factors are triggered due to the weak capacity of commissioners and staff of Komnas HAM, lack of good team work,⁴ failure in formulating strategic programs and weak institutional governance, especially in the areas of financial management and staffing. On the other hand, external factors are contributed by the weak political support from both the Government and other State institutions to the extent that Komnas HAM is often not regarded as an independent institution worthy of respect. This is evident in the frequent occasions where recommendations made by Komnas HAM have not been implemented, followed up, or have been even ignored by the relevant State institutions. For example, Komnas HAM's request to members of relevant State institutions for questioning in relation to the investigation on alleged gross human rights violations in the enforced disappearance cases of 1997/1998⁵ was rejected by Maj. Gen. Kivlan Zen, former Chief of Staff of Konstrad (Army Strategic Reverse Command). In another case, the Governor of Yogyakarta, Sri Sultan Hamengkubuwono X, ignored completely the recommendations of Komnas HAM in relation to the issue of prohibition of land ownership by non-indigenous Indonesians living in Yogyakarta.⁶

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² Article 76 clause (1) Law No.39 of 1999 on Human Rights.

³ Article 4 Law No.26 of 2000 on Human Rights Court.

⁴ The team work in question is between commissioners, commissioners with staff, or among staff themselves.

⁵ Former Chief of Staff of Kostrad, Maj. Gen. (Ret) Kivlan Zen rejected Komnas HAM's call regarding the handling of missing person cases in 1997/1998. The reason, in addition to the lack of persistence of Komnas HAM investigators, is the fact that he also questioned Komnas HAM's commitment in handling past human rights cases 8 May 2014, <http://sp.beritasatu.com/politikdanhukum/kivlan-zen-tak-berani-penuhi-panggilan-komnas-ham/54820>, accessed on 18 September 2017.

⁶ *Tak Patuhi Komnas HAM, Gubernur DIY Kembali Disomasi*, <http://ekspresionline.com/2016/10/23/tak-patuhi-komnas-ham-gubernur-diy-kembali-disomasi/>, accessed on 18 September 2017.

The above situations have become more worrisome especially if the performance of the members of Komnas HAM for 2012-2017 period is to be taken into consideration. The commissioners decided to change the election of Komnas HAM chairperson from two elections in five years (one term of Komnas HAM) to having election every year. In June 2016, the Supreme Audit Agency (BPK) officially issued a disclaimer opinion⁷ on Komnas HAM's financial report 2015, revealing a number of fictitious activities, misappropriation of budget, overpayment of fees and projects, as well as reports of money expended without receipts, resulting in a loss of 1.19 billion Rupiah (US\$87,702).⁸ One of the commissioners was found to have embezzled funds of 330 million Rupiah (US\$24,000) for his official residence, which was confirmed by Komnas HAM chairperson in a press conference held on 31 October 2016.⁹

The findings of financial embezzlement and misappropriation in Komnas HAM is certainly a bad precedent especially since one of the reasons for the poor performance of Komnas HAM in dealing with cases of gross human rights violations of the past has been attributed to the issue of limited budget.¹⁰

It is in such an alarming context that the office terms of Komnas HAM commissioners for the 2012-2017 period will end in October 2017. There is an urgent need for a thorough evaluation and restructuring of Komnas HAM to address its internal and external problems. This is to ensure that similar problems will not recur in the subsequent leaderships of Komnas HAM.

2. Review of Work of Komnas HAM

2.1 Effectiveness of Work

The term of membership of Komnas HAM is for five years and, upon completion, may be re-appointed for only one more term of office. Komnas HAM is headed by a chairperson and two vice chairpersons who are elected amongst the members of Komnas

⁷ Disclaimer opinion is issued if the auditor refuses to give an opinion. In other words, there is actually no opinion given. In this case, the auditor cannot be sure whether or not the financial statements are fair. This opinion may be published if the auditor considers any audit scope limited by the audited institution; for example, because the auditor cannot obtain the necessary evidence to make conclusion or declares that the report has been presented fairly. The disclaimer status can disrupt the staff's allowance and additional budget for Komnas HAM in the future.

⁸ http://kbr.id/berita/10-2016/dewan_kehormatan_selidiki_penyelewengan_anggaran_di_komnas_ham/86051.html accessed on 18 September 2017.

⁹ Komnas HAM admitted that there has been budget misappropriation by commissioner, <http://nasional.kompas.com/read/2016/10/31/13453401/komnas.ham.akui.ada.penyelewengan.anggaran.oleh.komisioner>, accessed on 20 August 2017.

¹⁰ See the Press release of the Save Komnas HAM Coalition on the unacceptable performance of Komnas HAM, <http://nasional.kompas.com/read/2017/07/16/22372671/apa-penyebab-tak-maksimalnya-kinerja-komnas-ham->, accessed on 18 September 2017.

HAM.¹¹ On 12 January 2013, based on the principle of collegiality in the leadership of Komnas HAM and an attempt to make the governance of the Commission more effective, Komnas HAM members amended the Rules of Procedure of the Commission and decided that the term of Komnas HAM chairperson should be changed from two years and six months to one year.¹²

At one glance, the change of the term of chairperson to one year seemed to be a mere matter of leadership rotation. The concept of collegiality is also insignificant in Komnas HAM as the decision-making or policy is already generated through collective consensus. Nevertheless, if the governance of the Commission is to be based on the principle of collegiality, namely collective decision-making done equally without any opinion is to be treated higher than others, it must be defined clearly to avoid any misinterpretations that will affect the performance of Komnas HAM as a whole as every single expenditure of the budget of Komnas HAM requires approval from its chairperson.

Yosep Adi Prasetyo, a former member of Komnas HAM for the 2007-2012 period, argued that the change of tenure of Komnas HAM chairperson will surely affect the management of Komnas HAM. The problem is that the organisational structure of the Commission changes each time a new chairperson takes the office. Moreover, the change of chairperson also triggers other necessary administrative requirements and procedures. Everytime a new chairperson takes office, he or she will have to name new leaders for the sub-commissions, for example, a Letter of Decision (Surat Keputusan [SK]) must be issued to appoint new leaders of the sub-commissions.¹³

The term of office of Komnas HAM chairman, which can be changed easily through amendments to the Rules of Procedure, reflects an inherent weakness in the institutional arrangements of Komnas HAM that is provided under *Law No. 39/1999*. Article 88 of *Law No. 39/1999* states that further provisions on the obligations and rights of Komnas HAM members and its implementation procedures shall be determined by *the Rules of Procedure of Komnas HAM*. Meanwhile, the *Rules of Procedure of Komnas HAM* is decided at plenary sessions participated by all members of Komnas HAM. In short, the term of Komnas HAM chairperson will be determined by all members of the Commission. If the members are not honest, then the *Rules of Procedure* may be changed without regard to the interests of the institution. For example, members may take turns to benefit from the perks that come along with the position of Komnas HAM chairperson, and this is made possible with the fact that the term of Komnas HAM chairperson can be changed easily at plenary session of Komnas HAM.

¹¹ Sriyana, National Commission on Human Rights, Human Rights Subject Series for Lawyer XI 2007, http://lama.elsam.or.id/downloads/1262843232_13_Mekanisme_Komnas_HAM_di_Indonesia.pdf accessed on 16 July 2017.

¹² <http://nasional.kompas.com/read/2013/01/12/15533728/Perubahan.Tatib.Komnas.HAM.Sarat.Muatan.Polit> is accessed on 17 July 2017.

¹³ <http://www.hukumonline.com/berita/baca/lt50f0041962ae3/lsm-kritik-perubahan-masa-jabatan-ketua-komnas-ham>, accessed on 17 July 2017.

Indeed, the term of office of Komnas HAM chairperson is different when compared to other similar State auxiliary agencies. While the term of office of Komnas HAM chairperson is determined by the commissioners themselves, the terms of chairperson of other State institutions are determined by law. For example, *Law Number 13 of 2006* that establishes the Witness and Victim Protection Agency (LPSK), stipulates in Article 17 that the term of office of chairperson and vice chairperson of LPSK is for five years and thereafter can be re-elected in the same position for one additional term.

Besides the above problems, Komnas HAM is also desperately in need of members who are community leaders or public figures with professional skills, high integrity and uphold the rule of law, a social justice and human rights. According to *Law No. 39/1999*, there shall be 35 members of Komnas HAM, elected by the House of Representatives (DPR), based on Komnas HAM's proposal and appointed by the President as Head of State. In practice, the maximum number of candidates that the DPR had selected was 23 in 2002. These candidates were appointed through Presidential Decree Number 165 / M of 2002 dated 31 August 2002.

There were 11 commissioners in Komnas HAM during the 2007-2012 period and the number of commissioners for 2012-2017 period is 13. Meanwhile, Komnas HAM and the DPR have reached an agreement that there should be only seven commissioners appointed for the period of 2017-2022.¹⁴ According to Zoemrotin Susilo, former vice chairperson of Komnas HAM in 2002-2007, the reason for selecting only seven commissioners was due to the current number of commissioners was decided without any basis and not in correlations with the output of Komnas HAM. He pointed out that in many countries; the numbers of commissioners were generally between five to seven. He rationalized the figure of seven based on one commissioner to lead in each of the four functions of Komnas HAM, one chairperson, and two other commissioners to assist in the internal management and external affairs respectively.¹⁵ Nevertheless, such changes of the number of commissioners do not reflect any definite correlation with the declining performance of Komnas HAM.

Allocation of duties and the composition of Komnas HAM is determined at the plenary sessions in accordance with the members' interest. Strategic sub-commissions such as the Sub-Commission on Monitoring and Investigation is filled by more than five commissioners while sub-commissions that are not considered as strategic, such as the Sub-Commission on Education and Counseling and the Sub-Commission on Assessment and Research are filled with less commissioners.¹⁶ However, as the commissioners are lacking the necessary competencies to develop Komnas HAM and maximise its mandate, a large number of commissioners do not necessarily contribute positively to the effectiveness of Komnas HAM. Such changes of commissioner numbers are also an

¹⁴ <http://nasional.kompas.com/read/2017/05/17/08202411/menguji.calon.anggota.komnas.ham.?page=all> accessed on 11 August 2017.

¹⁵ <https://tirto.id/anggota-komnas-ham-ke-depan-harus-mementingkan-organisasi-ct4C> accessed on 18 September 2017.

¹⁶ Organizational structure of Komnas HAM 2012-2017 <https://www.komnasham.go.id/index.php/about/3/struktur-organisasi.html> accessed on 12 September 2017.

indication that the DPR and the President have no idea about a State institution such as Komnas HAM.

Law No. 39/1999 does not regulate, in details, Komnas HAM as an institution. There are only six articles in *Law No. 39/1999* that deal with the structure, functions, leadership, members, and regional representatives of Komnas HAM. In fact, the regulations determined by the elected commissioners have had a much bigger impact on the functions and performance of Komnas HAM.

Currently, the implementation of Komnas HAM's functions as stipulated in *Law No. 39/1999* are translated into four sub-commissions (assessment & research, monitoring & investigation, mediation, education & counseling). This differs from the arrangement of previous terms, which consisted of three sub-commissions, namely Sub-Commission on Civil and Political Rights (SIPOL), Sub-Commission on Economic, Social and Cultural Rights (EKOSOB) and Sub-Commission on Vulnerable Groups with the assumption that all commissioners assigned to these sub-commissions would be able to carry out the functions of assessment and research, monitoring and investigation, mediation, education and counseling.

Clearly, the lack of professional knowledge among the commissioners and their weak commitment have affected the manner Komnas HAM functioned and compromised the handling of human rights violations cases. In addition to this, there were also cases of misuse of the sub-commissions for personal publicity or the abuse of budget allocated for the sub-commissions. For example, the budget of the Sub-Commission on Monitoring and Investigation, which has the biggest number of commissioners — a total of seven in the period of 2012-2017, has been regularly used to support all members of the Sub-Commission to go to the fields of human rights violations.¹⁷ In comparison, *Law No. 30/2002* that establishes the Corruption Eradication Commission regulates explicitly its institutional mechanisms on field visits.¹⁸

The flaws in the structure of Komnas HAM can also be reflected in the investigation of human rights violations. Article 18 (1) of *Law No. 26/2000* states that Komnas HAM may establish an ad-hoc team to assist in carrying out its function, namely to investigate gross human rights violations. The lack of an explanation from Komnas HAM on why such powers given by the law was not used raises questions about the commitment of Komnas HAM when it comes to investigation of gross human rights violations. Such attitude has affected the follow-up of cases of human rights violations as well as the completion of the investigation results submitted by investigators, police or prosecutors.¹⁹

¹⁷ Fields of human rights violations are usually in the provinces, districts, outside of the capital city, Jakarta.

¹⁸ Commissioners should not be required to travel to places where there are branch offices that can manage the case. Komnas HAM has six branch offices.

¹⁹ Presented by Siti Noor Laila, Commissioner 2012-2017 in the trial continued testing of Law No. 26 of 2000 at the Constitutional Court, 8 September 2015.

The other problem that has impacted Komnas HAM's performance is the staffing comprising of civil servants who may provide administrative and technical support but lacking in human rights knowledge, including the Secretariat General, the Administration Personnel Subdivision, the Mediation Administration Section, the Counseling Administration Section, the Housewares Section, the Planning Section, the Human Rights Enforcement Administration Bureau, and the Administrative Bureau of Human Rights Enforcement. Consequently, the substantive work is left with the commissioners, further burdening them with heavy workloads.²⁰ The lack of human rights perspectives and knowledge among the supporting staff has ultimately compromised the performance of Komnas HAM.

Furthermore, the institutional support of Komnas HAM is often not in sync with the needs of human rights enforcement and protection on the ground. For example, the Secretary General, who serves as budget control officer, often makes budget planning which is different from the actual needs of Komnas HAM. Such scenario fuels public perception that the commissioners and the Secretary General have failed to work together effectively to resolve human rights violations in the country.

It should be noted that the post of Secretary General of Komnas HAM is filled by a government official. The power to change Secretary General rests with the government and depends on the political context. There have been at least three changes of the Secretary General within the period of 2012-2017, namely Masduki Ahmad, Untung Tri Basuki, and Bambang Iriana (PLT). The findings of the BPK on Komnas HAM could be attributed to the frequent changes of the Secretary General that eventually led to the poor internal management and budget control of Komnas HAM.²¹

Politically, the ruined reputation of Komnas HAM together with all its problems have dented the authority and credibility of Komnas HAM in the eyes of other government institutions and ministries. The implication is far reaching, as Komnas HAM is no longer considered as an important institution to be consulted in the making of human rights policies by other State institutions, such as the drafting of legislation in the DPR, policy making at executive level and the regional level and implementation of recommendations submitted by Komnas HAM. For example, Commissioner Natalius Pigai was quoted by media that Komnas HAM had used Google search engine to gather data about its claim of national disintegration incidents following the protests against criminalization of Habib Rizieq, the head of Islam Defender Front (FPI) over his case of alleged pornography chat and photo on social media. As there are a lot of unverified news online, such research method raises public doubts about the quality and credibility of Komnas HAM's research and data.²²

²⁰ <http://mediaindonesia.com/news/read/105127/masalah-internal-komnas-ham-disorot-para-calon-komisioner/2017-05-17> accessed on 20 September 2016.

²¹ *Ibid.*

²²

<http://nasional.kompas.com/read/2017/06/09/16241491/saat.komisioner.komnas.ham.jadikan.google.sebagai.rujukan>, accessed on 20 September 2017.

On the other hand, Komnas HAM has also failed to intervene in the appointment of public officials, who have been implicated in human rights violations, such as the appointment of the Chief of Police of the Republic of Indonesia (Polri), the Commander of the Indonesian Armed Forces (TNI), or the head of other State institutions.

Meanwhile, the divisive internal politics within Komnas HAM has contributed to difficulties for its members to take a collective firm stand on any problem caused by fellow members of Komnas HAM. For example, when the Honorary Board of Komnas HAM declared that Commissioner Dianto Bachriadi had committed embezzlement of the rental for his official residence and recommended that he should be dismissed as commissioner, however, the plenary meeting of Komnas HAM only suspended temporarily the duties of Dianto Bachriadi.²³ Such conduct ultimately leads to weak internal leadership in Komnas HAM.

In connection with the financial frauds and abuses by commissioners is the lack of enforcement of codes of ethics. In the case of Dianto Bachriadi above, Komnas HAM did not conduct further investigation to determine if he had violated the procedures or the values of Komnas HAM. On the other hand, the Advisory Board, who should have provided feedback and reprimanded wrongdoers, has done little to improve the situation.²⁴

2.2 Transparency

Of the total complaints received by Komnas HAM, it has followed up on about 73.3% of the complaints. Out of this, about 68.8% of the complainants viewed Komnas HAM's follow-up as very slow. As for the complaints that were not followed up by Komnas HAM, as high as 40% of the cases were without any reason given by Komnas HAM. These figures reflect poorly on the accountability and transparency of the work of Komnas HAM in the 2012-2017 period.²⁵

In the area of engagement with other State institutions, 68.8% of the 17 State institutions that participated in the survey indicated that they have had engagement with Komnas HAM. However, as much as 78.6% of them viewed the responses of Komnas HAM to be generally slow.

One of the functions of Komnas HAM is to receive complaints both directly and online. The complaint mechanism of Komnas HAM accepts written complaint that provides

²³

<http://nasional.kompas.com/read/2016/11/02/07480291/temuan.penyimpangan.anggaran.di.komnas.ham.harus.ditindaklanjuti> accessed on 20 September 2017.

²⁴ Statement by Saparinah Sadli Member of the National Commission on Human Rights (1996-2000) in the FGD organized by PBHI in July 2017.

²⁵ The Save Komnas HAM Coalition, which comprises of non-governmental organizations (NGOs) from various sectors who are committed to rescue Komnas HAM from destruction. One of the actions taken is to evaluate the performance of Komnas HAM by checking the perceptions of civil society organisations that work with the institution regularly. The method used is questionnaires that are completed by representatives of these civil society organisations based on their experiences during the period of 2012-2017.

identity of the complainant, case information, and evidence together with supporting documentation, reported directly by the victim or the victim's representative with the consent of the victim.²⁶ Complaints can also be done through telephone with the Complaint Section of Komnas HAM.

However, the numbers of complaints received by Komnas HAM every year and the follow-up are not disclosed by Komnas HAM in details. In addition, based on the online search conducted by the Save Komnas Ham Coalition, Komnas HAM's annual report is only made available until 2015.²⁷ We also note that the complaints lodged by civil society did not always receive a response or be acted upon directly even when the complaint was one of significance. For example, KontraS issued an open letter²⁸ to Komnas HAM in October 2014 requesting Komnas HAM to respond to the discriminatory statement released by certain groups who rejected Basuki Tjahaja Purnama [Ahok] as Governor of Jakarta on the grounds that he was not a Moslem and an ethnic Chinese. In the opinion of KontraS, Komnas HAM should make efforts to eliminate racial and ethnic discrimination in line with Article 8, Paragraph 1 of *Law on the Elimination of Racial and Ethnic Discrimination*.²⁹ However, Komnas HAM only responded to the letter one year later with the substance of the letter being very normative and contains only general responses.

3. Internal Evaluation

Solution for internal issues

To overcome various problems especially those related to internal management, Komnas HAM formed an Honorary Board and an Internal Inquiry Team.³⁰ Both teams are working to improve Komnas HAM's overall performance as an institution to restore public confidence, including the case of embezzlement of public funds by Commissioner Dianto Bachriadi, a clear violation of Article 4(e) and Article 10 of Komnas HAM Regulation No: 004B / PER.Komnas HAM / XI / 2013 on Amendment of Code of Ethics of Komnas HAM Members.

On September 2016, the deliberation of the Honorary Board finally recommended that Dianto Bachriadi be dismissed as a commissioner of Komnas HAM. However, this recommendation was not accepted by the Plenary Session of Komnas HAM, which in

²⁶ See Komnas HAM's complaints and mechanisms, <https://www.komnasham.go.id/index.php/pengaduan-mekanisme/> accessed on 20 September 2017.

²⁷ According to the annual report of Komnas HAM 2015, Komnas HAM received 8,249 complaints in 2015 with the complaints against police ranked the highest, followed by corporations, local governments, TNI and the judiciary.

²⁸ Open Letter: Calls on Komnas HAM to take actions on racial and ethnic discrimination measures by FPI and FUI, 16 October 2014, <http://www.kontras.org/home/index.php?module=pers&id=1959>.

²⁹ Article 8, Paragraph 1, *Law on the Elimination of Racial and Ethnic Discrimination* stipulates the supervisory roles of Komnas HAM in the elimination of all forms of racial and ethnic discrimination.

³⁰ In addressing the internal problems affecting Komnas HAM, the Honorary Board and the Internal Inquiry Team have worked with the Corruption Eradication Commission (KPK) to form a joint team in developing internal financial systems for Komnas HAM, <http://nasional.kompas.com/read/2017/01/03/19072421/perbaiki.sistem.keuangan.internal.komnas.ham.ben.tuk.tim.bersama.kpk>, accessed on 18 September 2017.

turn decided to grant Dianto Bachriadi time until December 2016. However, Dianto Bachriadi submitted his resignation before the end of December at the request of Komnas HAM. Subsequently, Komnas HAM plenary meeting in October 2016 approved the resignation of Dianto Bachriadi.³¹ According to Komnas HAM chairperson, as the case of Dianto Bachriadi only involved internal transactions and the amount of money was under one billion Rupiah (US\$73,900), BPK only recommended for Dianto Bachriadi to return the money. Upon the findings, Dianto Bachriadi admitted that he had returned the money that the BPK considered to be a misappropriation of 330 million Rupiah (US\$24,000).³² A number of human rights and anti-corruption activists have criticised that Komnas HAM's internal remedies were too lenient and indecisive as it has failed to handle the case of Dianto Bachriadi as a crime of corruption despite all criminal elements were met. It was only after several parties submitted their complaints to the Corruption Eradication Commission ((Komisi Pemberantasan Korupsi, KPK) on alleged irregularities that occurred in 2015, including the case of Dianto Bachriadi, that compelled Komnas HAM to finally submit this case to the KPK for further investigation.

Unfortunately, despite the above mentioned internal problems, Komnas HAM does not seem to consider them as serious problems that must be resolved immediately. There is a likelihood that the BPK will release a second report in 2017 indicating that there has been no improvement in Komnas HAM's internal financial management and administration.

4. The Issues of Secretary General

Komnas HAM has a Secretariat that provides administrative support for the implementation of Komnas HAM activities. The Secretariat is headed by the Secretary-General with the assistance of work units in the form of bureaus. The position of Secretary General is held by a civil servant that is nominated at the Plenary Session of Komnas HAM and appointed by Presidential Decree.³³

In elaborating the provisions in *Presidential Decree No. 48/2001, Regulation of the Secretary General of Komnas HAM Number: 002 / PERSES / III / 2015* was issued and formed part of the working procedures of the Secretariat of Komnas HAM. Based on this regulation, the Secretariat of Komnas HAM established four bureau offices.

On 31 December 2016, Tri Basuki, then Secretary-General of Komnas HAM, resigned. On 13 February 2017, Komnas HAM appointed Bambang Iriana Djajaatmadja as its new

³¹ Presented by Imdadun Rahmat, who was then chairperson of Komnas HAM, at a press conference on 31 October 2016 in Jakarta.

³² According to Komnas HAM chairperson, Imdadun Rachmat, Dianto Bachriadi has returned the amount of 330 million Rupiah to the BPK, <https://tirto.id/rumah-dinas-fiktif-rp330-juta-wakil-ketua-komnas-ham-bVaw>, accessed on 18 September 2017.

³³ Sriyana, National Commission on Human Rights, Series of Human Rights Subjects, Readings for Lawyers XI Year 2007, http://lama.elsam.or.id/downloads/1262843232_13_Mekanisme_Komnas_HAM_di_Indonesia.pdf accessed on 16 July 2017.

Secretary General.³⁴ Komnas HAM commissioners are involved in the operational structure that constitutes the main functions of Komnas HAM while the supporting structure, including financial administration of Komnas HAM, is under the responsibility of the Secretary General. Thus, the internal management of Komnas HAM will be hampered by the absence of the Secretary General.

The responsibility of the Secretary General is to coordinate, synchronise and integrate the administration of Komnas HAM, including organisational development, personnel administration, financial management, and facilities and infrastructure development at the Secretariat, in support of the work of commissioners. The Secretary General also serves as budget control officer. However, the Secretary General often makes budget planning which is not matching with the needs of Komnas HAM, largely due to the lax administrative and technical support system.

Article 4 Paragraph (2) of *Presidential Decree Number 48 of 2001* states that the post of Secretary General of Komnas HAM should be held by a civil servant who is not a member of Komnas HAM. It has been assumed that the Secretary General of Komnas HAM must be a public servant transferred from other state institutions. Nevertheless, the selection of the Secretary General of Komnas HAM has become highly political despite *Law Number 5 of 2014 on State Civil Apparatus* states that the appointment of state officials should be based on performance and competence. In addition, *Circular of the Ministry of Administrative Reform and Bureaucracy Reform Number 16 of 2012* regulates the procedures relating to the filling of vacancy in public institutions. Komnas HAM should comply with such legislations and regulations in the recruitment of its Secretary General.

The internal management control system of Komnas HAM lies with the Sub-Section of Internal Planning and Supervision under the Bureau of Planning, Internal Control and Cooperation. The rank of the section head is IIIa while the rank of the bureau chief is IIa. The rank of the Secretary General of Komnas HAM is Ia.³⁵ It is out of the ordinary for an official to be supervised by someone whose rank is lower, rendering the internal control of Komnas HAM superficial.

Another problem is that most of Komnas HAM staff are civil servants, who lack adequate knowledge of human rights and skills on human rights advocacy. It is also not stated clearly the education requirements to become Komnas HAM staff and how the staff are assigned to the different sub-commissions.

Currently, all staff of Komnas HAM are regulated by the Ministry of Home Affairs and entered into contract of Civil Service Candidates (CPNS) with the Ministry. The preconditions are very general and do not include the understanding of human rights as one of the necessary requirements. Komnas HAM does not have a say in the recruitment

³⁴ <https://www.komnasham.go.id/index.php/news/2017/02/14/282/bambang-iriana-djajaatmadja-sebagai-plt-sesjen-komnas-ham.html> accessed on 3 September 2017.

³⁵ Article 7 of Presidential Decree No. 48/2001 concerning the Secretariat General of the National Commission on Human Rights.

of staff other than informing the Ministry of Home Affairs the number of new staff needed. Furthermore, the human resource needs are not planned with measurable assessment, but merely based on forecasts by the Secretary General.³⁶

This is in stark contrast with other state institutions such as the KPK, which recruits its staff through the "Calling Indonesia" program with a system based on its *Regulation Number 63 of 2005 on Human Resources Management System*. In vacancy advertisements of the KPK, it is stated clearly the criteria of candidate selection and the position to be filled to ensure that the right candidate is recruited for the right position.

5. Budget Management

On 24 May 2016, BPK released an audit report of Komnas HAM Financial Report 2015. It highlighted various issues that revealed poor governance in Komnas HAM, particularly in the area of financial administration.³⁷

More specifically, there are at least eight irregularities found by the BPK, namely:³⁸

- a) The procurement of fictitious goods and services amounting to 820.25 million Rupiah (US\$60,817) with 671 questionable receipts. Further searches found three receipts whose vendor could not be located.
- b) Rental payments of 330 million Rupiah (US\$24,000) were made for the official residence of Commissioner and Deputy Chairperson, Dianto Bachriadi, who never occupied the house. It was found that the rental payments, after a series of transactions involving a third party, eventually ended up in the bank account of Dianto Bachriadi.
- c) Payments of meeting allowances in the office of Komnas HAM, amounting to 2.17 billion Rupiah (US\$160,380), were not in accordance with the regulations of the Ministry of Finance, which requires the presence of two echelons of officer / community participants in the meeting, held at least three hours outside working hours, and the officers do not receive overtime payment.
- d) There was no proof of accountability for 87.35 million Rupiah (US\$6,464) spent in the procurement of consultancy services on the development of online complaints application. Furthermore, Komnas HAM found the application that cost them 273.87 million Rupiah (US\$20,269) could not be utilized.
- e) There were payments of honorarium of 925.78 million Rupiah (US\$68,516) to the activities implementation team of Komnas HAM without proof of accountability. In addition, Komnas HAM also made an overpayment of 12.37 million Rupiah (US\$914) and received a penalty of 12.2 million Rupiah (US\$902) for delays in making payments. There were also other payments of honorarium fees amounting to 6.01 billion Rupiah (US\$444,800) that did not comply fully with the prevailing rules.

³⁶ Interview with Muhammad Nur Khoiron, Commissioner for the 2012-2017 period, on 11 September 2017.

³⁷ <https://www.cnnindonesia.com/nasional/20160808202741-20-150010/audit-bpk-tunjukkan-kelalaian-administrasi-komnas-ham/> accessed on 20 September 2017.

³⁸ Written by Egi Primayoga of Indonesia Corruption Watch (ICW) for the Save Komnas HAM Coalition.

- f) The procurement of internet service and payment of service charge for Komnas HAM office building Hayam Wuruk, amounting to 3.38 billion Rupiah (US\$250,153), was not implemented in accordance with the provisions. This conclusion was based on the BPK's evaluation of the building rental and internet usage, which also found that the building was not fully utilised.
- g) Komnas Perempuan's budget is part of Komnas HAM's budget. The standard cost rules used by Komnas Perempuan had not been approved by the Minister of Finance. Under the current provisions, the mechanism for the implementation and reporting of project with direct grants from donor agencies should be implemented with the endorsement of State Treasurer (BUN)³⁹ and the approval of the Minister of Finance.
- h) There was Non-Tax State Revenue (PNBP) generated from giro services, which was not yet to be calculated by the banks.

After the audit of Komnas HAM Financial Report 2015 was published on 24 May 2016, Komnas HAM initiated some reform measures. A new *Regulation of the Secretariat of Komnas HAM No. 009 / Per.0.0.3 / X Year 2016 on Management Competency Standards* was issued on 31 October 2016. This was followed by *Regulation of the Secretariat of National Human Rights Commission No. 013 / Per.0.0.3 / XI / 2016 on Guidelines of Internal Governance* on 28 November 2016. While both rules are good reform measures to be put in place, they are insufficient to address the problems. The audit report proves a lack of seriousness of Komnas HAM to reform its institutional governance.

6. Problems of Independence of Komnas HAM; From the Selection Process

The Selection Committee and the DPR must remain consistent in interpreting the Paris Principles⁴⁰. They should also respond to the institutional needs of Komnas HAM and most importantly adhere to *Law No. 39 of 1999*. Article 84 of *Law No. 39 of 1999* requires that the candidate for Komnas HAM commissioner must be an Indonesian citizen who: (i) has experience in advancing and protecting persons or groups whose human rights have been violated; (ii) has experience as a judge, prosecutor, police officer, lawyer or other legal profession; (iii) has experience in the legislative, executive, and state institutions; or (iv) is religious leader, community leader, leader of non-governmental organizations and universities.

The selection process of Komnas HAM commissioners for the period 2017-2022 started with the opening of registration of interested candidates on 22 December 2016.⁴¹ Interestingly, there were not many who were interested in the beginning as only 68 people registered before the deadline on 22 February 2017. Due to poor response, the Selection Committee extended the registration deadline to 22 March 2017. It also accommodated demands from the Save Komnas HAM Coalition and removed the discriminatory age requirement for candidates to be at least 40 years old. The minimum

³⁹ The role of State Treasurer is on the management of transactions while the role of Minister of Finance is on the budgeting.

⁴⁰ See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

⁴¹ <http://pansel.komnasham.go.id/#facts> accessed on 5 September 2017.

requirement of education level of S1 (undergraduate) was also taken out.⁴² These steps succeeded in increasing the number of registrations to a total of 132 people.

At the administrative review stage of the selection process, 121 names passed in the checking of the completeness of their application. A written test was conducted on 2 May 2017 with 60 names passed at this stage. The next stage was public interview and track record checking. Of the 60 names, only 28 names qualified. In the final stage, psychological and health test as well as a direct interview with the Selection Committee were conducted. 14 names were shortlisted and they will be examined by Commission III of the DPR where seven of them will be selected to become members of Komnas HAM for the period 2017 - 2022. Of the 14 names, five of them are women, fulfilling the minimum requirement of 30% of women's quota in the selection of candidates for public offices. As the term of current Komnas HAM members will end in October 2017, Commission III of the House of Representatives will schedule the examination of the 14 candidates before finally deciding on the seven members of Komnas HAM.

This selection process received a lot of attention from the public, especially among human rights activists due to the poor performance of Komnas HAM commissioners in the period 2012 - 2017. While there had been efforts to organise the selection process in a transparent and accountable manner by receiving public inputs via electronic mail and organising open interviews with the candidates where public members could post their questions, the Selection Committee has been criticised for allowing some names allegedly linked to political parties and extremist groups to get pass in the early stages of the selection process.

It was under the leadership of Chairperson Imdadun Rahmat that Komnas HAM formed for the Selection Committee to select candidate commissioners for the period 2017-2022 with Jimly Asshiddiqie as chairperson of the committee. Jimly was also chairperson of the previous Selection Committee that received a lot of criticism from civil society. In addition to Jimly, former member of the previous Selection Committee, Makarim Wibisono, also sits in the committee. Other members included Harkristuti Harkrisnowo as Vice Chairperson, Bambang Widodo Umar, Musdah Mulia, and Zoemrotim K. Susilo as members of the committee.

The selection of members to the Selection Committee is conducted by all commissioners in the plenary session. Each commissioner may nominate a list of names, which will then be filtered to seven through a voting mechanism. Each commissioner is entitled to vote for two candidates. With such a system, it is inevitable that some commissioner may feel indebted to those who chose him or her to become a commissioner and return the favor by supporting them to be re-elected again as commissioner.⁴³ This process is highly political and lack of objectivity.

⁴² <https://www.komnasham.go.id/index.php/news/2017/03/03/291/persyaratan-seleksi-komnas-ham-diubah.html> accessed on 13 September 2017.

⁴³ Interview with Muhammad Nur Khoiron, commissioner of 2012-2017 on 11 September 2017.

From our observation of the process, the Selection Committee should also monitor the performance of members of Komnas HAM as their moral obligation for choosing them as commissioners. In such scenario, the performance of Komnas HAM members will not only be monitored by civil society but also the Selection Committee.

7. Conclusion and Recommendation

Conclusion

The deteriorating conditions of Komnas HAM; from poor governance, corruption to haphazard handling of complaints, have set a very bad precedent in the development of human rights protection in Indonesia.

The issues of internal governance uncovered by the BPK's audit remain unresolved. It is indicative of the failure of monitoring and evaluation system in Komnas HAM. Komnas HAM should be evaluated more thoroughly, including the performance of each of its members. Such evaluation should be used as a reference for the overhaul of Komnas HAM.

In addition, it is important to ensure that candidates for commissioners are selected by the Selection Committee based on their understanding of human rights issues and experiences in the promotion and protection of human rights in Indonesia. Public members need to scrutiny the track record of candidates to ensure that they will not become a future obstacle to human rights protection and promotion in the country. Otherwise, the selection process will not only fail to initiate the much needed reform in Komnas HAM, it may continue to be manipulated by certain individuals or groups for personal gains. Finally, the Selection Committee and the selection system need to be evaluated thoroughly as well to ensure Komnas HAM is led by commissioners who are competent with high integrity in future.

Recommendations to Komnas HAM

- Create a transparent electronic complaint system to facilitate easy tracking of the progress of cases by the Commission as well as the complainants;
- Enhance accountability and transparency in the financial management of Komnas HAM in accordance to the BPK's recommendations;
- Separate the Internal Planning Division and the Control Division and strengthen both the divisions. The internal supervision system should be strengthened as well;
- Improve both the internal and external monitoring and evaluation systems of the commission;
- Pro-actively respond and provide direct inputs to the President and other state institutions on crucial human rights issues in Indonesia.

Recommendations to DPR and/or Government

- The Government and the DPR should draft a new legislation on Komnas HAM or revise the existing *Human Rights Law* in order to make Komnas HAM as strong and as good as other state institutions;
- The Government and the DPR must monitor and evaluate the performance of members of Komnas HAM to ensure they work in accordance with their mandates.

Recommendations to the President

- Issue a Presidential regulation that stipulates clearly the criteria and qualifications for Komnas HAM staff to ensure that they possess the necessary human rights knowledge.

MALAYSIA: A MISREPRESENTED COMMISSION AND THE EXECUTIVE'S ALIBI FOR VIOLATION

*Suara Rakyat Malaysia (SUARAM)*¹

1. Introduction

Human rights in Malaysia have gradually declined over the years with the Government of Malaysia adopting increasingly repressive laws and policies to suppress and punish dissent. With heightened international scrutiny and the 'need' for Malaysia to be seen as a progressive and democratic state, the Government has expanded the use of non-state actors in attacking human rights advocates² and threatening civil societies and vulnerable groups.³

As noted in ANNI's 2016 report on Malaysia, the Human Rights Commission of Malaysia (SUHAKAM) suffered from a substantial budget cut of 50% (budget of RM 11 million was reduced to a mere RM5.5 million)⁴ which resulted in inadequacies that threatened the operation of SUHAKAM as a national human rights institution (NHRI). As noted before, the budget cut imposed upon SUHAKAM represents a failure to fulfil Section 19(1) of the Human Rights Commission of Malaysia Act 1999, which requires the Government to provide adequate funds to enable SUHAKAM to discharge its duties.⁵

Furthermore, the current Government effectively controls the Parliament and continues to disregard many of the principles outlined in the Belgrade Principles.⁶ Funding for SUHAKAM remains largely under the control and whim of the executive with limited intervention open to Parliament (avenue for intervention further compromised by majority seats held by the ruling party). SUHAKAM's annual report has consistently failed to be tabled and debated in Parliament due to the Government's indifference.⁷

2. Notable Developments with SUHAKAM in 2016

Some of the key developments in SUHAKAM in 2016 includes the appointment of a new panel of commissioners⁸ and the reinstatement of SUHAKAM's budget prior to budget cuts in 2015/2016.

¹ Chew Chuan Yang, Documentation & Monitoring Coordinator of SUARAM, monitoring@suaram.net. Our warmest regards for friends who made this report possible.

² The Star Online, 'Jamal And Nine Red Shirts Charged With Rioting' (Star Online, 14 April 2017) <<http://www.thestar.com.my/news/nation/2017/04/14/jamal-and-nine-red-shirts-charged-with-rioting/>> accessed 18 May 2017.

³ 'Labelled 'Militant', LGBT Community Says Joined Bersih 5 To Uphold Democracy' (Malay Mail Online, 5 December 2017) <<http://www.themalaymailonline.com/malaysia/article/labelled-militant-lgbt-community-says-joined-bersih-5-to-uphold-democracy>> accessed 18 May 2017.

⁴ '2015 Report On The Performance And Establishment Of National Human Rights Institutions In Asia', 1st Ed. Bangkok: Asian Forum for Human Rights and Development (FORUM-ASIA), 2015.

⁵ Human Rights Commission of Malaysia Act 1999, s 19(1).

⁶ Parliament does not have effective oversight over financial independence of SUHAKAM; Parliament consistent failure in engaging with SUHAKAM on its Annual Report and strategic planning.

⁷ An issue that would be further examined.

⁸ 'Announcement On The Appointment Of The New Commission Members For The Term 2016-2019' (SUHAKAM, 22 June 2016) <<http://www.suhakam.org.my/announcement-on-the-appointment-of-the-new-commission-members-for-the-term-2016-2019/>> accessed 18 May 2017.

The current appointed commissioners were appointed in June 2016 - 2 months after the conclusion of the previous commissioners' term in April 2016.⁹ The newly appointed commissioners are led by Tan Sri Razali Ismail who had a long history of serving Malaysia as a diplomat.¹⁰ His early days as the Chairperson of SUHAKAM was not without challenge. As an example, some of his initial comments relating to freedom of assembly contravened international norms and resulted in vociferous backlash from members of civil society.¹¹

The budget cut that affected SUHAKAM's work in 2016 was reversed in 2017 with SUHAKAM's budget returned to its previous levels.¹²

2.1 SUHAKAM's Intervention in Cases of Human Rights Violations

In SUHAKAM's 2016 Annual Report, it reports a total of 879 cases with 350 complaints falling outside of SUHAKAM's jurisdiction. Of the 529 cases accepted, the Commission has completed investigations for 322 cases while the rest are still under investigation. Due to the prevailing circumstances, this report would not be able to identify and assess each report lodged with SUHAKAM. While a quantitative analysis would not be viable, this chapter adopts a qualitative approach in examining and analysing three notable cases of human rights violations reported to SUHAKAM.

2.1.1 Case of R. Sri Sanjeevan

Dato' Seri R. Sri Sanjeevan, the chairman of a non-governmental organisation (NGO) Malaysian Crime Watch Task Force (MyWatch), was arrested a total of nine times and received more than 15 charges during a period of merely two months. He was first arrested on 23 June 2016 for allegedly blackmailing and extorting from an illegal gaming operator. He then spent about a month in remand for various other offences including extortion, cheating and hiring an illegal immigrant. He was subsequently detained under the *Prevention of Crime Act 1959 (POCA)* after several days of remand to facilitate police investigation on alleged criminal intimidation and extortion. On 26 July 2016, the High Court ordered him to be released from POCA after allowing his habeas corpus application on the ground that the detention order to be remanded for 21 days given by the Magistrate was faulty. He is now facing various charges of extortion and a charge for insulting the Inspector General of Police.

Following his detention and the complaint lodged by his family to SUHAKAM on 29 June 2016, SUHAKAM visited Sanjeevan in detention. After the visit, Sanjeevan claimed

⁹ SUARAM, 'ANNI: Appointment of SUHAKAM Commissioners and the Way Forward' (SUARAM, 24 Jun 2016) <<http://www.suaram.net/?p=8077>> accessed 18 May 2017.

¹⁰ SUHAKAM, 'Biodata of Tan Sri Razali Ismail' <<http://www.suhakam.org.my/biodata/>> accessed 18 May 2017.

¹¹ 'Be more sophisticated in fight for human rights, Suhakam chief tells Bersih 2.0' (Malay Mail Online, 31 July 2016) <<http://www.themalaymailonline.com/malaysia/article/be-more-sophisticated-in-fight-for-human-rights-suhakam-chief-tells-bersih>> accessed 18 May 2016.

¹² 'RM3m boost for AG, Suhakam doubles 2016 budget' (MalaysiaKini, 22 October 2016) <<http://www.malaysiakini.com/news/360074>> accessed 30 May 2017.

that he was physically abused and complained to his lawyer when he was brought to court on 19 July 2016.¹³

SUHAKAM visited the remand centre in question on 15 July 2016 in relation to the complaints raised and interviewed the doctor from Hospital Kuala Lumpur on 1 August 2016. Upon Sanjeevan's release on 26 July 2016, SUHAKAM released a statement applauding the court decision.¹⁴

2.1.2 Case of Maria Chin Abdullah

On 18 November 2016, Maria Chin Abdullah, the chairperson of BERSIH 2.0 was arrested a day before the BERSIH 5 rally. She was detained under the *Security Offences (Special Measures) Act 2012 (SOSMA)* to facilitate investigations under section 124C of the Penal Code for attempting an act detrimental to parliamentary democracy, specifically claiming that she was receiving funds from the Open Society Foundation (OSF). She was detained and placed in solitary confinement in a 15ft x 8ft windowless cell with two light bulbs that were perpetually lit, and was released after 10 days in detention. Maria complained that she was only provided with a wooden bed and had only cold water to wash with. Further, it is important to note that during her detention, she was interrogated by at least 3 different officers from morning to evening on a daily basis.

In response to her detention, SUHAKAM released a press statement on 21 November 2016 opposing Maria's detention¹⁵ and subsequently visited her on 23 November 2016¹⁶ and submitted recommendations to the Royal Malaysian Police based on some of the requests put forward by Maria during her detention.

2.1.3 Crackdown against Indigenous Communities

In promoting and protecting the human rights of all persons, SUHAKAM has paid due attention to the rights of indigenous people mainly because the Government has made promises concerning the land rights of the indigenous communities that have not materialised. The Department of Orang Asli Development (JAKOA) is the Government body responsible to protect and ensure the well-being and advancement of the Orang Asli but has failed to carry out their responsibilities in protecting the rights of the indigenous communities.

It has been reported by SUHAKAM that violations of native customary land rights have worsened this year. The Government has failed to protect the land rights of indigenous communities which led to the blockades set up by a group of Orang Asli, known as the Temiar tribe, on a logging trail in Gua Musang, Kelantan.

¹³ Lawyer claims crime watch NGO chairman physically abused, tortured in prison' (Malay Mail Online, 19 July 2016) <<http://www.themalaymailonline.com/malaysia/article/lawyer-claims-crime-watch-ngo-chairman-physically-abused-tortured-in-prison>> accessed 18 May 2017.

¹⁴ SUHAKAM, The Human Rights Commission Malaysia (SUHAKAM), 'Prevention Of Crime Act (POCA)' (SUHAKAM, 28 July 2016) <<http://www.suhakam.org.my/prevention-of-crime-act-poca/>> accessed 18 May 2017.

¹⁵ SUHAKAM, 'Press Statement No. 31 of 2016 (The Security Offences (Special Measures) Act 2012 (SOSMA)' (SUHAKAM, 21 November 2016) <<http://www.suhakam.org.my/press-statement-no-31-of-2016-the-security-offences-special-measures-act-2012-sosma/>> accessed 18 May 2017.

¹⁶ 'Visit to Maria Chin 2016' (SUHAKAM, 23 November 2016) <<https://drive.google.com/file/d/0B6FQ7SONa3PRNUxJZ0h4RURHNWw/view>> accessed 30 May 2017.

The Temiars belong to one of 18 Orang Asli groups in Peninsular Malaysia and a substantial number of them still reside within the forest reserves. They had set up blockades in the Balah forest reserve in Kelantan as part of an initiative by the community to prevent loggers from going in and out of what the local villagers claim is part of their ancestral land, with the main purpose of protecting and preventing further deforestation of their native land. They have asserted that the 2014 mass floods which occurred in Kelantan were caused by excessive logging.

However, on 28 September 2016 police and Forestry Department officers entered the area and dismantled the blockades and subsequently arrested about 54 of the Orang Asli activists involved for trespassing on a permanent forest reserve. Mobile phones and cameras were confiscated and houses were destroyed. Police were also reported to have seized several blowpipes and machetes and arrested more Orang Asli activists who were involved. A 210-strong team of officers from the police, the state forestry department, the Malaysian Anti-Corruption Commission and the district land office also tore down 35 makeshift bamboo tents in the vicinity during the operation.¹⁷

Throughout 2016, it was reported that SUHAKAM had conducted two visits to the community and have reached out to the relevant state government that was violating the rights of the indigenous communities in question.

Effectiveness of SUHAKAM

In the abovementioned cases, the effectiveness of SUHAKAM's actions and intervention varied. In Maria Chin Abdullah case, the visit conducted by SUHAKAM effectively exposed the inhuman and degrading treatment Maria was subjected to which forced the police to grant additional amenities to Maria. The amenities received by Maria and the improvement in her treatment was attributable to SUHAKAM's comment and feedback to the police after meeting with Maria. Furthermore, the mental and psychological support derived from the visit was important especially in circumstances where lawyers and families were not permitted to visit her throughout her detention.

However, it must be noted that SUHAKAM's visit could also serve as a potential hazard to the wellbeing of the detainee. While the visit to Maria Chin Abdullah during her detention was positive, Sanjeevan was allegedly subjected to additional physical abuse shortly after the visit by a SUHAKAM commissioner. Though it is difficult to ascertain whether the physical abuse that followed was the result of the complaint lodged with SUHAKAM by Sanjeevan, the timing of the alleged abuse certainly raises concern that it was possibly a reprisal against Sanjeevan in relation to SUHAKAM's visit.

2.2 SUHAKAM's Role as a National Human Rights Institution

Apart from individual cases, SUHAKAM has received requests by civil society to monitor public assemblies. Some of the notable public rallies monitored by SUHAKAM included #*BantahTPPA* rally in January 2016, #*TangkapMOI* rally in Kuala Lumpur in August 2016 and Bersih 5 convoy throughout October and rally in November 2016.

¹⁷ Ashley Tang & Syed Azhar, '41 orang asli arrested in operation at Gua Musang barricade' (The Star Online, 29 November 2016) <<http://www.thestar.com.my/news/nation/2016/11/29/orang-asli-gua-musang-arrested/>> accessed 30 May 2017.

SUHAKAM is easily accessible to those seeking SUHAKAM monitoring of peaceful assemblies. Requests can be emailed to SUHAKAM and directed to the complaints and monitoring division which usually responds within three working days for further inquiries and follow up.

SUHAKAM has also shown a degree of proactiveness in engaging with human rights issues such as those pertaining to freedom of religion in the case of arrest of dozens of alleged Shia practitioners;¹⁸ issues pertaining to sexual abuse of children¹⁹ and non-state actors' attack on journalists.²⁰ It has also agreed in principle to undertake a baseline study to obtain information on the discrimination faced by transgender community.

2.3 SUHAKAM's Engagement with Government Agencies, Parliament & Judiciary

In terms of engagement with government agencies, SUHAKAM continues to play a pivotal role in engaging with government agencies in a wide array of human rights issues. SUHAKAM continued its engagement with Minister Paul Low on the development of a National Action Plan on Business and Human Rights which includes the preparation of a cabinet paper on the matter; a round table discussion with the Ministry of International Trade and Industry on the Trans Pacific Partnership Agreement (TPPA); engaging with the Ministry of Home Affairs and the Royal Malaysian Police pertaining to the issue of security laws, torture and death in custody; and also engagement with the Syariah courts on human rights issues.

Unfortunately, the result of these engagements can be seen as mixed with some engagements turning out to be unproductive for the Commission. As an example, meeting between government agencies, ministers from relevant ministries with members of civil societies and opposition members of Parliament on TPPA was unsatisfactory as many of the concerns were not addressed and it became a platform for government agents to 'preach' its own narrative on these issues.

In other engagements such as those on the use of security laws in Malaysia and the use of torture in detention, the Ministry of Home Affairs has on several occasions called for meetings between their officers and SUHAKAM. However, these meetings between SUHAKAM and the Home Ministry became an opportunity for government to misrepresent SUHAKAM's stance. Examples of this can be found in the uni-directional briefing by the Home Ministry on the introduction of the Prevention of Terrorism Act 2015. Despite the objections and concerns raised by SUHAKAM in that meeting, Home Minister, Ahmad Zahid Hamidi claimed that SUHAKAM had given the Act their seal of approval.²¹

¹⁸ 'Suhakam reminds of religious freedom after Jais arrests 50 Shiite Pakistani' (MalaysiaKini 13 October 2016) <<http://www.malaysiakini.com/news/358958>> accessed 30 May 2017.

¹⁹ 'Press Statement No .27 of 2016 (Sexual offences against Children)' (SUHAKAM, 15 November 2016) <<http://www.suhakam.org.my/press-statement-no-27-of-2016-sexual-offences-against-children/>> accessed 30 May 2017.

²⁰ 'SUHAKAM Condemns Attacks on Journalists' (SUHAKAM, 17 October 2016) <<http://www.suhakam.org.my/suhakam-condemns-attacks-on-journalists/>> accessed 30 May 2017.

²¹ 'No Zahid, we disagreed with Pota, says Suhakam' (MalaysiaKini, 17 April 2015) <<http://www.malaysiakini.com/news/295533>> accessed 30 May 2017.

Similarly, in early 2017 SUHAKAM was briefed prior to the ‘renewal’ of SOSMA 2012 in the March-April 2017 Parliamentary session. Despite the objections and concerns raised, the Deputy Home Minister, Nur Jazlan claimed that SUHAKAM had visited and approved the state of affairs in detention under security laws during the Parliamentary debate.²² The misrepresentation of SUHAKAM’s stance is not a new development as a similar practice was observed in 2015 when the issue of SUHAKAM’s budget cut was at the forefront of news in Malaysia.

In engagements where SUHAKAM inquired into potential human rights violations, there were incidences when communications by SUHAKAM resulted in ‘confusion’ within government agencies in regard to SUHAKAM’s role and stance.²³ As an example, letters sent by SUHAKAM highlighting their concern with the use of the POCA in selected cases was met with a peculiar response in which the Ministry of Home Affairs somehow perceived the concerns raised by SUHAKAM as representing the detainees under Section 19A(4) of POCA.²⁴

This development raises concerns that SUHAKAM could be unwittingly co-opted to support the Government’s narrative through misrepresentation and false alibi by selected ministries in cases of human rights violations despite clear objections and disagreements aired by SUHAKAM. Although engagement with the Government must continue to be the centrepiece of SUHAKAM’s responsibility as a NHRI, steps should be adopted by SUHAKAM to minimize opportunities where government agencies can misrepresent SUHAKAM’s stance. In essence, the Government should not use engagements between the Government and SUHAKAM as an alibi for human rights violations.

SUHAKAM’s involvement in the on-going human rights violations involving the indigenous community raises new areas of concerns in terms of engagement with the Government. As opposed to engagement with the Federal Government of Malaysia, the cases involving the indigenous community requires engagement with state governments.²⁵ With the exposure of varying degree of encroachment and harassment of indigenous communities by state agencies as opposed to federal agencies, SUHAKAM has begun engaging state governments directly on reported human rights violations. In the Kelantan case mentioned earlier in this report, SUHAKAM has reportedly sent four written communications to the Kelantan state government but have received no response. While it may be too early to tell whether engagement with opposition-ruled state governments would be better received than engagement with the current Federal Government, the reported lack of response in the case of Kelantan leaves us with the grim possibility that a different governing coalition would not necessary resolve the apathy shown towards SUHAKAM as a human rights commission.

²² Hansard 4 April 2017 (<http://www.parlimen.gov.my/hansard-dewan-rakyat.html?uweb=dr&arkib=yes>).

²³ Page 52, SUHAKAM Annual Report 2016.

²⁴ Detainees can appoint a representative for his or her hearing under POCA. Usually a legal counsel is appointed by those who can afford.

²⁵ As a Federation, Malaysia has 11 independent state government with their respective legislature and executive. Since election in 2008, several state government such as those in Kelantan, Selangor and Penang has been under the control of the Federal opposition.

2.4 SUHAKAM's Engagement with Civil Societies

After the momentary lapse during the transition period between the outgoing and incoming commissioners, SUHAKAM has continued its engagement with civil society. The appointment of the new commissioners was followed by a meeting between newly appointed commissioners and members of civil society.

SUHAKAM's collaboration with civil society calling for the ratification of the United Nations Convention against Torture, Degrading or Inhuman Treatment or Punishment (UNCAT) continued throughout 2016. For the most part, the joint working group²⁶ has brought positive benefits to SUHAKAM and civil society involved. On top of the benefits derived from collaboration and sharing of expertise, civil societies were granted opportunities to understand the inner workings of SUHAKAM and provided room for direct engagement with SUHAKAM's secretariat.

While the development mentioned is certainly applaudable, there are still substantial room for SUHAKAM to expand in terms of collaboration with civil society. First, SUHAKAM has extensively engaged with relevant ministers and ministries on human rights violations, unfortunately the engagement and meetings have largely been closed door and not accessible to members of civil society. Engagement such as this should be made open and accessible as much as possible. As a point of reference, the roundtable discussions which include members of civil society and other interest group should be used as a benchmark for future engagement whenever possible.

In the event of pressing or emerging human rights violations such as those during the detention of Maria Chin Abdullah or the crackdown against the indigenous communities, SUHAKAM should immediately call for a meeting with relevant ministries with the presence of civil society, interest groups and members of the community. Similarly, in incidents of grave human rights violation such as the 2017 case of S. Balamurugan,²⁷ SUHAKAM should look beyond investigating the case alone but develop plans to lead meetings with relevant ministries and civil societies and drive the discourse on challenging the violations on hand.

2.5 SUHAKAM Collaboration with Enforcement Agency Integrity Commission (EAIC)

In 2015 and early 2016, SUHAKAM and the Enforcement Agency Integrity Commission (EAIC) cooperated on several accounts including surprise visits to immigration detention centres. However, throughout the year, the practice has slowed. Apart from those reported last year when SUHAKAM and EAIC conducted joint 'spot checks' at immigration detention centres and subsequent joint investigations into the allegations of torture of terror suspects in detention, there has been little collaboration between the two statutory bodies.

²⁶ *Joint Working Group of ACT4CAT.*

²⁷ Balamurugan was a victim of police brutality who passed away after being left to die in the police station after a court ordered for his release in February 2017. He suffered substantial physical abuse and was reportedly coughing up blood in the court room when he was brought for remand hearing. - Akil Yunis, 'MP: Govt must act on Suhakam findings on custody death' (The Star Online, 30 March 2017) <<http://www.thestar.com.my/news/nation/2017/03/30/govt-must-act-on-suhakam-findings-on-custody-death/>> accessed 31 May 2017.

When the claims of fatal abuse by immigration officers in Malaysia during detention by former immigration detainees surfaced in August 2016,²⁸ SUHAKAM and EAIC conducted a joint investigation into the matter on 22 August 2016. However, in that case, both commissions found that there was no evidence of fatal abuse though they made recommendations for construction of new detention centres to be expedited and prioritized as existing centres are in poor conditions.

In early 2017, the two statutory bodies seemed to adopt a competitive stance in addressing cases of police abuse of power which is seen as a human rights violation (SUHAKAM's mandate) and also represents a failure to comply with existing standard operating procedures of the police force (EAIC's mandate).

For the most part, the competition seems to have potential benefit to the human rights discourse as a whole as both statutory bodies have shown notable initiative in leading intervention and addressing cases of abuse.²⁹ While the report acknowledges the benefits of both statutory bodies competing to provide resolution to violation of human rights, the limited resources available to all parties involved and the challenges that are bound to arise during investigation makes it of paramount importance that SUHAKAM strengthens the avenues of cooperation and collaboration with EAIC.

3. Conclusions and Recommendations

Reflecting on the overall circumstances and room for SUHAKAM to intervene or investigate human rights violations in Malaysia, we have to draw the conclusion that SUHAKAM has been and will still be seen as a toothless tiger by the Government in the foreseeable future. Government's failure to cooperate in investigations and take into account recommendations made by SUHAKAM essentially dooms SUHAKAM to failure in its function as a national human rights commission.

As noted in the report findings on SUHAKAM in 2016, this report reiterates that despite the shortcomings noted above, the inquiries and visits initiated by SUHAKAM still hold substantial influence in directing the Government's actions. In this regard, written communications to relevant government agencies by SUHAKAM would remain relevant.

While SUHAKAM may not necessarily have the power to conduct its duties as required due to government indifference, the Commission should continue with its engagement as and when possible and maintain close communication with interest groups and civil society to consolidate its credibility and support.

Furthermore, the cases involving the indigenous community reveals that SUHAKAM would also need to engage with state governments in selected cases of human rights violations. The development in this area suggests that state governments have a degree of influence not just in the rights of indigenous peoples but also in the area of freedom of assembly and freedom of expression. SUHAKAM should look into engagement with state governments and establish spaces where SUHAKAM can advise and assist state governments in developing policies that are in line with human rights principles.

²⁸ Zsombor Peter & Kuch Naren, 'Maids Claim Fatal Abuse at Malaysian Depot' (The Cambodia Daily, 15 August 2016) <<https://www.cambodiadaily.com/news/maids-claim-fatal-abuse-malaysian-depot-116653/>> accessed 30 May 2017.

²⁹ Though it is noted that SUHAKAM and EAIC addresses cases received with different approach.

Reflecting on the content of this report, we would recommend the following to **SUHAKAM**:

1. Implement a clear policy and operating procedures on responding to families or victims of human rights violations and supporting members of civil society or other interest groups such as a monthly response/update form, or an online system for checking development or case monitoring;
2. Conduct close follow up after SUHAKAM's intervention, especially during critical phases in order to provide certain degree of protection from reprisal for those who have lodged complaints to SUHAKAM;
3. Strengthen internal policy and strategy for engagement with other commissions and include a brief report on its collaboration with other commissions in SUHAKAM's Annual Report;
4. Establish memorandum of understanding on collaboration and establish permanent operation structure and plans for joint investigations with EAIC;
5. Release public statements or reports on engagement with government agencies whenever possible to mitigate possibility of misrepresentation by government agencies;
6. Continue to strengthen collaboration and cooperation with civil society and explore possibility of active working group on other issues apart from torture;
7. Develop plans of engagement with government agencies which are inclusive and accessible to members of civil society, interest group and community; and
8. Engage with state governments to develop state-level policies that are in line with international human rights principles.

To the Federal Government of Malaysia, we recommend:

1. Recognize the role of SUHAKAM as a NHRI in accordance to the Paris Principles and the Belgrade Principles;
2. Table and debate SUHAKAM's Annual Report in Parliament;
3. Discuss SUHAKAM's Annual Report in Cabinet meetings;
4. Ensure and guarantee SUHAKAM's financial independence and absence of executive interference in SUHAKAM's operations;
5. Acknowledge and accept SUHAKAM's expertise and capacity to advise on the drafting of laws that have human rights implications;
6. Commit to engagement with SUHAKAM through roundtable discussions or meetings between ministers and senior officials with SUHAKAM's Commissioners; and
7. Amend and strengthen SUHAKAM's enabling act or implement policy to make it mandatory for government agency found to have violated human rights by SUHAKAM to response officially and provide remedy.

To respective state governments in Malaysia, we recommend:

1. Proactively engage with SUHAKAM to source their advice and expertise in developing laws that have potential impact on human rights;
2. Engage SUHAKAM for human rights training for their respective enforcement agencies; and
3. Respond and engage with SUHAKAM on its inquiries and investigations.

MYANMAR: SUSPICIOUS MINDS, THE MNHRC'S TRUST DEFICIT

Progressive Voice; Action Committee for Democracy Development; Smile Education and Development Foundation¹

Scope and Methodology

Information on the Myanmar National Human Rights Commission (MNHRC) 's activities was sourced largely from its website, most recent annual report, and statements to the media. However, given that the annual report covers only 2015 and that portions of the website, such as the complaints section, are incomplete, analysis on the MNHRC has been supplemented with in-person and email interviews with Commissioners, civil society and community-based organisations (CSOs/CBOs), domestic media, and international organisations both inside and outside of Myanmar. As the MNHRC was not addressed in the Asian NGO Network on National Human Rights Institutions' (ANNI) 2016 publication, this report covers developments from July 2015-June 2017, but places emphasis on the most recent 18 months. In establishing the effectiveness of the MNHRC, analysis focused primarily on activities of three of its five divisions: the Human Rights Policy and Legal Division, the Human Rights Protection Division, and the Human Rights Promotion and Education Division. A draft of this report was provided to the MNHRC to give an opportunity for them to clarify any information and make any comments; however, they declined to accept the report.

1. Introduction

The National League for Democracy (NLD)'s electoral victory in November 2015 gave Myanmar its first democratically-elected government in 54 years. But over a year onwards from the NLD's ascension to power, the military maintains its stranglehold on political capital, and impunity continues to flourish unchecked. While there has been some progress, such as the release of hundreds of political prisoners and improved flexibility to conduct human rights work, the overall human rights situation remains precarious. In this context, it is even more urgent for the MNHRC to interpret its mandate in a "broad, liberal, purposive"² manner and become a more effective promoter and protector of human rights.

In the past two years, discriminatory laws such as the four controversial *Race and Religion Protection Laws*, enacted in 2015, continue to limit the rights of women and religious minorities, and the politicized, disproportionate use of certain legislation like Section 66(d) of the *Telecommunications Law*, continue to curtail democratic space. As of May 2017, there are 40 political prisoners serving sentences, and 209 people awaiting

¹ Aung Khaing Min (akm@progressive-voice.org); Alex Moodie (alex@progressive-voice.org); and Bochen Han (bhan95@gmail.com).

² Office of the United Nations High Commissioner for Human Rights (OHCHR), accessed 20 April 2017, <http://nhri.ohchr.org/EN/AboutUs/GANHRIAcreditatio/Document/SCA%20FINAL%20REPORT%20-%20NOVEMBER%202015-English.pdf>.

trial for political activities.³ The murder of constitutional expert and NLD legal advisor U Ko Ni in January 2017 is a stark reminder of the fragile climate faced by people who attempt to change the status quo.

The past 18 months also saw an escalation in armed conflict between ethnic armed organisations (EAOs) and the Myanmar Army, and invigorated calls for investigation into alleged grave abuses of human rights by the Myanmar Army. CBOs such as the Shan Human Rights Foundation and the Kachin Women's Association of Thailand document regular looting, sexual violence, extrajudicial killings, arbitrary arrest, torture, and forced labor by the Myanmar Army in conflict zones of Shan State and Kachin State, respectively. In February 2017, the Office of the United Nations High Commissioner for Human Rights (OHCHR) released a harrowing flash report, based on testimonies of Rohingya refugees in Bangladesh, detailing abuses, including of mass gang-rape, torture, and killings, committed by the Myanmar Army on Rohingya civilians in Rakhine State following the surprise October 2016 attacks on border police by Rohingya militants. The combination of these allegations, in the context of failed domestic efforts at investigation, formed the backbone of calls for an independent, international investigation into the Myanmar Army's human rights violations —some of which, according to UN experts, possibly amounted to crimes against humanity.⁴ A resolution incorporating a fact-finding mission to investigate abuses throughout the country, particularly in Rakhine State, was passed by the UN Human Rights Council in March 2017.

Escalation of armed conflict in northern Shan and Kachin States, and the fallout from the October attacks in Rakhine State, have also contributed to widespread internal displacement. As of March 2017, approximately 98,000 remain displaced in Kachin and Shan States, and 120,000 in Rakhine State.⁵ Many of those living in internally displaced persons (IDP) camps face threats to their livelihood as ongoing armed conflict and government controls continue to obstruct humanitarian access.

Intensified state-driven attempts at natural resource extraction in ethnic areas have exacerbated ethnic communities' concerns over land confiscation and the destruction of livelihoods and natural environments. Protests are ongoing over proposed dam and mining projects, which have been further complicated by increased militarization by the Myanmar Army, particularly in Karen State. Eruption of armed conflict between the Myanmar Army and EAOs due to the Hatgyi Dam project in September 2016 led to the displacement of 5,000 people in Karen State,⁶ which has been a longtime host to IDPs. Land issues made up nearly 50% of the complaints submitted to the MNHRC in 2015.⁷ The first biannual 21st Century Panglong peace conferences were held in August 2016 and May 2017, but led to no substantive outcomes while rifts between non-signatory EAOs to the nationwide ceasefire agreement (NCA) have been exacerbated. The

³ Assistance Association for Political Prisoners (AAPP), 16 June 2017, <http://aappb.org/2017/06/monthly-chronology-of-may-2017-and-current-political-prisoners-list/>

⁴ UN News, 6 February 2017, <https://www.un.org/apps/news/story.asp?NewsID=56117#.WQ8AfeWGPIU>.

⁵ UN OCHA, May 2017, <http://www.unocha.org/myanmar>

⁶ Office for the Coordination of Humanitarian Affairs (OCHA), 14 February 2017, http://reliefweb.int/sites/reliefweb.int/files/resources/ROAP_Snapshot_170214.pdf.

⁷ MNHRC 2015 Annual Report, <http://www.mnhrc.org.mm/en/publication/2015-annual-report/>.

stagnation of the peace process has made concerns over conflict-related human rights abuse even more pertinent, particularly as conflict has intensified.

Meanwhile, the MNHRC continues to refuse to investigate abuses in conflict areas, particularly those reportedly committed by the military, asserting that it is not part of its mandate to do so.⁸ Rather, it has primarily addressed low-hanging fruit—namely, cases that do not directly involve the Myanmar Government or Army, as well as high-profile cases that would further damage the Commission’s credibility if they were not addressed. For instance, after seething public outcry⁹ over the MNHRC encouraging the teenage victims of severe domestic abuse to accept a payout rather than pursue legal action, four Commissioners resigned in October 2016.¹⁰

Otherwise, the MNHRC has its focused efforts on what it has called a “longer-term strategy”¹¹ of raising awareness of human rights practices. To that effect, the MNHRC has provided human rights training to military officers, police forces, civil servants, and prison staff, and helped expand integration of human rights education into public school curricula. Its prioritisation of human rights promotion over protection was the subject of parliamentary criticism in July 2016.¹²

In November, following the 2015 ANNI mission into the country,¹³ the Sub-Committee on Accreditation (SCA) of the Global Alliance of National Human Rights Institutions (GANHRI)¹⁴ accorded the MNHRC a grading of B,¹⁵ denoting that the body is “not fully in compliance with the Paris Principles.”¹⁶ A year and a half later, the MNHRC has not gained any significant level of public confidence, nor has it succeeded in fulfilling its mandate in the broad manner needed to effectively progress human rights. The *Myanmar National Human Rights Commission Law* (hereinafter enabling law), cited as an obstacle by civil society, Members of Parliament, and outside critics alike, remains unchanged and thus a continued obstacle in the Commission’s efforts to improve. Without substantive legal and institutional reform, the MNHRC risks falling into greater irrelevance and ineffectuality.

⁸ Los Angeles Times, 1 July 2015, <http://www.latimes.com/world/asia/la-fg-ff-myanmar-elvis-20150701-story.html>.

⁹ Burma Partnership, 27 September 2016, <http://www.burmapartnership.org/2016/09/latest-human-rights-abuse-case-demonstrates-urgent-need-to-reform-the-myanmar-national-human-rights-commission/>.

¹⁰ Radio Free Asia, 6 October 2016, <http://www.rfa.org/english/news/myanmar/myanmar-national-human-rights-commissioners-10062016153158.html>.

¹¹ Myanmar Times, 29 September 2014, <http://www.mmtimes.com/index.php/national-news/11803-rights-body-shake-up-under-fire.html>.

¹² Myanmar Times, 29 July 2016, <http://www.mmtimes.com/index.php/national-news/21640-mps-and-human-rights-commission-spar.html>.

¹³ Forum Asia, 18 November 2015, <https://www.forum-asia.org/?p=19742>.

¹⁴ ICC renamed to Global Alliance of NHRIs (GANHRI) in March 2016. ICC-SCA will be used when referencing activities or documents before March 2016; GANHRI-SCA will be used for those after.

¹⁵ ICC-SCA Report – November 2015, <http://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20FINAL%20REPORT%20-%20NOVEMBER%202015-English.pdf>.

¹⁶ The Paris Principles refers to the Principles relating to the Status of National Institutions, adopted by the UN General Assembly resolution 48/134 of 20 December 1993.

2. The MNHRC and Its Mandates to Protect and Promote Human Rights

2.1 Independence and Pluralism

While MNHRC Chairperson U Win Mra says that the body “[does] comply with [the] principle of independence [contained in the Paris Principles]”,¹⁷ both its composition and appointment procedure fall short. Furthermore, the Paris Principles states that national human rights institutions (NHRIs) should ensure the “pluralist representation of the social forces...involved in the protection and promotion of human rights.”¹⁸ While the enabling law pays lip service to pluralism by stating that the body should “seek to ensure the equitable representation of men and women, and of national races...”,¹⁹ this is not reflected in practice.

The current body does not have any female representation,²⁰ not having replaced the two female commissioners who resigned following a controversial domestic worker case.²¹ While the MNHRC membership has Muslim, ethnic Karen and ethnic Rakhine representation, it is unclear whether these commissioners were chosen for their understanding of ethnic or religious issues given the opacity surrounding the selection process. The MNHRC has asserted that its staff is pluralistic and selected via a competitive process,²² however, this cannot be verified as the composition of the staff is not made public, and no staff recruitment advertisement could be located online.²³ A civil society member familiar with the MNHRC told the authors of this report that most of the female staffers were part of the Administrative and Finance Division rather than the more consequential Human Rights Protection and Promotion Divisions, and that the staffing process favors people from military and government backgrounds.²⁴

Moreover, all seven commissioners are former civil servants, two being former military employees, meaning that the body may find it difficult to extricate itself from the influence of the Myanmar government and Army. There’s no need to look very far to see the inextricability of the Myanmar government and the MNHRC. Most notably, Chairperson U Win Mra and Commissioner U Khin Maung Lay were appointed by the State Counsellor’s Office to serve on the Kofi Annan-led Advisory Commission on Rakhine State,²⁵ one of several government-mandated commissions set up in recent years

¹⁷ Irrawaddy, 27 October 2015, <https://www.irrawaddy.com/news/burma/burmas-human-rights-commission-courts-credibility-ahead-of-un-review.html>.

¹⁸ OHCHR, accessed 5 May 2017, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

¹⁹ Myanmar National Human Rights Commission Law, 2014, http://www.burmalibrary.org/docs23/2014-03-28-Myanmar_Human_Rights_Commission_Law-21-en.pdf.

²⁰ MNHRC, accessed 20 April 2017, <http://www.mnhrc.org.mm/en/about/commissioners/>.

²¹ In September 2016, a case came to light that the MNHRC, rather than pursuing criminal justice, brokered a financial settlement for two domestic workers who had been tortured while working for the family of a tailoring shop, causing outrage in the Myanmar media. Please see *case study 2* below.

²² Interview with MNHRC Chairperson, Yangon, May 2017; MNHRC 2015 Annual Report.

²³ Nothing was found in an online search using the Myanmar language. This is corroborated by interviews with two CSOs.

²⁴ Interview with CSO that focuses on human rights education, Yangon, May 2017.

²⁵ State Counsellor Office, accessed 20 April 2017, <http://www.statecounsellor.gov.mm/en/node/228>.

to make recommendations on the situation in Rakhine State. Commissioner U Nyunt Swe serves on the Maungdaw Investigation Commission,²⁶ which was established in the aftermath of the October 2016 attacks in Rakhine State. Given these frequent instances of double involvement, it's not unreasonable to conclude that credible or out-of-the-box leadership from the MNHRC is unlikely. Furthermore, these instances can be interpreted as violations of the enabling law, which states that “a member of the Commission...shall not hold any other office or engage in any activities or practices that conflict with or may be perceived to conflict with the functions of the Commission.”²⁷

Moreover, none of the current commissioners have had direct experience with civil society, all of them having engaged with the breadth of social issues related to human rights from the top-down perspective of corporations, government (including government organized non-governmental organization - GONGO), or intergovernmental bodies.²⁸ While this gap can be mitigated by meaningful engagement with civil society, interaction with CSOs and CBOs is neither regular nor substantive enough at this point to justify this gap. In a telling example, the MNHRC has produced a copy of the Universal Declaration of Human Rights (UDHR) booklet in the Karen language, yet a CBO working on ethnic Karen issues has already produced a translation that was clearer and more accessible for ethnic Karen villagers – something the MNHRC had been informed about. While such an initiative on the part of the MNHRC is positive, in the words of the CBO, “if the [MNHRC] would have collaborated with local ethnic human rights organisations they might not have needed to spend time and resources on producing something that already exists.”²⁹ Direct experience with civil society is often crucial to comprehensively understanding or tackling any human rights issue—in this case, greater familiarity and affinity with CSOs and CBOs working on ethnic issues may have prevented this unnecessary expenditure of resources. Failing to include or involve civil society within its core leadership means that the MNHRC risks making strategic errors down the road.

In response to criticisms of the Commission's composition, current Commissioner U Yu Lwin Aung says that “attitude is more important than the background of the commissioners.”³⁰ Yet the institutional mindset of the Commission is inconsistent in reflecting a progressive attitude toward human rights. The remarks of the Chairperson are a case in point: responding to criticism that the MNHRC has not spoken out against alleged abuses by the military in conflict areas, U Win Mra said “We do whatever we can, why would people expect us to do more than what we have the authority to do?”³¹ The Chairperson has also stated that he does not read critical reports from outside groups

²⁶ President's Office, accessed 8 May 2017, <http://www.president-office.gov.mm/en/?q=briefing-room/news/2017/04/01/id-7454>.

²⁷ Myanmar National Human Rights Commission Law, 2014.

²⁸ MNHRC, accessed 20 April 2017, <http://www.mnhrc.org.mm/en/about/commissioners/>.

²⁹ Email interview with Karen Human Rights Group, May 2017.

³⁰ Myanmar Now, 27 April 2017, <http://www.myanmar-now.org/news/i/?id=53be3354-a14b-4cff-a137-967bd9712730>.

³¹ Los Angeles Times, July 1 2015, <http://www.latimes.com/world/asia/la-fg-ff-myanmar-elvis-20150701-story.html>.

due to their lack of objectivity,³² putting to question how conducive the Commission is to diverse feedback. Several civil society members questioned the strength of the Commission's commitment to human rights, noting that while some commissioners may have the willingness to go the extra step to challenge the political constraints in the country, others did not.³³ But the broader point that must be recognized by the MNHRC and NLD-led government is that no matter how much the MNHRC changes its attitude, or how much tangible progress is made, the backgrounds of the commissioners, if unchanged, will remain a strong source of public distrust. The commissioners' backgrounds are regularly noted by civil society members as the primary reason as to why they do not, and will not, trust the MNHRC.³⁴

The problematic composition of the MNHRC is unsurprising given that its Selection Board, as per the enabling law, is no more pluralistic. While the enabling law acknowledges the role of civil society by stipulating that the Board must be made up of two representatives from registered non-governmental organisations, this stipulation is inadequate as large portions of the "social forces" involved in the promotion of human rights in Myanmar are not part of registered NGOs. Many CSOs and CBOs choose not to register, not least because doing so would put them under the purview of the military-controlled Ministry of Home Affairs.

The actual details surrounding the make-up and the procedures of the Selection Board remain murky. To this day, CBOs and CSOs say that they have not been made aware of how the Selection Board is currently comprised. Just like the opacity surrounding the 2014 reshuffle of the Commission,³⁵ it is unclear why the President's Office has yet to replace the four members who resigned in light of the controversial domestic workers' case. While the current number of members falls within the range mandated by the enabling law, its lack of pluralistic representation and now diminished capacity begs this question).

The MNHRC has, in light of criticism for its lack of financial independence,³⁶ reformed its financing procedures. The body's 2016-2017 budget, rather than being submitted to the President's Office for approval as in previous years, was submitted and claimed directly from the Parliament through the Ministry of Finance.³⁷ This is a positive step

³² Los Angeles Times, July 1 2015, <http://www.latimes.com/world/asia/la-fg-ff-myanmar-elvis-20150701-story.html>.

³³ Interviews with CBO in Shan State, and domestic journalist in Yangon, May 2017.

³⁴ Interviews with 8 CSOs and CBOs in Yangon and Shan State, May 2017; also evidenced by years of observation and engagement with civil society by the authors of this report.

³⁵ Myanmar Times, 29 September 2014, <http://www.mmtimes.com/index.php/national-news/11803-rights-body-shake-up-under-fire.html>.

³⁶ ICC-SCA, November 2015, <http://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20FINAL%20REPORT%20-%20NOVEMBER%202015-English.pdf>.

³⁷ MNHRC 2015 Annual Report, <http://www.mnhrc.org.mm/en/publication/2015-annual-report/>; MNHRC financial procedures (Myanmar Language), 2016, <http://www.mnhrc.org.mm/publication/%E1%80%84%E1%80%BD%E1%80%B1%E1%80%80%E1%80%BC%E1%80%B1%E1%80%B8%E1%80%86%E1%80%AD%E1%80%AF%E1%80%84%E1%80%BA%E1%80%9B%E1%80%AC->

towards financial independence; however, the enabling law must be modified to reflect this to ensure that this process is continued for successive administrations.

2.2 Effectiveness

The MNHRC has a broad legal mandate to protect and promote human rights. While civil society and Myanmar MPs have condemned the MNHRC as ineffective due to its reluctance to address key human rights issues, such as serious human rights violations by the Myanmar Army in areas of armed conflict, the Commission has argued that it has been effective given its limited legal and logistical capacity to address violations. Indeed, assessing the MNHRC's effectiveness will require examining how the body has fared in practice based on its legal mandate, enshrined in the enabling law, and in the context of political restrictions in Myanmar.

2.2.1 Human Rights Protection

Per the enabling law, the MNHRC can investigate human rights violations and recommend further action from competent authorities. It has established a public complaints mechanism to help facilitate this process. The first case study below will elucidate how the MNHRC has little excuse for its current level of inaction against abuses by the Myanmar Army but also how the NLD-led Government has a role in according greater authority to the Commission. The second case study will reveal the opportunities available for the MNHRC to become a more authoritative voice on civilian-to-civilian abuses, and how various domestic and international stakeholders play a crucial role in holding the MNHRC accountable to its mandate.

Case Study 1: Conflict-related human rights violations

Per GANHRI-SCA recommendations, the MNHRC should conduct itself with a “heightened level of vigilance and independence”³⁸ in times of internal unrest or conflict. However, despite frequent and escalating reports of violations such as sexual violence and extrajudicial killing committed by the Myanmar Army in conflict areas,³⁹ the MNHRC has continuously failed to adequately speak out. In the rare occasions that it has, the MNHRC does not assign responsibility nor suggest potential perpetrators, choosing to rely on generic recommendations such as “both sides should take extra care not to inflict undue damage to the lives and belongings of the populace.”⁴⁰ In the past 18 months, the MNHRC has not made a single statement on allegations of conflict-related violations on

<http://www.mnhrc.org.mm/en/2015/02/press-release-by-the-myanmar-national-human-rights-commission-on-the-armed-conflict-in-laukkaing-area/>

³⁸ ICC-SCA, November 2015, <http://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20FINAL%20REPORT%20-%20NOVEMBER%202015-English.pdf>.

³⁹ This refers to both areas of ongoing armed conflict and civilian areas without EAOs where the Myanmar Army has operated, such as in the case of northern Rakhine State in October 2016 following the border attacks by Rohingya militants.

⁴⁰ MNHRC, 27 February 2015, <http://www.mnhrc.org.mm/en/2015/02/press-release-by-the-myanmar-national-human-rights-commission-on-the-armed-conflict-in-laukkaing-area/>.

its website.⁴¹ Even in light of OHCHR’s damning flash report -which highlighted cases of mass gang-rape and children being killed in front of their mothers by security forces in Rakhine State⁴²- the body failed to take a stance. Instead, the MNHRC has prioritised promotion over protection. According to Chairperson U Win Mra, “education is the best way towards peace” as it is “more sustainable than any type of ceasefire.”⁴³ The MNHRC has also attributed its failure to protect vulnerable populations in armed conflict areas to the lack of complaints brought to its attention. In response to skepticism about its ability to address cases of sexual violence in conflict areas, an MNHRC representative said, “If there are women being abused in the conflict areas, we want them to make complaints to the MNHRC, but they haven’t done it so far.”⁴⁴

Yet there is nothing in the enabling law that prohibits investigating conflict-related violations, or any form of human rights violations for that matter. Rather, the actual wording is quite broad. Per the enabling law, duties and powers of the Commission include “verifying and conducting inquiries in respect of complaints and allegations of human rights violations,” and “visiting the scene of human rights violations and conducting inquiries, on receipt of a complaint or allegation or information.”⁴⁵ Second, while it is unclear how many conflict-related complaints have been made to the MNHRC, CSOs and CBOs have long been sending evidence of military-perpetrated sexual violence to the government, and such information has been widely and regularly disseminated in the public domain. Moreover, given the lack of public confidence in the body, many find it futile to send in complaints and choose not to do so. (Indeed, the number of complaints are on the decline.⁴⁶) Given the egregious nature of the allegations, the MNHRC should have, regardless of the presence of relevant complaints, and per its mandate to act “on receipt...of information,” visited and reported on the situation in at least Rakhine State, Kachin and northern Shan States.

In making the argument that it is focusing on human rights education rather than investigating complaints from conflict areas, while also mentioning the lack of complaints it has actually received, the MNHRC reveals not only its lack of sensitivity to human rights, but also that it has chosen to interpret its mandate, as outlined in the enabling law, in a limited manner. Given the pressing human rights problems in the country, however, particularly in armed conflict areas, more must be done in the short-term to address such grave situations immediately and give a clear message that perpetrators of such violations will be held accountable. Tackling impunity in the country, and building public confidence in the body, requires consistency in stance, and the simultaneous implementation of both short term and long term solutions.

⁴¹ MNHRC (Myanmar language), accessed May 12, 2017, <http://www.mnhrc.org.mm/my-news/>.

⁴² OHCHR, 3 February 2017, <http://www.ohchr.org/Documents/Countries/MM/FlashReport3Feb2017.pdf>.

⁴³ Interview with MNHRC Chairperson, Yangon, May 2017.

⁴⁴ Irrawaddy, 8 March 2016, <https://www.irrawaddy.com/news/burma/can-burmas-human-rights-commission-fight-sexual-violence-in-conflict-areas.html>.

⁴⁵ MNHRC Law, 2014.

⁴⁶ Myanmar Now, 27 April 2017, <http://www.myanmar-now.org/news/i/?id=53be3354-a14b-4cff-a137-967bd9712730>; also evidenced by trend since 2011, see MNHRC Three Year Report 2011-2014, <http://www.mnhrc.org.mm/en/publication/three-year-report-2011-2014/>.

Naturally, the MNHRC’s various rationale for inaction could be a mere euphemism for the fact that the Commission remains bound to the military line. While it hasn’t made outright refusals to investigate conflict-related violations, its limited authority can be seen with how it addresses complaints. In May 2016, the MNHRC dealt with a complaint regarding a Kachin villager killed by the Myanmar Army in Kamaing, Hpakant Township by passing the case onto the Ministry of Defense,⁴⁷ one of the three military-controlled ministries. Even with the high-profile alleged rape and murder of two Kachin teachers, the MNHRC was limited to sending a letter to the Ministry of Home Affairs recommending that the suspects be tried in civilian court.⁴⁸ The MNHRC has expressed willingness to address complaints of sexual violence in conflict areas but when probed as to what that meant in March 2016, responded, “if some cases are related to the military, we would ask the military for an explanation.”⁴⁹ Indeed, the MNHRC’s lack of authority is well-recognized by civil society.⁵⁰ The burden here is on the Myanmar Executive and Parliament to provide the MNHRC with more autonomy, power, and independence—a point that was emphasized repeatedly by interviewees for this report. This is especially salient now that the number of commissioners is down to seven since four resigned after the Ava tailoring case, while three of the commissioners are serving on either the Maungdaw Commission or the Kofi Annan Commission. It is the responsibility of the President’s Office to convene the Selection Committee to appoint further commissioners.

Still, the military’s Orwellian presence is not adequate rationale for the MNHRC’s inaction on serious human rights violations. It remains to be seen how the MNHRC has attempted to maximize its mandate. For instance, it can apply indirect pressure on the military by choosing to reach out to the affected communities, and to speak out more regularly and compellingly on violations in conflict areas, without naming perpetrators. Rather than creating arbitrary boundaries for its mandate, it can pressure parliamentarians to push for reform of the enabling law or use the media to carve more political space for its work. (The GANHRI-SCA notes that, “the release of public reports [in particular] serve to combat impunity for human rights violations.”⁵¹) Furthermore, the MNHRC can be more transparent, such as by publicising its responses to complaints online in a timely manner to allow stakeholders to hold both the Commission and respective government ministries accountable. Opportunities to change the status quo are limited by the creativity and commitment of the MNHRC.

⁴⁷ MNHRC (Burmese version), August 2016, <http://www.mnhrc.org.mm/2016/08/%E1%80%86%E1%80%B1%E1%80%AC%E1%80%84%E1%80%BA%E1%80%9B%E1%80%BD%E1%80%80%E1%80%BA%E1%80%81%E1%80%BB%E1%80%80%E1%80%BA%E1%80%A1%E1%80%99%E1%80%BE%E1%80%90%E1%80%BA%E1%80%85%E1%80%89%E1%80%BA-%E1%81%87/>.

⁴⁸ Myanmar Times, 27 July 2016, <http://www.mmtimes.com/index.php/national-news/21585-human-rights-commission-urges-action-in-investigation-of-kachin-teachers-murder.html>.

⁴⁹ Irrawaddy, 8 March 2016 <https://www.irrawaddy.com/news/burma/can-burmas-human-rights-commission-fight-sexual-violence-in-conflict-areas.html>.

⁵⁰ Interview with, CSOs, Yangon, May 2017.

⁵¹ ICC-SCA, November 2015.

Case Study 2: Teenage Domestic Workers

The high-profile case of the two female domestic workers was by all measures, in the words of a domestic journalist that covered the case, “easy.”⁵² With nothing about it directly implicating the Myanmar Government or Army, this was an ordinary civilian case that garnered, with the exception of the MNHRC itself, a consensus of outrage. Given the political restrictions faced by the MNHRC in dealing with cases involving the state, ordinary civilian cases represent the greatest area of opportunity for the MNHRC to enact change, and a deeper analysis into the response to the case can help highlight gaps for attention and improvement.

In a move that drew domestic and international ire in September 2016, the MNHRC pressured the families of two female victims of domestic abuse⁵³ to accept a monetary settlement of 5 million kyat (\$3,700 USD) rather than pursue legal action. The victims, Ma San Kay Khaing, 17, and Ma Tha Zin, 16, were tortured for five years during their time as domestic helpers at the Ava Tailoring Shop in Yangon’s Kyauktada Township. Testimonies from the girls reveal harrowing experiences of being stabbed with scissors, severely beaten, and being deprived of meals and adequate bedding. For years, the abusers also lied about the girls’ whereabouts to their families.⁵⁴

The MNHRC became involved when a *Myanmar Now* journalist, Ko Swe Win, contacted them after the police in Kyauktada Township failed to take action. In encouraging a payout for a case that involved egregious human rights abuses, the MNHRC revealed its lack of sensitivity to human rights issues, giving credence to civil society criticism about the lack of competence of the commissioners. According to an interview with a civil society member familiar with the MNHRC, some of the commissioners had voted against allowing the payout but was overpowered by two others, revealing again the importance of having a body of commissioners that is more pluralistic and more sensitive to human rights issues.⁵⁵ Civil society responded with anger, including protests in front of the MNHRC office, along with an online petition, “Justice for the Domestic Helpers,” calling for legal action against the shop-owners and an investigation into the MNHRC.⁵⁶ An open letter to President U Htin Kyaw from 142 CSOs was also sent, calling for the reform of the MNHRC according to the Paris Principles.⁵⁷

This case also highlights how limited knowledge among the general public about the MNHRC allowed it to shirk its duties—the families of the two girls came from rural

⁵² Interview with domestic journalist, Yangon, May 2017.

⁵³ There was a total of three girls who suffered domestic abuse at Ava Tailoring, however, one, Ma Tin Tin Khine, did not receive the payout.

⁵⁴ Irrawaddy, 19 September 2016, <https://www.irrawaddy.com/news/burma/rangoon-family-who-enslaved-girls-for-years-settle-case-for-4000.html>.

⁵⁵ Interview with civil society member familiar with MNHRC, Yangon, May 2017.

⁵⁶ The Myanmar Times, 22 September, 2016. <http://www.mmtimes.com/index.php/national-news/22670-mnhrc-defends-itself-against-public-outrage-in-child-torture-case.html><http://www.mmtimes.com/index.php/national-news/22670-mnhrc-defends-itself-against-public-outrage-in-child-torture-case.html>

⁵⁷ Open letter to President U Htin Kyaw from 142 CSOs. Available at <http://www.burmapartnership.org/2016/09/26837/>

areas and were illiterate, and without adequate counsel to fully understand their situation.⁵⁸ Were the case not brought to the national limelight, garnering attention from INGOs, MPs, domestic media, the President’s Office, and domestic civil society, and eventually leading to the resignation of four commissioners, the plight of overlooked cases of civilian-to-civilian abuse, especially involving those who do not have sufficient knowledge of the legal system, might have never been highlighted.

The way that this case was brought to the limelight is also concerning; the case was afforded serious attention only because a journalist with the shrewdness to mobilize the media got involved. Cases like this are ongoing throughout the country; one can only imagine the number of overlooked abuses.

While it is difficult to ascertain how the MNHRC has reformed beyond allowing the four commissioners to resign without penalty, the fear of further backlash seems to have led the Commission to be more proactive and prompt in their responses to human rights issues. One CSO noted that “since the commissioners resigned in 2016, [our] ability to communicate with the MNHRC has improved.”⁵⁹ In one example of greater initiative, in March 2017, the MNHRC investigated the site of a reported domestic violence against a housemaid by her employers in Mandalay’s Amarapura Township, based on information gathered on social media.⁶⁰

While ultimately the demands by civil society for a personnel overhaul of the MNHRC and criminal penalties for the commissioners involved fell short,⁶¹ revealing the reluctance for the MNHRC to change and its lack of accountability to the people it has vowed to protect, the resignation of the four commissioners highlights the crucial role that both international and domestic civil society can play in holding the MNHRC accountable, even when democratic space is severely curtailed.

It must be noted, however, given the process for addressing complaints, which involves the MNHRC investigating a case and then making recommendations to relevant government ministries, it is not always guaranteed that substantive action will be taken on complaints, even if an investigation has been done by the MNHRC. In 2015, of the 288 complaints forwarded to relevant ministries by the MNHRC, only 180, or 62.5%, received responses within the stipulated 30 days by the enabling law.⁶² The lack of response by government ministries is symptomatic of a systemic problem, and partly a reflection of the lack of recognition of the utility or relevance of the MNHRC. Thus,

⁵⁸ Interview with civil society member who interacted with the girls and families, Yangon, May 2017.

⁵⁹ Email interview with CSO working on political prisoners, May 2017.

⁶⁰ MNHRC (Myanmar language), <http://www.mnhrc.org.mm/%E1%80%99%E1%80%BC%E1%80%94%E1%80%BA%E1%80%99%E1%80%AC%E1%80%94%E1%80%AD%E1%80%AF%E1%80%84%E1%80%BA%E1%80%84%E1%80%B6%E1%80%A1%E1%80%99%E1%80%BB%E1%80%AD%E1%80%AF%E1%80%B8%E1%80%9E%E1%80%AC%E1%80%B8/>

⁶¹ See civil society petition, <http://www.burmapartnership.org/2016/09/latest-human-rights-abuse-case-demonstrates-urgent-need-to-reform-the-myanmar-national-human-rights-commission/>; and open letter to the President signed by 142 CSOs, <http://www.burmapartnership.org/2016/09/26837/>.

⁶² MNHRC Annual Report 2015.

there is an urgent need for the MNHRC to more effectively increase its efforts in pressuring government bodies, such as by using the domestic media or by improving its outreach so that the ministries are more amenable to addressing the complaints. More broadly, this is an urgent reminder for the MNHRC to maintain a more consistent, sensitive stance on its mandate and its broader purpose.

Case Study 3: Inspection of Prisons, Labor Camps, Detention Centers and Places of Confinement

Per the enabling law, the Commission is responsible for conducting inspections to prisons, detention centres and other places of confinement. The Commission has accordingly continued its prison visits, visiting a total of seven from January to August 2016, and has made recommendations on prison-related problems.⁶³ According to the MNHRC, it has recommended to the Ministry of Home Affairs to take necessary measures to redress these problems, and the Ministry has responded that it has taken the recommendations into “serious consideration.”⁶⁴ In a tangible example, the MNHRC says that the Ministry of Home Affairs had enlarged its budget, to deal with the problem of overcrowding, leading to the addition of a storey for a prison in Kachin State.⁶⁵ This is a positive outcome; however, the long-standing consistency of recommendations made by the MNHRC over the years at each prison site suggests that there may be significant gaps in its follow-up or understanding of issues. One such gap has been suggested by a CSO that works with political prisoners - namely, that the MNHRC needs to shift its ways of thinking. For example, instead of building more prisons or expanding prison buildings to deal with overcrowding, the MNHRC can recommend that the relevant ministries incorporate mechanisms such as probation, parole or reduction of sentences for minor offences.⁶⁶ The CSO also noted that while there is generally transparent follow-up of these visits on the MNHRC website, the recommendations made could be more detailed.⁶⁷

The gaps in the MNHRC’s understanding could be mitigated with greater engagement with CSOs that have expertise in the area. This has become evident with the Myingyan Prison case in October 2016, involving the protest of prisoners accusing the prison wardens of human rights violations,⁶⁸ for instance, when the MNHRC greatly benefitted from collaboration with a CSO working on the issue of political prisoners. After this CSO contacted the MNHRC about this case, the MNHRC elicited suggestions from them on the most ethical way to interview the prison staff and the prisoners involved.⁶⁹

Another frequently cited problem is that while the reports of these prison visits have been publicised online, the visits were conducted after prior notification has been given to the Ministry of Home Affairs. As noted by the GANHRI-SCA, prior notification would

⁶³ APF, 8 November 2016, <http://www.asiapacificforum.net/resources/work-myanmar-nhrc-apf21/>

⁶⁴ APF, 8 November 2016, <http://www.asiapacificforum.net/resources/work-myanmar-nhrc-apf21/>

⁶⁵ Interview with MNHRC Commissioner, Yangon, May 2017.

⁶⁶ Email interview with CSO working on political prisoners, May 2017.

⁶⁷ Email interview with CSO working on political prisoners, May 2017.

⁶⁸ Irrawaddy, 12 October 2016, <https://www.irrawaddy.com/news/myingyan-prison-warden-investigated-protest.html>.

⁶⁹ Email interview with CSO working on political prisoners, May 2017.

compromise a fair assessment of the conditions. This is an issue that must be dealt with via reform of the enabling law, which requires such prior notification.⁷⁰

2.2.2 Human Rights Promotion

Education and Training

Since the last ANNI report, the Commission has, per its mandate, continued with its human rights awareness-raising activities, cooperating with international organisations like the United Nations and the Raoul Wallenberg Institute (RWI) to host trainings for its own staff, civil servants, police force, and military officers from the regional to the township levels.⁷¹ In December 2016, the MNHRC hosted several workshops across the country to train prison officials on rights-based treatments of prisoners.⁷² The body's efforts in addressing education have led to the integration of human rights education in primary schools as early as second grade.⁷³

However, despite the MNHRC's efforts in human rights promotion, interviews with CSOs from rural areas reveal that there is very little awareness about the MNHRC's capacity.⁷⁴ Per its mandate, the burden is on the MNHRC to educate the public about its role in human rights protection. The overall ability of the Commission to do so has also been put to question by civil society. CSOs that have worked with rural communities say that the MNHRC lacks understanding of the situation on the ground in rural areas, leading to tangible gaps in its promotion strategy. For instance, the MNHRC is conducting human rights education activities mostly for high ranking officials in urban areas when most of the human rights violations are committed by lower ranking soldiers or officials in rural areas. The same can be said with its outreach, which is primarily in urban areas. As this CSO based in Taunggyi, the capital of Shan State pointed out, "Many CSOs based in Taunggyi or big cities don't know about MNHRC, so it is more likely that many CSOs in ethnic areas don't know about MNHRC."⁷⁵ By focusing on the urban areas, the MNHRC will miss out on protecting the most affected and vulnerable populations.

Human Rights Policy and Law

Per the enabling law, the MNHRC is to make recommendations to the government on treaties and conventions that it should become a party to, and to hold the government accountable to ones that it is currently a party to.⁷⁶ In June 2016, the MNHRC submitted a report on the implementation of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), in which it recommends that the government

⁷⁰ MNHRC Law, 2014.

⁷¹ MNHRC 2015 Annual Report; material on the MNHRC's 2016 promotion activities provided to the authors of this report by the MNHRC.

⁷² Myanmar Now, 8 November 2016, <http://www.mmmtimes.com/index.php/national-news/yangon/24169-prison-officials-to-be-offered-human-rights-training.html>.

⁷³ Myanmar Times, 27 March 2017 <http://www.mmmtimes.com/index.php/national-news/25465-primary-school-curriculum-to-include-human-rights-subject.html>.

⁷⁴ Interviews with three CBOs in Shan State, May 2017.

⁷⁵ Interview with CSO based in Shan State, May 2017.

⁷⁶ MNHRC Law, 2014.

ratify the ASEAN Convention on Trafficking, among others.⁷⁷ The MNHRC has also recommended the Myanmar government to accede to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which the government signed in 2015. However, given the relatively few international human rights conventions that the government has acceded to, the MNHRC can do more in speaking out to invigorate these processes. The MNHRC should prioritise the nine core international human rights treaties in its approach,⁷⁸ such as by bringing back to public and parliamentary attention the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishments (CAT), which has fallen off the map in recent years after efforts during the Thein Sein administration.⁷⁹

In November 2015, per the enabling law, the MNHRC submitted a statement as part of the government's submission to the UPR. The submission, however, is quite simplistic and makes broad conclusions such as "complaints were given careful consideration"⁸⁰ without providing much detail. What is more concerning is the self-assessment that the MNHRC has provided: "[the MNHRC] is now carrying out its mandate for the promotion and protection of human rights effectively."⁸¹ Such statements reveal how out of touch the MNHRC is with the realities on the ground in Myanmar.

2.2.3 Engagement with Stakeholders

Civil Society

As outlined in the enabling law, the MNHRC should "engage, coordinate, and cooperate"⁸² with civil society working in the field of human rights. It has held consultations with CSOs, and gave speeches at CSO-led workshops and forums.⁸³ It has also utilized, in cooperation with a CSO that works on human rights education, the training materials of that CSO for human rights talks at the grassroots level.⁸⁴

While CSOs say that they are willing to work with the MNHRC strategically,⁸⁵ there is a broad consensus amongst civil society that the MNHRC is not to be trusted, with the primary reason that the Commission lacks independence and pluralism. For CSOs, many of which are either composed of or represent people who have suffered at the hands of

⁷⁷ OHCHR, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_IFN_MMR_24177_E.pdf.

⁷⁸ OHCHR, accessed May 12, 2017, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>.

⁷⁹ Burma Partnership, 15 September 2016, <http://www.burmapartnership.org/2016/09/assistance-association-for-political-prisoners-burmas-statement/>.

⁸⁰ Information provided by the Myanmar National Human Rights Commission (MNHRC) - UPR Submission - Republic of the Union of Myanmar - November 2015, https://www.upr-info.org/sites/default/files/document/myanmar/session_23_-_november_2015/mnhrc_upr23_mmr_e_main.pdf.

⁸¹ MNHRC UPR Submission, November 2015.

⁸² MNHRC Law, 2014.

⁸³ MNHRC 2015 Annual Report.

⁸⁴ Interview with CSO that works on human rights education, Yangon, May 2017.

⁸⁵ Interview with CSOs, Yangon and via email, May 2017.

previous military regimes, a human rights commission riddled with former representatives of repressive military governments and no representation from civil society is egregious and simply unacceptable. That the MNHRC and the NLD-led government hasn't prioritised personnel reform represents a fundamental misunderstanding of the very populations that they seek to assist and protect. (This misunderstanding is evident in the Commission's 2014-2016 Strategic Plan, which states: "[The MNHRC] has earned credibility, confidence, and the trust of people through its work over the past two years..."⁸⁶). If the MNHRC wishes to garner any semblance of public confidence, it must first undergo a massive personnel overhaul.

There is also consensus amongst civil society that the MNHRC is largely a toothless organisation. Several civil society members interviewed said that while the MNHRC can improve on its consultation with civil society, its ineffectiveness is largely due to its lack of political authority. This lack of authority has correspondingly contributed to frustrations from CSOs and CBOs. Several questioned whether the MNHRC had, or will ever have, the capacity to address its promises. As described in an interview with one CBO, the MNHRC had apparently pledged to help the CBO organize a meeting with representatives of all human rights organisations in Myanmar, but has not yet followed up.⁸⁷

While the MNHRC has consulted with civil society, such as on the draft prison law, it seems that the MNHRC rarely, if ever, takes the more proactive approach to reach out. One example of how it did proactively reach out after reading reports of human rights violations in Karen State, only led to disappointment. After contacting a CBO that had documented human rights violations in the area to help arrange a meeting with affected villagers, the MNHRC postponed the meetings after the villagers had already arrived at the previously agreed upon place. The new time given by the MNHRC was not convenient for the villagers who had to travel a long way to get there. Ultimately the meeting did not happen, trust in the MNHRC on the part of the villagers was eroded, and the CBO that had helped to organise the meeting lost credibility with the villagers.⁸⁸ The MNHRC has also been inconsistent in responding to requests from CSOs and CBOs to engage. While it is understandable that the MNHRC cannot respond favorably to every request, the MNHRC should work to improve its communication with civil society to mitigate misunderstanding.

Generally, CSOs and CBOs that have managed to successfully reach out to the MNHRC in the past 18 months do not report any problems in regards with communication; the response rate from the MNHRC is reportedly immediate.⁸⁹ However, it must be noted that these CSOs and CBOs are generally well-equipped with the knowledge and resources for communication, and have headquarters in urban settings. Awareness of and

⁸⁶ MNHRC, November 2015, <http://mail.mnhrc.org.mm/en/publication/strategic-plan-2014-2015/>

⁸⁷ Interview with Karen Human Rights Group, May 2017.

⁸⁸ Interview with Karen Human Rights Group, May 2017.

⁸⁹ Email interviews with two CSOs, May 2017; corroborated with experience of authors for this report.

engage with the MNHRC is still low throughout the country, especially in the rural areas.⁹⁰

The lack of engagement in rural areas can be seen in the relatively fewer number of complaints that come from those areas. While the areas that have the largest number of complaints come from the country's three most populated states, Yangon, Ayeyarwaddy, and Mandalay,⁹¹ the fourth largest number of complaints come from Naypyidaw, the third least populated, whereas Shan State, home to nearly the same population of Mandalay, as well as ongoing armed conflict, is tied for eighth for the number of complaints.⁹² According to the RWI, a Swedish organization that has provided capacity building to the MNHRC since 2013, outreach to CSOs has "tapered off in recent years."⁹³ Naturally, the MNHRC should continue with its prompt response rate to build greater trust, but also should accordingly step up its effort to reach out to less prominent, non-urban CSOs, including non-registered ones, as they are usually dealing with the populations that are the most vulnerable to human rights abuse.

International organisations

In the past 18 months, the MNHRC has conducted workshops with numerous international organisations, including OHCHR, UN Women, Democracy Reporting International (DRI), and the RWI. The RWI described a largely positive experience working with the MNHRC, noting that both sides have initiated projects, and that the MNHRC has consistently integrated feedback from the RWI into their working plans.⁹⁴ The MNHRC should seek to continue this positive collaboration.

Government

According to the MNHRC, the "authorities never interfere in our process," and that [its] process is better under the present administration.⁹⁵ However, it remains unclear how willing the NLD-led government is to maximize the mandate of the MNHRC and afford it adequate authority to protect the Myanmar people. Chairperson U Win Mra noted that the MNHRC has offered training to the new administration, however has not yet received a response.⁹⁶ In one instance in May 2016, the government-appointed Legal Affairs and Special Issues Commission that is mandated to review legislation reached out to civil society for recommendations on amendments to the enabling law. Yet after receiving a document from civil society that analyzes the law and makes recommendations, there was no response by the committee.

⁹⁰ Interviews with three CBOs in Shan State, May 2017.

⁹¹ Mimou, http://www.themimou.info/sites/themimou.info/files/documents/Population_Map_2014_Census_Population_St-Rg_MIMU841v05_26Sep2014_A4.pdf.

⁹² MNHRC 2015 Annual Report.

⁹³ Email interview with Raoul Wallenberg Institute, May 2017.

⁹⁴ Email interview with Raoul Wallenberg Institute, May 2017.

⁹⁵ Myanmar Now, 27 April 2017, <http://www.myanmar-now.org/news/i/?id=53be3354-a14b-4cff-a137-967bd9712730>.

⁹⁶ Interview with MNHRC Chairperson, Yangon, May 2017.

The RWI, which has provided capacity building and funding to the MNHRC since 2013, has stated that, the MNHRC’s “human rights outreach to ministries and other state related bodies have gone well and have opened doors for cooperation,” and that “ministries are now aware of their mandate and complaint letters are replied to within the stipulated timeframe.”⁹⁷ While this may be true, there still seems to be a lag in timely, effective response from certain ministries to ensure justice for victims of severe abuse, suggesting that the MNHRC should continue their outreach, as there is frequent turnover within the ministries.

Media

As seen with the Ava Tailoring case, the media has a crucial role in holding the MNHRC accountable and in highlighting cases of human rights abuse to the general public. The relationship between the media and the MNHRC seems to be weak, however, suggesting that the MNHRC needs to do more in improving its outreach. For instance, the MNHRC can provide information in a more transparent and timely manner, and take a more proactive action in using the media to promulgate its mandates.

Parliament

The parliamentary debate in July 2016 over the 2015 Annual Report revealed that parliamentary confidence in the MNHRC was low,⁹⁸ suggesting that the MNHRC must improve its outreach to the Parliament. Part of the duties of the Commission is to respond to any matter referred to the Commission by either the Lower or Upper House of Parliament.⁹⁹ Thus, it is also incumbent upon the Parliament to use the MNHRC in a more purposive, consistent manner, such as by bringing matters of importance to the MNHRC’s attention.

3. Assessment/Conclusion and Recommendations

The MNHRC has consistently asserted that time will show just how effective it can be, but six years into its existence, the body largely still lives up to original criticisms—that is, it continues to be deeply reluctant to do anything that may incur the dissatisfaction of the government or military. The ICC-SCA report of November 2015 outlined seven key aspects that must be changed in order for the MNHRC to be Paris Principles compliant. While it has made some moves towards rectifying one of these, the allocation of its budget from Parliament rather than the President’s Office, it remains to be seen how much progress will be made on the other six.

The most egregious weakness of the MNHRC is its failure to serve as a spokesperson for the country’s most vulnerable, independent from the government and military line. On the ground, this has resulted in the MNHRC offering a distinct lack of protection of victims of human rights violations in conflict affected areas. Indeed, as recognized by stakeholders across the board, the failures of the MNHRC are reflective of the systemic

⁹⁷ Email interview with Raoul Wallenberg Institute, May 2017.

⁹⁸ Myanmar Times, 29 July 2016, <http://www.mmtimes.com/index.php/national-news/21640-mps-and-human-rights-commission-spar.html>.

⁹⁹ MNHRC Law, 2014.

obstacles facing Myanmar's transition into civilian rule. Thus, especially as the powers of the MNHRC are so reliant on the Myanmar executive, the NLD-led government should do more as well, such as with pushing for reform of the enabling law, and adding pressure to reform the composition of the bodies, and on government ministries to respond more promptly to recommendations by the MNHRC. As it stands, the NLD-led government seems reluctant to use the MNHRC, as seen with its creation of several separate commissions to address violations in Rakhine State, and with the apathetic statements made by its representatives: When asked about how the new government would deal with the MNHRC in March 2016, NLD spokesperson U Win Htein responded: "I don't know. I don't care about them."¹⁰⁰ Without more proactive action from the Myanmar government, the MNHRC will remain stuck in its own optimism, while public trust and confidence in the body continues to deteriorate.

But the MNHRC's failure to attend to serious violations of human rights cannot be attributed only to the enabling law or the political environment. Even within these limitations, the MNHRC has room to do more than what it has currently done. Despite shortcomings, an analysis of the enabling law reveals that the institution has a broad mandate to promote and protect human rights and contribute positively to democratic reforms. For one, the MNHRC can do more to maximize the vagueness of the enabling law (such as with the scope of the nature of the violations that it is supposedly allowed to investigate) and push outside the arbitrary boundaries that it has created and functioned under. Thus, rather than focusing on human rights education and promotion as regards conflict affected areas, it should take clear and decisive action to investigate perpetrators of human rights violations, and this includes pursuing accountability of those from the most powerful institution in the country – the military. It could also be more proactive with its approach, such as by taking on overlooked cases and by institutionalizing its relationship with civil society. Taking these steps is necessary to building public and parliamentary confidence in the body, which is crucial for the fulfilment of its mandate.

3.1 Recommendations

3.1.1 To the Myanmar Government (Executive):

- To provide support to the Parliament to reform the enabling law to:
 - Explicitly mandate the MNHRC to investigate violations in conflict zones and to allow them unrestricted access to active conflict and ceasefire areas with guarantees of protection.
 - Expand the stipulation for the composition of the Selection Board to include civil society representatives from non-registered NGOs.
 - Establish a quorum for different criteria regarding pluralism, such as by specifying that at least a third of both the body's membership and staff are from gender, ethnic and religious minorities or from civil society with human rights experience.
 - Establish an independent mechanism for dismissal of commissioners to prevent reprisal for investigation into sensitive issues.

¹⁰⁰ Myanmar Times, 2 March 2016, <http://www.mmmtimes.com/index.php/national-news/19253-questions-for-rights-body-as-nld-prepares-to-take-office.html>.

- Make the processes of selection more transparent, such as a requirement to publicise the members of the Selection Board, in order to remove executive influence from the formation of the Selection Board.
- Remove clause about prior notification to allow for unannounced visits to sites of detention.
- Allow MNHRC to initiate an investigation into a case if a case is under trial before any court or if a Myanmar court has “finally determined on a case”.
- Ensure that the two parliament representatives of the Selection Board are selected by the Parliament itself rather than the President and that they represent different political forces in the legislature.
- Set out procedures for nominating potential members of the MNHRC, which should include broad consultations with civil society.
- Give the Commission authority to take actions if the response provided by relevant ministries is not satisfactory.
- Specifically stipulate that the funds for the MNHRC should be allocated through parliamentary vote.
- Ensure that the budget is public, such as by adding a line in the national budget for the MNHRC budget.
- To ensure regular, wide and systematic publication of the MNHRC’s reports and findings by deleting “as appropriate” from Article 22(j) and Article 45, “as may be necessary” from Article 39, and by adding “to the public” to Article 22(m).
- Ensure staff recruitment procedure is open and transparent, such as advertising the positions publicly.
- Refrain from interfering in MNHRC investigations and demonstrate the political will to respect and undertake recommendations from the Commission.
- Amend the 2008 Constitution to include the MNHRC and enshrine the independence of the Commission.

3.1.2 To Parliament

- Encourage meaningful debate on the role and the annual report of the MNHRC in parliamentary sessions, and hold public hearings on the MNHRC, including on amendments of the enabling law.
- Table a motion to amend the enabling law.

3.1.3 To the MNHRC:

- Interpret the enabling law in a “broad, liberal, purposive”¹⁰¹ manner that is more consistent with the Paris Principles.
- Be more proactive in pressuring the government and parliament to reform the enabling law in accordance to the Paris Principles.

¹⁰¹ ICC-SCA, November 2015.

Human Rights Policy and Legal Division

- Review and implement the recommendations made by the GANHRI-SCA.
- Ensure that the work of the MNHRC adheres to international agreements relevant to NHRIs such as the Paris Principles, Merida Declaration and Belgrade Principles.
- Solicit inputs from civil society and other key stakeholders in the development of MNHRC's organizational objectives, including strategic plans.
- Continue to actively encourage the Parliament to sign and ratify international conventions, especially the nine core international human rights treaties, which Myanmar is still not a party to.
 - Undertake a more proactive approach in using the domestic, and when relevant, international, media to add pressure.
- Ensure that meaningful, inclusive consultation with CSOs is undertaken before submitting comments to government ministries on draft legislation or proposed amendments.
 - Encourage government ministries to invite CSOs for consultations on draft legislations or proposed amendments.

Human Rights Protection

- Educate the general public on process of complaints submission, such as that the MNHRC is required by law to protect complainant confidentiality.
- Take the initiative to act upon information about human rights abuse, even not in the form of complaint filed to the Commission.
- Act in a confidential manner when it comes to information sharing between the Executive, Parliament, the Myanmar Army and other branches of law enforcement to ensure that complainants and relevant witnesses are protected from reprisal.
- Accompany human rights investigations and recommendations with political pressure to ensure that relevant parties, especially government ministries, respect them.
- Solicit assistance from civil society to deal with all aspects of human rights protection, including receiving complaints and carrying out investigations.

Human Rights Promotion

- Provide human rights training to lower-ranking Myanmar Army soldiers, police officers, Border Guard Forces and local government officials, especially in rural ethnic areas where most egregious human rights violations are taking place.
- Open more branch offices in the rural areas with sufficient resources to educate marginalized, vulnerable communities about its mandates to protect and promote human rights.
- Engage in more outreach with smaller CSOs and grassroots CBOs.
- Include resources useful for vulnerable communities online, such as a calendar of upcoming events, a repository of relevant laws, and a searchable database of human rights training materials used and developed by the MNHRC.

Transparency

- Improve its website to make it more user-friendly.
- Publicise all complaints and responses online, while maintaining confidentiality as necessary.
- Make clearer the procedure for submitting complaints, such as by including detailed instructions online.
- Ensure that complaint forms and procedures are available in all local languages
- Publicise results of consultations with government ministries, CSOs, intergovernmental institutions, as well as all reports in a more timely manner.
- Publicly disclose financial statements online.
- Publish all annual reports online in a timely fashion.

3.1.4 To the international donor community:

- Continue to provide capacity building to the MNHRC until it is fully effective and in compliance with the Paris Principles, and all other declarations and principles relevant to NHRIs, including the Belgrade Principles, Merida Declaration, Edinburgh Declaration
- Encourage the Parliament and the Government to reform the law and open and recognize the space for civil society to strengthen the MNHRC
- Actively participate in consultations with the Government and the MNHRC, and engage in periodic follow-ups

3.1.5 To domestic civil society network:

- Campaign for amendment of the enabling law to enhance effectiveness of the MNHRC
- Help victims of human rights violations to engage with the MNHRC, such as with submitting complaints
- Hold the MNHRC accountable by highlighting situations where its work would be appreciated or where it is failing to meet its mandate, such as by bringing issues to the attention of the media and international human rights mechanisms

THAILAND: OPERATING UNDER MILITARY COUP GOVERNMENT

Peoples' Empowerment Foundation¹

1. Introduction

This report is an assessment of the performance of the National Human Rights Commission of Thailand (NHRCT) for the period from August 2016 to August 2017. The report is compiled with data culled from the NHRCT's website, Facebook account, news clippings and interviews with individuals who are currently working or have worked with the NHRCT, including three NHRCT commissioners, namely, Mrs. Angkana Neelapaijit, Mr. Chatchai Suthoklom, and Mr. Surachet Sathitniramai, MD.

In addition, the People Empowerment Foundation (PEF) also sent two letters to request information from the NHRCT on 7 April 2017 and 24 May 2017, including information on the implementation of recommendations from the Universal Periodic Review (UPR) process and the United Nations Committee on Civil and Political Rights. The NHRCT replied and furnished PEF with some documents on 20 June 2017.

This report was presented to various civil society stakeholders from different regions of the country at the launch of the NHRCT Monitoring Report 2016 on 17 August 2017 at the Girl Guides (Girl Scouts) Association of Thailand, Bangkok. Several rounds of consultation meetings on the report were held with civil society organisations (CSO) based in the southern, northeastern, northern and western part of the country on 2 September 2017, 13 September 2017, 1 October 2017 and 12 October 2017 respectively.

2. The Status of the Present NHRCT

Following the military coup in May 2014, Thailand has been under the rule of the military-led National Council for Peace and Order (NCPO). On 22 May 2014, the military regime made an announcement of NCPO. No. 11/2557, officially ended the Constitution of the Kingdom of Thailand B.E 2550 (hereafter referred to as the 2007 Constitution), except category 2 about independent organisations and other organisations in the Constitution, which remained on duty and this included the NHRCT.

Such announcement led to various questions about the legal basis of the NHRCT. As the NHRCT was a constitutional organ under the 2007 Constitution, in principle, it should have ceased to exist once the 2007 Constitution was revoked.

Despite the controversies, the NCPO proceeded with the appointment of the third batch of NHRCT commissioners on 29 May 2014 through the announcement of NCPO. No. 48/2557.

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The selection of the third batch of commissioners was neither in full conformity with the 2007 Constitution nor in compliance with the Paris Principles. The Selection Committee was composed of five former judges appointed by the military regime on the justification that judges were the legal guardian, who were neutral and impartial. Such composition of the Selection Committee did not reflect pluralist representation of the society and was thus questionable. Another concern is that many of the commissioners eventually nominated and appointed may not have the necessary competency in the field of human rights. This puts to question the ability of the present Commission to perform its duties professionally and impartially.

In October 2014, the NHRCT was downgraded from status A to B by the Global Alliance on National Human Rights Institutions (GANHRI), which is the global umbrella body that assesses and accredits NHRI internationally. The GANHRI has been raising a number of concerns about the NHRCT's structure and functions, including the selection process after it was modified under the 2007 Constitution. Since such concerns remained unaddressed by the Government of Thailand after a one-year of grace period during which the NHRCT can submit supporting documents to show that concerns raised by the GANHRI have been addressed, the downgrading was inevitable.

Several international human rights monitoring mechanisms such as the Universal Periodic Review (UPR) and the treaty bodies of international human rights instruments that Thailand has ratified, for example the Committee on Civil and Political Rights, have expressed concerns over the B status of the Commission. They have encouraged the NHRCT to take the necessary actions in order to return to the A status.

The new Constitution (hereafter referred to as the 2017 Constitution) promulgated by the military regime entered into force on 6 April 2017. Under Chapter 12 on Independent Organizations of the 2017 Constitution, Article 246 stipulates that there shall be a national human rights commission established with seven commissioners for a term of seven years. The Commission is to be governed by the *Organic Act on National Human Rights Commission 2017* (Hereafter referred to as the "2017 NHRC Organic Act"). It also requires the selection of the commissioners to have participation of CSOs representatives.²

It should be noted that there are some major differences in the provisions related to the NHRCT under the 2007 Constitution and the 2017 Constitution.

Under the 2007 Constitution, the NHRCT is empowered to file lawsuit to the Court of Justice on behalf of the injured person victims of human rights violations and to refer the matter to the Administrative Court and the Constitutional Court, when a by-law, order, or any other administrative act negatively affects human rights, along with the NHRCT's opinions and recommendations for amendments. This function is vital for the protection of human rights in Thailand and the formation of human rights policies. However, this function has been omitted from the 2017 Constitution.

² The Constitution of Kingdom of Thailand 2017.

To make matter worse, the 2017 Constitution added a new duty for the NHRCT, namely to clarify and report the facts in case of inaccurate or unjustified reporting of Thailand human rights situation from civil society's reports and/or international bodies/organizations that criticise human rights in Thailand. Clearly, such function should not have been included as the role of NHRCT should not be about protecting or to defending the state or state officials. The NHRCT should impartially review recommendations from any party and advise the State to address human rights issues where necessary.

At the writing of this report, the *2017 NHRC Organic Act* is expected to be vetted at the third session of the National Legislative Assembly (NLA) with serious concerns expressed by civil society that some provisions of the bill will severely weaken the Commission.³ There is concern that the NHRCT may be demoted further from status B to C if the *2017 NHRC Organic Act* is passed in its current form.

3. The 2017 NHRC Organic Act

The *2017 NHRC Organic Act* is an organic law that elaborates the provisions of Article 246 and 247 of the 2017 Constitution regarding the NHRCT. It governs the operation of the Commission, including qualification, recruitment, prohibitions and vacating of office.⁴ The *2017 NHRC Organic Act* is vital for the NHRCT's mission as it should reflect what the Constitution envisions the NHRCT to be an independent and productive institution to protect human rights of the people or the regulations of the state.

The *2017 NHRC Organic Act* will replace the *1999 NHRC Act*, which remains in force at the time of writing of this report, despite the military coup in 2006 and 2014 and led to the redrafting of the Constitution. However, unlike the *1999 NHRC Act*, the *2017 NHRC Organic Act* will cease to have any legal force if the 2017 Constitution is revoked.

The Government of Thailand deeply distrust civil society, as evident in the non-inclusion of civil society representatives in the Selection Committee and the selection process of the third batch of commissioners. Unfortunately, such sentiment has continued to influence the drafting of the *2017 NHRC Organic Act* and its content.

Section 77 of the 2017 Constitution stipulates that before the enactment of any law, the State shall conduct consultation with stakeholders, analyse any impacts that may occur from the law thoroughly and systematically, and shall also disclose the results of the consultation and analysis to the public. However, in practice, the drafting process of the *2017 NHRC Organic Act* lacks transparency and broad public participation. While a small number of individuals were invited to give feedback to the draft, the draft Organic Act was not made available to the public. Comments made in public hearings were not integrated into the draft as in the case of recommendations contained in the open letter

³ An open letter by civil society on the Draft of *2017 Organic Law on the National Human Rights Commission* dated 20 June 2017, with 157 individual and organization signatories.

⁴ The 2017 Constitution of the Kingdom of Thailand, Section 246.

from civil society to the Chairman of the drafting committee. Unfortunately, when the final draft was finally made available to the public, media and the public focused their scrutiny on the termination of service of the existing commissioners once the *2017 NHRC Organic Act* is enforced, dubbed the "Set Zero" provision. The overall content of the *2017 NHRC Organic Act*, including the selection process of commissioners, qualifications of candidates, and the mandate of the Commission, which were more crucial in determining the effective functioning of the Commission, largely escaped public scrutiny.

As a result of the non-inclusive process of drafting, the *2017 NHRC Organic Act* is flawed in many aspects and it is not in compliance with the Paris Principles.

3.1 Mandates

Section 26 of the *2017 NHRC Organic Act* states that the NHRCT shall have the duties and the responsibility as follows:

- 1) To investigate and report on the accurate facts about human rights violations in all cases without delay and to recommend appropriate measures or guidelines for the prevention or to address of human rights abuses, including remedies for human rights abuse victims to the relevant public or private entities;
- 2) To prepare human rights situation assessment reports in the country and to submit the reports to the Parliament and the Cabinet. The reports shall also be made available to the public;
- 3) To recommend measures or guidelines for the promotion and protection of human rights to the Parliament, the Council of Ministers and relevant agencies. The NHRCT shall recommend law, regulation, and/or order amendments to comply with human rights principles;
- 4) To clarify and report the facts, without delay, in case of inaccurate or unjustified reporting of Thailand human rights situation; and
- 5) To promote every sector in the society to be aware of the importance of human rights.

In line with the 2017 Constitution, paragraph 4 of Article 26 was added. Such provision indicates that the 2017 Constitution expects the NHRCT to defend the State and to act as the Government's spokesperson. This will compromise the Commission's independence and is not in compliance with the Paris Principles.

3.2 Selection Committee

The *2017 NHRC Organic Act* stipulates that there shall be a Selection Committee composing of eleven members. The President of the Supreme Court of Justice is the Chairperson and the other ten members are: President of the House of Representatives, Leader of the opposition in the House of Representatives, President of the Supreme Administrative Court, representative of the Lawyers' Council, representative of the Medical and Public Health Professional Association, representative of the Press Association, representative appointed by meetings of lecturers who are teaching human

rights at university level, and three representatives appointed by meetings of human rights CSOs.

The Paris Principle requires the Selection Committee to recruit competent and qualified human rights commissioners. Therefore, the Selection Committee must understand fully the criteria for selection and the committee must be impartial. Evidently, the *2017 NHRC Organic Act* does not embrace diversity and pluralism for the Selection Committee. Out of the 11 members, five are from the judicial sector and State-controlled organisations (Lawyer's Council, Medical and Public Health Association and Press Association) with one of them being the Chairperson.

Under the *1999 NHRC Act*, the Selection Committee was composed of:

- The President of the Supreme Court
- The President of the Supreme Administrative Court
- The Prosecutor-General
- The Chairman of the Law Council
- Five (5) rectors or representatives of high education institutions
- Ten (10) representatives from civil society
- Five (5) representatives from political parties, and
- Three (3) representatives from the media

As evident in above, the Selection Committee under the *1997 NHRC Act* was much more diverse and independent with most of the members coming from civil society.

3.3 Qualification and Composition of Commissioners

The selection of the commissioners is considered one of the most critical elements in determining the effectiveness of an NHRI's functions. The Paris Principles requires an NHRI's composition to be established according to a procedure that ensures a pluralist representation of civil society involved in the promotion and protection of human rights.

Section 8 of the NHRC Organic Act outlines the qualification for commissioners, namely, a) experience in human rights; b) relevant knowledge either by teaching or researching on human rights at the university level; c) knowledge and expertise in human rights laws in the national and international level; d) knowledge and experience in public administration; and e) knowledge and experience in Thai philosophy, culture, tradition and way of life. The candidates are required to have 5 to 10 years of experience and each expertise field is limited to have not more than two commissioners.

The above prerequisite may confine qualified candidates for the future NHRCT to a small pool of people and undermine the independent and impartial process of selecting and recruiting commissioners. One may guess easily who would serve as potential candidates and commissioners. It is impossible to know if there will be qualified candidates as defined in the NHRC Organic Act. The appointment of not exceeding two delegates for each field of expertise may also limit potential qualified applicants to be a candidate. The criterion of experience in teaching or researching on human rights at university level only

is also limiting as teaching and researching on human rights can be done in any educational institutions and outside of educational institutions as well. The Commissioners must have practical knowledge and expertise in the field of human rights as well and not only the laws and the theories. Furthermore, there is no provision to ensure gender equality in the composition of the Commission. Therefore, the draft NHRC Organic Act is flawed and may lead to various problems in the selection of commissioners in future.

3.4 Sub-Commissions

Sub-Commission is a mechanism established by the NHRCT to maintain the engagement between the NHRCT and the people, assist the Commission to work effectively and facilitate investigation and response to complaints received by the Commission.

The Sub-commissions can assist the commissioners in investigating complaints and drafting investigation reports in a more efficient manner. They also free the commissioners from handling the investigation and enable the commissioners to perform other necessary functions in defending human rights.

Currently, there are all together 19 sub-commissions under the NHRCT, with 10 of them focusing on investigation, six focusing on thematic issues while the remaining three are ad-hoc sub-commissions.

In the past, civil society representatives were appointed to sit in these Sub-Commissions to assist in bringing the NHRCT closer to the public and made the Commission more accountable to the people. Section 29 of the *NHRC Organic Act 2017*, however, stipulates that sub-commissioners can be appointed only when it is inevitable. Furthermore, Section 51 requires Sub-Commissioners to be recruited internally from the NHRCT staff. These provisions have reduced drastically the roles, participation and contribution of the civil society in the Sub-Commissions. As CSOs are diverse in background and work closely with the people and communities, they have information and trust of the people, which are vital for the work of the Commission. The restrictions on civil society's participation in the Sub-Commissions reflect that the Drafting Committee of the NHRC Organic Act, is either lacking in understanding of human rights or harboring ill intent to control the NHRCT by reducing the participation of civil society.

3.5 The Office of National Human Rights Commission

The *NHRC Organic Act 2017* reassigns the role of the Office of the National Human Rights Commission (hereafter referred to as “the Office”) under Chapter 3, Section 47. It places the Office under the stewardship of the commissioners collectively. In contrast to Chapter 2, Section 17 of the *1999 NHRC Act*, which defines the Office as a bureaucratic organization under the Parliament and the stewardship of the Office rested with the President of the NHRCT. This change is a positive development because the Office will report directly to the commissioners. Nevertheless, the quality and the level of professionalism of the officials in the NHRCT is a concern and in need of improvement.

3.6 Compulsory Vacating of Office or the “Set-zeroing” Provision

Under Section 60 on Transitional Provisions of the *NHRC Organic Act 2017*, it is required that all current third batch commissioners should vacate the office when the Organic Act entered into force. On 17 August 2017, the NLA passed the *2017 NHRC Organic Act* with 199 support votes and four abstention votes. As the Organic Act will be enforced soon, a new NHRCT will be constituted. Civil society is however concerned with such a move while the country is still under the rule of the military regime. They have recommended for the new NHRCT to be constituted only after a democratic government is established through elections.

4. The Effectiveness of the NHRCT

Under the military regime, democratic and human rights space in Thailand is shrinking rapidly. The NCPO pays little heed to human rights and democracy in ruling the country. Instead, the Government employs military framework in its governance that demands total obedience to the orders from the leaders.

Thailand does not have any mechanism to protect human rights defenders. After the coup, many human rights defenders have been intimidated, detained and prosecuted. Some have been summoned by the military for the so-called “attitude adjustment” sessions while many have been tried in military courts for merely expressing views different from the Government. Ethnic minorities are also increasingly being subjected to human rights violations.

The military regime has also discontinued the implementation of recommendations from the NHRCT, reports of Asian NGO Network on National Human Rights Institutions (ANNI) and the UPR reports.

Under such circumstances, the NHRCT continued its operation in 2016 to the first half of 2017 with varied effects.

4.1 Recommendations to the Government

As the only national human rights institution in the country, the NHRCT is expected to give its comments, opinions and recommendations on human rights issues, especially to the government agencies.

In 2016, the NHRCT has revised, recommended and submitted four important policy recommendations as follows:

- Letter to the Prime Minister No. 0007/22, dated 16 June 2016 on the right to participate in natural resources and environmental management and the negative impacts of the *Minerals Act* on human rights;
- Letter to the Prime Minister No. 0004/33, dated 19 October 2016 on the recommendations to amend the law on overdue imprisonment term;

- Letter to the Prime Minister, dated 2 November 2016, on the *Computer Crimes Act*;
- In 2017, the NHRCT submitted a letter to the Prime Minister entitled "Labor rights with the right to social security and the case for a revision of the *Social Security Act*".⁵

Unfortunately, the Government did not prioritise and implement such recommendations of the NHRCT.

In relation to the Government's forest reclamation policy issued under Article 44 of the Interim Constitution, the NHRCT did not provide any recommendations despite having knowledge that the policy will inevitably lead to eviction of forest dwellers and disrupt their livelihoods.

The advisory role of the NHRCT has suffered from the flaws in the commissioner selection processes as the commissioners selected have apparently quite different understanding of human rights among them. As a result, the commissioners have failed to work as one united voice as they tend to differ in many issues. For instance, the commissioners could not come to a collective agreement on the issue of the use of shackles on prisoners.

4.2 Complaints Handling Mechanisms

One of the main functions of the NHRCT is to receive complaints of human rights violations, conduct investigation and provide recommendations to state agencies on resolving human rights violations in the country.

The Commission receives large number of complaints. As indicated in the table 1 below, since the third batch of Commissioners assumed office, the NHRCT has received a total of 897 complaints with 574 complaints (65%) resolved. The Sub-Commission on Human Rights Protection Coordination received the largest number of complaints, a total of 389 complaints or about 44 % of the total complaints received. The Sub-Commission on Litigation and the Sub-commission on Policy Recommendation and Restorative Approach received the least number of complaints, about 0.3 % of the total complaints respectively.

Statistics of Complaints Processed by the NHRCT Sub-commissions (Data from NHRCT)

<p>Results of NHRCT Complaint Handling For the period between 20 November 2015 to 31 May 2017</p>
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⁵ NHRCT website, Policy and Recommendations to Amend the Laws for the Parliament and the Prime Minister

No.	Cases	Number of Cases		
		Received	Concluded	Pending
1	Human Rights Protection Coordination (Mr. Surachet Satiniramai)	389	348	41
2	Land and Resources (Mrs. Tuenjai Deetes)	125	20	105
3	Land and Forest Resource Management (Mr. What Tingsamitr)	76	45	31
4	Rights Related to Judicial Process (Mr. Chatchai Sutiklom)	72	30	42
5	Human Rights in Southern Border Provinces (Mr. Chatchai Sutiklom)	65	52	13
6	Civil and Political Rights and the Rights of Sexual Orientation and Gender Identity (Mrs. Angkhana Neelapaijit)	40	16	24
7	The Rights of the elderly, disabled persons, and the right to health (Mr. Surachet Satiniramai)	35	31	4
8	Economic, social and cultural rights (Mrs. Prakairatana Tontiravong)	33	9	24
9	The Status of Ethnic Group and Indigenous Tribes (Mrs. Tuenjai Deetes)	29	10	19
10	Child's Rights and Education (Chairperson: Mrs. Chatsada Chandeeying)	16	6	10
11	Women's Rights (Mrs. Angkhana Neelapaijit)	8	0	8
12	Litigation (Mr. Chatchai Sutiklom)	3	3	0
13	Measures or Guideline Recommendation for Human Rights Promotion and Protection, including Law Amendments to Comply with Human Rights Principles (Chairperson: What Tingsamitr)	3	3	0
14	Restorative Approach (Mrs. Prakairatana Tontiravong)	3	1	2

Total	897	574	323
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The number of complaints received by the Commission reflects high public expectation on the NHRCT to address human rights problems and ensure justice. However, due to various reasons, there have been backlogs on investigation of complaints received, as indicated that only 65% of the complaints received were resolved.

For Instance, in the case of Chaiyaphum Pasae, a young Lahu activist and human rights defender for stateless people who was extrajudicially killed in March 2017, the NHRCT appointed a Sub-Commission to investigate the case.⁶ Nevertheless, progress has not been made in a timely and reasonable manner. Similarly, the investigation report of the alleged enforced disappearance of a Karen community leader, Porlajee Rakchongchareon or “Billy” in April 2014, is also yet to be finalized. The Sub-Commission has argued that the Porlajee case should be left open in order for the NHRCT to summon relevant persons for more information.

According to Commissioner Chatchai Suthiklom, who chaired the Sub-Commission on Complaint Screening, sometimes a case can take a long time because an agency probably takes five to six months to reply. The Sub-Commission had to wait for a reply from the government agency involved before it can consider any other actions. After a reply was received, the Sub-Commission will forward the reply to the complainants and wait for their response. Thus, many complaints may take a year without much progress. To improve the system, Commissioner Chatchai Suthiklom introduced a new guideline, which will allow the NHRCT to proceed with the case and use whatever available facts for investigation if the first notice and a second notice are not replied by the concerned government agencies within 60 days and 30 days respectively. According to the Commissioner, after the change of this procedure, the NHRCT has been able to get replies with facts from government agencies in a more timely manner.⁷

There are other flaws with the current complaint handling mechanisms. Former member of Sub-Commission, Pornpen Kongkachonkiat, said in an interview that access to the complaint mechanism was still limited as many did not aware that they could file a complaint at regional offices of the NHRCT besides the Bangkok head office. Those who had accessed the complaint mechanism were mostly recommended by organisations in the human rights network rather than normal public members whose rights had been violated. The number of people who suffered from human rights violations and the number of complaints were not proportionate. According to her, records indicated that rights violation cases were under-reported due to inaccessibility of the complaint mechanisms. For example, sometimes a victim could not file a complaint within the time limit set by the NHRCT or a complaint was dropped as the complainant was not able to reply to the NHRCT within the time limit due to the need for more consultation with lawyers. While these procedural requirements helped the NHRCT to facilitate its work,

⁶Thairath Online, “NHRCT Appointed Three Investigation Sub-commissions for Lahu Activist’s Extrajudicial Killing.” *Thairath*, uploaded 22 March 2017, <https://www.thairath.co.th/content/892917>.

⁷ Interview with Mr. Chatchai Suthiklom, Chairperson of the Sub-Commission on Complaint Screening

they may at the same time undermine effective investigation of human rights violations. Pornpen Kongkachonkiat suggested that the complaint mechanism should be flexible and the procedures should be revised to ensure effective accessibility for public members.

Another challenge of the complaint handling mechanisms is the public perception that it is inefficient and not trustworthy. For example, the NHRCT was alleged of unprofessional in handling confidential information of complainants. A human rights organisation reported to cases of torture in three southern border provinces involving Internal Security Operations Command (ISOC) officials to the NHRCT. However, information of the complaints was revealed to the ISOC officials by the NHRCT. Subsequently, the complainant was harassed and intimidated by the ISOC officials. In fact, the victims faced more threats as a result of the incompetency of the NHRCT. This dented the credibility of the NHRCT in protecting victims of human rights violations. Many victims or human rights organizations have opted to bypass the NHRCT and lodge their complaints directly with regional or international human rights mechanisms.⁸

Therefore, while the effectiveness of the NHRCT can be measured partly by the number of complaints concluded, there have been questions about the quality of complaints being handled and resolved in a satisfactory manner.

4.3 The functioning of the Office of the NHRCT

The Office of the NHRCT is an important supporting unit for the work of the Commission. The interviews of some sub-commissioners however reflect a serious concern on the lack of capacity of the NHRCT staff in providing the necessary support for commissioners and sub-commissioners. Several factors have been listed as obstacles, including the Office does not have adequate number of staff to handle large number of complaints, information such as data for investigation have not been properly documented and stored and lack of report writing skills among the staff. Clearly, the capacity of the staff needs to be strengthened as they are the permanent staff, unlike the commissioners who serve for a limited term.

In addition to the inefficiency of the office in term of capacity, some interviewees also highlighted the problem of patronage culture in the NHRCT. In the early years of the establishment of the NHRCT, government officials without human rights knowledge and skills were transferred from various government departments to work in the Commission. The bureaucratic mentality of these civil servants has since affected the operation of the NHRCT as the NHRCT staff continue to work in a typical government framework and mindset. Therefore, while the staff recruitment of the NHRCT will be done via entrance examination in future, the lack of qualified staff remains a serious concern.

Furthermore, under the *1997 Organic Act*, the NHRCT chairperson lead the Office of the NHRCT but the Office of the NHRCT reports to the Parliament. Such arrangement created two problems. Firstly, it opens the Office of the NHRCT to political intervention

⁸ Interview with Ms. Anchana Heemena, Hearty Group Director and Human Rights in Southern Border Provinces Sub-Commissioner.

beyond the control of the NHRCT chairperson, thus compromising the independence of the NHRCT. Secondly, the NHRCT chairperson may abuse the power by refusing to extend office support to other commissioners who disagree with the chairperson. While these problems have been addressed in the *2017 NHRC Organic Act*, which makes the Office of the NHRCT reports to and led by the commissioners collectively instead of the chairperson alone, there appears to be internal problems in relation to the governance under the current chairperson, which led to the resignation of Commissioner Surachet Satiniramai, who cited “the working atmosphere is not conducive to work harmoniously and creatively” as the grounds for his resignation.⁹ Another commissioner, Angkhana Neelapaijit, who commented on the resignation of Mr. Surachet, said "I want to see respect, acceptance to the reality, democracy and good governance in the workplace."¹⁰ The resignation of Surachet Satiniramai is an indication of problems and conflicts in the internal management of the Commission, which can be detrimental to the future development of the NHRCT if not managed properly.

5. Conclusion and Recommendations

During the second cycle of UPR review of Thailand on 11 May 2016, eleven countries have recommended that the Government of Thailand should ensure the independence of the NHRCT, adhere to the Paris Principles and improve the NHRCT in order for it to be upgraded from B status to A status.¹¹

During the review of the implementation of the International Covenant on Civil and Political Rights (ICCPR) on 13-14 March 2016, United Nations Human Rights Committee expressed regret that the NHRCT was downgraded to B and expressed its concern on the lack of transparency in the selection process of commissioners. It recommended the Thai Government to ensure that the NHRCT is able to carry out its mandate effectively and independently in line with the Paris Principles.¹²

Based on these recommendations, the Government has formulated a plan to implement the accepted UPR recommendations. The plan includes strengthening the human rights mechanism and the National Human Right Action Plan,¹³ as illustrated in the table below.

Time Frame	Activities	Relevant Government Agencies
2016	Comment on the amendment of the law, such as the draft	Rights and Liberties Protection Department, Ministry of Justice and other agencies

⁹Mr. Surachet Satiniramai's resignation statement.

¹⁰ <https://www.matichon.co.th/news/521502>

¹¹ The 11 countries are Egypt, Honduras, Indonesia, Paraguay, Poland, New Zealand, Portugal, Senegal, France and Nepal. Thailand's voluntary pledge during the second cycle of UPR, is available at <http://humanrights.mfa.go.th/upload/pdf/UPR2%20recs%20for%20printing.pdf>.

¹² Concluding Observations of the UN Human Rights Committee Thailand's UPR Submission, page 2-3, accessed at <http://humanrightmfa.go.th/upload/pdf/Concluding%20observations.pdf>.

¹³ Department of International Organization, Ministry of Foreign Affairs, UPR Action Plan.

2016 - 2020	Meet regularly with The Office of the NHRCT to develop human rights work, through the mechanism of the Coordination Committee for the Promotion and Protection of People's Human Rights, Liberties, and Human Rights	Rights and Liberties Protection Department, Ministry of Justice and other agencies
2016 – 2020	Cooperate with the NHRCT to drive key human rights issues, such as the implementation of the abolition of capital punishment, and the promotion of business and human rights.	Rights and Liberties Protection Department, Ministry of Justice and other agencies
2559 – 2020	Support capacity building activities for the staff in the NHRCT	Rights and Liberties Protection Department, Ministry of Justice and other agencies

Clearly, the above action plan will not deliver the necessary change — the promotion of the NHRCT from status B to A by the GANHRI as the planned activities do not involve the strengthening of the independence of the NHRCT, especially the pluralistic composition of the Commission and a transparent and impartial selection process of commissioners as required by the Paris Principles.

In this regard, PEF sent a letter dated 24 May 2017 to inquire how the NHRCT would review and implement the recommendations from the UPR and the UN Human Rights Committee, but no reply was received from the Commission.

From the website and interviews, it appears that the Government and the Office of the NHRCT have been making efforts to strengthen the NHRCT and the National Human Right Action Plan by contributing recommendations to the NHRC Organic Act Drafting Committee.¹⁴ There have been programs conducted to enhance the capacity of the staff of the NHRCT as well.

However, these efforts may not be sufficient to improve the situation and lift the NHRCT from status B to A. We further note that the NHRCT performance has regressed, particularly with the people in the northern, north-eastern and southern part of the country, who participated in the consultation meetings organized by PEF. Many complained that the NHRCT did not listen to their recommendations and expressed their disappointment over the unprofessional conduct of some commissioners. Such events dented further the image of NHRCT.

¹⁴ See also the draft NHRC Organic Act and rationale by section, as submitted to the President of the Drafting Committee, dated 15 July 2016.

In the draft of the *2017 NHRC Organic Act*, the Drafting Committee tried to integrate recommendations from various international human rights mechanisms in the hope to bring in line the NHRCT with the Paris Principle. However, it appears that the Drafting Committee does not fully understand the Paris Principles, especially on the requirement of pluralist composition and impartial and transparent selection process of the commissioners.¹⁵

The Paris Principle also requires that an NHRIs should at least be able to: a) Promote human rights by hosting trainings, seminars, supporting community-based activities and hosting the national human rights information clearinghouse; b) Protect human rights by handling complaints from individuals, systematically hearing and considering complaints with clear criteria, seeking an amicable settlement through conciliation, resolving disputes, investigating and hearing any complaints, giving investigation finding, effective execute its orders or recommendations, monitoring its performance; c) Monitor human rights situation by conducting fact-finding missions in specific incidents and monitoring emerging human rights situations; d) Monitor operations of local agencies/ bodies to ensure compliance with NHRI's recommendations; e) Working with national stakeholders and other organizations such as the parliament, international rights organizations, NGOs civil society. NHRIs must be impartial, independent, and operate on human rights principle.¹⁶

Measuring the NHRCT against these standards, the NHRCT is clearly not up to the mark and much improvement needs to be made if it is to be upgraded from the status B to A by the GANHRI.

Recommendations

To the Government of Thailand

- 1) Integrate civil society's recommendations in the *2017 NHRC Organic Act*;
- 2) Review the Selection Committee and bring it in line with the Paris Principles, especially on the independence of the committee, transparent selection process and participation of civil society;
- 3) Review and consider the NHRCT's reports and ANNI reports on the NHRCT;
- 4) Develop measure to protect human rights defenders from threats, intimidations and other forms of violence;
- 5) Reconstitute the NHRCT only after the national election and the forming of an democratically elected government;
- 6) Change the attitude towards civil society and build trust and collaboration with the CSOs to promote and protect human rights.

To the NHRCT

- 1) Be courageous and independent in promoting and protecting human rights. Maintain the independence of the Commission and conduct investigation on human rights fairly and impartially;

¹⁵ The Office of the NHRCT, *The NHRI Standard and Guideline: Executive Summary*, page 5

¹⁶ The NHRI Standard and Guideline, The Office of the NHRCT, *Executive Summary*, page 6-7

- 2) Prioritise investigation of human rights violations to establish truth and recommend policy and legal changes. Use the recommendation on policy and legal changes to educate the public;
- 3) Build and enhance the capacity of the staff of NHRCT to ensure that they have the necessary expertise and qualification to fulfil the mandate;
- 4) Promote human rights knowledge and awareness to the public, including the awareness that everyone has human rights and is entitled to lawful human rights protection;
- 5) Stand with the people whose human rights have been violated, provide strong moral support and assistance to the people consistently.

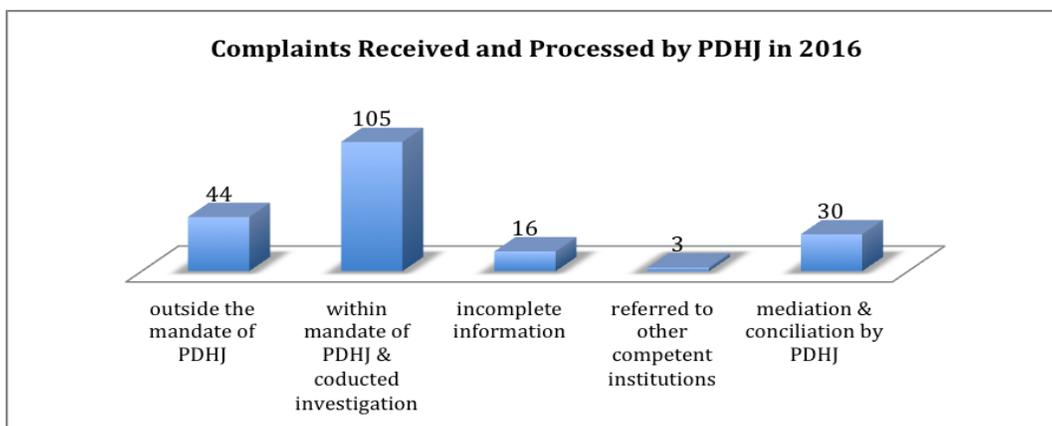
TIMOR LESTE: STEPPING UP CONSTITUTIONAL AND LEGAL MANDATES

Judicial System Monitoring Programme¹

1. Introduction

The *Provedoria dos Direitos Humanos e Justiça* (PDHJ, the Ombudsman for Human Rights and Justice) has generally performed well in its duties in protecting and promoting human rights during the reporting period although some in the civil society still maintain that the actions taken by PDHJ have not been effective and efficient and they failed to resolve the cases of human rights violations or complaints of people.² They argued that the PDHJ needs to be more proactive in monitoring and finding cases of human rights violations instead of waiting for people to lodge their complaints.³

In 2016, the PDHJ received 198 complaints, with 113 cases related to good governance and 85 cases related to human rights violations. These complaints were lodged through mechanisms that the PDHJ put in place.⁴ The following chart shows the complaints and their status after being processed by the PDHJ.



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

² Evangelino Pereira Gusmão, the Secretariat of Civil Society Human Rights Networking, e-mail: evangelinogus1992@gmail.com.

³ Celestino Gusmão, human rights activist and researcher at La'o Hamutuk in an interview with JSMP on 29 of May 2017. www.laohamutuk.org.

⁴ Dr. Horacio de Almeida, Deputy Ombudsman for Human Rights and Justice; <http://pdhj.tl/about/meet-the-ombudsman-and-deputies/?lang=en>.

The PDHJ had conducted mediation to try to solve the cases of ambulant sellers/vendors whose goods have been destroyed or taken away by police as they were prohibited from selling their goods at public places or roadsides, but to no avail⁵. However, the PDHJ managed to solve the case of expropriation that took place in Special Region of Oecusse (ZEEMS) where properties of community members such as land, plants and houses have been expropriated without any proper compensation.⁶

The PDHJ has asked the National Parliament to conduct investigation on the killing of Mouk Moruk and his followers during joint military and police operation in 2015 and 2016. However, one of the human rights activists that responded to our questionnaire said the PDHJ has not been seen to have taken any measure to follow-up this serious case of human rights violations.⁷ The PDHJ has also referred some cases that were related to crimes to Public Prosecutor for further investigation and prosecution.⁸ However, the PDHJ is still lacking a mechanism for case monitoring and follow up that can help it to keep the complainants informed of the status of their cases.⁹

Most of the human rights violations received by the PDHJ since its establishment have been committed by Timor-Leste National Police (PNTL), in particularly the complaints of “excessive use of force”. The issue of excessive use of force by police continued to be a major human rights violation that took place during the reporting period from January 2016 to mid of May 2017,¹⁰ such as the case of a university student and a journalist beaten by police in Colmera, central part of Dili. There were cases of police shooting as well. A mentally ill civilian was shot dead in Suai, southern part of Dili. A young man was shot dead in Bebonuk while another was killed in Bairro dos Grilhos, Dili. In another case, the victim was shot in Pantai Kelapa, Dili and became paralyzed. There were also two young men shot and injured in Liquisa, western part of Dili. These major cases are just the tip of the iceberg. Every year, many cases of civilian beaten and injured by police are reported.

The PDHJ normally conducts investigation on cases that fall within its legal mandate. In 2016, the PDHJ concluded its investigations on 169 cases with the results as illustrated in the chart below.

⁵ Celestino Gusmão, human rights activist and researcher at La’o Hamutuk at an interview with JSMP on 29 of May 2017. www.laohamutuk.org

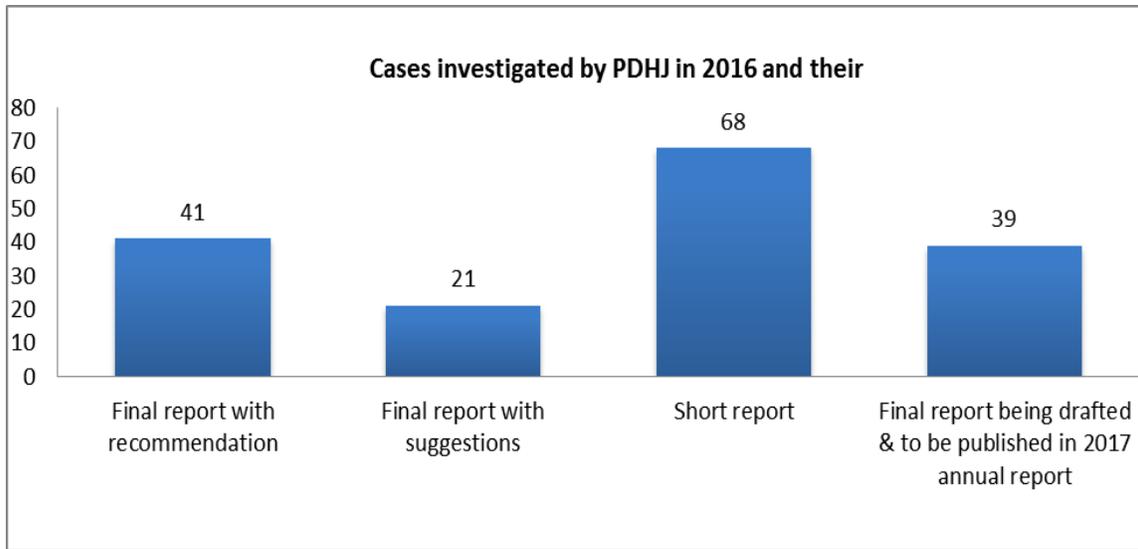
⁶ Dr. Horacio de Almeida, Deputy Ombudsman for Human Rights and Justice; <http://pdhj.tl/about/meet-the-ombudsman-and-deputies/?lang=en>

⁷ Celestino Gusmão, human rights activist and researcher at La’o Hamutuk at an interview with JSMP on 29 of May 2017. www.laohamutuk.org

⁸ *Ibid.*

⁹ Dr. Horacio de Almeida, Deputy Ombudsman for Human Rights and Justice at an interview with JSMP on 29 of May 2017; <http://pdhj.tl/about/meet-the-ombudsman-and-deputies/?lang=en>

¹⁰ *Ibid.*



In term of implementation of the Asian NGO Network on National Human Rights Institutions (ANNI) recommendations, the PDHJ has implemented the recommendation on ensuring the rights of people to compensation for their lands and properties that were destroyed by mega projects¹¹ in Special Zone of Oecusse. The PDHJ has also reactivated the Consultative Council¹² even though it is not functioning properly.¹³ The PDHJ has also turned its attention to other human rights such as social, economic and political rights as recommended in ANNI report 2016.¹⁴

2. PDHJ and Its Mandates to Protect and Promote Human Rights

2.1 Inception and Mandates

The PDHJ has constitutional and legal mandates to protect and promote human rights. It was established in 2004 by Law No. 7/2004 that approved the office of the PDHJ,¹⁵ which subsequently received constitutional status in March 2002.¹⁶ The Constitution and the laws have given the PDHJ a lot of powers to protect and promote human rights and justice.¹⁷ Thus, the PDHJ has strong constitutional and legal foundations and mandates in performing its duties. However, the PDHJ has not fully exercised all its constitutional powers such as to request the Supreme Court of Justice (STJ) for abstract review of the

¹¹ Recommendation no. 6.3.3. ANNI Report 2016.

¹² Recommendation no. 6.3.7. ANNI Report 2016.

¹³ Dr. Horacio de Almeida, Deputy Ombudsman for Human Rights and Justice in an interview with JSMP on 29 May 2017 at the office of the PDHJ; <http://pdhj.tl/about/meet-the-ombudsman-and-deputies/?lang=en>

¹⁴ Recommendation no. 6.3.9.

¹⁵ See Law No. 7/2004 on Approving the Statute of the Office of the PDHJ, <http://mj.gov.tl/jornal/lawsTL/RDTL-Law/RDTL-Laws/Law-2004-7.pdf>.

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

¹⁷ See Article 27 on Ombudsman, Article 150 (f) on Abstract Review of Constitutionality and Article 151 on Unconstitutionality by Omission: <http://mj.gov.tl/jornal/lawsTL/RDTL-Law/RDTL-Laws/Law-2004-7.pdf> and also Chapter IV of Law No. 7/2004 with some of articles were being amended and revoked by Article 30 of Law No. 8/2009 on the Statute of the Anti-Corruption Commission (CAC).

constitutionality¹⁸ by omission of any legislative measures deemed necessary to enable the implementation of constitutional provisions.¹⁹ There are some laws that can be opened to abuse and lead to human rights violations. For instance, Law No. 5/2017 on Legal Regime of the Practice of Martial Arts, Rituals, Cold Steels, Ambon Arrow and the Fifth Amendment of Penal Code in its Chapter VI on Use of Force permits the PNTL to shoot when the person who has violated law does not follow the order or stage a resistance.²⁰ The intention of the law is good but the institution responsible for the law enforcement does not seem to be adequately trained to implement it. The PNTL has emerged as the government agency that commits most of the human rights violations every year even before the existence of this law. With the enforcement of this law that legitimises the use of force without proper regulations, it may only intensify human rights violations in future.

2.2 Mechanisms of addressing human rights violations

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

2.2.1 Branch Offices

Since its establishment, the PDHJ has established five branch offices. Two of them are in eastern part of the country, Baukau District and Viqueque District respectively, one in central part of the country in Manufahi District and the remaining two offices are in western part of the country in Bobonaro District and the enclave of Oe-cusse.

The overall objective of setting up branch offices is to bring its services closer to the community so that people can easily present their complaints as well as to introduce or socialise the role of the PDHJ itself within the community.

2.2.2 Temporary Focal Points or Human Rights Monitoring Network²¹

The PDHJ has also established temporary focal points in each district to support the monitoring and reporting of human rights violation cases and to support members of community who want to present their complaints. These focal points are temporary as they are not paid by government but work voluntarily.²²

2.2.3 Complaint Box

Complaint boxes have been placed at all offices of the sub-district administration. These complaints boxes are one of the mechanisms to bring the PDHJ closer to the people,

¹⁸ See Article 150 (f) of Timor-Leste Constitution: http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution_RDTL_ENG.pdf.

¹⁹ See Article 151 of Timor-Leste Constitution: http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution_RDTL_ENG.pdf.

²⁰ See Article 35 to 40 at Journal of Republic p.613; http://www.mj.gov.tl/jornal/public/docs/2017/serie_1/SERIE_I_NO_15.pdf.

²¹ See p. 7 of PDHJ's strategic plan 2011-2020 on Recognition of the PDHJ in 13 districts in Timor-Leste; <http://pdhj.tl/wp-content/uploads/2013/11/SP-PDHJ-2011-2020-e.pdf>.

²² Dr. Horacio de Almeida, Deputy Ombudsman for Human Rights and Justice in an interview with JSMP on 14 July 2016 at the office of the PDHJ; <http://pdhj.tl/about/meet-the-ombudsman-and-deputies/?lang=en>.

especially for those without the means to reach its regional or central offices. Complaints are collected from these boxes for further action in accordance with Article 28 of Law No. 7/2004 on the mandate of PDHJ and Chapter V of the law on complaint handling processes.

2.2.4 Free Landline

There is also a free landline provided by the PDHJ for the public to make their complaints²³ if the complainants do not know the direct landline of PDHJ personnel, including the Ombudsman and his deputies. Once a complaint is recorded in the free landline, the PDHJ will return their call. This free landline service is also a recommendation in the 2013 ANNI Report.²⁴

2.2.5 Media Personnel or Journalists

Media personnel or journalists also report cases of human rights violations to PDHJ when they encountered them in the field. There have been several cases of human rights violations committed by police or other authorities,²⁵ which were reported to the PDHJ by journalists.

2.2.6 Civil Society

Civil society organisations (CSOs), particularly those that are actively advocating for the protection and promotion of human rights and justice, often receive complaints from public. As CSOs do not have legal mandate to address issues of human rights violations, those cases are referred to the PDHJ. Besides complaints that complainants presented to CSOs, there have been cases of human rights violations directly reported to the PDHJ and other relevant institutions by CSOs as they monitor activities of public institutions such as joint military and police operations.

2.2.7 Direct Intervention or Immediate Response

The PDHJ has also taken immediate actions on cases of human rights violations as and when it receives such information in many occasions.²⁶ The objective is to prevent further human rights violations and to protect and defend people's rights from being violated in a timely manner.

2.2.8 Direct Monitoring

The PDHJ has also conducted direct monitoring of specific events in the field where human rights violations are likely to occur, including military and police joint operations, public demonstrations and national elections. In March 2017, the PDHJ monitored the presidential election and produced a thematic report on the election.

²³ The number for the Central Office in Dili is (+670) 3331184.

²⁴ See point 2 of recommendations to PDHJ in 2013 ANNI Report, <http://jsmp.tl/wp-content/uploads/2014/10/ANNI-annual-report-2013.pdf>.

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

²⁶ *Ibid.*

The objective of direct monitoring is to ensure that human rights will be protected in these events as well as a measure of prevention. If there were human rights violations, the PDHJ would provide report and recommendations to the relevant state institutions for institutional changes or reform.

2.2.9 Annual and Specific Reports

Pursuant to Article 34 of Law No. 7/2004, the PDHJ is mandated to provide an annual report on its activities, as well as thematic report if there is any specific issue of human rights violations to be addressed.²⁷ Article 46 of Law No. 7/2004 also requires the PDHJ to submit a complete and detailed annual report to the National Parliament no later than 30 June each year on the activities that have been undertaken during the calendar year ending on the preceding 30 December.²⁸ The report shall make recommendations concerning reforms and other measures, whether legal, political or administrative, which could be taken to achieve the objectives of the Office, prevent or redress human rights violations and promote fairness, integrity, transparency, responsibility and accountability in public administration.²⁹

These reports that will be submitted to the National Parliament are one of the mechanisms that the PDHJ can use to lobby for the implementation of its recommendations by the relevant state institutions or to hold them accountable in the case of non-implementation.³⁰ Pursuant to Paragraph 3 of Article 47 of Law No. 7/2004 on Recommendations, the organ to which a recommendation is addressed to, must within 60 days, inform the PDHJ of the extent to which the recommendation has been acted upon or implemented.

Besides submitting reports to the National Parliament, the PDHJ as a full member of the Asia Pacific Forum of National Human Rights Institutions (APF), the PDHJ may in cooperation with other agencies share information with the APF and its members on any specific issue on human rights. In 2013, the PDHJ with the support of UNDP and ILO produced a thematic report on the right to health and sexual orientation and gender identity.³¹

2.2.10 Online complaint

Online complaints can be made through the official website of the PDHJ,³² particularly for those with internet access. Due to technical problems with the website, some information is not accessible or not updated,³³ particularly its annual and thematic

²⁷ Paragraph 4 of the Article 46 on the Progress Report of the Law No. 7/2004: <http://mj.gov.tl/jornal/lawsTL/RDTL-Law/RDTL-Laws/Law-2004-7.pdf>.

²⁸ See paragraph 1) of the Article 46 on the Progress Report of the Law No. 7/2004.

²⁹ See paragraph 1 of the Article 46 on the Progress Report of the Law No. 7/2004.

³⁰ See paragraph 4 of the Article 47 on Recommendations of the Law No. 7/2004.

³¹ See, <http://www.tl.undp.org/content/dam/timorleste/docs/reports/DG/Timor-Leste%20National%20Report.pdf>.

³² See <http://pdhj.tl/case-handling/make-a-complaint-online/?lang=en>.

³³ Interview with Deputy Ombudsman for Human Rights and Justice, Dr. Horacio de Almeida on 14 July 2016.

reports³⁴ and also reported complaints.³⁵ According to Deputy Ombudsman for Human Rights and Justice, Dr. Almeida, the PDHJ has tried to solve the problem by changing the service provider to Telecomcel.

2.2.11 Recommendation Follow-up

Pursuant to Article 5.2 of Law. No. 7/2004, the PDHJ has the mandate to provide recommendations to relevant and competent state organs that are deemed appropriate to prevent or redress human rights violations or injustices³⁶ and advisory opinions or recommendations to state organs or institutions regarding the protection and promotion of human rights.³⁷

2.2.11.1 High Level Meeting

The PDHJ uses its high-level meetings with officials of relevant ministries and state institutions or organs to ensure that its recommendations are addressed, to follow-up on implementation when the 60-day period expires and there is no information from the relevant organs on action taken.³⁸

2.2.11.2 Department for Follow-up of Recommendations

In order to ensure the implementation of the recommendations addressed to relevant state institutions, the PDHJ has established a department to follow-up its recommendations. The establishment of this mechanism, which is one of the recommendations made in several ANNI annual reports,³⁹ has been included in the strategic plan of the PDHJ⁴⁰. With this department in operation in 2016, the PDHJ managed to track the progress of the implementation of the recommendations. Out of 19 recommendations sent to state institutions and government ministries; 12 recommendations have been fully implemented, 3 recommendations have been partially implemented while 4 other recommendations are still in the process of implementation.⁴¹

³⁴ See <http://pdhj.tl/media-publications/annual-reports-budgets/?lang=en>.

³⁵ See <http://pdhj.tl/case-handling/reporting-on-complaints/?lang=en>.

³⁶ See <http://mj.gov.tl/jornal/lawsTL/RDTL-Law/RDTL-Laws/Law-2004-7.pdf>, and the version as amended by Article 30 of the Law No. 8/2009 at <http://cac.tl/wp-content/uploads/2011/11/Law-8-2009-CAC1.pdf>.

³⁷ See paragraph (b) of Article 24 of Law No. 7/2004.

³⁸ See paragraph 3 of Article 46 of Law No. 7/2004, <http://mj.gov.tl/jornal/lawsTL/RDTL-Law/RDTL-Laws/Law-2004-7.pdf>.

³⁹ See point 6 of ANNI recommendation to PDHJ in 2013 ANNI Report, <http://jsmp.tl/wp-content/uploads/2014/10/ANNI-annual-report-2013.pdf>; see point 5 of ANNI recommendation to PDHJ in 2014 ANNI Report, <http://jsmp.tl/wp-content/uploads/2014/10/ANNI-Annual-Report-20141.pdf>; and see point 6 of ANNI recommendation to PDHJ in 2015 ANNI Report.

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

⁴¹ See the PDHJ Annual Report 2016.

2.2.12 Electronic Case Management System (ECMS)

The ECMS is included in the PDHJ strategic plan for 2011-2020⁴² and it is currently in operation. This system is useful for the PDHJ in documentation of cases. The central office in Dili can immediately access cases as soon as they are recorded in the regional offices.⁴³

2.2.13 Consultative Council

After the establishment of the PDHJ, it created a consultative council whose members included civil society organisations. This purpose of this council is to advise the PDHJ on the performance of its duties in the protection and promotion of human rights, justice and good governance. However, the council or similar mechanisms have not been functioning for many years. It is important to reactivate this council to strengthen cooperation and consultation between the PDHJ and civil society, which will in turn assist the work of the PDHJ.⁴⁴

2.2.14 Private Lawyer and Public Defender

The PDHJ is considering of establishing a link with private lawyers and public defenders⁴⁵ for the protection and promotion of human rights as they are also human rights defenders.⁴⁶ The objective is to facilitate reporting and referral of cases related to human rights violations to PDHJ by lawyers or defenders as well as legal representation for victims when their cases go to court.

2.3 PDHJ and Excessive Use of Force by PNTL

Excessive use of force by the police against civilians has been the main cause for most human rights violations for years since the restoration of independence in 2002. Based on the PDHJ annual reports, the PNTL is one of the state institutions that commit most of the human rights violations as illustrated in the chart below.



⁴²See p. 11 of PDHJ Strategic Plan for 2011-2020: 'Ensure PDHJ has the capacity and independence to guarantee the implementation of its mandate', <http://pdhj.tl/wp-content/uploads/2013/11/SP-PDHJ-2011-2020-e.pdf>.

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

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

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

⁴⁶ Deputy Ombudsman for Human Rights and Justice, Dr. Horacio de Almeida interviewed on 14 July, 2016.

In the period between mid of 2016 to mid of 2017, there have been cases where members of the PNTL have been reported to have aggressively and arbitrarily beat up and kicked civilians in public as well as shoot to death several civilians. The cases are illustrated in the table below.

List of major human rights violations resulting from excessive use of force by the PNTL during the reporting period				
No.	Complete Name	Data and locality of the incident	Status of the case	Brief description of the incident
1	Costodio de Oliveira Pereira	April 19 th 2016, Maumeta, Bazarte, Liquisa	The case is still under investigation because the perpetrator has not yet been identified	The Police shot Costodio de Oliveira Pereira from behind and the bullet went through his anus and penis and then hit Simão da Costa Pereira, who was riding the motorbike. They could not identify the police who shot them because it happened during night time and the shots came from somewhere in the dark.
2	Simão da Costa Pereira	April 19 th 2016, Maumeta, Bazarte, Liquisa	The case is still under investigation because the perpetrator has not yet been identified	The bullet hit his butt and remained inside. It could not be operated based on medical examination as the risk of operation is too high.
3	Leonito Amaral	August 3 rd 2016, Fatumean, Covalima	<ul style="list-style-type: none"> •The case is currently being processed in court •The police officer has been transferred to the police headquarters. He has been suspended of his duty •The police officer reports regularly to the 	<ul style="list-style-type: none"> •Leonito Amaral was a patient of mental illness. His family called in the police when they were having difficulties to calm him down. •When the police arrived and tried to calm him down, he tried to stab a police officer. •In self-defense, the police officer shot him dead⁴⁸

			Prosecutor General ⁴⁷	
4	Elias Marques	April 22 nd , 2017, Malibaka-Bobonaro	The case is still under investigation	Elias Marques was beaten and kicked by PNTL unit, Public Order Brigade (BOP) until he fell to the ground.
5	Tiago Inacio Coelho	May 6 th , 2017, Bebonuk-Dili, Timor Leste	The case is still under investigation	Tiago Inacio Coelho was shot dead by PNTL unit, Public Order Brigade (BOP)
6	Guelermino da Costa Freitas	May 12, 2017, Pantai Kelapa, Dili, Timor Leste	The case is still under investigation	Guelermino da Costa Freitas was shot at his leg by police. His bone was broken with the bullet remains inside his bone.

Growing concerns with the human rights violations committed by the PNTL, a Timor-Leste CSO that monitors closely and regularly defence and security institutions of Timor Leste criticised the PNTL publicly and stated that the actions and attitudes of the PNTL have created a negative public perception of the institution. It said the public currently viewed the PNTL as a force of terror rather than a force that provides safety and security to the general public. It called on all PNTL members to behave professionally because PNTL is the institution that is given the responsibility to provide security for all communities in the entire country.⁴⁹

Besides thematic and annual reports, the PDHJ also conducts investigations and provides brief report and recommendations to state institutions that commit human rights violations. Despite of all these efforts, including capacity building on human rights,⁵⁰ the number of human rights committed by state institutions remains almost at the same level every year. The chart of human rights violations committed by the PNTL is a case in point.

3 Conclusion

The PDHJ has generally performed well in its duties in protecting and promoting human rights even though sections of civil society maintain that most of its actions have not been effective and efficient. This is largely due to most of its reports and recommendations were not given due attention by the PNTL and the Falintil-Forsa Defeza Timor-Leste (FFDTL) or Falintil-Timor-Leste Defence Force. On the other hand, one of the good

⁴⁸ *Ibid.*

⁴⁷ And Statements of PNTL's Commander Julio Hornai, source from National Journal Timor Post, 5/8/16, 19/8/16 and 31/3/2017.

⁴⁹ Deputy Director of Fundasaun Mahein, João de Almeida, source from National Journal Timor Post, 5/8/16, 19/8/16 and 31/3/2017.

⁵⁰ See all of the annual reports of the PDHJ: <http://pdhj.tl/media-publications/relatoriu-anual-no-orsamentu-sira/> and its newsletter 2016, p.18: <http://pdhj.tl/wp-content/uploads/2014/06/BULETIN-EDISAUN-II-2016.pdf>.

initiatives taken by the PDHJ is the establishment of a follow-up department to make sure that all its recommendations are implemented, although the mechanism is yet to be functioning fully.

The PDHJ reported non-compliance or violations of human rights to the Parliament through its annual report as a means to change the conduct of state institutions and agencies. Although the PDHJ has been operating independently, it also understands that cooperation with and participation of all stakeholders is crucial to the improvement of its effectiveness.⁵¹ In sum, much progress has been made since the establishment of the PDHJ although some gaps and structural problems remain to be resolved.

4 Recommendations

4.1 To the National Parliament

- 4.1.1 Consider and discuss the annual report of the PDHJ, particularly the recommendations addressed to state institutions that have committed human rights violations but failed to implement the recommendations of PDHJ with the aim to hold these state institutions accountable;
- 4.1.2 Consider, allocate and approve adequate budget for the PDHJ to implement its strategic plan for 2011-2020.

4.2 To the PNTL

- 4.2.1 Consider and implement all recommendations provided by the PDHJ in relation to human rights violations that have been committed by PNTL officers;
- 4.2.2 Conduct capacity building and promote professionalism to ensure PNTL officers will carry out their duties in line with human rights.

4.3 To the PDHJ

- 4.3.1 Be more proactive in protecting and promoting of human rights. It should not only monitor and publish reports, but also making public statements or declarations against any action of state institutions or organs that acted against the Constitution and the laws, or in violation of human rights;
- 4.3.2 Intervene in situations where human rights violations occur regardless of citizenship, race, colour, religion, and ethnicity of victim;
- 4.3.3 Ensure the rights of victims of human rights violations to health services, to be compensated for the loss of their properties due to development projects, and timely settlement of their cases;
- 4.3.4 Actively follow-up and inform complainants on the status of their cases;
- 4.3.5 Make available its information and reports on human rights violations for public access;
- 4.3.6 Establish a network or coordinating mechanism on human rights with civil society and convene related coordination meetings;

⁵¹ Asia-Pacific Human Rights Information Center (2007) Volume 47, “Ombudsman for Human Rights: The Case of Timor-Leste”, <http://www.hurights.or.jp/archives/focus/section2/2007/03/ombudsman-for-human-rights-the-case-of-timor-leste.html> (11.07.2016).

- 4.3.7 Ensure the Consultative Council to be more effective and enhance cooperation and collaboration with civil society organisations;
- 4.3.8 Provide training or capacity building to human rights defenders to improve their capacities in protecting and promoting human rights;
- 4.3.9 Take actions on other human rights as well such as social, economic and cultural rights to ensure the government protects the rights of people to clean water, land, sanitation, education, etc.

BANGLADESH: BECOMING A SUBSERVIENT TO THE GOVERNMENT

*Odhikar*¹

1. Introduction

The year 2017 is yet another crucial period for the National Human Rights Commission (NHRC), Bangladesh as the new team of the NHRC² will be facing numerous challenges, in particular the implementation of its mandates to protect and promote human rights, while dealing with different stakeholders. The selection process of the commissioners is not transparent as neither the founding law has a specific provision to include civil society members in the selection committee, nor has the selection committee ever practiced any formal process of consultation with civil society in any occasion.

The Sub-Committee on Accreditation (SCA) of the Global Alliance of National Human Rights Institutions (GANHRI) has highlighted the importance of a clear, transparent and participatory selection process that promotes the independence of, and public confidence in, the senior leadership of the Commission, and has called upon the NHRC to advocate for formalisation of the selection process in relevant legislation, regulations or binding administrative guidelines.³

This report is a critical assessment of the performance of the NHRC in the protection and promotion of human rights, mainly for the year 2016, as well as from January to April 2017. The first part of the report describes the NHRC's situation till date and the general human rights situation of the country. The second part is an assessment of the NHRC's independence and effectiveness in the context of its performance while protecting and promoting human rights over the reporting period.

1.1 Methodology

This report is prepared based on verified information on the situation of human rights in Bangladesh, in consultation with different organizations and stakeholders, including ANNI members through interviews; reviewing of media reports; and analysis of the previous reports and performance of the NHRC of Bangladesh.

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² On 2 August 2016, the appointment of new members of NHRC was approved by the president and took effect through announcement in the government gazette. <http://www.dhakatribune.com/bangladesh/2016/08/02/kazi-rezaul-hoque-new-nhrc-chief/>.

³ GANHRI Sub Committee on Accreditation Report – November 2016; <http://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20Final%20Report%20-%20Nov%202016%20-%20English.pdf>.

1.2 Overview

In 2016, the overall human rights situation in Bangladesh was catastrophic due to the lack of democratic and functional institutions and this was aggravated after usurpation of power by a violent, intolerant and autocratic regime through farcical parliamentary elections on 5 January 2014. This has emerged as the main barrier for restoration of democracy, establishment of the rule of law, human rights and delivery of justice. Since the independence of Bangladesh in 1971, successive regimes have failed to build Bangladesh into a democratic state, based on equality, human dignity and social justice. Bangladesh ratified several international treaties and conventions, including the Rome Statute of the International Criminal Court and the International Covenant on Civil and Political Rights (ICCPR). It has also ratified or acceded to other key UN conventions, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention against Corruption. In spite of all this, the human rights situation of Bangladesh is worsening. While facing massive criticism on its record of human rights violations, Bangladesh has thrice been elected a member of the UN Human Rights Council.⁴

The judiciary has become politicised with the justice delivery system increasingly becoming dysfunctional. The space for freedom of opinion, expression and thought as well as freedom of assembly and association has experienced an abrupt decline due to ongoing harassment and repression.

Incidents of gross human rights violations including enforced disappearances and extrajudicial killings by security forces, torture and custodial deaths, shooting at the limbs of the opposition and civil society activists, the imposition of draconian laws against human rights defenders, teachers, journalists and on-line activists, oppression of religious and ethnic minority communities and violence against women and children have become regular occurrences. These were some of the serious causes for concern in 2016.

Political violence: A series of local government elections held in 2016 were marred by violence. In 2016, there were a total of 846 incidents of political violence, including intra-party clashes, election-related violence, clashes between law enforcement officials and political party activists, and clashes between activists of the ruling party and the opposition. During such violence, 215 persons were killed and 9,053 were injured. Across the country, criminal activities of the leaders and activists of the ruling party affiliated organisations, Chhatra League⁵ and Jubo League⁶ reportedly increased during

⁴ <http://www.ohchr.org/EN/HRBodies/HRC/Pages/CurrentMembers.aspx>.

⁵ Student wing of the Awami League.

⁶ Youth wing of the Awami League.

this period. In many cases they were seen attacking opponents with lethal weapons which were publicised in the print and electronic media⁷.

Extrajudicial killings: Although the highest court of the country issued rules against extrajudicial executions, many incidents of extrajudicial killing that violated Article 32⁸ of the Bangladesh Constitution and Article 6⁹ of the ICCPR continue to take place. A total of 178 persons were reported killed extra-judicially in 2016.¹⁰ Law enforcement agencies termed such incidents as deaths in ‘gunfight’ or ‘crossfire; and in most cases they enjoy impunity, despite allegations from victim-families to the contrary.

Enforced disappearances: According to information gathered by Odhikar, at least 90 persons were allegedly disappeared by various law enforcement agencies in 2016.¹¹ Among them, 11 were found dead, 68 were freed or shown as arrested and whereabouts of 11 persons remain unknown. The acts of enforced disappearance have become an institutionalised practice of repression by the government. The UN Working Group on Enforced or Involuntary Disappearances¹² has expressed its concern on the growing trend of enforced disappearance in Bangladesh and urged the Bangladesh Government to take action to stop enforced disappearances in the country.¹³ Meanwhile, in March 2017, the United Nations Human Rights Committee, during its concluding observations on the ICCPR review on Bangladesh, strongly urged the government to criminalise enforced disappearances in its domestic law.¹⁴

Torture and inhuman treatment: In 2016 allegations of acts of harassment, extortion, torture and killings, perpetrated by the security forces, were found to be a common phenomenon. Given that torture has become a regular feature in the police work, due to its long standing practice, it is considered that the actual number of such allegations are several times more than the documented cases. In 2016, according to information gathered by Odhikar, at least 11 persons were allegedly tortured to death. A Torture and Custodial Death (Prevention) Act was passed in Parliament on 24 October 2013 after a prolonged campaign by human rights defenders. On 10 November 2016, the Appellate Division of the Supreme Court issued a 19-point guideline to judicial and law-

⁷ No arrests or charges yet in illegal use of arms, en.prothom-alo 29 October 2016, <http://en.prothom-alo.com/bangladesh/news/126965/No-arrests-or-charges-yet-in-illegal-use-of-arms>.

⁸ Article 32: No person shall be deprived of life or personal liberty save in accordance with law.

⁹ Article 6: Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

¹⁰ Odhikar, Annual Human Rights Report 2016 on Bangladesh, <http://odhikar.org/annual-human-rights-report-2016/>.

¹¹ Odhikar only documents allegation of enforced disappearance where the family members or witnesses claim that the victim was taken away by people in law enforcement uniform or by those who said they were from law enforcement agencies or from administration. Cases where returnees have confirmed they were detained by members of a law enforcing agency are also documented.

¹² http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/33/51.

¹³ The daily New Age, 17/09/2016, ‘UN concerned over enforced disappearance’, <http://newagebd.net/251835/>.

¹⁴ <http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/BDIndex.aspx>.

enforcement officials regarding arrests without warrant and the procedure of remand.¹⁵ Despite this, there is no change in the actual situation.

Death in jail: In 2016, Odhikar documented 63 persons reportedly died in jail allegedly due to the lack of treatment facilities and negligence by the prison authorities.¹⁶ Prisoners sometimes became ill due to the effects of torture during police remand, which caused their death later when they were sent to jail custody.

Public lynching: Several people are getting killed by mobs in acts of public lynching every year due to the absence of rule of law, dysfunctional justice delivery system and instability in the country. In 2016, 53 persons were reportedly killed due to public lynching.

Enactment and imposition of repressive laws: The government has drafted several repressive laws in 2016 and if these laws are passed, they will severely violate the human rights of the citizens. The Information Ministry drafted a bill called ‘National Broadcasting Act’, incorporating the provisions of imprisonment and monetary fine. The Government also drafted another bill called ‘Distortion of the History of Bangladesh Liberation War Crimes Act’ while the Press Council finalised the draft bill for a Press Council (amendment) Act 2016, incorporating provisions for stopping the publication of any newspaper or media for a maximum of three days or a fine of five hundred thousand taka, if the media and news agencies contravene any decision or Order of the Press Council.¹⁷ On 5 October, the National Parliament passed the Foreign Donation (Voluntary Activities) Regulation Act 2016, which is extremely repressive and in contradiction with international law. On 27 February 2017, the National Parliament passed the ‘Child Marriage Restraint Act, 2017’¹⁸, allowing the marriage of minor girls (with no minimum age specified) in ‘special circumstances’ and for ‘best interest’ with the consent of the Court and parents.¹⁹ The Information and Communication Technology Act 2006 (amended 2009, 2013) and the Special Powers Act 1974 continued to be imposed against the people who are critical of the decisions and activities of those in high positions of the government and their families. The law enforcement agencies are also arresting ‘accused persons’ under sedition charges for criticising the above-mentioned persons, mainly on Facebook.

Hindrance to freedom of expression: The right to freedom of opinion and expression in 2016 was under serious threat due to aggressive attitude of the government and the imposition of repressive laws. The government interference in the media was highly

¹⁵ “Reform of CrPC Provisions of Arrest, What 19 SC guidelines for law enforcers stipulate” The daily Prothom Alo, 10/11/2016;

<http://en.prothom-alo.com/bangladesh/news/128573/What-19-SC-guidelines-for-law-enforcers-stipulate>.

¹⁶ Odhikar, Annual Human Rights Report 2016 on Bangladesh, <http://odhikar.org/annual-human-rights-report-2016/>.

¹⁷ The daily Jugantor, 03/05/2016.

¹⁸ “Child marriage law with special provision passed at Parliament”, The Daily Star, 27 February 2017; <http://www.thedailystar.net/country/child-marriage-law-passed-js-1368184>.

¹⁹ Child Marriage: Nothing to worry about new law: PM/ The Daily Star November 25, 2016/ <http://www.thedailystar.net/backpage/child-marriage-nothing-worry-about-new-law-pm-1326775>.

visible during the entire period as most of the media, particularly the electronic media, are controlled by the government. Journalists faced many risks such as threats, physical attacks, arrests, persecution and detention and abuse in remand, which are in violation of Article 39²⁰ of the Bangladesh Constitution and Article 19²¹ of the ICCPR.

Freedom for assembly: The government barred and attacked meetings, assemblies and rallies organized by the opposition political parties and civil society organisations in 2016, which are violations against the right to freedom of peaceful assembly and freedom of association of the citizens guaranteed in Article 37²² of the Bangladesh Constitution and Article 21²³ and 22²⁴ of the ICCPR. In many cases, leaders and activists of the ruling party attacked rallies and assemblies of the opposition parties along with members of the law enforcement agencies.²⁵

'Extremism' and human rights: Acts of extremism have emerged in Bangladesh in recent times and exceeded all such incidents that occurred in the past. Bloggers have been killed since 2013. In 2016, many people, including a teacher and editor of a Lesbian, Gay, Bisexual, Transsexual and Intersex (LGBTI) rights magazine, citizens belonging to minority communities were killed. In July, 22 persons, both Bangladeshi and foreign, were killed by extremists at a Spanish restaurant 'Holey Artisan Bakery' in Gulshan, Dhaka; and there were casualties during Eid-ul-Fitr in Sholakia under Kishoreganj District.²⁶ To weed out 'extremists', law enforcement agencies carried out operations in Gulshan and Kalyanpur in Dhaka in July; in Paikpara, Narayanganj in August, in Rupnagar and Azimpur of Dhaka in September, Gazipur and Tangail in October, and in Ashkona, Dhaka in December, which resulted in 34 persons, including women and children, being killed.

Mass arrest: In 2016, the government started a special drive in the name of arresting 'extremists' across the country after the incidents of attacks and killings of citizens

²⁰ Article 39: (1) Freedom of thought and conscience is guaranteed. (2) Subject to any reasonable restrictions imposed by law in the interests of the security of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence– (a) the right of every citizen to freedom of speech and expression; and (b) freedom of the press, are guaranteed.

²¹ Article 19: 1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

²² Article 37: Every citizen shall have the right to assemble and to participate in public meetings and processions peacefully and without arms, subject to any reasonable restrictions imposed by law in the interests of public order or public health.

²³ Article 21: The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

²⁴ Article 22: Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

²⁵ For details, please see Odhikar's monthly human rights reports. www.odhikar.org.

²⁶ For details, please see Odhikar's monthly report of July 2016. <http://odhikar.org/human-rights-monitoring-report-july-2016/>.

belonging to religious minority communities and people belonging to different professionals. Although this operation was against the alleged ‘extremists’, however, many leaders and activists of the opposition political parties, ordinary people, including pedestrians, day-labourers, petty businessmen and students were also arrested.

Situation of workers’ rights: There were several incidents of human rights violations of workers in 2016 and impunity enjoyed by the related government officials and factory owners for such violations were apparent. Such violations included deprivation of rights to security, proper and due wages, health, maternity leaves and exercising the right to form trade unions. Workers have also been terminated without any notice. Furthermore, at least 45 workers died in fires at various factories due to the negligence of the owners and government factory inspectors.

Human rights of minority communities: In Bangladesh, people from different religions and ethnic groups have been living in harmony with each other for many years. Unfortunately, over the past few years, a division is being made because of corrupt politics. Attacks on the citizens of religious minority communities have become a phenomenon due to inactive administration and direct patronage of the local leaders of the ruling party. The representatives of the Hindu-Buddhist-Christian Oikko Parishad alleged in a press conference on 22 April 2016 that the human rights situation of minority groups was deteriorating. According to them, violence against minority groups in first three months of the year 2016 was three times more than the whole year of 2015. The perpetrators were using political influence and power in these incidents as many leaders of the ruling Awami League were allegedly involved in such incidents.²⁷

Border killings: Human rights violations by the Indian Border Security Force (BSF) have been going on for a long time along borders between Bangladesh and India. The BSF is shooting/ attacking at Bangladeshi civilians near the border, violating international law and human rights. In 2016, BSF killed 29 Bangladeshi citizens either by shooting or torturing while 36 were injured and 22 were abducted by BSF.

Violence against women: In 2016, a significant number of women were the victims of domestic violence, dowry related violence, rape, acid attacks and sexual harassment. Victims are not getting justice due to a culture of impunity which encourages perpetration. The lack of implementation of laws, failure of the justice delivery system, the absence of victim and witness protection laws, corruption, the criminalisation and politicisation of members of law enforcement agencies and the lack of good governance are all factors contributed to the perpetual of such violence.

2. Mandate of NHRC to Protect and Promote Human Rights

The NHRC of Bangladesh was established in 2007 under the Human Rights Commission Ordinance during the State of Emergency and it was re-constituted under the National Human Rights Commission Act 2009 on 22 June 2010 after the 9th Parliamentary Elections in December 2008. The NHRC comprises of a full-time Chairman, a full-time

²⁷ The daily Manabzamin, 23/04/2016; <http://archive.prothom-alo.com/detail/date/2013-01-17/news/322123>.

Member and five-part time Members. With power to investigate but no authority to sanction any action, it is to be an “independent body”²⁸ for “protecting, promoting and providing guarantee to human rights properly”.²⁹ However, the process of selecting the NHRC Chairman and members put to question the independence of the Commission as six out of seven members of the Selection Committee are government officials with the remaining member being a member of parliament from the Treasury Bench and two Ministers under the leadership of the Speaker of the Parliament.³⁰ This results in the selection being based on loyalty to the government.

The NHRC’s primary activity was educating the public about human rights and ostensibly advising the government on key human rights issues. The Global Alliance of National Human Rights Institutions (GANHRIs) found that the NHRC did not fully comply with international standards. Specifically, the GANHRIs focused on the lack of transparency in selecting NHRC commissioners and the NHRC’s lack of hiring authority over its support staff. In August 2016, the government appointed Kazi Reazul Hoque as the new chairman of the NHRC through a process that lacked transparency with limited civil society participation.³¹

The NHRC Act 2009 empowers the NHRC to investigate any complaint of human rights violations and make recommendations to the government to take action against the perpetrators. It has legal mandate to review and monitor human rights-related national legislations or policies to ensure compliance with the international legal framework. As claimed by the Commission, over the last five years, it has provided policy advice to the Government of Bangladesh on pressing human rights issues in compliance with various international instruments. The NHRC reviewed various national legislations and submitted its recommendations to the government. However, these recommendations are not binding and therefore, mostly ignored.

In order to ensure better coordination of its strategic priorities, the NHRC formed nine thematic committees comprising members from civil societies, international non-governmental organizations (INGOs), United Nations (UN) bodies and state actors with NHRC member as chair to implement its strategic plan. These include the Committees on Child Rights, Child Labour and Anti-Trafficking Women’s Rights, Chittagong Hill Tracts Affairs, Dalits and other Excluded Minorities, Business and Human Rights, Persons with Disabilities, Migrant Workers’ Rights, Protection of Religious Minorities,

²⁸ NHRC Act 2009, Chapter II, section 3 (2), see http://nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/law/de62d323_fe91_45f0_9513_a0d36ab77fdf/NHRC%20Act%20English.pdf.

²⁹ NHRC Act 2009, Preamble.

³⁰ According to section 7, the Selection Committee shall consist of the Speaker of the House of Nation, Ministers for Law and Home Affairs, Cabinet Secretary, Chairman of the Law Commission, and two MPs nominated by the Speaker of the Parliament, out of whom one shall belong to the ruling party and the other from the opposition party. NHRC Act 2009, Chapter II, Section 7, http://nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/law/de62d323_fe91_45f0_9513_a0d36ab77fdf/NHRC%20Act%20English.pdf.

³¹ ‘Bangladesh Reports on Human Rights Practices for 2016’, United States Department of State, Bureau of Democracy, Human Rights and Labor. <https://www.state.gov/documents/organization/265744.pdf>.

Child Labour and Anti-Trafficking, and the Committee for Protection of Rights for Ethnic Groups and Economic Social and Cultural Rights. As claimed by the NHRC, these Committees have been in operation since 2011 under the umbrella of NHRC and addressing the need of specific groups regarding human rights violations.³²

The NHRC of Bangladesh is still ranked as ‘B’ category institution³³ re-accredited by the SCA of GANHRI, which was previously named as International Coordinating Committee of the National Human Rights Institutions (ICC-NHRI). The Paris Principles set out six main criteria that national human rights institutions are required to meet, namely mandate and competence, autonomy from the government, independence guaranteed by statute or constitution, pluralism, adequate resources and adequate powers of investigation. It is important to note that the NHRC of Bangladesh is yet to fulfill the criteria for full compliance with the Paris Principles.

The second five-year strategic plan (2016 – 2020) of NHRC Bangladesh³⁴ sets out to ensure the rule of law, social justice, freedom and human dignity through promoting and protecting human rights with a long-term goal. To attain these goals, it has developed its five-year outcomes, key strategies to achieve the outcomes and key performance indicators to measure the changes. The NHRC was unable to execute most of its five-year strategic plan for 2010 – 2015 and there are shortcomings in the 2nd five-year strategic plan with regard to investigation and monitoring of the cases and coordinating with state agencies and civil society organizations. The most pressing human rights challenge for the NHRC is violence by the state. Unfortunately this is largely unaddressed.

2.1 Initiatives taken by NHRC addressing human rights violations/issues

The NHRC has taken some initiatives in 2016 through organizing some events – seminars, meetings, press statements and spot visits to address human rights violations. The NHRC has also received complaints and committed to pursue them. Apart from receiving complaints, the NHRC could exercise the power of *suo motu*³⁵. According to its Annual Report 2015, the NHRC initiated *suo motu* against 17 cases only. Among them, five cases were related to extrajudicial killings but all are still pending. Most importantly, the NHRC has not issued any *suo motu* in respect of enforced disappearances despite such incidents are in full blown situation.

³² National Human Rights Commission, Bangladesh, Annual Report 2015; http://nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/annual_reports/5116283f_1970_4f1d_9c37_19602f176436/Annual%20Report%20English-%202015.pdf.

³³The Sub-Committee on Accreditation (SCA) of the International Coordinating Committee for National Human Rights Institutions (ICC-NHRI), which accredits national human rights institutions ranked the National Human Rights Commission, Bangladesh as a ‘B’ category institution in 2010. After five years, the ICC-SCA did another review in March 2015 and once again accredited as a ‘B’ status. <http://www.asiapacificforum.net/news/nhris-must-be-apolitical-says-icc-accreditation-body/>.

³⁴ 2nd Five-Year Strategic Plan (2016-2020) NHRCB, http://nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/535c363f_91a8_40b6_b58a_714954c85b4e/2nd_Five-Year_Strategic_Plan_%282016-2020%29_of_JAMAKON.pdf.

³⁵ *Suo motu*, meaning "on its own motion," is a Latin legal term, approximately equivalent to the term *sua sponte*. For example, it is used where a government agency specially courts acts on its own cognizance, as in "the Commission took *suo motu* control over the matter".

The second five-year strategic plan for 2016 – 2020 focuses its key strategies on investigation and monitoring of cases of human rights violations, cooperate and coordinate with state agencies, civil society, regional and international bodies for better promotion and protection of human rights, and support and protect human rights defenders. However, in reality it has failed to develop any actual strategy to implement such plans.

The performance of the NHRC is disappointing in many areas. The Commission did not monitor the progress and implementation of the laws enacted after the formation of the NHRC. For example, the government formulated a three-year action plan (2013-2015) to prevent human trafficking, but this has not been implemented. According to the plan, special tribunals would be set up in seven divisions, which are yet to be done. The Torture and Custodial Death (Prevention) Act 2013 and the Overseas Employment and Migrants Act 2013 were adopted but hardly enforced. The NHRC could have monitored and made recommendations to the government for the effective implementation of these laws.

The NHRC is not critical against repressive laws and the government (in) actions. The Commission did not take any position against the Foreign Donation (Voluntary Activities) Regulation Act 2016, which was passed by the National Parliament despite immense criticisms from several national and international human rights organisations, including the UN bodies³⁶ and the UN Special Repporteur on the rights of freedom of peaceful assembly and of association.³⁷ The Act contains additional repressive elements, including ‘inimical’ and ‘derogatory’ remarks that undermine the Constitution and constitutional bodies.. Apart from speaking at public meetings³⁸, the NHRC has not done anything before the Child Marriage Restraint Act, 2017 was passed by the Parliament, which allows the marriage of minor girls under certain special provisions.³⁹

The NHRC Chairman promised during his visit at Tampaco Foils Industry in Tongi in September 2016 that the Commission would form a high level inquiry committee consisting of representatives from the relevant agencies to make spot inquiry and discussion with stakeholders to identify the reasons of factory fire. However, it is a pity that such commitment made by the NHRC Chairman has not been implemented.

The GANHRI-SCA recognized that the NHRC of Bangladesh is operating in difficult circumstances with numerous challenges, including the lack of manpower and resources. However, that does not absolve the Commission from its interventions and actions which were not in compliance with the Paris Principles. NHRC remained silent during the Kalyanpur slum eviction by police and ministry officials on 21 January 2016 when

³⁶ <http://freeassembly.net/tag/bangladesh/>.

³⁷“UN official urges JS: Do not pass foreign donation bill”, The Daily Star, 07/11/2015; <http://www.thedailystar.net/frontpage/do-not-pass-foreign-donation-bill-168745>.

³⁸ “Child marriage act shocking: NHRC” The Daily Observer, 24/03/2017; <http://www.observbd.com/details.php?id=65142>.

³⁹ “Child marriage law with special provision passed at Parliament”, The Daily Star, 27 February 2017; <http://www.thedailystar.net/country/child-marriage-law-passed-js-1368184>.

40,000 dwellers were forcibly evicted.⁴⁰ The NHRC did not take any step when houses belonging to the Hindu community in Nasirnagar, Brahmanbaria were torched on 4 November 2016 despite the presence of police.⁴¹ The Commission did not take any action during the eviction of the Santal community by Rangpur Sugar Mill authority, police and ruling party activists on 12 July 2016 in Govindaganj, Gaibandha. It has been proved by the judicial inquiry committee that police were involved in setting fire at the Santal huts. Although the NHRC claimed that it has conducted an investigation into this matter and the reports have been sent to the government. However, such report was never made public. The Commission did not take any stand against ethnic cleansing of Rohingya Muslim minority people in Rakhine State of Myanmar by the Myanmar military junta. On the contrary, the NHRC Chairman said that, “Bangladesh is already overburdened with sheltering many Rohingyas who are staying in the UNHCR-camps of Bangladesh. Moreover, there are many undocumented Rohingyas. We have great sympathy for the Rohingya victims. But the question is: how long will we keep them in our country?”⁴²

The Human Rights Committee (CCPR) has expressed its concern that the NHRC of Bangladesh may not have a broad enough mandate to investigate all alleged human rights violations, including those involving State actors such as the police, military and security forces. However, the Committee recommended the NHRC to impartially and independently fulfill its mandate in line with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles).⁴³

2.2 NHRC and Country Specific Thematic Issue

2.2.1 Case Study 1: Situation of Human Rights Defenders at Risks

The NHRC of Bangladesh has not taken any initiative to address any case of persecuted human rights defenders at the appropriate level through investigation or monitoring. The Commission did not undertake any specific documentation on the situation of HRDs and WHRDs or even issued press statement in this regard. The complaint receiving mechanism of the Commission is extremely weak. So far the Commission has not made any focused or dedicated effort to receive complaints relating to rights violations of HRDs and WHRDs since its inception.

Although freedoms of assembly, association, and expression are enshrined respectively in Article 37, 38 and 39 of the Constitution of the People’s Republic of Bangladesh as fundamental rights and Article 16 guarantees all citizens the protection of the law, there is no specific legal framework in practice to facilitate or protect the activities of human rights defenders in Bangladesh. On the contrary, restrictive legislations/provisions/rules are applied to directly or indirectly hinder the work of human rights defenders.

⁴⁰ Violence during Kalyanpur slum eviction”, *Daily Star*, 21 January 2016, <http://www.thedailystar.net/city/slum-eviction-turns-violent-kalyanpur-205057>.

⁴¹ The daily Jugantor, 05/11/2016; www.jugantor.com/news/2016/10/31/72534/.

⁴² <http://www.thedailystar.net/law-our-rights/law-interview/nhrc-act-needs-be-reevaluated-1329358>.

⁴³ <http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/BDIndex.aspx>.

Human rights defenders and organizations that work on human rights, in particular in the areas of civil and political rights, were persecuted and harassed by the government in 2016. This trend could be witnessed in several emblematic cases of the repression of free expression and the judicial harassment of journalists and human rights defenders. **Mahmudur Rahman**, the Acting Editor of the Daily Amar Desh, was arrested on 11 April 2013 and spent 1322 days in arbitrary detention until his release on bail on 24 November 2016.⁴⁴ Despite his release, Mahmudur Rahman is still facing prosecution in 81 cases filed against him across the country, mainly for defamation and sedition. **Shafik Rehman**, 81-year-old author and journalist, was arrested on 16 April 2016 by plain clothed police officers without a warrant. He was eventually charged with “conspiring to abduct and assassinate” Prime Minister Sheikh Hasina’s son, and was repeatedly denied bail despite his advanced age and frail medical condition. He was freed from jail on 6 September 2016.⁴⁵ **Mahfuz Anam**, Editor of *The Daily Star*, is facing 82 cases of sedition and defamation for having published reports in 2007 that accused the incumbent Prime Minister Sheikh Hasina of corruption. On 11 April 2016, the High Court stayed the proceedings of 72 of the cases filed against him for three months and later extended to June 2017; the High Court stayed the remaining 10 cases on 13 June 2016. **Shaukat Mahmud**, Editor of *Weekly Economic Times* and President of the Bangladesh Federal Union of Journalists, was arrested on 18 August 2015 and spent nearly a year in arbitrary detention for 24 fabricated criminal charges of arson and vandalism. On 22 June 2016 he was finally released on bail on orders of the High Court. His case is still under investigation.

Severe harassment on Odhikar commenced in 2013 by different organs of the government to this date. Human rights defenders, including Odhikar members and staff are constantly under harassment, threats and persecution for the past several years for having published information on human rights violations in the country. Furthermore, the government has barred the release of all project related funds of Odhikar and withheld renewal of its registration since March 2014, in order to stop its human rights activities.

In addition to judicial harassment and violations of their due process rights, HRDs and journalists often face physical violence, notably from law enforcement agents. There are several reports of journalists being threatened and harassed by police, and being physically attacked by security forces. However, no steps were taken by the NHRC of Bangladesh in such matters.

2.2.2 Case Study 2: Gross Human Rights Violations by State Security Forces

According to information gathered by Odhikar, a total of 178 persons were reported killed extra-judicially by members of the law enforcement agencies without due process of law while 17 persons were shot in the legs by law enforcers in 2016. Meanwhile, 63 people were reported as being extra-judicially killed during the first four months in 2017.

44 For more information see <https://www.fidh.org/en/issues/human-rights-defenders/bangladesh-mahmudur-rahman-finally-freed-after-more-than-three-years>.

45 <http://www.thedailystar.net/backpage/shafik-rehman-out-bail-1281874>.

The Rapid Action Battalion (RAB) officials have always maintained that any people they have killed were wanted criminals and they have been killed in active shoot-outs or due to “crossfire”. There are several cases of individuals killed by the RAB where witnesses have claimed otherwise, or that are proven to be cases of mistaken identity.⁴⁶ However, RAB officials have never publicly accepted responsibility for the alleged extrajudicial killings.

Joint operations carried out by The Counter Terrorism Unit of Dhaka Metropolitan Police and Special Weapons and Tactics (SWAT) and RAB in the name of ‘countering extremism’ have even caused the deaths of women and children.⁴⁷ According to Odhikar’s documentation, 38 persons were reported killed during such operations from July 2016 to April 2017. The NHRC remained silent in this regard.

Incidents of enforced disappearance in Bangladesh are rapidly increasing. In a large number of enforced disappearance cases that are documented, the abductors were dressed in uniforms and arrived in vehicles belonging to law enforcement agencies, and had identified themselves as members of law enforcement agencies such as the RAB or the Detective Branch (DB) of the Police. In 2016, Odhikar documented 90 persons were forcibly disappeared after having allegedly picked up by men claiming to be members of law enforcement agencies. Between January and April 2017, Odhikar documented 30 cases of enforced disappearance. Not a single case was investigated by the Commission.

Despite the passing of the Torture and Custodial Death (Prohibition) Act 2013, reports of torture in police custody continue to surface, and perpetrators enjoy almost complete impunity. In 2016, Odhikar documented at least 11 incidents of persons who were tortured to death in the custody of different law enforcement agencies. In most cases, the police, RAB and other law enforcers tortured detainees during interrogations in remand.

3. NHRC: A subservient body of the government

The human rights situation in Bangladesh is catastrophic. Incidents of gross human rights violations by the State security forces, local representatives, public companies, corporations continue to take place while the ordinary people as victims have no place to lodge their complaints. The NHRC is seen reluctant in taking action against the state actors for gross human rights violations. It appears to be comfortable only in dealing with cases perpetrated by non-state actors. The main purpose of the establishment of NHRC in the country is to provide remedy to its citizens/victims. Poor and ordinary citizens cannot enjoy their guaranteed rights from the courts as the justice delivery mechanism has become dysfunctional and the judicial procedures are lengthy, expensive and corrupt. The NHRC is a quasi-judicial body which is empowered by the law to give relief for violation of human rights against state bodies promptly and without resorting to long drawn judicial processes. Dealing with cases of human rights violations, a formal complaint is sufficient and no lawyer is required to engage the NHRC, as long as the case contains elements of human rights violations. However, the NHRC of Bangladesh is yet

⁴⁶ <http://odhikar.org/kaiser-mahmud-bappi-allegedly-shot-to-death-by-rab-at-rampura-in-dhaka/>.

⁴⁷ The daily Prothom Alo, 01/04/2017; www.prothom-alo.com/bangladesh/article/1130046/.

to institutionalise its statutory obligations and mandates. In fact, it has not at all exercised its power given under the National Human Rights Commission Act 2009.

4. Conclusion and Recommendations

Apart from conducting some inquiries on selective cases, spot visits and issuing press statements, the function of the NHRC is not effective and visible. It has not fully exercised its power and mandates given as per the Act of 2009. Victims and their families are not getting benefits out of it. The way the NHRC deals with the complaints of human rights violations is questionable. It has not even framed rules on how to deal with complaints in the last six years. The NHRC's long overdue mandates are: (i) Making recommendations on compensation as interim relief to the victims or departmental actions against violators as deterrent against future violations; (ii) Filing cases under article 102 of the Constitution to compel dilly-dallying violators to comply with prompt responses to the NHRC's show-cause notices; (iii) Framing rules on receiving and dealing with complaints on human rights violations; (iv) Making rules on mediation under section 15; (v) Developing proper *modus operandi* on investigation and inquiry under sections 16 and 17; (vi) Establishing Memorandum of Understanding with NGOs working for protection of human rights; (vii) Devising directives or rules addressing all courts, tribunals and other judicial or quasi-judicial bodies that in all human rights violations related cases, the NHRC should be given representations.

Considering the human rights situation in Bangladesh in 2016, the country needs a fully independent NHRC that is empowered to protect the rights of the people. Such institution should follow the Paris Principles, adopted by the UN General Assembly in March 4, 1994,⁴⁸ in which the national human rights institutions should have “all necessary guarantees to ensure the pluralist representation of the social forces of civilian society”⁴⁹ and shall “Freely consider any question falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner”⁵⁰. The role of NHRC of Bangladesh unfortunately is still very far from these expectations.

4.1 Recommendations to the Government of Bangladesh

- 4.1.1 Allow the NHRC to function independently, so that the victims get remedies.
- 4.1.2 Accept the recommendations of the NHRC, and take its statements and representations with utmost importance.
- 4.1.3 Allow an independent secretariat of the NHRC to ensure independence and effective functioning of the NHRC.
- 4.1.4 Provide adequate budget for the NHRC and improve its financial autonomy.

48 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

49 Article 1 of the Chapter titled as ‘Composition and guarantees of independence and pluralism’ of the Paris Principles, <http://www.un.org/documents/ga/res/48/a48r134.htm>.

50 Article a of the Chapter titled as ‘Methods of operation’, <http://www.un.org/documents/ga/res/48/a48r134.htm>.

4.2 Recommendations to the National Human Rights Commission

- 4.2.1 Exercise full power and mandates specified in the National Human Rights Commission Act, 2009.
- 4.2.2 Organize capacity enhancement trainings/workshops for the NHRC staff on human rights issues on gross human rights violations and HRDs at risk.
- 4.2.3 Develop mechanisms to support persecuted human rights organizations and HRDs at risk by providing immediate support, safe houses, relocation, etc.
- 4.2.4 Conduct follow-up on the implementation of the UPR Recommendations and prepare stakeholders report as NHRC for the UPR process.

4.3 Recommendations to the Parliament

- 4.3.1 Review and make necessary changes of the Act of 2009 and bring it in line with the Paris Principles.
- 4.3.2 Empower the Commission with authority to directly investigate members of the Republic (public representatives) and public servants (especially the security forces and/ or the police) for the allegations of human rights violations committed by them.

4.4 Recommendations to the International Mechanisms/Bodies

- 4.4.1 The Asia Pacific Forum of National Human Rights Institutions (APF) and the GANHRI should regularly monitor the activities and performance of the NHRC and recommend the NHRC of Bangladesh to act in compliance with the Paris Principles.
- 4.4.2 UN Human Rights Council should strongly urge the Government of Bangladesh and the NHRC to abide by international laws and effectively implement the recommendations made by the Council in compliance with the Paris Principles.

INDIA: LOYAL TO THE STATE BUT FAILING THE PEOPLE

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

1. Introduction

Indian National Human Rights Commission (NHRC) was assessed by the Sub-Committee on Accreditation (SCA) of the Global Alliance of National Human Rights Institutions (GANHRI) in November 2016 and the report of the same published in January 2017. The SCA decided to defer NHRC's application for accreditation to its second session in November 2017.

This report is focused on the specific recommendations made by the SCA in November 2016 highlighting issues of composition and pluralism, selection and appointment of members, appointment of senior staff (secondment from government), political representation and complaints handling. The report also makes an assessment of NHRC's response to the cases of human rights defenders (HRDs).

The year 2016 witnessed a tremendous rise in attacks on HRDs and shrinking of democratic space in India. There were several instances such as, direct assaults on fundamental freedoms of expression, association and assembly. In all these cases, petitioned before the NHRC, not a single case did the NHRC order for compensation or prosecution. With no relief from NHRC or a pro-active measure by NHRC, there is an emerging perception of the NHRC not being independent and seemingly positioning itself close to the government.

Nine months since the last accreditation process of NHRC, it can be confidently said on the basis of adequate facts as laid out in this report, that there have been no positive and desired developments in NHRC in achieving what has been pointed out in the SCA report and it is difficult to believe that the SCA's report is at all taken seriously by the NHRC as well as the Government of India. At some levels, some of the actions are projected to be positive developments but a closer analysis proves these to be an eyewash. Two appointments -one of an active member of ruling political party as member of NHRC and later withdrawal of the same and appointment of a woman member associated with a wing of the ruling party- are clearly reflective of the fact that no due process was followed and these appointments were made in a non-transparent manner. Similarly disposing of cases solely based on the report of the Intelligence Bureau, informally agreeing to States' vague replies and settling cases, hesitation in exercising powers guaranteed by the founding law against the State et cetera are some of the other areas of serious concerns.

Several cases and developments speak volumes of NHRC's deliberate inactions. This report is an attempt to argue about and demonstrate the same factually. Being the largest democracy in the world with a long-demonstrated respect for human rights inspired through the Indian Constitution, it is imperative that the Indian NHRC is an independent and autonomous body. The current scheme of things inspires little confidence in the institution and its leaders.

¹ Mathew Jacob, National Coordinator, AiNNI (mj@pwtm.org) and Rajavelu K, Associate, AiNNI (rajavel@pwtm.org). Writers acknowledge valuable contribution by Mr. Henri Tiphagne, National Working Secretary, AiNNI. The data and facts used in this report is till July 2017.

2. NHRI and its Mandates to Protect and Promote Human Rights

2.1 Pluralism and Diversity in NHRC's Composition

The SCA in its report concerning NHRC's accreditation in November 2016 and its earlier reports in 2006 and 2011, had emphasised on the preponderance of judiciary in the NHRC. The SCA noted its concern that the qualification for the Chairperson, who needs to be a former Chief Justice of the Supreme Court "severely restricts the potential pool of candidates".² The SCA further stated that quasi-judicial function is only one of the ten functions of NHRC as mentioned in its founding law.³ The quasi-judicial function of NHRC should not be a justification for having the chairperson and two other members out of four members to be from the higher judiciary. Adequate amendments need to be made in the *Protection of Human Rights Act 1993 (PHRA)* to ensure representation to all segments of society and various human rights expertise in NHRC.

Indian civil society, since the establishment of NHRC in 1993, expressed grave concerns about non-representation of civil society in NHRC. The Government of India, despite repeated demands from the civil society and recommendations by the SCA, called for the NHRC Appointment Committee meeting on 17 October 2016 and recommended the appointment of Mr. Avinash Rai Khanna, National Vice-President of Bhartiya Janta Party (BJP – ruling party in India), as a member of the NHRC. Prima-facie which appears to be a political appointment was later withdrawn after protests, criticism and litigation. The Government of India again called for the NHRC Appointment Committee meeting on 10 March 2017 and recommended the appointment of Ms. Jyotika Kalra as a member of the NHRC. In both the appointment instances mentioned here, the All India Network of NGOs and Individuals working with National and State Human Rights Institutions (AiNNI) is in possession of minutes of the Appointment Committee furnished by Ministry of Home Affairs. There is no reference to any other names considered for appointment or assessment of candidates' human rights record. Ms. Kalra, an advocate by profession, is the first woman member in NHRC in the past 13 years. She is closely associated to the Rashtriya Swayamsevak Sangh (RSS), BJP's larger social body and associated with its legal wing – Adhivakta Parishad. Her appointment is therefore perceived to be political given her formal alliance with the ruling party and its associations, also given that no other names were considered for this post and she was appointed in a non-transparent manner. Ms. Kalra's appointment was done in clear disregard of SCA's recommendations in January 2017.

Chairpersons of other national commissions⁴ are deemed members of NHRC's Full Commission and it has been argued by the NHRC that it contributes to the aspect of plurality and diversity in the NHRC. However, the deemed members seldom attend the Full Commission Meetings as stated in last year's Asian NGO Network on National Human Rights Institutions (ANNI) report. The SCA had also noticed that the 'deemed members' rarely attend the Full Commission Meetings of NHRC and that this practise of

²<http://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20Final%20Report%20-%20Nov%202016%20-%20English.pdf>.

³ The Protection of Human Rights Act, 1993.

⁴ PHRA Section 3(3) states that "The Chairperson of the National Commission for Minorities, the National Commission for the Scheduled Castes, the National Commission for the 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".

the NHRC is not sufficient to ensure plurality in the Commission.

Only six women have served as judges in the Supreme Court of India since its inception in 1950 and currently only one woman judge (Justice Banumathi) presently serves in the Supreme Court and her retirement is due in 2020.⁵ As the elevation of judges in the Supreme Court as the Chief Justice of India is according to their seniority, there are very less chances of Justice Banumathi to be elevated as the Chief Justice by the time of her retirement and thereby making her ineligible to be considered as a candidate for the appointment of Chairperson of NHRC if the present statute governing it continues to be in place. Hence, it is very unlikely for a woman to head the NHRC in the near future.

The SCA through its General Observations made in 2013 has mentioned that “pluralism refers to broader representation of the national society”. This includes representation from civil society as well. Though NHRC’s founding law provides that two persons having knowledge and experience about human rights shall be appointed as its members, since its inception only one person fills this slot. And this appointment of advocate Jyotika Kalra, who has been mentioned above as an associate of the ruling political dispensation, has already become controversial.

AiNNI in its submission to the SCA had mentioned about the lack of representation of religious and ethnic minorities in NHRC. Muslims being the largest minority in India with a population share of 14.23% is not represented in the country’s national human rights institution through a member or a chairperson. Same is the fact with tribal and Dalit communities in India who despite having a share of 8.6% and 16.6% respectively of the total population, are not represented in the NHRC.⁶

The SCA had also mentioned in its report about the glaring deficiency in gender balance among the staff of NHRC, with only 20% (92 of 468)⁷ of them being women and had encouraged NHRC to ensure pluralism by having its staff from diverse sections of the society.

2.2 Transparency and Consultation in Appointment Process

The SCA in its accreditation reports of NHRC, in January 2017, stated that “The SCA is of the view that the selection process currently enshrined in the Act is not sufficiently broad and transparent. In particular, it does not:

- require the advertisement of vacancies;
- establish clear and uniform criteria upon which all parties assess the merit of eligible applicants; and
- specify the process for achieving broad consultation and/or participation in the application, screening, selection and appointment process.”

The SCA further stated that for appointments, NHRC should:

- Publicise vacancies broadly;
- Maximise the number of potential candidates from a wide range of societal groups and educational qualifications;

⁵ <http://supremecourt.gov.in/chief-justice-judges>.

⁶ ANNI Report 2016.

⁷ *Ibid.*

- Promote broad consultation and / or participation in the application, screening, selection and appointment process;
- Assess applicants on the basis of pre-determined, objective and publicly-available criteria; and select members to serve in their individual capacity rather than on behalf of the organization they represent.

Despite repeated recommendations made by the SCA, the recent appointments of Ms. Jyotika Kalra and earlier of Mr. Avinash Rai Khanna as NHRC members, were not held in a transparent and consultative process. The Government of India did not advertise the vacancy, did not spell out the criteria of assessment and made these appointments in a very secretive manner. It is to be noted that the representatives from the ruling government are majority in the selection committee as the post of the Leader of Opposition in the Lower House is vacant since May 2014. The Government of India has yet again failed to make the selection broad based and transparent, which would have led to consideration of a wide-ranging pool of desirable candidates from various segments of the society – academicians, social scientists, jurists, et cetera.

2.3 Appointment of the Secretary General and the Director General of Investigations from Central Government

2.3.1 Appointment of the Director General of Investigations

The SCA in its accreditation reports of NHRC, in January 2017, stated the following regarding appointment of police officers in NHRC:

“In October 2006 and May 2011, the SCA emphasized that a fundamental requirement of the Paris Principles is that an NHRI is, and is perceived to be, able to operate independent of government interference. Where an NHRI’s staff members are seconded from the public service, and in particular where this includes those at the highest level in the NHRI, it brings into question its capacity to function independently.

Also in May 2011, the SCA expressed its concern about the practice of having police officers and former police officers involved in the investigation of human rights violations, particularly in circumstances where the alleged perpetrators are the police. It noted that this practice has adverse implications for the actual and perceived independence of the NHRCI.”

The SCA had recommended NHRC to consider policy options to address the perceived independence issue created by having former police officers investigate complaints, for example, by providing for civilian oversight of these activities.

Disregarding the recommendations made by SCA, on 1 February 2017, Mr. P.V.K. Reddy was appointed as the Director General (Investigation) of the NHRC⁸ pursuant to an order of the Supreme Court of India dated 23 January 2017. Mr. Reddy was a police officer prior to his appointment in the NHRC and was serving as the Special Director General in Central Reserve Police Force (CRPF), which is the largest para-military organisation in India. It is important to note that there are several complaints on human rights violations by security personnel including that of members of CRPF pending before the

⁸ <http://pib.nic.in/newsite/PrintRelease.aspx?relid=157887>.

Chhattisgarh High Court,⁹ other Indian courts and in the NHRC. By appointing an officer from the CRPF as the chief of its investigation wing, NHRC's credibility comes under serious questioning. Mr. Reddy completed his term of service in three months of his appointment in April 2017 and as of 5 July 2017, this post continues to be vacant. As mentioned in the last ANNI report, the Director General (Investigation) prior to Mr. Reddy demitted the office in September 2014 and Mr. Reddy only joined in February 2017, after a gap of 30 months.

Mr. Reddy was appointed only after the Supreme Court of India has directed the Government of India to fill the vacancies in NHRC without any delay while hearing a public interest litigation. Observing its displeasure over long-lying vacancies in NHRC since 2014, the apex court had ordered in February 2017 to appoint the Director General (Investigation)¹⁰ within one week.

2.3.2 Appointment of the Secretary General

Regarding the appointment of the Secretary General, the SCA in November 2016 noted that, in the past five years, the position has been held by a variety of people and has been vacant for a substantial period of time. As this position is seconded from the public service (government service), and in particular where this includes those at the highest level in the NHRC, it brings into question its capacity to function independently. In the light of the above, SCA had recommended that the Secretary General should be recruited through an open, merit-based selection process.

As of 5 July 2017, the post remains vacant after the retirement of Mr. S.N. Mohanty in June 2017. It is not available in public knowledge that the NHRC has taken steps to adhere to SCA recommendations to appoint a Secretary General through an open process and the same stands for the Director General of Investigation too.

2.4 Political Representatives in NHRC

PHRA Section 3(3) states that “The Chairperson of the National Commission for Minorities, the National Commission for the Scheduled Castes, the National Commission for the 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”.

As of 5 July 2017, the Chairperson of the National Commission for Minorities is Mr. Syed Ghayoor Hasan Rizvi (appointed in May 2017) – former General Secretary of BJP's minority wing; the Chairperson of the National Commission for the Scheduled Castes is Prof. Ram Shankar Katheria (appointed in May 2017) – an elected representative in Parliament from Agra constituency as a BJP candidate; the Chairperson of the National Commission for the Scheduled Tribes is Mr. Nand Kumar Sai (appointed in February 2017) – a nominated representative in Parliament from the state of Chhattisgarh as a BJP candidate and former elected representative in Parliament from Raigarh constituency as a BJP candidate, the Chairperson of the National Commission for Women is Lalitha

⁹ <https://thewire.in/109760/after-nhrc-report-chhattisgarh-high-court-pulls-up-security-forces-for-sexual-violence-in-bastar/>.

¹⁰ <http://www.thehindu.com/news/national/Appoint-NHRC-DG-within-a-week-SC-tells-Centre/article17081500.ece>.

Kumaramangalam (appointed in September 2014), a member of BJP who unsuccessfully contested parliament elections in 2004 and 2009 as a BJP candidate.

The SCA in its accreditation reports of NHRC, in January 2017, noted that “the Paris Principles require an NHRI to be independent from government in its structure, composition, decision-making and method of operation. It must be constituted and empowered to consider and determine the strategic priorities and activities of the NHRI based solely on its determination of the human rights priorities in the country, free from political interference.”

The SCA had expressed its concern that the ‘deemed members’ have voting rights in NHRC’s Full Commission Meetings and hence having political representatives intrude with the independence of the NHRC and is against the Paris Principles. In its report, the SCA had categorically stated that “...government representatives and members of parliament should not be members of, nor participate in, the decision-making organs of an NHRI”. However, categorically ignoring this specific recommendation of the SCA of January 2017, chairpersons and members of National Commissions of Minorities, Scheduled Castes and Scheduled Tribes were all appointed thereafter and presently hold positions as ‘deemed member’ of the NHRC. It is pertinent to note here that in February 2016, Mr. Katheria, Chairperson of National Commission for the Scheduled Castes, who was then a Union Minister of State, had allegedly made hate speeches¹¹ and thereby was accused of inciting communal tensions in the state of Uttar Pradesh. He was later dropped from the Cabinet. The Chairperson of the National Commission for Women, a member of the BJP, was however appointed prior to the SCA recommendation of January 2017.

The NHRC expressed concerns and reported to the SCA during November 2016 accreditation review that the Chairperson of the National Commission for Scheduled Castes is a Member of Parliament, and that this individual has voting rights in the full statutory commission. At the time of NHRC’s reporting, the Chairperson of the said Commission was appointed by the previous government. This partial reporting on political appointments raises concerns as it conveniently did not mention about other national commissions who were also political appointees and appointed by the current government. Thus, the Full Commission which comprises five full time members and four deemed members, is now on the whole having five members who are members and even functionaries of the ruling BJP party and constitutes the majority in the NHRC.

As mentioned in the above sections, in October 2016, there were reports in wide sections of mainstream media that Mr. Avinash Rai Khanna is appointed as a member of NHRC.¹² Mr. Khanna is the Vice-President of BJP, the ruling party in India. Immediately after these reports, there were numerous voices of concerns from among the civil society organisations,¹³ political parties against the appointment of a politician as member of NHRC. A public interest litigation was filed in the Supreme Court of India on this matter after which the government pulled back its decision to appoint Mr. Khanna. The Ministry of Home Affairs in an official statement informed the Supreme Court that Mr. Khanna has

¹¹ <http://indianexpress.com/article/india/india-news-india/muslims-warned-of-final-battle-at-sangh-meet-mos-katheria-says-weve-to-show-our-strength/>.

¹² <https://thewire.in/78184/nhrc-centre-politician/>.

¹³ <https://scroll.in/article/821152/why-human-rights-groups-do-not-want-an-active-politician-on-the-national-human-rights-commission>.

expressed his unwillingness to work as member of NHRC due to personal reasons.¹⁴

It is pertinent to also mention that the United Nations High Commissioner for Human Rights, Mr. Zeid Ra'ad Al Hussein, had addressed a letter dated 12 April 2017,¹⁵ to the Minister of External Affairs, Mrs. Sushma Swaraj, with copies marked to the Chairperson of the Rajya Sabha (Upper House of the Parliament), the Speaker of the Lok Sabha (Lower House of the Parliament), the Minister of Home Affairs and the Chairperson of the NHRC, highlighting the November 2016 SCA review of the Indian NHRC and encouraging the Indian Government to consider the following recommendations for amending NHRC's legal basis, namely the 1993 PHRA in order for it to fully reflect NHRC's core functions. The Permanent Mission of India to the United Nations in Geneva had also on 11 May 2017 duly acknowledged that the said letter had been duly delivered to the Minister for External Affairs. However, the said letter from the United Nations High Commissioner for Human Rights had to this date not yet reached the persons to whom it was copied including the NHRC. The recommendations made were as follows:

- Establishing an open, transparent and merit based selection process for the members of the governing body of the NHRC by giving equal representation to all sections of the society.
- Appointing an advisory council to the governing body of NHRC without voting rights comprising NGOs, civil society actors and independent experts.
- Empowering NHRC to issue independently its own rules of procedure and guidelines with provisions for citing any person for violations for these procedures and guidelines.
- Establishing three additional offices of NHRC in Eastern, Western and Southern parts of India and providing the Commission with appropriate funds to carry out its mandate.
- Establishing a toll-free national helpline for contacting NHRC in emergency and urgent situations of grave violations of human rights.
- Empowering NHRC to cover all relevant cases involving paramilitary forces and the army, including in the Jammu & Kashmir state.
- Empowering NHRC to inquire into alleged human rights violations and abuses by the armed forces of India.

2.5 Engagement with the Civil Society

In its report to the SCA, the NHRC had highlighted that the presence of NHRC's NGO Core Group in which civil society organisations and activists are represented has ensured the compliance of Paris Principles in the Commission. But the stark reality is that, these mechanisms do not function effectively and hence the interaction between NHRC and the civil society is very minimal. Concerning the same, the NGO Core Group met twice after the SCA report in January 2017. Apart from two core group meetings, there is very minimalistic interactions between civil society and NHRC. Civil society members, only those selected by the state governments, are invited to NHRC's camp sittings as can be made out from a few camp sittings NHRC had recently, for example in Assam. However, despite being very active as a large membership network of groups working with human rights institutions, AiNNI has not been invited by NHRC for any interaction so far.

¹⁴<http://www.livelaw.in/sc-dismisses-challenge-nhrc-selection-bjp-vice-president-avinash-rai-khanna-withdraws-candidature-read-order/>.

¹⁵ Letter dated 12th April from the UN HCHR to the Hon'ble Minister for External Affairs of the GOI.

It is also to be mentioned that the NHRC's NGO Core Group met on 9 August 2016, chaired by Justice Dattu, who acknowledged in his welcome address that the meeting was being convened after a period of three years.¹⁶ He also assured the members gathered for the same that henceforth the meetings would be held twice a year. However, within a few weeks of the same, on 23 September 2016, the said NGO Core Group of the NHRC was re-constituted with no reference to the previous members.¹⁷

2.6 Complaints Handling

The complaint handling mechanism of NHRC is not effective and is plagued with inordinate delays. Section 17 of PHRA empowers the NHRC to conduct its own investigation in cases where the authorities of Central Government or State Government do not respond within the stipulated time. But this provision has been seldom used by the NHRC.

In 2015, the High Court of Allahabad in a landmark judgment ruled that the recommendations made by NHRC cannot be ignored as mere 'opinion or suggestion' and be allowed to be disregarded with impunity.¹⁸ The High Court also emphasised the importance of NHRC and its role in 'better protection of human rights' and observed that Section 18 of the PHRA allows NHRC to approach the Supreme Court or High Courts to ask for orders or direction upon completion of its own enquiry into incidents of human rights violation.

The year 2016 had witnessed a large number of incidents of human rights violations including systemic attack on fundamental freedoms enshrined in the Constitution of India.¹⁹ But not even in a single case, during this period, did the NHRC approach the courts for upholding the human rights nor did it make itself a party to any of the ongoing cases of human rights violations. Rather it has confined itself to another bureaucratic set-up without trying out any alternative or innovative ways to ensure justice to the victims of human rights violations nor to proactively protect the fundamental rights of the citizens.

The SCA in its accreditation reports of NHRC, in January 2017, stated that NHRC should ensure that complaints are dealt with fairly, transparently, efficiently, expeditiously, and with consistency. In order to do so, a NHRC should:

- ensure that its facilities, staff, and its practices and procedures, facilitate access by those who allege their rights have been violated and their representatives; and
- ensure that its complaint handling procedures are contained in written guidelines, and that these are publicly available.

The concerns expressed in last ANNI report continue to remain. There are significant delays and police officers are constantly used to investigate complaints, including those

¹⁶ http://nhrc.nic.in/Documents/Minutes_of_the_meeting_of_Core_Group_of_NGOs_held_on_09_08_2016.pdf.

¹⁷ http://nhrc.nic.in/Documents/CoreGroupofNGO_23092016.pdf.

¹⁸ <http://www.livelaw.in/human-rights-commission-orders-not-merely-recommendatory-state-duty-bound-comply-allahabad-hc/>.

¹⁹ <https://www.hrw.org/world-report/2017/country-chapters/india>.

against the police. There is an over reliance on the state system, mostly on those against whom the complaint is lodged in the NHRC.

The complaints regarding the violations of rights of HRDs are also handled in the same manner as other complaints sent to the NHRC even though there is a National Focal Point for HRDs at the NHRC. On the instances of false cases being filed on HRDs, the NHRC has never exercised its powers in Section 12 and intervened on behalf of the HRDs, despite several written requests. NHRC has repeatedly mentioned about the large number of cases it has to deal with. It is pertinent to mention here that every single petition with regard to a specific case of human rights violation is numbered separately but heard only after clubbing many complaints together. Since NHRC accepts complaints from multiple sources and later clubs them together, the number of complaints dealt by the Commission is not a true reflection of the instances it has intervened into. A closer look at these cases will also reveal that a large number of these cases are either dismissed or transferred to State Human Rights Commissions after closing the case at the NHRC's end.

The NHRC should be more proactive while corresponding with the government authorities, given the inordinate delay in its communication with government authorities. While asking for action to be taken on reports or status of any incident, the NHRC should mention about strict compliance with the time given to give their response. Though the NHRC has powers to issue summons to government officials or approach the Supreme Court or High Court, this power has not been well used.

A study of the NHRC recommendations, collated from its monthly newsletters for the year 2016 and January-April 2017, reveals that of the total 317 recommendations made in 2016, 122 cases [38.48%] are treated as closed with its recommendations having been carried out. In five of these cases, the pendency before the NHRC was for seven years; in three cases for six years; in nine cases for five years; in 19 cases for four years; in 33 cases for three years. Out of the 376 cases where compliance has been reported for 2016, in only 144 cases were the compliance made within one year.²⁰

The issues pertaining to complaints handling is explained through a few selected cases as below.

2.6.1 Inaction on the attacks on HRD's in Chhattisgarh

Central Indian state of Chhattisgarh, has witnessed several incidents of large scale and systemic violations of human rights of innocent villagers and tribal population including sexual violence, abduction and killings by the security forces. Chhattisgarh administration and police and vigilante groups supported by the State have systematically targeted activists, researchers, academicians, journalists, lawyers and other HRDs who raised their voice against these human rights violations. After repeated complaints sent to NHRC and numerous calls for independent investigation, the NHRC in April 2016 sent its investigation team to Chhattisgarh to enquire into the complaints of gross human rights violations. However, despite repeated requests from Human Rights Defenders Alert – India (HRDA) and Women against Sexual Violence and State Repression (WSS), NHRC has not released its report in the public domain or to HRDA and WSS who are

²⁰ <http://ainni.in/wp-content/uploads/2017/07/AiNNI-study-of-recommendations-and-their-compliance-as-reported-with-NHRC-Monthly-Newsletter-for-the-period-of-Jan16-April17.pdf>.

complainants in these cases. There is no tangible action taken on any of the complaints even after the visit of the investigation team.

During November 2016, the Chhattisgarh police had filed a false case of murder against renowned academicians Prof. Nandini Sundar and others which led to a huge outcry²¹ against the repressive measures targeting HRDs in Bastar region of Chhattisgarh. After a lot of pressure, the NHRC summoned Chief Secretary of Chhattisgarh and Mr. S.R.P Kalluri, Inspector General of Police, Bastar, regarding this case. But these summons were not respected and both the Chief Secretary and Mr. Kalluri did not appear before the NHRC in person. Two representatives from the state government of Chhattisgarh appeared on their behalf before the NHRC and they informed that the state government has prepared a six-point 'Action Plan' to ensure that human rights are protected in Bastar region. The prime accused in all these cases, Mr. Kalluri, has just been transferred from the Bastar region following this NHRC summon and now placed in state capital. Mr. Kalluri himself avoided meeting NHRC on various grounds despite NHRC communications.

By having a close-look at the Action Plan submitted it can be seen that the provisions are merely an eye-wash. The Action Plan states the formation of District-Level Human Rights Protection Committee and State Human Rights Protection Committee. In fact, the formation of such Committees was directed by the Supreme Court in the land mark judgment of *Prakash Singh v. Union of India* which deals with police reforms in the country way back in 2006. It should have been the duty of NHRC to admonish the Chhattisgarh Government for not following the directions of the Supreme Court for so many years, rather it had blindly accepted the Action Plan. The NHRC did not question the vagueness in the Action Plan, for instance both the district and state level committees will have 2-3 eminent citizens to act on human rights complaints. There are apprehensions that the government might appoint biased persons to go slow on complaints against the police personnel.

The NHRC did not take cognizance of the fact that the Chhattisgarh Police Act 2007 mandates the State government to establish a 'State Police Accountability Authority' having powers to inquire into allegation of serious misconduct against police personnel. The NHRC has not even verified whether the State Police Accountability Authority has been formed under that state and functioning. The State Government thereby has just reiterated and also contravened the existing statutory provisions from the Chhattisgarh Police Act to the NHRC, which has accepted them without any scrutiny.

2.6.2 Restricted from Traveling to Geneva to Attend UNHRC and Arbitrary detention of Mr. Khurram Parvez

Mr. Khurram Parvez is a Kashmiri HRD and has highlighted several gross violations of human rights in the state of Jammu & Kashmir. He was not allowed to travel to Geneva by the Indian immigration authorities on 14 September 2016 when he was scheduled to attend the 33rd session of United Nation's Human Rights Council. Mr. Parvez had a valid visa and all travel documents. He was told by the immigration authorities at New Delhi International Airport that due to orders from the Intelligence Bureau he cannot travel to

²¹ <https://thewire.in/78698/the-fir-against-nandini-sundar-and-archana-prasad-is-a-clear-case-of-vendetta-politics-say-civil-society-members/>.

Geneva. On 15 September 2016, he was arrested by the Jammu & Kashmir Police and was charged under the draconian *Public Safety Act*, under which a person can be detained up to six months. He was later released after 76 days when the High Court of Jammu & Kashmir quashed the order of his detention under *Public Safety Act* and termed his detention “illegal” and “abuse of power”²². In October 2016, a group of UN experts urged²³ the Government of India to release Mr. Parvez and said that “his continued detention following his arrest just a few days before his participation in the UN Human Rights Council, suggests a deliberate attempt to obstruct his legitimate human rights activism.”

HRDA had urged the NHRC to intervene in the case of his arrest and illegal deportation through a complaint sent on 16 September 2016. The NHRC took cognizance of the complaint and had sought a report from the Home Ministry to which a reply was given by the Joint Deputy Director of Intelligence Bureau, Government of India and upon its consideration, the NHRC had passed the following order:

“...It has been reported that Khurram Parvez is a Valley based Human Rights activist having anti-India and pro-separatist disposition. He maintains close links with prominent separatist leaders in the valley and has also participated in conferences/seminars organized by them. With a view to internationalize the ongoing disturbance and to castigate Indian policies, he had written a letter to UN High Commissioner for Human Rights and other Special Rapporteurs of UN for their urgent intervention and at the behest of SAS Geelani, he met foreign diplomats as well as representatives of HR organization based in Delhi and apprised them of the current situation and sought their intervention. He had also planned to attend the session of UNHRC at Geneva. During the current unrest in Kashmir Valley, he was at forefront of propagating separatist narrative among the valley based civil society activists. Four criminal cases have been against him for inciting violence in the District of Srinagar. Hence, damage could have been caused to national interest if he was allowed to go out of the country.”²⁴

It is shocking that, based on a report filed by an intelligence agency which has no parliamentary oversight, the NHRC did not take any action of the case of arrest and illegal deportation of a HRD and solely based on the report of Intelligence Bureau had closed the complaint without even asking for a response from the HRD or complainant, in this case the HRDA. NHRC didn't use its investigation division to enquire into the matter. Rather, NHRC violated the principles of natural justice by concluding the case only on the basis of the report of Intelligence Bureau. The NHRC also dismissed a review petition filed by HRDA stating legal limitations and reaffirming the Intelligence Bureau report. The NHRC also declined to share the Intelligence Bureau report with HRDA however the same was obtained by HRDA through right to information application.

2.6.3 Foreign Contribution Regulation Act - Licence Non-Renewal of Centre for Promotion of Social Concerns

Centre for Promotion of Social Concerns (CPSC), a non-profit and charitable trust involved in monitoring and documenting of human rights violations through its program-unit ‘People’s Watch’, had applied for renewal of its foreign funding grant licence under

²² <https://thewire.in/83567/khurram-parvez-released-after-76-days-in-detention/>.

²³ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20697&LangID=E>.

²⁴ See NHRC Case No. 183/9/13/2016.

Foreign Contribution Regulation Act 2010 (FCRA). The Government of India refused to renew the FCRA licence in October 2016 stating “adverse field agency reports”. CPSC has filed a writ petition in the High Court of Delhi challenging the non-renewal of its FCRA licence and the case is pending before the Court.

HRDA intervened in this case and a complaint was sent to NHRC in November 2016. NHRC transmitted the complaint to the ‘concerned authority for appropriate action’ and asking for action taken report in four-weeks’ time. The report, as of 13 October 2017, is still awaited.

In November 2016, in the same matter, a letter was sent from the 7th Asian Human Rights Defenders Forum to the NHRC to intervene in the case of non-renewal of FCRA licence and thereby violating fundamental freedom of association of CPSC. Upon receiving the letter from the 7th Asian Human Rights Defenders Forum, NHRC took suo-motu cognizance of the matter and issued a notice²⁵ directing the Union Home Secretary to reply within four weeks. The Union Ministry of Home Affairs had sent a response to NHRC on the notice sent and upon its perusal the NHRC again asked the Union Home Secretary to reply within four weeks as NHRC was not satisfied with the response sent earlier. It has been almost a year and NHRC is still awaiting a response from the Union Home Ministry. The complainant in this case had requested NHRC for the submissions made by the ministry which has not been shared and responded to in spite of personal representation to the Chairperson of the NHRC after the last meeting of the NHRC’s NGO Core Group on 12 May 2017.

However, this is a fit case for NHRC to use its power under Section 12 of PHRA, which empowers it to “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”. Despite this specific request to NHRC, NHRC has been tangibly hesitant to do so. The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association in April 2016, had presented a legal analysis of the Foreign Contribution Regulation Act 2010 and argued that the statute is not in conformity with international law, principles and standards.

Similarly, in the case of Lawyers’ Collective, a human rights organisation run by eminent lawyers Ms. Indira Jaising and Mr. Anand Grover, its FCRA registration was cancelled by the Government of India, but the NHRC failed to intervene in the matter and stated that “The Commission does not find any reason to intervene into the matter. The complainant may recourse to available legal remedies, if he so desires.”²⁶

2.6.4 Human Rights Defenders’ Cases at NHRC

In the year 2016, HRDA, a national platform working for the protection of HRDs in India, had sent 124 complaints on attacks on HRDs to NHRC. The NHRC had registered 112 of the complaints sent by HRDA. The analysis of the action taken by NHRC shows that 14% of the complaints sent were transferred to the respective state human rights commissions (SHRC). It is a matter of concern that many cases are transferred to SHRC, despite the fact that there is a severe shortage of members in SHRC and most of the vacancies for the

²⁵ <http://nhrc.nic.in/dispatch.asp?fno=34140>.

²⁶ <http://hrdaindia.org/?p=1865>.

posts of Chairperson and Members are lying vacant. Similarly, these commissions suffer from inadequate staffing, lack of resources, infrastructure, adequate funding and no proper investigations wings. Hence, they are not in a good state to act upon complaints in the cases of human rights defenders. Moreover, the accused in majority of these cases are local police personnel and sending the complaint to the SHRC, mostly comprising officials from state government, translates into increased instances of harassment and reprisals against HRDs.

Out of the 124 complaints sent, almost 30% of the cases are closed, disposed or dismissed by NHRC. An emerging new trend in NHRC is to close the complaints without sharing with the complainant the report submitted by relevant authorities and calling for response as mandated by Practice Directions Guideline 17 of the NHRC dated 28 May 2002. It is an attempt by NHRC to reduce the huge number of backlog of complaints in the NHRC, which is against the principles of natural justice. In most of these 30% cases, the cases were closed solely based on the report submitted by police. The NHRC does not investigate cases where HRDs are falsely implicated in a criminal case, citing that such cases are sub-judice, and therefore such complaints are closed.

Around 30% of the cases sent by the NHRC in the year 2016 are pending as the government authorities have not responded within the time frame given to them. NHRC has not taken any measures or actions, as provisioned in the PHRA, to prevent this inordinate delay, which adversely affects the delivery of timely justice to the victims of human rights violation and HRDs in particular.

The Commission has linked 12% of the complaints sent by HRDA with complaints sent by others on same matters. But the NHRC fails to duly inform about the updates of the cases to all the complainants in a linked case, by which the chance of providing additional information by other complainants is taken away.

The year 2016 witnessed targeted and systemic attacks on HRDs by State and non-State actors across the country. Despite this the NHRC has not taken any major intervention in the cases of attacks on HRDs, neither has it ordered compensation or prosecution in a single such case.

2.7 Annual Report

The most recent annual report of the NHRC publicly available is for 2013-2014. SCA in its report in January 2017 noted the concerns regarding the non-publication of annual reports. The annual reports for the years 2014 -15, 2015 – 2016 and 2016-2017 have also not made public as of 13 October 2017. There is no information available in the public domain indicating that NHRC has requested the Government of India to table the report in Parliament.

3. Recommendations²⁷

3.1 Recommendations to the Government of India:

- 3.1.1** The Appointing Committee of the NHRC should be guided by defined criteria especially the contribution to human rights made by each of the eligible former Chief Justices of the Supreme Court of India when selecting the Chairperson of the NHRC.
- 3.1.2** The Appointing Committee should take into consideration the contributions to human rights made by each of the eligible candidates being considered for the post of Member of the NHRC, along with other defined criteria. The vacancy should be filled through a public announcement and call for applications.
- 3.1.3** There should be no delay in filling vacancies; and prospective members should be identified in good time to ensure that no vacancy arises.
- 3.1.4** The total number of members of the NHRC should be increased by at least 5 times more, with experience and expertise in human rights, and drawn from different competencies including the plurality of civil society.
- 3.1.5** Amend the PHRA 1993 to ensure that other National Commissions established subsequent to 1993 are also included as deemed members of NHRC, such as the National Commission for the Protection of Child Rights, the National Commissioner for Persons with Disabilities, the National Commission on Safai Karamcharis and the Central Information Commission. The deemed members should co-implement nine of ten designated functions of the NHRC and should meet at least once in 15 days.
- 3.1.6** State Human Rights Commissions should also have deemed members from state-level human rights institutions such as State Commission for Women; State Commission for Minorities; State Commissioner on Protection of Child Rights; State Information Commission; State Commissioner for Persons with Disabilities, State Commission for Scheduled Castes and State Commission for Scheduled Tribes [where they exist] et cetera.
- 3.1.7** Table NHRC annual reports in the Parliament and hold discussions on the same. Once tabled, these reports should be made publicly available on NHRC's website.

3.2 Recommendations to the National Human Rights Commission of India:

- 3.2.1** NHRC should intervene in the Supreme Court of India with regard to the petition filed seeking reforms in the NHRC [W.P. No 162/2014] and advocate for full compliance to Paris Principles.
- 3.2.2** NHRC should strongly advocate amendment to the PHRA 1993 to remove the requirement that the Secretary General and Director of Investigations be seconded from the Government, and to provide for an open, merit-based selection process.
- 3.2.3** The practice of having police officers and former police officers involved in the investigation of human rights violations, particularly in circumstances where the alleged perpetrators are the police should stop. Special investigation teams and Special Rapporteurs need to be designated to look into cases of human rights violations and shouldn't depend on the State agencies or only former staff members of the NHRC for the same.
- 3.2.4** The NGO Core Group of the NHRC should meet minimum four-times a year. The

²⁷ Most of the recommendations are same as those submitted last year. None of these recommendations were adhered to by the Government of India and the NHRC. AiNNI believes these recommendations are important and NHRC should engage with civil society and initiate a discussion on the same.

- NHRC should consider CSOs as partners in conceptualising and implementing initiatives as contained in the Paris Principles and as outlined in the Kandy Programme of Action of the Asia Pacific Forum of NHRIs.
- 3.2.5 The NHRC's annual reports need to be periodically published. Pending annual reports need to be published immediately and NHRC should make sure that the following annual report is available within a fixed time after completion of the calendar year. Given the government delay in tabling it in Parliament, NHRC should share through its website the copy sent to the government.
 - 3.2.6 The NHRC should start with daily cause list for cases that the Full Commission, Division Benches and individual members hear. In the present context, there is no way that a complainant or victim can access information about the stage of hearing of a particular complaint even though three of the fulltime members are former judges of the Supreme Court and High Courts. In addition to the cause list, complainants and victims should be given the space to depose and record their statements, also through video conferencing, rather than relying solely on State agencies for 'investigation'.
 - 3.2.7 The NHRC should take care that notice period to respondents should be lessened from the present 6 to 8 weeks to 1 or 2 weeks so that period of duration of a complaint overall is reduced. This is possible through means and different forms of speedy communication. In addition, most complainants are also available on mobiles, and hence recourse to sms / whatsapp et cetera can be seriously and urgently considered for urgent complaints related communications.
 - 3.2.8 The NHRC should also ensure that in addition to compensation it should also start recommending criminal prosecution of those found responsible for the human rights violation and also ensure that rights contained in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985 are meticulously respected and adhered and thus that assurance of non-repetition of the violation by the perpetrator and delivering an apology to the victim are also incorporated in the recommendations of the NHRC.
 - 3.2.9 The NHRC should ensure that whenever complaints filed before it have to be transferred to the SHRC for disposal under section 13(6) of the PHRA, before such a transfer is ordered the NHRC should ensure that the SHRC has a full commission with a full-time chairperson (not acting) and two members as assigned under the Act. In cases where such transfer of complaints for disposal are made it should be ensured that the NHRC and the concerned SHRC inform the complainant of the said transfer, disposes of the complaint referred speedily and reports the final recommendation passed to the NHRC within a specified time limit.
 - 3.2.10 The NHRC should always instruct the respondents to whom complaints are referred for their versions to make sure that the complainant is not called to the police station or any other office of the respondent and ridiculed before the respondent for having approached the NHRC with the complaint. Such versions should be provided without summoning the complainants/victims directly or indirectly and communicating to them in any manner while the complaint is under the consideration of the NHRC.
 - 3.2.11 In all complaints submitted to the Focal Point on HRDs at the NHRC dealing with special reference to W/HRDs (women/human rights defenders), NHRC should undertake independent investigation using the services of its Special Rapporteurs, members of NGO Core Group and Special Investigation teams appointed from time to time. HRDs stand to face reprisals if the same State agencies are asked to

- investigate the complaint who most often are the actual perpetrators of the human rights violence in the complaint.
- 3.2.12 The NHRC should evolve principles and guidelines of case work in matters relating to HRDs in the country and twine its engagement with HRDs with the National/State/District/*Taluk* Legal Services Authority so that the most competent of senior criminal lawyers with experience can be made available to serve the interests of HRDs in all alleged false cases registered against HRDs.
 - 3.2.13 The NHRC should ensure that its Focal Point on HRDs should be a member of the Commission, and have an HRD background to fully understand the challenges faced by defenders as recommended by the UN Special Rapporteur on human rights defenders in her report of March 2012. A fast-track procedure for complaints from defenders within the NHRC and SHRCs should be developed and not allow the cases from HRDs to follow the usual route of other complaints.
 - 3.2.14 The Focal Point on HRDs should have a dedicated team of fellow HRDs, having expertise and knowledge in the field of human rights and should conduct regular regional visits, meetings with HRDs in difficulty or at risk, undertake trial observations of cases of HRDs wherever appropriate personally or by engaging others to do so, denouncing publicly on a regular basis violations against HRDs and impunity, taking active steps to encourage state governments and its officials to start recognising the UN Declaration on HRDs and taking active steps to respect the rights of HRDs and their own roles as directed under the said Declaration.
 - 3.2.15 The NHRC should lead the national process of advocating for a law on the protection of HRDs, with an emphasis on W/HRDs facing greater risks, developed in full and meaningful consultation with civil society and on the basis of technical advice from relevant United Nations entities and also review of existing HRD laws in other countries.
 - 3.2.16 The NHRC should lead the process of developing a comprehensive, adequately resourced, well-advertised national and state protection programme for HRDs at the central and state levels and in conjunction with the SHRC and other N/SHRIs.
 - 3.2.17 The NHRC should use its powers under Section 12 which enables the NHRC to review laws and undertake a detailed analysis pertaining to the FCRA which affects thousands of organisations. The legal analysis of the Indian FCRA offered by the UN Special Rapporteur on the right to peaceful assembly and association can also be utilised in this regard.
 - 3.2.18 The NHRC should intervene in courts using its powers under Section 12 (b) of the PHRA in fabricated cases against HRDs. The NHRC should undertake independent investigations and based on its investigations should intervene in these courts through competent senior lawyers.
 - 3.2.19 The NHRC should follow up with all the N/SHRIs with regard to the appointment of Focal Point on HRDs in each state. To date no state has appointed a focal point.
 - 3.2.20 In all cases of HRDs, the NHRC along with compensation, should develop the practice of ordering prosecution of the perpetrator of violation to be undertaken by the State and also obtaining an assurance of non-recurrence from the person(s) responsible and rendering apology to the HRD(s) by the perpetrator.

MALDIVES: MORE CRUCIAL UNDER POLITICAL DURESS

Maldivian Democracy Network¹

1. Introduction

The Human Rights Commission of the Maldives (HRCM) is an independent institution established in accordance with the *Human Rights Commission Act of 2005*, which was later amended in 2006. It is mandated to protect, promote and sustain human rights in the Maldives, assist and support non-governmental organisations in defending and promoting human rights in the Maldives, and according to Article 3 of the Act, it can sue or be sued as a legal entity.

The Asian NGO Network on National Human Rights Institution (ANNI) Report published in 2016 highlights the failure of the HRCM to implement recommendations made by ANNI in 2015, the little or no engagement that the HRCM maintained with the local civil society, the lack of transparency, independence and pro-activeness of the HRCM in defending human right defenders (HRD) and investigation of human rights violations, and the alarming loss of confidence among individual HRDs and public members in the institution. It is with great grief and disappointment that we reiterate what we reported a year back about the institution, yet this time, the state of human rights has deteriorated to an unimaginable extent in the Maldives. The HRCM once again has failed to follow through the ANNI recommendations, namely to create a dedicated help desk or focal points for HRD and develop a special mechanism to address urgent appeal to the Commission in cases related to the safety and security of HRD. By the end of 2016, no help desk or focal points on HRD was established, and the recommended special mechanism was not adopted by the Commission as well.

Other recommendations are to develop Standard Operating Procedures, to ensure transparency in complaints handling processes and strategies for intervention in situations of gross human rights violations, none of which were considered by the Commission. It was also recommended to develop a Memorandum of Understanding with the Maldivian Democracy Network (MDN) and other civil society organisations (CSO) on the implementation of ANNI recommendations; neither the MDN nor any other CSO was approached to collaborate on the implementation of ANNI recommendations.

Despite the claim of the HRCM that it was free to discharge its duties without any challenge or restriction, it was however evident in the *suo moto* case initiated by the Supreme Court against the HRCM alleging the Commission of spreading false information about the judiciary in its report to the Universal Periodic Review (UPR) of Maldives in 2014, that the functions of the HRCM had been severely undermined². The

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² On 16 September 2014 the Supreme Court of the Maldives initiated a *suo moto* case against the Human Rights Commission of the Maldives ([Supreme Court v HRCM](#)) on the grounds that the HRCM has “unlawfully spread false information about the Supreme Court’s jurisdiction, the constitutional and legal procedures followed by the courts of the Maldivian judiciary in conducting trials and ensuring justice, and

independence of the HRCM is diminishing fast as it is regularly seen to be taking the same stance as the government or resorting to symbolic acts to claim that they have done everything within their powers to address the issue involved.

The failure of the HRCM in implementing its mandate has contributed to the deterioration of human rights in the Maldives, which could have been avoided, or more realistically, slowed down if the Commission had been more rigorous in exercising its powers. Given the current tumultuous political development in the Maldives, the importance of engagement and collaboration between CSO and the HRCM is more crucial than ever.

2. HRCM and Its Mandates to Protect and Promote Human Rights

2.1 General

The HRCM was seen to be struggling to implement its mandate in 2015 as many high-profile cases went uninvestigated. It has failed to investigate cases against pro-government politicians and scrutinize constitutional amendments that drew huge public outcry. It remained silent when the bills that limit the right to freedom of assembly and the amendments to the infamous *Defamation and Freedom of Speech Act* (or more commonly known as the *Defamation Act*), both deemed unconstitutional by civil society and HRDs of the Maldives, were brought in by the Government.

It was reported that HRCM had advised the Government on 11 legislations (the specifics of which was not disclosed) and trained prison staffers on the Convention against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment (CAT). Previous ANNI reports noted that the HRCM was more receptive to act on "softer" or "safer" rights. However, even this aspect of the Commission is disappearing. For example, in the harassment cases of female parliamentarians by their fellow male parliamentarians using offensive language and even physical violence in one of the cases, the HRCM did nothing except a press statement condemning the acts of harassment, thereby allowing impunity for the male parliamentarians. Similarly, in the case of amendment bill relating to land ownership, the HRCM did not intervene in the Parliament or even suggest to the Government to have public consultation on the matter.

2.2 Addressing Human Rights Violations

The HRCM has been widely perceived to be passive in its work, regularly responded to many of the constitutional violations committed by the Government by merely releasing press statements instead of systematic and proactive interventions.

Even on cases related to the rights of children and women, which the HRCM is more comfortable to take up, the HRCM has complained about government institutions not

the procedures followed by the courts in releasing information". The verdict of the case featured an 11-point guideline on how to implement HRCMs mandate.

cooperating with the Commission, thus slowing down their probes into individual cases of human rights violations concerning children and women.

As noted in previous ANNI reports, the HRCM has always been an institution that is passive on protecting the fundamental rights enshrined in the Constitution and the rights of HRD and activists. For example, in the case of the amendment to the *Defamation Act*, the HRCM did submit its recommendations to the Parliament, only to be disregarded by the Parliament on grounds that it decided to "annul" the public review process. Instead of taking it up further with the Parliament or contesting the bill in court when it was ratified, the HRCM simply stopped pursuing the case. Similarly, in the case of the amendments brought by the government to restrict the right to freedom of assembly, the HRCM merely released a press statement and did not contest it in the Parliament or the courts. Inactions by the HRCM in such key political events as mentioned above have led to public perception that the HRCM is reluctant to take up any case of human rights violations and hold the State accountable, especially those related to civil and political rights.

Complaints handling

There are several ways to lodge a complaint with the HRCM, such as calling its Toll-Free Service or submitting the complaint form by hand, email or fax. All these methods require the name and address of the complainant to be submitted along with the complaint as the complaint mechanism does not accept anonymous complaints. The HRCM website has a page that is designed for complaints lodging. The HRCM has claimed that all complaints that are lodged with the Commission are managed by a "Complaints Management System" but information of case progress is not accessible by the public. The webpage provides a brief overview of the number of complaints received and disaggregated data of complaints by type and status for the year 2012. However, no further updates have been made available ever since.

Case intervention

One of the high profile cases that the HRCM was involved is the case of ownership disputes of Haveeru³, a 33-year-old media company that runs a printed newspaper and an online website. The ownership disputes led to a court ruling that halted all the operation of the company and barred its entire staff from working for any other media organisations with no requital to the employees. The court case dragged on for a month and for a good majority of this duration, the HRCM was relatively silent. The Vice President of the HRCM, Mr. Shifaq Mufeed, on a personal capacity expressed discontent with the inaction of the HRCM. Six days later, the HRCM announced that it was investigating the case but no further details could be given to the public due to the ongoing investigation. However, no report or findings were submitted to any of the relevant institutions or court.

³ Haveeru is the oldest local daily (32 years) in the Maldives. A case over its ownership was filed by the shareholders claiming that they are all shareholders in equal capacity and are entitled to its dividends whereas the defendant claimed that he was the sole shareholder of the news agency. The Civil Court of Maldives ruled to halt its operation and barred its staff from working for any other media organization or outlet. On August 25, 2015 the court rules to split the ownership of Haveeru. The defendant claimed the suit was politically motivated.

To this day, no information is made public by the HRCM on the findings of its investigation on Haveeru ownership case.

Advisory role

As mentioned earlier, the HRCM submitted its concerns on the amendment bill of the *Defamation Act*, recommended to the Parliament to remove the hefty fines — ranges from US\$3,242 to US\$129,700 depending on the type of offense — imposed on offender and to treat cases of defamation as civil instead of criminal case in the event the offender is unable to pay the fines. The offences include but not limited to acts involving thoughts and expressions against the tenets of Islam and expressions that opposes the conventional norms and order. The Parliament disregarded all the recommendations of the HRCM and the latter did not pursue the case any further when the bill was ratified.

The HRCM did not submit any amicus briefs for court cases related to human rights in 2016. The HRCM met with government agencies in 2016 to discuss recurring human rights violations in the country and the establishment of a more systematic mechanism to address the issues. However, the HRCM made little or no recommendations to government departments. There is no information to validate the existence of system within the HRCM to monitor the progress or impact of its recommendations.

Based on the legislations where the HRCM had made recommendations in 2016, the HRCM in general has failed to make affirmative progress in reverting or restoring the fundamental human rights that has been stifled in the country.

Follow-up on recommendations made

The HRCM conducted a total of five follow-ups to the recommendations that it has made in the investigation reports in 2016. However, besides information on these cases were made available to the public, the content of investigation reports and the outcomes of the follow-up made by the HRCM were not disclosed.

Aside from these cases, the HRCM has not followed up on its recommendations to the Government and the Parliament after the completion their review of governmental policies.

Annual report and other reports

Besides the annual report, the results of the HRCM's work in 2016 were rarely shared with the public or the institutions directly involved.

The annual report of the HRCM publishes the number of cases of human rights violations received and the responses given by the Commission in summary. However, these tabulations of data lack detailed information such as the details of the cases, government departments or any other institutions consulted by the Commission during the process of complaint handling and the recommendations made by the Commission for these cases. The report and other media briefs also do not disclose whether the recommendations made by the Commission have been taken up by the concerned public authorities.

In addition to the annual report and the anti-torture report, the HRCM also published a report on the state of sexual and reproductive health rights in the Maldives in 2016. Unfortunately, all these reports were not presented to the Parliament for debate or deliberation of the recommendations made as the HRCM was not provided the opportunity to appear before the Parliament or any of its parliamentary committees.

3. Case study: The Operation of the HRCM

3.1 Human Rights Defenders

The silence on the brutal murder frontline HRD, Yameen Rasheed and the inaction on legislation amendments that undermined fundamental human rights are the two biggest failures of the HRCM. Yameen Rasheed, who was highly critical of the Government and very vocal on the abduction of journalist Ahmed Rilwan (more commonly known by his twitter handle @moyameehaa, which translates to madman) and the brewing of religious extremism and politicization of religion in the Maldives, was found brutally murdered in his home with over 23 stab wounds on 23 April 2017. While the police have yet to reveal the motive and the perpetrators behind the murder, they disclosed that two persons have been detained for allegedly involved directly in carrying out the heinous act and another seven persons have been held in connection with the case.

The HRCM did not investigate the case of the enforced disappearance of Ahmed Rilwan. It has failed to make any public statement on the dire state of HRD in the Maldives, or express concerns over the murder Yameen Rasheed or call on the Government to investigate the case of Ahmed Rilwan.

Maldivian legal and policy framework does not recognize HRDs. While the HRCM does conduct training for youth on human rights and civic education, a great majority of them are unengaged in the political scenario of the Maldives. It will be false to claim that the HRCM does not recognize HRD since they have trained individuals on human rights; however, it will be similarly untrue that the HRCM has actively supported HRD, especially those who are working on civil and political rights. In a politically polarized country as the Maldives, HRD face various kinds of threats, from loss of job to death threats. Frontline human rights defenders like Yameen Rasheed had often publicised the threats that he received and lodged complaints at relevant institutions such as the police before he was murdered. The HRCM, despite having knowledge that HRD had been receiving threats due to their work, did not act to protect the individuals or at the very least, assist in providing protection using both domestic and international mechanisms available to them.

3.2 Legislations Violating Human Rights

The HRCM did not exercise its power to the fullest possible when the Maldivian Parliament stripped the right to protest in the capital of Maldives. No work has been done to reverse the regulation or to restore the right to protest in the Maldives. With an already

deteriorating political situation, the ban of protest meant that opposition parties could not demonstrate against the policies of the Government and civil society and social movements could not march for their causes. A final blow to the principles of democracy was delivered when the amendments to the *Defamation Act* was ratified. The amendments to the *Defamation Act* aimed to silence dissenting or alternative voices on any medium in the Maldives which is separated by geographic barriers and the only means to connect with each other is through various forms of communication and expression. While the HRCM did submit its concerns to the Parliament on the amendment bill, it failed to follow up on its recommendations on the legislation that is detrimental to the Maldivian democracy.

On amendments and legislations restricting fundamental freedoms, the governance system of Maldives follows theoretical democratic principles: laws can be made by the legislative body with due consideration to the Constitution and cannot be brought into force without the ratification by the President. If any party feels that there is a constitutional violation with the new legislation, they can lodge a case at the courts for a final decision. Since Maldives does not have a constitutional court, depending on the nature of the law or amendment, it can be contested at a court that has the jurisdiction pertaining to the case. If the party is unsatisfied with the verdict, they may appeal to the High Court and subsequently to the Supreme Court. Appellate process ends with the Supreme Court and its verdict is final.

By law, the HRCM is an independent institution with the power to appear before and assist the courts. However, in both cases of restricting the freedom to protest and the amendments to the *Defamation Act*, the HRCM had failed to challenge them in court on grounds of violation of the constitutional rights. In the absence of the HRCM expressing any concern or appealing to the courts to reverse these unconstitutional legislations, the Government has proceeded with prosecution of those who transgressed both laws

4. Challenges Faced by the Commission

Despite reassuring the public that there were no hindrances to the execution of its mandate, the critical role of the HRCM as an independent institution has been greatly impacted by the verdict of the *suo moto* case initiated by the Supreme Court. The activities of raising of public awareness and outreach and the pro-activeness and rigor of the HRCM fell significantly after the guideline for the operation of the HRCM as ruled by the Supreme Court was adopted.

As a result, two former HRCM members filed petitions with the UN Human Rights Committee with the assistance of International Service for Human Rights (ISHR), seeking a ruling to support the right of the Commission to submit information, evidence and reports to the UN, and that restrictions of such right or reprisals for exercising this right constitutes serious breaches of international law.

It is also speculated that major disagreements exist within the Commission regarding cases that requires immediate intervention of the HRCM. Shifaq Mufeed, Vice President

of the HRCM, had publicly criticized the inactions of the Commission and complained that he alone could not garner the support required for the Commission to act on cases of human rights violations. He resigned from the Commission in May 2017 but was appointed later as a state minister for the Ministry of Home Affairs - the reason for this conflicting shift remains unknown.

5. Conclusion and Recommendations

The HRCM -as stated in the Constitution of the Maldives- serves as one of the check and balance mechanisms of the state. The failure of such a significant body has caused great harm to human rights in the Maldives that it is mandated to uphold.

In fact, the HRCM has been reduced to a spectator of gross human rights violations in the country in recent years. On safeguarding the fundamental rights guaranteed to all Maldivians by the Constitution, the HRCM's role or involvement is close to non-existent. The HRCM was noted in previous reports for more receptive in upholding "softer" and "safer" rights, it is observed that even this aspect of work is slowly vanishing from the institution. While it engages in public awareness on gender equality and encourages civic participation of women, it fails to protect women and other marginalized groups if the State or the incumbent regime is a party to the case. The inconsistencies and inactions by the HRCM in high profile cases such as the disappearance of Ahmed Rilwan and the murder of Yameen Rasheed has further contributed to the disillusionment and loss of faith in the institution over the past years. This is confirmed by the interactions and engagement that the MDN had with HRD in the Maldives with a great majority of them stated that the HRCM had failed to redress their cases.

The Democracy Survey conducted by Transparency Maldives in 2015 reveals that the net difference for public confidence in the HRCM was at -16%. While we acknowledge that the HRCM operates under political duress, we like to emphasize on the importance of engaging with local human rights organisations and defenders as it could be beneficial to both the HRCM and the human rights community of the country.

The ANNI assessments over the past years have made countless constructive recommendations to the HRCM to assist and improve the implementation of the mandate. However, it has also failed to consider, implement, or start a dialogue on the recommendations made by ANNI in the best interest of all the stakeholders involved.

It is imperative for the HRCM to consider these recommendations, or by the least, start a dialogue on how to implement them in a more pragmatic way in the local context. We believe that this is the first step needed to improve the quality of human life and reverse the deteriorating of human rights in the Maldives.

While echoing the recommendations made in the ANNI assessment in 2016, such as:

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

We would like to make further recommendations as follows:

5. Develop a structured framework of engagement with HRD and marginalised groups in the country to foster their participation in policy making;
6. Initiate dialogue with the MDN and other civil society organisations on ways to address unconstitutional laws which limit the civil and political rights enshrined in the Constitution, and assist the HRCM in the process of defending these constitutional rights; and
7. Resume the proactive role of the HRCM in the face of gross human rights violation cases.

NEPAL: OPERATING IN POLITICAL APATHY OF THE STATE

Informal Sector Service Center (INSEC)¹

1. Introduction

The National Human Rights Commission of (NHRC) Nepal is an independent and autonomous body established in 2000 under the *Human Rights Commission Act 1997* with the motto of “Dignity, Equality and Justice for all”. The NHRC became a constitutional body later by the Interim Constitution 2007 and this was maintained in the subsequent Constitution of Nepal 2015. The commission is responsible for conducting inspections, investigation and monitoring of government agencies of Nepal, public institutions, companies and persons for the protection of human rights. It may provide recommendations to the government and its agencies with the aim of achieving full realisation of human rights for the people. The Commission may receive complaints of human rights violation and abuse and decide on the necessary actions, which may include among others, justice to the victim and legal action against the perpetrator. The Constitution of Nepal has specifically entrusted the NHRC with the mandates to protect and promote human rights and to ensure its effective implementation.²

The NHRC Nepal retained status “A” in its accreditation review held in October 2014 on the recommendation of the Sub-Committee on Accreditation (SCA) of the Global Alliance of National Human Rights Institutions (GANHRIs). Despite this, human rights in Nepal have seen little progress. The Commission published its mid-term status report on the fourth National Human Rights Action Plan 2015 to 2020,³ which is to be implemented by the State, and found no grounds to be satisfactory. The NHRC that is mandated to monitor the implementation of the Action Plan has been exerting pressure on the Government of Nepal for the proper implementation of Action Plan. The implementation of the Action Plan by the Government is weak due to the lack of adequate resources and political commitment in the State mechanisms. Another major challenge is the fact that many government agencies are not fully aware of the Action Plan even though the NHRC has advised the Government of the need to conduct training and orientation for the members of the Action Plan Implementation Committee.⁴ On the part of the NHRC, it has organized promotional and capacity development programs on the Action Plan.⁵ It has also conducted various monitoring in the districts on the implementation status. The implementation status of the Action Plan is found to be unsatisfactory as women, Dalit and other marginalized groups are deprived of meaningful participation in government structures and bodies. Many still face food crisis, inadequate

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² Article 249(1) of the Constitution of Nepal 2015.

³ http://www.nhrcnepal.org/nhrc_new/doc/newsletter/NHRC_Monitoring_Report_Nepal_Government_Human_Rights_National_Action_Plan_Implementation_status.pdf.

⁴ http://www.nhrcnepal.org/nhrc_new/doc/newsletter/NHRC_Monitoring_Report_Nepal_Government_Human_Rights_National_Action_Plan_Implementation_status.pdf at p. 30.

⁵ http://www.nhrcnepal.org/nhrc_new/doc/newsletter/Nepal_NHRC_Annual_Report_2072-73_Summary_Eng.pdf.

healthcare and many other violations of fundamental rights, especially in the far west of Nepal.

Article 249 (1) of the Constitution of Nepal 2015 provides for the protection, promotion and respect of human rights along with ensuring its effective implementation, which is to be monitored by the NHRC. The Commission has constantly monitored the State to ensure it fulfils its duty on protecting and promoting human rights and hold the State accountable. For this purpose, the Commission has conducted monitoring of human rights situations, investigation on human rights violations, human rights education, advocacy and review of laws which are in contradiction with international human rights standards and submission of recommendations to the Government of Nepal. The NHRC has also coordinated its work with the Office of the Prime Minister, various ministries of the Government, political parties, national and international non-governmental organisations (NGOs) and members of civil society.

One major achievement of human rights in Nepal is in the field of migrant workers. The NHRC of Nepal and the NHRC of Qatar agreed on an 11-point activation plan on 16 November 2015 for the implementation of an agreement to protect the rights of migrant workers in Gulf countries. Apart from this, the Commission has conducted 226 human rights promotional activities with the motto of “Human Rights in each Household: A Base for Peace and Development”.⁶ The Commission has also submitted its Annual Report of Human Rights to the President of Nepal as provided under the Constitution. The objective of the submission of this report is to bring it for discussion in the Federal Parliament.⁷ For the first time, the annual report was submitted to the Parliament and a total of 601 copies of the report were provided to the members of the Constitutional Assembly (CA). However, there was no formal discussion of the report. Since the inception of the NHRC, no annual reports of the Commission has been brought for discussion in the Parliament, despite the Interim Constitution of Nepal of 2007 also carried such similar provision.

Apart from the NHRC’s performance, the country has seen little progress in the field of human rights. The two transitional justice mechanisms - the Truth and Reconciliation Commission (TRC) and the Commission for Investigation of Enforced Disappearance People (CIEDP) formed two years ago to investigate incidents from the insurgency, have expired on 10 February 2017 before completing their tasks. Both commissions did not work properly and effectively except in collecting complaints. With their mandates in limbo, the victims of conflict situations, who were hopeful of getting justice when the two commissions were established, are in serious doubts now. The NHRC has continued to investigate conflict related complaints and provide recommendations despite the other two commissions (TRC and CIEDP) were in operation. The apparent abysmal

⁶ http://www.nhrcnepal.org/nhrc_new/doc/newsletter/Nepal_NHRC_Annual_Report_2012_13_Nep.pdf.

⁷ Article 294 of the Constitution of Nepal 2015 Annual reports of Constitutional Bodies: (1) Every Constitutional Body under this Constitution shall submit an annual report of its functioning to the President, and the President shall cause that report to be laid through the Prime Minister before the Federal Parliament.

performance of the two commissions was due to the non-cooperation from the Government and at the same time the United Nations has made it clear on 16 February 2016 that it will be unable to support the two commissions (TRC and CIEDP) as their enabling laws were not in line with the international standards.⁸ The Government neither streamlined the legal provisions of the two commissions in accordance to international standards and the verdict of Supreme Court⁹ nor provided sufficient logistics and expert human resources to them in the last two years. The TRC Act entrusted the NHRC with the role of monitoring the implementation of the recommendations made in the report of TRC and CIEDP.

This report will also focus on two major thematic issues for discussion, namely the transitional justice mechanisms and reconstruction.

2. General Overview

2.1 NHRC and Its Mandates to Protect and Promote Human Rights

The National Human Rights Commission Act 2012 defines the human rights as the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution and other prevailing laws and the rights embodied in the international instruments relating to human rights to which Nepal is a party.

The NHRC is one of the main actors in the area of the protection and preservation of human rights in Nepal. It can investigate cases of alleged violation of human rights and bring them to the attention of the authorities concerned. It issues recommendations for the compensation to the victims and legal prosecution against the perpetrator. It will also endorse different guidelines for the strengthening of the protection and promotion of human rights to ensure the rights of the Nepali. Similarly, it may initiate or conduct training and sensitizing programs for members of law enforcement agencies and awareness raising campaigns for the general population.

The NHRC is to fulfill the hopes and aspirations of the people for dignity, equality and justice. To fulfill this objective, it may conduct investigation or inquiry upon receiving petition/complaint of any person regarding the violation of his/her human rights. It can even investigate or inquire about the incident of violation of human rights in its own discretion as the Constitution has provided *sue-moto*¹⁰ power to the Commission. It has a Guidelines on Complaint Handling Procedures for effective and speedy actions to provide justice to the victim.

The NHRC had conducted investigation on the killings of police officer Laxman Neupane along with nine other people, including an infant, in Tikapur of Kailali District

⁸http://www.ohchr.org/Documents/Countries/NP/Nepal_UN%20osition_supportTRC_COIDP_Feb2016.pdf.

⁹<http://admin.myrepublica.com/politics/story/38075/no-support-to-trc-ciedp-on-present-status-unohchr.html>.

¹⁰ It is a term used when government agency acts on its own cognizance.

on 18 August 2015 in a clash during Terai-Madhes agitation.¹¹ After the investigation, the NHRC found that the incident was pre-planned and security personnel were sprinkled with petrol before setting fire on them. It has recommended the Government to take action against the accused and provide proper relief and compensation to the victims. Nevertheless, the NHRC did not make public the investigation report as it did in the investigation of Madhesh movement. It merely released publicly its recommendations via its press release.

Similarly, the NHRC had also conducted an investigation on a killing of six people who were shot dead by the police in Bethari of Rupendehi district during the agitation operated by various Terai-Madhes centered political parties. In a police shoot-out on 25 September 2015, six people including a four-year-old boy were killed and many others were injured. The field investigation report from the NHRC along with the post-mortem report found that the cause of deaths was the excessive use of force by the security personnel. The NHRC recommended to the Government (1) to take immediate action against the perpetrators along with proper compensation to the victim's family, (2) to provide financial relief and free treatment to the injured victims, (3) to provide compensation to the businessmen in Bethari by evaluating their loss of property during the incident.

The NHRC has visited, inspected or monitored state owned institutions, including prison, detention centers, and orphanage homes. On the basis of the findings, the NHRC expressed its concerns and recommendations to the Government for improvement and protection of human rights. It has been actively engaged in conducting seminars, interactions and discussion program to educate government agencies, NGOs, members of civil society and local human rights defenders in various ways. The NHRC has only advisory roles. It does not have power or mandate to punish the perpetrator, but it may send its opinions and recommendations to urge the Government of Nepal to take necessary actions against the violators of human rights, to provide justice to the victim and to initiate law and policy reforms. The NHRC has a strong mandate to fulfil its obligations in compliance with the Paris Principles. The newly promulgated Constitution of Nepal has provided that other functions, duties, rights and procedures of the NHRC shall be determined by the federal law.¹² In this regard, a new legislation is in the pipeline and the NHRC has reviewed the draft and submitted to the Office of the Prime Minister and Council of Ministers (OPMCM). The NHRC itself also did not lobby and advocate for the legislation as per the federal system.

As the NHRC does not fall within the priority areas of concern for the Government, it has suffered from various challenges. It received ineffective cooperation from the government, including difficulties in accessing government agencies. Although the *National Human Rights Commission Act 2012* has given broad mandates for the protection and promotion of the human rights, it has not been able to perform all of its mandates and functions.

¹¹[http://www.nhrcnepal.org/nhrc_new/doc/newsletter/Nepal_NHRC_decision_on_Tikapur_Rangeli_& Bethari_Incident.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/Nepal_NHRC_decision_on_Tikapur_Rangeli_&_Bethari_Incident.pdf).

¹² Article 249-5

For example, during investigation of a complaint, the NHRC may seek further information or clarification with concerned government agencies but the existing legal provisions are almost silent about the time period that the concerned government agencies must respond to the NHRC regarding the complaints. This has caused unnecessary delays at best, and unresolved cases at worst.

The NHRC may also investigate cases pending in court that involves human rights violations with the permission from the court as per Section 4 (1) (b) of the National Human Rights Commission Act 2012. However, this mandate has not been utilized yet by the NHRC. This problem arises because there are no proper statutory provisions for its involvement in the judicial proceedings, including the submission of *amicus curiae*. On the contrary, in many cases, writ petitioners made the NHRC as opponent in writ petition and the NHRC was compelled to defend in court.

The NHRC is also required to provide necessary information to the TRC and the CIEDP on the complaints of violations originated from conflict situations and its investigation as both the TRC and the CIEDP were non-existence at that time.

One of the mandates of the NHRC is to collaborate with civil society. The NHRC Guidelines has been followed by the Commission while collaborating with civil society as a Collaboration Committee was formed under the leadership of Hon. Gobinda Sharma Poudel. Similarly, there is also a Human Rights Defenders Guidelines that outlines the cooperation with civil society and capacity enhancement of human rights defenders and journalists for the wider protection and promotion of human rights.

2.2 Addressing Human Rights Compliance

There is no particular strategy that the NHRC is following to address human rights violations despite having a strategic plan. It drew attention of the concerned authorities to human rights issues through press releases, letters and meetings. The commission issued 44 press releases and 29 press notes in 2016.¹³ However, the Government was apathetic towards the concerns and recommendations raised by the NHRC, which is the main barrier for the full realisation of the human rights in Nepal.

The larger and systemic human rights issues in the country are addressed in coordination with the national, regional and international organisations and agencies. They include the Office of the President, Federal Parliament, government agencies, constitutional bodies, political parties, civil society, international associations and transitional commissions. The NHRC continued to make recommendation to the Government despite negligible amount of recommendations have been implemented. It may publicise the name of any officials, persons or bodies if found guilty of human rights violations. As per Article 249 (2) (h) of the Constitution of Nepal 2015, the NHRC may publish, in accordance with the law, the names of the officials, persons or bodies who have failed to observe or implement any recommendations or directives made or given by the NHRC and enlist

¹³[http://www.nhrcnepal.org/nhrc_new/doc/newsletter/Nepal NHRC Annual Report 207273 Summary Eng.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/Nepal_NHRC_Annual_Report_207273_Summary_Eng.pdf).

them as violators of human rights. A guideline on enlisting perpetrators is in the final process of approval from the Commission. The NHRC should utilise this mandate for the execution of its recommendations and directives.

The NHRC has been constantly reviewing the implementation status of its recommendations and found that its recommendations, especially those on legal actions, have not been implemented. The NHRC claimed that its compensation related recommendations were implemented but no one has been brought for prosecution or legal actions. The latter was affirmed by observation of the civil society. This has negatively impacted the activities of the NHRC in victim's eyes.

As the Commission does not have the power to prosecute or take action against the violators, it is important for the Commission to conduct systematic follow-up and discussion with the Government regarding the non-implementation of its recommendations.

In 2016, the NHRC forwarded 26 recommendations to the Government¹⁴ with some of the recommendations making some progress. For instance, compensation amounting to US\$5,880 was provided to the family of Suntali Tamang, who was raped and killed. The police headquarters also took actions against the perpetrator, Superintendent of Police (SP) Sanjeev Sharma as per the prevailing law. Similarly, compensation of US\$3,000 was provided to the family of Niraj Devkota, who died in Sindhuli prison. However, there has been no implementation of other recommendations of the NHRC. Similarly, the Commission has also submitted its Universal Periodic Review (UPR) supplementary report to the Human Rights Council through the Office of the High Commissioner for Human Rights (OHCHR) with the aims of providing an overall picture of human rights in Nepal.

The NHRC is mandated to present its annual report to the President of Nepal for discussion in the Parliament. In line with this, the NHRC has submitted its annual report for the fiscal year 2016-17 to President Bidya Devi Bhandary. The report focuses primarily on the call of disallowing any person, who is found to be guilty of human rights violations, to join civil service or receive promotion from his/her job.

3. Nepal Thematic Issues

The NHRC has made significant contribution on some thematic issues. While the NHRC deals with many important thematic issues such as migrant workers and prisoners, this report will focus on two major issues, which are transitional justice mechanisms and post-earth quake reconstruction. However, it is apparent for the NHRC that it is insufficient to move the Government by merely making recommendations and applying pressure on it.

¹⁴http://www.nhrcnepal.org/nhrc_new/doc/newsletter/Nepal_NHRC_Annual_Report_207273_Summary_Eng.pdf.

3.1 Issues of Transitional Justice Mechanism

The protection and promotion of human rights and the rule of law have been adversely affected by the decade-long armed conflict, peace processes, constitution building processes and the prolonged transitional period. The rights of the people, especially on justice delivery for the victims of armed conflicts, have been adversely affected by the ineffective State mechanisms. The transitional justice mechanisms, which were established to settle cases during the armed conflict era, were in dilemma and could not perform its functions within the time frame. The NHRC has supported transitional justice mechanisms (TRC and CIEDP) to settle the cases that were related to human rights violations during armed conflict era. Both the commissions have come under a lot of criticism for its credibility and its enabling laws. The victims have accused the commissions of more inclined to give amnesty to the perpetrators rather than ensuring justice for the victims. The NHRC has recommended the Government to amend laws related to transitional justice and bring them in line with international standards and the verdict of the Supreme Court of Nepal. Specifically, the NHRC urged the Government to amend the provisions relating to the possibility of withdrawing cases by the person(s) involved in serious human rights violations and crimes against humanity and the provisions on blanket amnesty that perpetuates a culture of impunity.

In the past decade, the NHRC had recommended actions in 735 cases of grave human rights violations. In these cases, 105 recommendations of the NHRC were implemented. In all of the cases which recommendations were implemented, the victims merely received compensation but not a single perpetrator was held accountable for the serious crimes that they committed.¹⁵ Instead, the government promoted and even rewarded senior officers from the security agencies that committed such violations. Presently, the NHRC plans to publish the list of alleged perpetrators to apply pressure on the Government to take actions on them.¹⁶

The NHRC faces many challenges as it has been mandated only to recommend and to investigate or monitor the cases. On one hand, the Commission continues to make recommendations to the State, but on the other hand, the apathy of the State in implementing these recommendations has impacted the socio-economic wellbeing of conflict victims.

The TRC and the CIEDP formed to deliver justice to the post-conflict victims have extended their mandates beyond the expired terms without amendments to the transitional justice related laws. Without such official amendment of the laws, both the commissions will lose their legal authority to address the root causes of the armed conflicts and provide justice to the victims. Unless the Government of Nepal is prepared to amend the law in line with the Supreme Court's rulings and international laws, and to take other

¹⁵ www.NHRCnepal.org.

¹⁶ <http://inseconline.org/en/interview/if-the-government-shows-apaty-in-implenting-any-recommendation-we-will-publish-the-list/>.

concrete steps to address the persistent challenges, the extension of their mandate will be meaningless. The NHRC had played an active and positive role in advocating for the need to bring Nepal's transitional justice mechanisms in line with international laws and standards. However, it has since remained silent on the issue even though one of its important duties is to prevent prolonged transitional justice processes in Nepal.

3.2 Reconstruction Issue

Nepal suffered a devastating earthquake on 25 April 2015. Many people lost their lives and thousands of them became homeless. Even after two years of the devastation, most of the earthquake victims are still living under plastic tents and zinc roof. The NHRC reported the human rights situations of the earthquake survivors by conducting field visits in the most affected areas of the nation and found that the victims are still living in pathetic conditions. The NHRC pointed out to the Government that the delays on the part of the National Reconstruction Authority (NRA) has jeopardized the people's right to life. The NHRC urged the Government to expedite the reconstruction work for the earthquake victims. It had submitted its preliminary report on monitoring the earthquake to the OPMCM of Nepal on 21 May 2015 and recommended the Government of Nepal to take immediate actions to protect the human rights of its people and ensure the rights of the earthquake victims, especially their economic, social and cultural rights should be on top of the priority. However, despite such recommendations, the Government was apathetic on providing relief and expediting reconstruction work.

Certain quarters and even political parties viewed the NHRC as the adversary of Government or another State agency. In reality, it is not true in both cases. The NHRC actually helps the authorities and agencies holding state power to perform their functions properly from human rights perspectives. As a watchdog of human rights, the NHRC cooperates with them to realise their functions and help them to cope with their problems. It is clear that the NHRC does not replace the roles of government agencies, the judiciary, parliamentary committees or any other bodies but cooperates with and supports them. It can make a unique contribution to the country's efforts to protect its citizens and develop a human rights culture but at present from the victim's point of view, the role of NHRC is not that encouraging especially in this issue of post-quake reconstruction work. The passiveness of the NHRC would create more possibilities of violations of the rights of the victims. Although the Constitution and the enabling law have given the NHRC a broad mandate for the protection and promotion of human rights, it has not been able to perform all of its functions and mandates as provided by the Constitution.

4. Conclusion and Recommendations

The Constitution of Nepal vests in the NHRC with the primary responsibility of protecting and promoting the human rights of the people. In 2016, the Commission conducted 242 monitoring based missions of human rights violations and made various recommendations to the Government. However, the progress is not satisfactory as the NHRC is confronted with major issues of non-implementation of its recommendations by the Government.

The level of implementation of the NHRC's recommendations by the Government would reflect the level of the Government's commitment on the protection and promotion of human rights. The Government of Nepal should pay adequate attention to implement the recommendations of the NHRC. The Government has claimed that 30 percent of the recommendations of NHRC have been implemented. However, the report published by the NHRC states that the implementation rate of its recommendations by the Government is only 14 percent. While there are positive aspects in the work of the NHRC but these aspects are diluted when the Government does not implement the recommendations it made.

On transitional justice processes, the NHRC exerted pressure on the Government to amend the enabling laws along with providing adequate resources to both the TRC and the CIEDP in order to make them more effective. However, there has been no action from the Government due to its apathetic attitudes, resulting in the victims becoming more victimized.

A strong judicial system and judicial activism are required in any democratic country. They will help the work of national human rights institutions by providing stronger and wider protection against and prevention of possible human rights violations. In this regard, the awareness of the people and the willingness of the Government are both very important. In the context of Nepal, however, the willingness of the Government does not look positive and the Government has done little to raise awareness of the people on human rights even though this is one of the obligations of the Government.

In the second cycle of Nepal's UPR at the Human Rights Council in November 2015, the government of Nepal has accepted 152 recommendations out of 195 with 43 recommendations rejected. Despite the acceptance, the implementation of these recommendations is very weak. The NHRC must give special attention to UPR recommendations and its implementation, as well as recommendations of UN treaty bodies and the submission of state party reports.

NHRC of Nepal is accredited with "A" status by GANHRI. There have been some commendable works performed by the NHRC in the past years such as the work on post-earthquake situations, however, there is still much progress needs to be made by the NHRC.

4.1 Recommendations to the Government of Nepal

- 4.1.1 The Government should pay adequate attention to the implementation of the recommendations by the NHRC;
- 4.1.2 The Government must ratify the Rome Statute on the International Criminal Court;
- 4.1.3 The Government must immediately initiate the amendments to the enabling law on transitional justice mechanisms in order to provide justice for the victims;
- 4.1.4 The Government should enact a new NHRC Act in line with the Paris Principles;

- 4.1.5 The Government must establish a human rights desk in each and every of the government ministries to facilitate the implementation and follow-up of the NHRC's recommendations.

4.2 Recommendation to the NHRC

- 4.2.1 The NHRC should continue to advocate for the implementation of its recommendations by the Government of Nepal;
- 4.2.2 The NHRC should develop an effective mechanism to publicise the name of those officials who evade the implementation of its recommendations;
- 4.2.3 The NHRC should advocate with the government to implement the draft of the International Labor Organization (ILO) Convention 169 Action Plan;
- 4.1.4 The NHRC should strongly advocate for the amendments of the enabling law for transitional justice mechanisms;
- 4.2.5 The NHRC should publish periodic human rights situation report and make the Government accountable for the implementation of the recommendations made by the NHRC, UPR reports and UN treaty bodies as well as the Five-Year National Human Rights Action Plan of the Government.
- Besides circumstantial work like natural calamities, demonstrations and protests, the NHRC must also give equal attention to other rights such as economic, social and cultural rights, women rights, minorities rights and rights of the disabled, as envisaged by the NHRC's Strategic Plan;
- 4.2.6 The NHRC should develop a clear role and approach for itself, especially after the nation goes for full federalism;
- 4.2.7 The NHRC should improve its administrative and management systems along with adequate resources for the enhancement of its effectiveness in future;
- 4.2.8 The NHRC should strengthen its relationship with civil society and NGOs for the better protection of human rights in the country.

PAKISTAN: AN ENABLING ENVIRONMENT NEEDED

Bytes for All¹

1. Overview

Protection and promotion of human rights is globally recognized mandate of a free and transparent national human rights institution (NHRI) under the United Nations resolution 48/134 passed in December 1993. Pakistan's NHRI, called National Commission for Human Rights (NCHR) is the latest in the Asia Pacific region, which was established under the *National Commission for Human Rights Act* (NCHRA) passed in 2012 in accordance with the Paris Principles. The outgoing Government of Pakistan People's Party took the initiative of approving this law in 2012, however, the incumbent Government of Pakistan Muslim League (N) took almost three years to establish the institution and announce the names of the chairman and members.²

Human rights situation in the country is precarious with increased threshold of violations being reported ranging from access to basic life amenities, freedom of expression, assembly and association rights, privacy, freedom of religion to mob justice, gender violence, death penalty and enforced disappearances.

Human Rights Commission of Pakistan (HRCP), a civil society organization, in its annual report 2016 highlighted that 728 Pakistani citizens were disappeared only in one-year.³ Military courts in Pakistan since their establishment in January 2015 made 81 convictions and awarded 77 death sentences till June 2016.⁴ Violations pertaining to expression, assembly, association, privacy, religious expression, blasphemy and gender rights are in bulk.

In digital spaces, the threshold of technology based crimes, as well as human rights violations have increased in recent years. However, the Government's approach to respond to technology driven crimes is problematic, as it has further deteriorated the situation vis-a-vis civil liberties. The government promulgated *Prevention of Electronic Crimes Act* in 2016 to counter technology driven crimes, however, it also legitimized and empowered the state institutions to broaden the scope of digital surveillance on citizens. In short, the Act instead has become the reason of circumcising fundamental freedoms in online spaces as well, including expression, campaigning online for common goals, privacy and others.

A fresh wave of criminalizing expression by the state and non-state actors have further created an environment of fear, intimidating progressive voices who frequently raise

¹ Naumana Suleman and Haroon Baloch, *Bytes for All Pakistan*.

² In Profile: From Pindi to Gambia and back. <https://www.dawn.com/news/1184293>.

³ 2016 saw highest number of disappearances in six years, HRCP report finds. <https://www.dawn.com/news/1332397/2016-saw-highest-number-of-disappearances-in-six-years-hrcp-report-finds>.

⁴ Military injustice in Pakistan. <https://www.icj.org/wp-content/uploads/2016/06/Pakistan-Military-court-Advocacy-.Analysis-brief-2016-ENG.pdf>.

questions online on certain state policies, particularly relating to security and law and order.

Unfortunately, some actors in this matter also have exploited the religion to silence these voices. The case of missing bloggers in January 2017 and painting the entire episode as if they were blasphemers involved in spreading profane material on the internet is just one example. During this wave of intimidation, multiple other blasphemy cases were reported including brutal murder of Mashal Khan, a student of journalism at Abdul Wali Khan University in Mardan in April 2017.

2. Nature of the NCHR

2.1 NCHR Structure, Working and Key Intervention Areas

A bi-partisan parliamentary committee, on 13 February 2015, cleared the name of eminent jurist, retired Justice Ali Nawaz Chowhan, to be appointed as the Chairman of the NCHR. Previously, he served as chief justice of Gambia and judge of the International Criminal Tribunal in The Hague.

The commission comprises of seven members, one from each administrative unit with due women and minorities representation. They include Ms. Fazila Aliani from Baluchistan, Dr. Begum Jan from Federally Administered Tribal Areas (FATA), Mr. Chaudhry M. Shafique from Islamabad Capital Territory, Dr. Yahya Ahmed from Khyber Pakhtunkhwa, Mr. Ishaq Masih Naz from minorities, Ms. Kishwar Shaheen Awan from Punjab and Ms. Anis Haroon from Sindh.

In the first two years' period, the NCHR has worked on its first five-year strategic plan⁵ and prioritized the following areas as key intervention areas:

- Human rights education;
- Human rights violations complaint handling and investigation;
- Compliance on international obligations;
- Review of national legal framework, and
- Addressing marginalization and vulnerability as key intervention areas.

2.2 NCHR Mandate, Powers and Legal Procedures:

The NCHRA 2012 stipulates a broad and overarching mandate for the promotion, protection and fulfillment of human rights, as provided for in Pakistan's Constitution and international treaties. As an impartial state body, the NCHR works independently of the Government and is directly accountable to the Parliament of Pakistan. The NCHR's financial and performance reports are also directly presented to the Parliament for approval on an annual basis. The primary functions and powers, as stipulated in the NCHR Constitution are to:

⁵ NCHR annual report page 23.

1. Conduct investigations into allegations of human rights abuses, either on petitions filed by individuals or institutions, or through *suo-moto* action;
2. Review existing and proposed legislation in relation to human rights principles;
3. Carry out research and advise on policy matters pertaining to the situation of human rights in Pakistan;
4. Contribute to national human rights awareness-raising and advocacy initiatives in the country;
5. Review and report on the government's implementation and monitoring of the state of human rights; and
6. Make technical recommendations and follow up on the implementation of treaty obligations and develop a national plan of action for the promotion, protection and fulfillment of human rights in Pakistan.

Section 13 of the Act confers all the powers of a civil court to the NCHR, as described in Sections 175, 178, 179, 180, and 228 of the Pakistan Penal Code 1860 (Act XLV of 1860). The Commission may use these powers while inquiring into complaints and trying a suit under the Code of Civil Procedure, 1908 (Act V of 1908). Hence, the Commission may summon witnesses and examine them on oath, discover and produce documents, receive evidence on affidavits, requisition public record from any court or office, conduct examination of witnesses or documents, etc. Every proceeding before the Commission shall be deemed to be a judicial proceeding within the meanings of Sections 193, 196, and 228 of the Pakistan Penal Code 1860.

However, the procedure while dealing complaints with respect to armed forces is different than other human rights complaints. For such, the commission may seek report from the Federal Government regarding human rights violation, and on receipt of the report, it may decide not to proceed further or make recommendations to the Federal Government. The Federal Government will ensure actions are taken on the recommendations within three months.

The most problematic provision in the NCHRA 2012 is that of relating to conducting inquiry on human rights violations committed by the intelligence agencies. The Commission cannot inquire into the act or practices of the intelligence agencies. In case if the Commission receives a complaint regarding human rights violation by an intelligence agency, the Commission shall refer it to the competent authority concerned.

2.3 NCHR Independence in Its Administrative and Financial Matters:

The NCHRA 2012 guarantees a pluralistic composition of members in the NCHR, the freedom to make rules and procedures, appoint staff and consultants, financial independence and accountability through the submission of annual reports to the parliament. Nonetheless, the Commission has just begun its journey to ensure a conducive environment for the exercise of equal rights without prejudice and discrimination, and is striving for its independence.

Section 16, sub-section (1) ensures the independence of the Commission. It says:

“The commission and every member of its staff shall function without political or other bias or interference and shall, unless this Act expressly otherwise provides, be independent and separate from any government, administrations, or any other functionary or body directly or indirectly representing the interests of any such entity.”

Since its establishment, the Commission has been struggling for its autonomy and impartiality from political influence. To date, the Commission could not succeed in getting approval from the government to establish NCHR Fund, which is the key requisite for the Commission to function freely without the influence of Government. As, once the NCHR fund is established, the Commission would not need prior approval for the spending. At the moment, NCHR is receiving funds through the Ministry of Human Rights. According to NCHR, the Government allocated 100 million Pakistani rupees (around \$953,880 USD) of funds to the Commission for the fiscal year 2015-16. However, they could not spend the entire amount as a few rules and procedures were in the pipeline. In the fiscal year 2016-17, the Government allocated 83 million rupees (around \$791,720 USD), which were inadequate to meet the Commissions’ finances. However, on the Commission’s request, it additionally received 40 million rupees (around \$381,552 USD) from the Prime Minister’s funds as a special grant to function smoothly. The Commission is of the view that the Government, without any further delay, should allow it to establish its constitutional fund, in accordance with Section 27 of the NCHRA:

“The government shall allocate specific amount of money for the commission in each financial year and it shall not be necessary to take prior approval from the government to spend such allocated money for the approved and specific purposes.”

The first annual report 2015-16 of the Commission states: “It had some teething troubles as noted earlier. It was severely handicapped with there being no rules in place and little money or logistical support available to discharge its duties.”

Another challenge that the Commission faced during initial days of its establishment was functioning without appropriate offices, logistic support and the sanctioned staff. Issue of the office was resolved only after the Chairman raised his voice in the Senate’s functional committee in April 2016.⁶ However, the Commission is still understaffed, and the permanent human resource is very few. According to the Commission, it is working on “makeshift” arrangements as its six offices including the head office in the federal capital has only 66 employees in total against the sanctioned posts of 171. Out of these, 12 officers have been working on deputation who have come from other government departments, while the rest are working on contractual basis.

6 NCHR functioning in one-room office, Senate body told. <https://www.thenews.com.pk/print/112565-NCHR-functioning-in-one-room-office-Senate-body-told>.

Lack of appropriate human resource is directly impacting the performance of the NCHR, and the reason for its inability to induct human resource is the absence of Services Rules that the Commission has to formulate and get approval from the Government.

3. NCHR Progress

Complaints Received and Status⁷

As per the mandate bestowed by the Act, the Commission started probing petitions/complaints received on human right violations from mid of December 2015. NCHR has received a total of 501 complaints and took 83 *Suo Motu* Notices, out of which 47 are in hearing, 244 under investigation and 210 disposed off.

Reports Produced

In the first year, the Commission produced 18 reports⁸ reviewing different aspects of law and human rights and made policy recommendations to the government. Salient among these were:

1. Kasur Child Abuse Incident;
2. A report on Tharparkar Crisis: The Haunting Footprints of Drought, Hunger and Poor Governance;
3. Forced ouster of Tenants of Okara Farms;
4. Proposed Procedural Amendments to check Misuse of Blasphemy Laws in Pakistan;
5. A Study on Honour Killings in Pakistan and Recommendatory Checks through Law;
6. PIMS Hospital-An Appraisal Report;
7. Investigative report on Mina Hajj Tragedy;
8. A report on Exploitative Trade of Human Organs in Pakistan;
9. Report on Transgender Persons (A need for Mainstreaming);
10. Report on FATA South Waziristan IDPs: Plights, Issues and Challenges; and
11. Towards Implementation of International Core Human Rights Conventions by NCHR.

The Role of NCHR regarding marginalized communities⁹

The Commission has the statutory role to receive and redress complaints of human rights violations. The Complaint Rules of the Commission have been in place since 2015 and the NCHR has been entertaining complaints from members of marginalized groups for the protection of their human rights. Following is a glimpse of the complaints received from the marginalized groups:

Sr. #	Description	Complaints
1	Women	33
2	Children	03
3	Transgender persons	03

⁷ NCHR annual report page 57.

⁸ NCHR annual report page 66 – 87.

⁹ NCHR annual report page 83 and electronic communication with the Commission.

4	Minorities	18
5	Disabled Persons	03

The Commission is also reviewing laws related to marginalized groups particularly women, children, transgender persons and minorities.

Reports to UN¹⁰

Complying with its obligations, the NCHR submitted its following independent reports to the Federal Government and United Nations (UN) treaty bodies.

1. NCHR's submission on implementation of United Nations Convention against Torture and other form of Cruel, Inhuman, Degrading Treatment and Punishment (CAT);
2. NCHR's submission on 'List of Issues' pertaining to International Covenant on Civil and Political Rights (ICCPR);
3. NCHR's submission on 'List of Issues' pertaining to International Covenant on Economic, Social and Cultural Rights (ICESCR); and
4. NCHR's submission on 3rd Universal Periodic Review of Pakistan (UPR).

Highlighted Cases 2015-2016¹¹

Case 1: Land for the Islamabad Hindu community

The Islamabad Hindu Panchayat (IHP) President Dr. Ashok Tanwani approached the NCHR on 31 May 2016. They wanted a land allocation from the Capital Development Authority (CDA) for community uses including cremation services. The Hindu community has been trying since long. They did not have even cremation grounds. Their case had been circulating between Senate committees and other government offices from CDA to the Ministry of Human Rights or the Ministry of Religious Affairs since 2012. Cremation is a basic human need of those in the Hindu faith. The Senate Functional Committee recommended the CDA to make land allotment as per rules. However, the matter remained pending in different forums. The IHP had spoilt their own case as their original plea was for a share in the land allocated to the Sikh community.

It was only after five or six hearings that the process made clear a parcel of land allocated to a community cannot be allotted to anyone else without their consent. The CDA said the Sikh community was not responding. Since it was now the property of the Sikhs, no government agency had jurisdiction. The NCHR then asked the IHP to amend its application for direct allotment of land by the CDA. The revised application was filed on 20 September 2016. But they did not respond. Three more formal hearings went unattended. Then the NCHR took serious notice and sent its own officials to serve the final summons to CDA with a policeman in tow. There are some 800 Hindus in Islamabad and are represented by the IHP. They demanded land as their basic human right for three purposes:

- Cremation Centre
- Community Hall

¹⁰ NCHR annual report page 51-52.

¹¹ NCHR annual report page 60-65.

- Temple

When no one from the CDA attended the first three hearings, NCHR wrote a letter to CDA seeking explanation on why no one appeared despite the summons. The Chairman of CDA was asked to explain their failure to comply and why there was no deputation of an official to represent the CDA in the NCHR case. The CDA requested postponement through their Director of Law that was granted till 30 June 2016. On that date, NCHR observed there was no Hindu cremation place in Islamabad. The CDA was asked to propose a few sites.

The Chairman of NCHR instructed the CDA to allocate the land to the IHP for the purposes as requested. The CDA said they have no objection for such allocation provided the IHP responds to CDA queries and completes the process as per rules. President IHP Dr. Tanwani handed over the needed papers. On the next hearing, CDA informed that the matter was placed for a decision in front of the CDA Board. The CDA board approved a 2354 square yard plot of land in H9/2 Islamabad on 9 December 2016.

Case 2: Violence against a woman

The complainant had a court marriage with a man from Mianwali in Rawalpindi. All was well at first. She went and lived happily in Mianwali. Soon it was transpired that the man was already married. Domestic conflicts started. The man divorced his first wife. The first wife was his second cousin. The domestic conflict grew larger and the whole family got involved. Her in laws bound the complainant to a chair, made deep knife cuts near her ankles and then poured acid on the cuts. She was not allowed any treatment. Then upon the promise of extending treatment, they got her to sign many documents. Even then they did not release her. She was kept in illegal confinement for one year, after which, her in laws left her at the Holy Family Hospital. She contacted her own family who took her to a civil hospital for treatment. But the doctors refused to extend treatment without due legal documentation. Police Station New Town, Rawalpindi also refused to register the case on justification that the incident took place outside their jurisdiction. Her need for treatment was urgent as her hand could be permanently damaged. An advocate of the High Court guided her in seeking relief from the NCHR. He also acted as her counsel free of cost. A formal complaint was lodged with the Commission.

The NCHR took up the complaint on a compassionate basis. Case was fixed and respondents were summoned. New Town Police said the incident took place in Mianwali so they could not take cognizance. However, the Commission guided them to act in her aid following the Criminal Procedure Code (CRPC) since part of the crime took place in their area and partial jurisdiction lies with them. The Commission also observed that the police was bound to make the First Information Report (FIR) and register it in its roznamcha (daily register). However, on the next hearing they said their legal department had not cleared them. The NCHR observed that the case could later be transferred and a Joint Investigation Team (JIT) could be formulated and then the case may be transferred for investigation after registration of the FIR. The police agreed to follow these instructions and created a JIT with Mianwali Police. Police followed the Commission's instructions in taking cognizance and entered the case into their roznamcha and took her

to hospital for treatment. Her treatment was thus started.

Case 3: Recovery of Missing Person

Miss Hani Abdul Baloch complained that her father -a telephone operator and a social worker in Karachi- was picked up from a toll plaza by armed persons. She alleged that some agencies were involved in the forcible abduction of her father. The Commission took notice and pursued with the authorities. It was later learned that Abdul Wahid Baloch was recovered thereafter. He met with the Chairman of NCHR during the former's visit to Karachi and expressed his thanks to the Commission for its effort leading to his recovery.

4. Conclusion and Recommendations

The establishment of the NCHR depicts the willingness of the Government of Pakistan to adhere to its international commitments, and an effort to protect human rights as a duty bearer. However, in the contemporary socio-political situation, it can be presumed that the NCHR would face challenges with regards to its independence and effectiveness to promote and protect human rights. Therefore, it is crucial as well as the responsibility of the Government to create an enabling environment, so that the NCHR's potential can be used to its fullest. Simultaneously, it is of extreme importance that the NCHR addresses its internal challenges in order to work collaboratively for the furtherance of its mandate.

4.1 Recommendations to the Government

1. Establish the NCHR fund as a priority.
2. Reinforce the importance and mandate of the NCHR in the Parliament.
3. Adhere to the Paris Principles and ensure the NCHR remains well resourced, independent, and effective.
4. Enhance the mandate of the NCHR in order to be able to hold all government institutions accountable so that none should remain above the law.
5. Prioritise the enforcement of actions prescribed by the NCHR in order to improve the state of human rights in Pakistan.
6. Support investigations carried out by the NCHR through providing the NCHR with timely information, access to places, and removing all *de facto* and *de jure* barriers faced by the NCHR.

4.2 Recommendations to the NCHR

1. Develop a comprehensive strategy to engage with all relevant stakeholders, including civil society organisations, government ministries, institutions, parliament and judiciary.
2. Develop rules and procedures for internal operations and coordination of NCHR, including the service rules.
3. Implement capacity building programs for the NCHR staff, specifically on the human rights (offline/ online) concept and approaches, involving experts from civil society organisations.
4. Develop mechanisms for immediate and continuous support for human rights defenders at risk.

5. Continue the submission of its independent reports at the UN and other relevant foras.
6. Develop a mechanism for regular monitoring and follow-up for the implementation of its recommendations.
7. Publish and disseminate periodic human rights situation reports.

SRI LANKA: REVIVING AMID CHALLENGES

Law and Society Trust¹

1. Introduction

National Human Rights Institutions (NHRIs) are regarded as one of the foremost independent institutions in the State machinery that protect and preserve the human rights and freedoms of the people of a particular country. NHRIs, which take the form of independent commissions, offices of Ombudsmen, or autonomous committees, are defined as “State bodies with a constitutional and/or legislative mandate to protect and promote human rights; they are part of the State apparatus and are funded by the State”.²

NHRIs are empowered, either constitutionally or by legislation, to monitor and/or investigate the compliance of State organs with their human rights obligations. They are also given the mandate to take measures to provide relief where violations of human rights have occurred or are continuing to occur. Methods for resolving such violations can include making recommendations to redress the said violations, and/or amicably settle disputes arising out of violations of human rights by alternative dispute resolution.³ An NHRI that enjoys “public legitimacy” - independent, accountable and efficient despite being part of the State apparatus, has the ability to play a substantial role in the protection and promotion of human rights within their jurisdictions. NHRIs can also feed into State policy/legislation on key issues pertaining to the rights and freedoms of the peoples of the country.⁴

It is for this reason that NHRIs are lauded as necessary institutions for the protection and promotion of human rights in a modern State structure. Sri Lanka, by enacting the *Human Rights Commission of Sri Lanka Act*, established the Human Rights Commission of Sri Lanka (HRCSL), thereby setting up its official NHRI.⁵

¹ *The contributing authors to this chapter are Uween Jayasinha (LLB, Attorney at Law) and Widya Kumarasinghe (LLB). The Law & Society Trust is grateful to Nigel Nugawela (Consultant Communications) for assistance in conducting interviews and collating data and various additions to the draft, and to Vijay Nagaraj (Former Head of Research, LST) and Dinushika Dissanayake (Executive Director, LST) for comments on various drafts.*

² OHCHR, *National Human Rights Institutions: History, Principles, Roles and Responsibility*, HR/P/PT/4/Rev.1 (United Nations, New York & Geneva, 2010), p. 13

³ B. Skanthakumar, *Neither Restraint nor Remedy: The Human Rights Commission of Sri Lanka* (Law & Society Trust, 2012), p. 2-3

⁴ P. S. Pinheiro & B. S. Baluarte, *National Strategies – Human Rights Commissions, Ombudsmen and National Action Plans (The Role of National Human Rights Institutions in State Strategies)*, Human Development Report 2000 Background Paper, found at <http://hdr.undp.org/sites/default/files/paulo_serjio_pinheiro_.pdf>; C. R. Kumar, *National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights*, 19 *American University International Law Review* 260 (2003), p. 281; A. Smith, *The Unique Position of Human Rights Institutions: A Mixed Blessing?*, 28 *Human Rights Quarterly* 905 (2006), p.906

⁵ Human Rights Commission of Sri Lanka Act No. 21 of 1996 [herein after ‘HRCSL Act’]

1.1 A Brief Institutional History and Structure

The HRCSL, which replaced the Human Rights Task Force and the Commission for Eliminating Discrimination & Monitoring of Human Rights (both of which were promulgated under emergency regulations), was given an extensive mandate. This mandate includes *inter alia* to investigate and inquire into complaints against violations and/or imminent violations of the Fundamental Rights enshrined in the Constitution of Sri Lanka,⁶ advise and assist the Government in the formulation of legislation and administrative practices with a view to preserving Fundamental Rights,⁷ make recommendations to the Government to bring legislation and administrative practices in line with international human rights norms,⁸ and promote awareness and education on human rights.⁹

Despite its expansive mandate, the HRCSL has been the subject of much criticism over the last 15 years as being an institution that had played, at best, a lackadaisical role in fulfilling its mandate. The criticisms originated from a multiplicity of factors including political interference in the independence of the HRCSL, lack of constructive engagement with the Government, and lack of adequate resources, all contributing to the decrease of public confidence in the HRCSL. These allegations taken together raised serious concerns on the compromising of the independence, accountability and efficiency of the HRCSL.

The criticisms of the HRCSL came to a head when, in 2007, the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights downgraded the accreditation of the HRCSL from ‘A Status’ to ‘B Status’.¹⁰ The ‘B Status’ accreditation is given to NHRIs when they are regarded as being only partially in compliance with the Principles Relating to the Status of National Institutions (Paris Principles)¹¹. The HRCSL has since continued to be a NHRI only partially in compliance with the Paris Principles.¹²

However, some of the criticisms of the HRCSL, particularly those pertaining to the independence of the HRCSL being compromised by political interferences, were redressed in 2015 with the establishment of the Constitutional Council following the 19th Amendment to the Constitution of Sri Lanka.¹³ While many international observers and

⁶ HRCSL Act, Section 10(a) and Section 10(b)

⁷ HRCSL Act, Section 10(c)

⁸ HRCSL Act, Section 10(d)

⁹ HRCSL Act, Section (f)

¹⁰ International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, *Report and Recommendations of the Sub-Committee on Accreditation* (Geneva, proceedings of 22 to 26 October 2007)

¹¹ Principles relating to the Status of National Institutions [herein after The Paris Principles], UNGA Res. 48/134, adopted on 20 December 1993

¹² International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights Sub-Committee on Accreditation, accreditation statuses of NHRI’s can be found at <<http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/default.aspx>>

¹³ Chapter VIIA of the Nineteenth Amendment to the Constitution, certified and Gazetted on the 15 May 2015.

local reporters were critical of the lack of credibility and transparency in the appointments of the Chairperson and commissioners of the HRCSL when the 17th and 18th Amendments to the Constitution were in force,¹⁴ the enactment of the 19th Amendment ensured transparency and credibility in the appointments and tenure of office of the members of the HRCSL.

The Constitutional Amendments and their implementation infused a fresh life into the HRCSL, and restored public legitimacy with respect to the independence of the HRCSL, at least to some degree.¹⁵ In October 2015, the Constitutional Council appointed a new Chairperson and commissioners to the HRCSL, and the year 2016 was anticipated as the year that the HRCSL would recommence its functions and mandate with renewed fervour.¹⁶ Over the last two years, the HRCSL's performance has improved drastically, with the adoption of an interventionary and proactive response to a number of key national issues, including attempts to eradicate torture and advocacy for the inclusion of economic, social and cultural rights in the constitutional reform process.

This chapter reviews the performance and functioning of the HRCSL for the year 2016 and draws from the interview responses of a number of human rights advocates, lawyers and activists working on different aspects of human rights in the country. It also explores the performance indicators of and challenges faced by the HRCSL in the attempt to fulfil its mandate.

The chapter comprises three parts; the first part being a statistical review of certain key performance indicators of compliance of the HRCSL. The second part reviews the other functions of the HRCSL during the year 2016 while highlighting certain constraints faced by the HRCSL. Thirdly, the chapter explores certain key issues and challenges faced by the HRCSL, reviews measures taken by the HRCSL to respond to these issues and challenges, and make recommendations that the HRCSL may implement to enhance its performance and functioning in order to achieve its mandate and thereby restore public confidence in the HRCSL.

1.2 Method

The method used for the compilation of this report is through a survey of primary and secondary data. This method was chosen by the authors due to the reason that it permitted direct engagement with the HRCSL whilst also providing for limited collection of views by independent civil society actors. The report intends to reflect both the direct views of the HRCSL and the views of independent parties vis-a-vis the performance of the

¹⁴ United Nations Human Rights Committee, *Concluding Observations on the Fifth Periodic Report of Sri Lanka*, CCPR/C/LKA/CO/05 (21st November 2016), ¶5; U.S. Department of State, *Country Report on Human Rights Practices – Sri Lanka 2014 Report*, found at <http://photos.state.gov/libraries/sri-lanka/5/pdfs/hr_report_2014_en.pdf>, p. 53; Asian NGO Network on National Human Rights Institutions, 'Sri Lanka: Lost Opportunities' in the *2015 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia* (FORUM-Asia, 2015)

¹⁵ Nineteenth Amendment to the Constitution, *supra* note 12, Article 41A and Article 41B

¹⁶ HRCSL, *HRCSL New Commission Starts Work*, News Release dated 2 November 2015, found at <<http://hrctl.lk/english/2015/11/02/hrctl-new-commission-starts-work/>>

HRCSL during the year under review. It is the views of the authors that the said approach allows the report to present an unbiased review of the HRCSL. All questionnaires and interview transcripts have been archived at the Law and Society Trust Library and Information Centre after anonymizing sources for their protection. These documents are accessible by the public.

A total of ten interviews were conducted, of which one interview was with an incumbent Commissioner of the HRCSL. Primary data from the perspective of the HRCSL was gathered through a qualitative interview with one of the incumbent Commissioners of the HRCSL. A questionnaire was prepared to assess the perceptions of human rights defenders regarding the functioning of the HRCSL in preparation for the Asian NGO Network on National Human Rights Institutions (ANNI) report of 2017. A further nine civil society actors were also interviewed for this report. A cross-section of organisations and individuals was selected based on a) their strong regional/local presence and/or broader national advocacy involvements; b) their consistent and substantive engagement with the human rights framework in the country; and c) their strong record of legal practice or advocacy work on human rights issues in general.

In acquiring primary data, a comprehensive questionnaire was submitted to the HRCSL in February 2017. Subsequently, an interview was conducted with one of the incumbent Commissioners of the HRCSL in order to obtain additional data and discuss the subject matter of the questionnaire at depth. In order to substantiate the data obtained via the interview and questionnaire, statistical data of performance indicators (of the year under review and previous years) was obtained from the HRCSL.

The main mode of acquiring secondary data was by analysing and collating reports of the HRCSL in the media. Additionally, independent reports and studies on the HRCSL (as of 1 July 2017) and its performance were also considered. Reports issued after 1 July 2017 have not been considered in this review.

2. Review and Analysis of Statistics and Key Performance Indicators in Receiving and Concluding Complaints

2.1 Number of Complaints Received

The year 2016 has been recorded as the year in which the HRCSL received the highest number of complaints in the past five years. It received a total of 9,071 complaints. The increase in complaints is not necessarily a significant increase when compared to the year 2015 wherein the HRCSL received a total of 8,746 complaints, but the statistics for the years 2015 and 2016 indicate a quantum leap in the number of complaints received when compared to the years 2012, 2013 and 2014 as illustrated in the table below.

Statistics of Complaints Received by the HRCSL - Overall (2012 – 2016)

Year	No. of Complaints	Increase from Previous Year	Percentage of Increase from Previous Year
2012	4726	-	-
2013	4979	250	5.28%
2014	5074	95	1.9%
2015	8746	3,672	72.36%
2016	9071	325	3.71%

(Source: ANNI Report 2015; Quarterly Reports of the HRCSL for 2015 and 2016)

Of the total of 9,071 complaints received by the HRCSL in the year 2016, 4,990 complaints (55.02%) were received by the Head Office, while 4,081 complaints (44.98%) were received by the Regional Offices.¹⁷

It is to be noted that in the year 2015, the number of complaints received by the HRCSL rapidly increased, and further increased by 3.71% in 2016. Although there is no analysis conducted by the HRCSL to explain this rise in complaints, the most plausible explanation for this increase is the change in the political climate of Sri Lanka following the Presidential Elections on the 8 January 2015 and the subsequent victory of the “*Yahapalanaya*¹⁸” Government, which campaigned on a political platform to strengthen accountability and promote human rights in the 2015 General Elections. It was noted that the change of government in the year 2015, had augmented the public’s confidence in the HRCSL, which is the most likely reason for the rapid increase in complaints being submitted to the HRCSL.

However, notwithstanding the positive perception towards the HRCSL¹⁹, this sudden increase in complaints submitted to the HRCSL has overburdened the staff and the internal processes and systems of the HRCSL²⁰ in view of over the last 15 years; it has displayed little or no enthusiasm in being proactive in fulfilling its mandate, and functioned in a perfunctory manner. All internal mechanisms and processes are wrought with systemic malaise and bureaucracy, which has made grappling with the high number of complaints even more challenging.²¹ As such, institutional reform, as noted by the current administration of the HRCSL, is the need of the hour.

** At the first instance, it is pertinent to note that at the time of writing this chapter the Annual General Report of the HRCSL for the year 2016 was not available. As such, all statistics and data presented herein were obtained by personal requests for the same from the administration of the HRCSL.

¹⁷ See HRCSL Response to LST Data Request dated 3 March 2017, Archived, Law & Society Trust Library and Documentation Centre.

¹⁸ i.e. ‘good governance’

¹⁹ The positive perception was mainly due to the appointment of the Chairperson and members of the HRCSL and the greater responsiveness to emergency issues witnessed since 2015.

²⁰ See HRCSL Response to LST Questionnaire, dated 03/03/2017, Archived, Law & Society Trust Library and Documentation Centre.

²¹ *Ibid.*

2.2 Types of Complaints Received

NHRIs must be strictly accountable in order to maintain public legitimacy. However, at the time of writing this chapter, the data with respect to the types of complaints received by the HRCSL was inconclusive, in that only *types* of complaints received by the Head Office were made available. Although the regional data was not available, the data pertaining to the types of complaints made to the Head Office in the year 2016 (i.e a total 4,990 complaints) provides insights into the human rights record of Sri Lanka.

Types of Complaints Received by the HRCSL Head Office in 2016

Type of Complaint	Head Office		
	Total ²²	Percentage	
Personal Liberty (<i>includes, but not limited to, Torture, Sexual Harassment, Arrest/Detention, Death in Custody, Abduction</i>)	1,012	20.28%	
Inaction Complaints	358	7.17%	
Employment disputes	712	14.27%	
Education	408	8.18%	
Health	04	0.08%	
Land & Property Rights	183	3.67%	
Social Services & State Welfare	14	0.28%	
Infrastructure & Utilities	49	0.98%	
Environment	31	0.62%	
Civil & Political Rights (<i>Freedom of expression, assembly, religion, movement</i>)	24	0.48%	
Complaints related to Elections	04	0.08%	
Child Rights	05	0.10%	
Women's Rights	03	0.06%	
Rights of Persons with Disabilities	00	0.00%	
Elder's Rights	01	0.0002%	
Language Rights	01	0.0002%	
IDP's/Refugee Returnees	01	0.0002%	
Migrant Worker's Rights	20	0.0040%	
LGBTIQ Rights	01	0.0002%	
Administrative Complaints	343	0.0687%	
Housing	02	0.0004%	
Complaints Pending for want of more information	730	0.146%	
Complaints that the HRCSL cannot proceed with	No Fundamental Right – 91	1,083	21.70%
	Beyond HRCSL Mandate – 397		
	Time Barred – 95		

²² We note that the total we have listed adds to 4989 and therefore the percentages have been calculated as a percentage of 4989.

	Referred to Other Authorities – 455		
	Pending in Court – 45		

(Source: Year Report of the HRCSL 2016)

From this data it can be gathered that four types of complaints, namely allegations of human rights violations pertaining to deprivation of personal liberty, employment disputes, education (school admissions), and complaints of inaction of State authorities, constitute 50% of the complaints received by the Head Office of the HRCSL. These figures indicate that these are the human rights that are most widely complained of within Sri Lanka. However, it does not necessarily mean that these are the most common or grave violations. It is possible that the ordinary citizen sees the HRCSL as having the ability to resolve violations of this nature and thus takes recourse in the complaints mechanism provided by the commission.

As many as 1,012 complaints have been submitted to the Head Office of the HRCSL on the grounds of deprivation of personal liberty. These complaints include, *inter alia*, cases of torture, threats, sexual harassment, arbitrary arrest & detention, abductions, and reporting of missing persons. The deconstruction of the nature of the complaints received in the year reveals a continuum of violations *vis-a-vis* the personal liberty of the individual by the State authorities despite the change of government in mid-2015. It also indicates the lack of checks and mechanisms to curb arbitrary infringement on personal liberties with these mechanisms may be either lacking or significantly inadequate.

Complaints regarding employment disputes; i.e. disputes between State employees and State authorities/institutions regarding recruitment, promotions, transfers, salaries and retirement benefits, constitute 14% of the complaints received by the Head Office of the HRCSL. The high number of employment disputes is reflective of a need for equitable administrative mechanisms within the public employment sector, and is possibly a cause of the inefficiency and discontent that generally exists within the ranks of State employees. The number of complaints against inaction on the part of the Police and State authorities, and administrative complaints, combined, amount to 701 complaints (representing 14% of all complaints).

The fact that 28.73% of complaints received by the Head Office of the HRCSL (the collective percentage of public employment disputes, State inaction and administrative complaints) deal with public sector administration and management, it is symptomatic of a failure of State administrative frameworks and mechanisms to set in place systems that are transparent, accountable and protect the rights of State employees and society. Accordingly, this is reflective of the need to revamp and enhance existing administrative mechanisms of State authorities/institutions towards facilitating public administrative and management systems that serve the rights of those working in the public service, while preserving and promoting the human rights of society as a whole.

It is noted, however, that not all complaints received by the HRCSL will, following investigations, amount to an infringement of human rights. Nevertheless, the high number of complaints received, particularly those pertaining to deprivation of personal liberty and administrative infringement of rights, should be regarded as indicative of the dire need for checks and balances mechanisms, as well as a better appreciation of human rights and equitable administrative practices, within State authorities and institutions.

It is also relevant to note that 1,083 complaints (22%) received by the Head Office cannot be proceeded with. It is regrettable that as many as 95 cases have been time barred, while 855 complaints have either been beyond the mandate of the HRCSL or have been referred to other authorities, as they highlight the lack of knowledge and awareness among the general public of the procedure, framework and mandate of the HRCSL. However, the imposition of a time bar to receive complaints by the HRCSL is unjustly self-imposed as the *Human Rights Commission of Sri Lanka Act* imposes no such time bar²³. It is regrettable that the Head Office of the HRCSL has dismissed 95 complaints (1.9%) it received in the year 2016 on the basis of this unreasonable self-imposed time bar.

2.3 Determining/Settling of Complaints

A criticism that has been consistently levelled against the HRCSL over the years is the slow rate of concluding complaints by the HRCSL. The same can be said of the year 2016.²⁴ At least one interviewee noted the lack of progress with respect to investigating individual routine complaints and others underlined the inefficiencies within the system as a factor that prohibits the effective investigation and settling of complaints.

In the year 2016, only a total of 2,522 complaints were settled by the HRCSL.²⁵ While this number, taken in isolation, can be regarded as being commendable, it falls woefully short of being substantial in light of the growing number of complaints received by the HRCSL and the backlog of cases yet to be determined or settled by the HRCSL.

Statistics of Complaints Concluded by the HRCSL (2014 – 2016)

Year	No. of Complaints Received	No. of Complaints Concluded/Settled	Percentage of conclusions/settlements
2014	5074	1760	35%
2015	8746	3465	40%
2016	9071	2522	28%

(Source: ANNI Report 2015, Annual Reports of the HRCSL for 2015 and 2016)

²³ Skanthakumar, *supra* note 2, p.56-57

²⁴ U.S. Department of State, *Country Report on Human Rights Practices – Sri Lanka 2013 Report*, found at <<https://www.state.gov/documents/organization/220616.pdf>>, p.43; INFROM Human Rights Documentation Centre, *Human Rights Situation in Sri Lanka: 17 August 2015 – 17 August 2016* (INFORM, 2016), p.5; R. Hofmann, *Minority Rights in South Asia* (Peter Lang, 2011), p.56-57; Skanthakumar, *supra* note 2, p.95

²⁵ HRCSL Response to LST Data Request, *supra* note 16

Statistics of Cases Concluded by the Head Office (2016)

Description	No. of 2016 Complaints that were Concluded	No. Complaints that were Concluded from Other Years	Total
No violation of rights	06	180	186
Complainant has not pursued the complaint	47	83	130
Recommendations were made	08	33	41
Entered into Settlement	11	71	82
Relief Granted	07	63	70
Withdrawn	44	141	185
Referred to other Authorities	03	66	69
Directives Given	01	29	30
Total	127	666	793

From the available data, it can be seen that the Head Office, which received 4,990 complaints in the year 2016, was capable of concluding only 127 (2.54%) complaints that arose in 2016. This has resulted in the creation of a backlog of complaints of 3,780 (excluding the complaints that cannot be proceeded with) spilling over into the year 2017. It is pertinent to note that from the 127 complaints that were concluded by the Head Office, 91 complaints were either withdrawn or dismissed due to lack of interest by the complainant and, as such, only 36 complaints were actually concluded by the Head Office by delving into the merits of the complaint. In terms of the complaints from other years that were concluded by the Head Office, the performance is far better, yet it pales in comparison with the backlog of the complaints that have accumulated over the years.

The Regional Offices of the HRCSL, having concluded a total 2,440 complaints in the year 2016, have fared marginally better than the Head Office.²⁶

The data represents the slow rate of concluding complaints by the HRCSL, which undoubtedly will cause substantial delays in complainants being afforded relief. The HRCSL, thereby, runs the risk of denying justice to complainants and causing society to be disillusioned with the public legitimacy of the HRCSL.

The HRCSL has stated that the failure to conclude complaints, in the face of the ever-mounting number of complaints being submitted to the HRCSL, has further increased the backlog of pending cases at the HRCSL. The primary cause for the backlog, as stated by the HRCSL, is that it is severely short-staffed. The existing number of staff at the HRCSL, 159 officers, is barely adequate to process, investigate, determine and conclude the extraordinarily high level of complaints being submitted to the HRCSL.²⁷ The

²⁶ HRCSL Response to LST Data Request, *supra* note 16

²⁷ HRCSL Response to LST Questionnaire, *supra* note 17

backlog of complaints that has accumulated over the years further hampers the rapid conclusion and disposal of complaints.

The shortage of staff is most telling by the fact that the Head Office had concluded just 127 complaints (2.54%) in 2016, despite the Head Office receiving 4,990 and 4,724 complaints in 2016 and 2015, respectively. The Head Office is the most expansive of the offices of the HRCSL and has to engage in a multitude of other operations such as, *inter alia*, administration, visiting places of detention, engaging with civil society organisations, and engaging with State authorities on policy and legislation. As such, its' capacity to conclude complaints is significantly hampered due to lack of an adequate number of staff, resulting in meagre complaint conclusions rates as low as 2.54%.

On the other hand, it is also pertinent to note that merely expediting the conclusion of cases should not be the sole goal of the HRCSL in clearing this backlog. For example, setting completion targets to inquiring officers to conclude cases speedily could also have unforeseen consequences, and can result in inquiring officers resorting to encourage victims of abuses to settle cases or to withdraw. Therefore, clearing this backlog should be approached in an effective manner, and increase of staff, budgets and support to the HRCSL to meaningfully address the delays in conclusions, are important as part of a holistic approach to the issue that will address the 'root-causes'.

3. Effectiveness in Fulfilling Mandate and Other Functions

Receiving, investigating and determining complaints, and making recommendations to the necessary State authorities to redress any violation of human rights or to assist the parties to a dispute to come to a settlement are some of the key functions of the HRCSL. The performance of the HRCSL in receiving and concluding complaints has been dealt with in the previous part of this Chapter; the following section will explore the other functions of the HRCSL within its mandate, and review its performance for the year 2016.

3.1 Advising and Assisting the Government in Formulating Legislation and Administrative Directives and Procedures.

The *Human Rights Commission of Sri Lanka Act* lists one of the functions of the HRCSL as the taking of measures to advise and assist the Government in formulating legislation and administrative directives and procedures. The said measures are to be taken with a view to promote and protect human rights and harmonise international human rights law with municipal law – a function required of a NHRI by the Paris Principles as well.²⁸ As such the HRCSL is granted the authority to independently comment and/or convey its observations on draft Bills and policy, so that the same will feed into legislative processes and policy formulation.

²⁸ HRCSL Act, Sections 10(c) & 10(d); The Paris Principles, *supra* note 10, Articles 10(a) & 10(b); R. Carver, *A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law*, 10 Human Rights Law Review 1 (2010), p.12

This function is one of the most critical functions of any NHRI, as it is a means of establishing and strengthening cooperation between the Government and the NHRI while promoting and preserving the rights and freedoms of the public by way of legislation and policy. Through this, the NHRI simultaneously supplements treaty compliance of the Government, and ensures human development through active espousal of the promotion of human rights.²⁹

During the year 2016, the HRCSL took a proactive stance and issued a number of substantive statements and reports, expressing its views and observations on key legislation and policy issues. This was in marked contrast to previous years as the HRCSL, especially under previous governments, restrained its interventions and instead adopted a timid approach in exercising its mandate.

One of the most commendable statements issued by the HRCSL during 2016 was its strong objection to the amendment bill to the Criminal Procedure Code Act No. 15 of 1979, which was Gazetted on 12 August 2016. The proposed amendment would have permitted an arrested person to access an attorney-at-law only after making a statement to the arresting officer.³⁰ The HRCSL apprehended the dire consequences that would flow from denying an arrested person from gaining any legal assistance before making a statement to the State authorities, strongly objected to this amendment and called on the Government to withdraw the amendment bill immediately. The statement was premised on the understanding that a person's right to a fair hearing commences from the inception of an investigation against the said person, and that such investigations will not be impartially conducted if the person is denied access to legal counsel.³¹ Subsequently, in the face of mounting pressure opposing the bill, the proposed amendment was withdrawn by the Government.³²

The HRCSL also issued a seminal statement on memorialisation and reconciliation in response to a complaint by Rev. Fr. Elil Rajendran, a human rights advocate who was repeatedly summoned and harassed by the police in Mullaitivu and Vavuniya for holding a memorial event to remember those who lost their lives in last stages of the war.

In its statement, the HRCSL underlined the importance of memorialisation and the right of all communities to remember the dead;

“...to construct memorials to remember their family members and loved ones. The fact that the person who died was a LTTE cadre should not be used as the

²⁹ B. Dickson, “*The Contribution of Human Rights Institutions to the Protection of Human Rights*”, Public Law (Summer, 2003), 272-285, p. 278-279; C. R. Kumar, supra note 3, p. 273; C. R. Kumar, *National Human Rights Institutions and Economic, Social, and Cultural Rights: Toward the Institutionalization and Developmentalization of Human Rights*, 28 Human Rights Quarterly 755 (2006), pp.767-771

³⁰ The Bill to amend the Code of Criminal Procedure Code Act No. 15 of 1979, gazetted on the 12 August 2016 can be found here <http://www.sguardian.org/wp-content/uploads/2016/09/119-2016_E.pdf>. See Clause 2 of the Bill.

³¹ HRCSL, *Proposed Amendment to the Code of Criminal Procedure Act Depriving Suspects of Access to Lawyers until their Statements are Recorded*, 21 September 2016, found at <<http://hrctl.lk/english/wp-content/uploads/2016/09/Letter-to-PM-on-21.09.2016.pdf>>

³² Anurangi Singh, *CPC Amendments Shelved*, Sunday Observer, 16 October 2016

reason to deny the family to mourn and remember their loved one. Every family has the right to remember and memorialise their loved ones irrespective of their status or political beliefs.”³³

It also weighed in on the growing religious intolerance in the country, particularly in light of the continuing attacks against the Muslim community. The Commission urged the Government to prevent acts of violence and to curb the proliferation of hate speech.³⁴ The timbre and substance of the statements issued by the HRCSL over the last two years clearly demonstrate intent to leverage its authority, shape the direction of policy and to check government action and/or inaction.

The HRCSL submitted an interim report in response to the establishment of the Office on Missing Persons (OMP) in accordance with the *Office on Missing Persons (Establishment, Administration & Discharge of Functions) Act No. 14 of 2016*. The recommendations included therein were, *inter alia*, to establish a network of regional offices under the OMP; recruit staff with impeccable integrity and no prior allegations of abuses of human rights or public authority; provide gender sensitivity training to the staff; and call for mechanisms for the OMP to transparently and widely disseminate information on its methodology and internal procedures and safeguards. It was also recommended that mechanisms to foster public trust be included in the Witness Assistance and Protection Division of the OMP.³⁵

Recommendations had also been made by the HRCSL for the proposed national security legislation, which would repeal and replace the *Prevention of Terrorism Act No. 48 of 1979* (PTA), urging the Government to ensure that any new national security or counter-terrorism legislation adheres to international human rights standards.³⁶

The HRCSL has also exercised its mandate of feeding into legislative and policy formulation by presenting its observations at various stages of the constitutional reform process, ever since the Constitutional Assembly commenced the first phase of constitutional reform in January 2016. The HRCSL submitted its proposals for constitutional reform to the Public Representations Committee in March 2016, wherein it urged, *inter alia*, that principles of constitutionalism, an expanded Bill of Rights, and checks and balances within the arms of Government be the cornerstones of the new

³³ ‘Memorialisation and Reconciliation’, Statement by the Human Rights Commission of Sri Lanka, 7 June 2017, available at <http://hrctl.lk/english/wp-content/uploads/2017/06/Letter-to-H.E.-President-Memorialization-and-Reconciliation-E.pdf>

³⁴ ‘Human Rights Commission’s Letter to His Excellency the President on growing religious intolerance’, HRCSL, 31 May 2017, available at <http://hrctl.lk/english/wp-content/uploads/2017/06/Letter-to-H.E.-re-Religious-Intolerance-E.pdf>

³⁵ HRCSL, *Human Rights Commission of Sri Lanka Recommendations to the Government on the Establishment of the Office on Missing Persons*, 22 August 2016, found at <http://hrctl.lk/english/wp-content/uploads/2016/08/IMG_0011.pdf>

³⁶ HRCSL, *Public Statement by the Human Rights Commission of Sri Lanka dated 22 June 2016*, found at <<http://hrctl.lk/english/wp-content/uploads/2016/06/Public-Statement-by-HRCSL.pdf>>

Constitution.³⁷ Furthermore, the HRCSL made submissions to the Sub-Committee on Law and Order appointed by the Constitutional Assembly, wherein it made several proposals and recommendations on the present public security regime, with a view of enhancing the protection of human rights and strengthening due process.³⁸

It also made a recommendation to the President on the importance of economic, social and cultural rights and called for these rights to be enshrined in the new Constitution along with civil and political rights.³⁹ This is a commendable achievement given the role NHRIs ought to play in promoting economic, social and cultural rights – a role exemplified by the practice of NHRIs such as the Human Rights Commissions of South Africa and India.⁴⁰

With regards to detention and civil liberties, the HRCSL recommended directives to be followed by State officials when making arrests and causing the detention of any person under the PTA, inclusive of operational procedures to be followed during and after arrest, as well as special procedures related to the arrest and detention of women and minors. The said directives were later approved by the President.⁴¹ Additionally, the HRCSL has made recommendations to the President to abolish the death penalty in Sri Lanka by ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights.⁴²

Although it has made attempts to submit its observations pertaining to key legislation and policy documents, these observations and views have often come far too late in the legislative/drafting process to meaningfully feed into the final drafts. This, however, is not due to a lack of competence on the part of the HRCSL, but rather due to the failure of the State authorities to meaningfully engage in an exchange of views with the HRCSL. The position of the HRCSL, quite rightly, is to be independent and, thereby, removed from being directly involved in legislative or policy formulation process – to do otherwise would be to compromise the independence of the HRCSL, making it an arm of

³⁷ HRCSL, *Human Rights Commission of Sri Lanka Proposals for Constitutional Reform – 2016*, found at <<http://hrctl.lk/english/wp-content/uploads/2016/06/Proposals-for-Constitutional-Reform-by-HRC-in-English.pdf>>

³⁸ HRCSL, *Submission to the Sub-Committee on Law & Order by the Human Rights Commission of Sri Lanka – August 2016*, found at <<http://hrctl.lk/english/wp-content/uploads/2016/08/HRCSL-proposals-to-Sub-Comm-on-Law-Order.pdf>>

³⁹ HRCSL, *The Need to Incorporate Economic, Social & Cultural Rights in the Future Constitution of Sri Lanka*, found at <<http://hrctl.lk/english/wp-content/uploads/2016/10/Need-to-Incorporate-Economic-Social-and-Cultural-Rights-in-the-Future-Constitution-of-Sri-Lanka-E.pdf>>

⁴⁰ M. Kjørsum, *National Human Rights Institutions Implementing Human Rights* (DIHR, 2003), pp.12-15; Commonwealth Conference of National Human Rights Institutions, *Protecting Human Rights: The Role of National Institutions* (Cambridge, Commonwealth Secretariat, 2000), p.20; OHCHR, *Economic, Social & Cultural Rights: Handbook for National Human Rights Institutions* (United Nations, 2005), pp.43-92

⁴¹ HRCSL, *Directives Issued by the Human Rights Commission of Sri Lanka on Arrest and Detention under the Prevention of Terrorism (Special Provisions) Act No. 48 of 1979*, 18th May 2016, found at <<http://hrctl.lk/english/wp-content/uploads/2016/05/Directives-on-Arrest-Detention-by-HRCSL-E-.pdf>>

⁴² HRCSL, *Recommendation to Abolish the Death Penalty in Sri Lanka*, dated 1st January 2016, found at <<http://hrctl.lk/english/wp-content/uploads/2016/01/RECOMMENDATION-TO-ABOLISH-THE-DEATH-PENALTY-IN-SRI-LANKA-E-1.pdf>>

the legislature or State administration.⁴³ Thus, it feeds into legislative and policy formulation processes by requesting State authorities and institutions to forward any draft legislation or policy to the HRCSL so that it may revert with its independent observations and views.⁴⁴

Despite the HRCSL consistently making requests for copies of draft bills and policy documents from State authorities such as the Ministry of Justice and the Legal Draftsman's Department in the year 2016, according to the HRCSL, it did not receive positive responses. As such, the HRCSL is limited in exercising its mandate, in that it can make observations on draft legislation and policy documents only after they have been made public.⁴⁵ This is evident from the fact that the HRCSL was able to present its observations on the proposed amendment to the *Civil Procedure Code Act* only after it was gazetted, while the recommendations on the OMP were presented after the *Office on Missing Persons Act* was passed.

The lack of engagement on the part of State authorities with the HRCSL renders the function of the HRCSL to advise and assist the Government in the formulation of legislation and policy virtually nugatory. This leads to legislative and policy formulation processes in Sri Lanka void of any independent input through the lens of protecting and promoting human rights.

3.2 Monitoring of the Welfare of Persons Detained either by a Judicial Order or otherwise, by Regular Inspection of their Places of Detention

The HRCSL is empowered to monitor the welfare of persons in detention of custody.⁴⁶ The need for robust monitoring processes of places of detention in Sri Lanka was also highlighted by the Committee that oversees the implementation of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) during the consideration of the fifth periodic report of Sri Lanka in November 2016. The CAT committee concluded that the practice of torture, harassment and cruel and degrading treatment of detainees/persons was "routine" in places of detention or custodial centres in Sri Lanka.⁴⁷ At the same time, it was also reported that prisons and places of detention in Sri Lanka were marred by incidents of deaths in custody, overcrowding, and lack of prisoner/detainee complaining mechanisms.⁴⁸

The HRCSL, received 488 complaints of arbitrary arrest/detention, eight complaints against the conditions of detention centres, and seven complains of deaths in custody in the year 2015. Thus, there were at least 605 incidents in the year 2015 which required officials of the HRCSL to visit and investigate places of detention and custody centres, in

⁴³ A. Smith, *supra* note 3, pp.935-937

⁴⁴ See HRCSL Response to LST Questionnaire, *supra* note 17

⁴⁵ *Ibid*

⁴⁶ HRCSL, Section 11(d)

⁴⁷ UN Committee Against Torture, *Concluding Observations on the Fifth Periodic Report of Sri Lanka*, U.N. Doc. CAT/C/LKA/CO/5, (submitted on 30 November 2016, published on 27 January 2017), ¶9

⁴⁸ U.S. Department of State, *Country Report on Human Rights Practices – Sri Lanka 2016 Report*, found at <<https://www.state.gov/documents/organization/265760.pdf>>, p.5

addition to conducting regular visits for monitoring purposes. The HRCSL, therefore, was compelled to conduct a large number of visits to places of detention for the purposes of monitoring and investigating them.

Number of Visits by the HRCSL to Places of Detention in 2015 and 2016

Place of Detention	2015		2016 (01/01/2016 – 30/09/2016)	
	Head Office	Regional Offices	Head Office	Regional Offices
Police Stations	75	1804	373	1484
TID/CID Offices	-	01	09	06
Army Camps	-	-	-	01
Prisons	02	36	07	43
Boosa Detention Camp	-	-	02	10
Rehabilitation Centres	-	02	-	05
Child Care Centres	-	33	-	33
Elders Homes	-	-	-	13
Total	77	1876	391	1595

(Source: HRCSL Report to Committee Against Torture 2016)

Considering the data, it is evident that the HRCSL has increased its efforts in visiting places of detention in the year 2016. It is noteworthy that the Regional Offices of the HRCSL have also expanded the monitoring processes to rehabilitation centres, childcare centres and elder’s homes.

While the HRCSL has stated that the performance of the Regional Offices in visiting and monitoring places of detention covers a significant portion of all places of detention within their areas of control, the Head Office has struggled to effectively monitor the high number of places of detention and custodial centres within its area of control; a problem that is only compounded by the increased number of complaints received by the Head Office.⁴⁹

The major hindrance of the Head Office in effectively monitoring all the detention centres within its area of control is the shortage of staff in the Head Office. The HRCSL has stated that, being under-staffed, a monitoring officer is required to conduct each stage of the monitoring process; responding to a complaint, visiting the place of detention, monitoring or investigating the place of detention, and compiling and reporting any findings.⁵⁰ As such, it is evident that the said officers do not have the opportunity of distributing the labour of this procedure amongst specialized units to increase efficiency. This type of inefficiencies results in a significant amount of time and effort being required for a straight forward process, making it virtually impossible to effectively monitor all places of detention and respond rapidly to a complaint with the existing staff. The HRCSL states that although it has established a hotline so that complainants may

⁴⁹ See HRCSL Response to LST Questionnaire, *supra* note 18

⁵⁰ *Ibid.*

lodge complaints easily, monitoring officers are unable to respond rapidly due to logistical and administrative constraints.⁵¹

3.3 Conducting Investigations, *suo moto*, into Infringements of Human Rights

The powers of investigation given to the HRCSL include the authority to carry out investigations into infringements or imminent infringements of Fundamental Rights as enshrined in the Constitution, by executive or administrative action or under and in terms of the PTA.⁵² In carrying out these investigations, the HRCSL may make its findings and present them to the relevant State authorities along with recommendations. However, the HRCSL is limited by the nature of its mandates as the statements and recommendations issued by it are not binding. A few interviewees expressed concern about the limitations within the mandate and the lack of enforcement mechanisms, which means that the HRCSL is hampered and unable to substantively promote and protect human rights in the country. As one interviewee noted, the HRCSL “...*should be provided with binding powers, so their recommendations are taken more seriously...*” by the Government and other state institutions.⁵³

There were several investigations launched by the HRCSL, *suo moto*, in the year 2016. One of the most controversial incidents was when the HRCSL launched an investigation *suo moto* into the assault on demonstrators and journalists at the Magampura Mahinda Rajapaksa Port in Hambanthota. The incident received wide coverage in Sri Lanka; particularly the assault mounted against journalists at the Port by senior officials and armed personnel of the Sri Lanka Navy. Despite the assault being an affront to the right of peaceful assembly, the freedom of expression, and the freedom to engage in one’s employment, there were no disciplinary measures taken against any of the personnel of the Sri Lanka Navy.⁵⁴ The HRCSL, however, launched an investigation on its own accord into the infringements of Fundamental Rights that occurred during the demonstrations at the Hambanthota Port, which is still ongoing during the time of writing.⁵⁵

The HRCSL has also undertaken investigations on its own accord into the shocking deaths of detainees while in custody at the Pussellawa Police Station in September 2016, as well as a custodial death in Trincomalee.⁵⁶

⁵¹ Ibid.

⁵² HRCSL Act, Section 14

⁵³ Interviewee response to LST questionnaire

⁵⁴ Sandun Jayawardena & Chandani Kirinde, *Navy Intervenes to Evict Strikers from Ship*, The Sunday Times, 11 December 2016, found at <<http://www.sundaytimes.lk/161211/news/navy-intervenes-to-evict-strikers-from-ships-219876.html>>; Kavindya Chris Thomas, *Navy Commander in Alleged Fracas with Protesters Defense Secretary calls for Full Report*, Ceylon Today, 12 December 2016, found at <<http://www.ceylontoday.lk/print20161101CT20161231.php?id=11025>>

⁵⁵ See HRCSL Response to LST Questionnaire, *supra* note 18

⁵⁶ Sandasen Marasinghe & Disna Mudalige, *Comprehensive probe into youth’s death in Police custody: Sagala*, Daily News, 21 September 2016, found at <<http://www.dailynews.lk/?q=2016/09/21/law-order/93664>>

An investigation was also initiated into the assault of a hairdresser in Hatton by the OIC and officers attached to the Hatton Police Station.⁵⁷

The HRCSL also commenced investigations into the allegations that the Matugama Meegahatenne Primary School had wrongfully denied admission to 10 children residing within the Matugama area, and the subsequent demonstrations in front of the Matugama Zonal Education Office.⁵⁸ Investigations were also conducted into an incident of denial of school admission to a child on account of the child's HIV positive status.⁵⁹

The HRCSL has stated that the latter two investigations were concluded as the matters were resolved administratively and by way of Order by the Supreme Court. However, the investigations into the incidents of deaths in custody and assault by the police are still ongoing.⁶⁰

It is regrettable, however, that the HRCSL has not conducted independent investigations into the alleged infringements/imminent infringements of fundamental rights and disputes that were reported during 2016, such as the killing of two undergraduates of the University of Jaffna by the police,⁶¹ the alleged violation of the labour rights of the SLT manpower workers who commenced and maintained strike action in December 2016,⁶² the harassment of Tamil journalists by law enforcement officers in April 2016,⁶³ and continued heightened tensions between Sinhala and Muslim communities, as well as land disputes in the Wilpattu area involving public officials.⁶⁴

It is also unfortunate that the HRCSL has not taken measures to investigate alleged incidents of harassment of human rights defenders, such as the detention of Balendran Jeyakumari and the repeated threats received by Sandya Ekneliyagoda, during the year 2016.⁶⁵

⁵⁷ Asela Kuruluwansa, *Special Probe into Attack on Barber*, Daily News, 26 September 2016, found at <<http://dailynews.lk/2016/09/26/law-order/94123>>

⁵⁸ Daily News, *Thewarapperuma in Satyagraha protest in Matugama*, 29 June 2016, found at <<http://dailynews.lk/2016/06/29/local/86043>>

⁵⁹ The Sunday Times, *6 year-old boy denied school admission because parents 'rumoured' to be HIV positive*, 28 February 2016, found at <<http://www.sundaytimes.lk/160228/news/6-year-old-boy-denied-school-admission-because-parents-rumoured-to-be-hiv-positive-184637.html>>

⁶⁰ See HRCSL Response to LST Questionnaire, *supra* note 18

⁶¹ Kurulu Koojana Kariyakarawana, Romesh Madusanka and Pradeep Kumara, *Two Jaffna Uni students killed in police shooting*, Daily Mirror, 21 October 2016, found at <<http://www.dailymirror.lk/article/Two-Jaffna-Uni-students-killed-in-police-shooting--117862.html>>

⁶² Nushka Nafeel, *Manpower Employees demand SLT Recruitments*, Daily News, 28 December 2016, found at <<http://dailynews.lk/2016/12/28/local/103137>>

⁶³ U.S. Department of State, *Country Report on Human Rights Practices – Sri Lanka 2016 Report*, found at <<https://www.state.gov/documents/organization/265760.pdf>>, p.11

⁶⁴ Centre for Policy Alternatives, *Dynamics of Sinhala Buddhist Ethno-Nationalism in Post War Sri Lanka* (CPA, 2016), p.22; Dr. M. S. Asees, *Resettlement of Muslim IDPs and issues of Wilpattu*, Daily FT, 6 January 2017, found at <<http://www.ft.lk/article/589620/ft>>

⁶⁵ Amnesty International, *State of the World's Human Rights: World Report 2016/2017*, found at <<https://www.amnesty.org/en/documents/pol10/4800/2017/en/>>, pp.340-341

3.4 Intervening in Fundamental Rights Proceedings in the Supreme Court

The HRCSL has the power to intervene in proceedings before the Supreme Court, where a violation or imminent violation of fundamental right is complained of⁶⁶ through the submission of *amicus curiae*.

Despite having the authority to intervene in court proceedings, there wasn't a single instance in the year 2016 when the HRCSL intervened in proceedings before the Supreme Court to present its independent submission on any alleged infringements or imminent infringements of fundamental rights. The HRCSL has stated that it may explore the possibility of intervening in proceedings that take the form of public interest litigation. Yet, regrettably, the HRCSL has no standard operating policy or framework to intervene in fundamental rights proceedings in the Supreme Court.

The HRCSL does, however, advise complainants on possible legal action that can be pursued against infringements of their human rights but does not provide any legal aid.⁶⁷ The Regional Offices of the HRCSL have given advice in a consultative capacity to 7,029 persons during the year 2016, and have referred many of these persons to the Legal Aid Commission.⁶⁸

3.5 Promoting Research and Awareness of Human Rights

In addition to investigations into allegations of human rights, monitoring places of detention and feeding into national legislative and policy formulation processes, the HRCSL is also empowered to conduct research and awareness on human rights with a view to promote and foster the appreciation and comprehension of human rights.⁶⁹

In the year 2016, the HRCSL took measures to commemorate international days of human rights, such International Women's Day, the International Day in Support of the Victims of Torture and International Human Rights Day.⁷⁰ Additionally, the HRCSL has conducted many awareness and training programs with civil society groups and public officials, on its own accord or upon the request of such groups and public institutions.⁷¹ The Head Office and Regional Offices have also conducted awareness programs for military personnel. The HRCSL has also taken measures to cooperate with the Sri Lanka Institute for Development Administration so that human rights and equitable administrative practices are included in training modules for public officials.⁷²

⁶⁶ HRCSL Act, Section 11(c)

⁶⁷ See HRCSL Response to LST Questionnaire, *supra* note 17

⁶⁸ See HRCSL Responses to LST Data Request, *supra* note 16

⁶⁹ HRCSL Act, Sections 10(f) and 11(f)

⁷⁰ HRCSL, *International Women's Day 2016* <<http://hrctl.lk/english/2016/03/30/international-womens-day-2016/>>, HRCSL, *HRCSL Starts Anti-Torture Campaign* <<http://hrctl.lk/english/2016/07/05/hrctl-starts-anti-torture-campaign/>>; HRCSL, *International Human Rights Day 2016* <<http://hrctl.lk/english/2016/12/14/international-human-rights-day-2016/>>

⁷¹ See HRCSL Response to LST Questionnaire, *supra* note 17

⁷² See HRCSL Response to LST Questionnaire, *supra* note 17

However, the HRCSL has admitted that these measures are insufficient as currently the HRCSL's awareness programs cover only a fraction of all public officials, and do not include demographics and professionals such as the youth, media houses, and journalists.⁷³

In terms of the research conducted by the HRCSL for the year 2016, a research program had been conducted on the theme of 'children deprived of liberty', which was concluded in late 2016. The report of this research program is expected to be published shortly.

The research and awareness raising capacity of the HRCSL is, however, hardly functioning at its maximum given the pressing need for an increased staff. The HRCSL has stated that the Research and Monitoring Division of the HRCSL has a staff of just two officers, making it unfeasible to undertake multiple large-scale research and awareness programs within any given period of time.

4. Key Issues, Measures Taken by the HRCSL, and Recommendations

In analysing the performance of the HRCSL in 2016 it is apparent that there are several key issues and challenges faced by the HRCSL that continue to erode its public legitimacy. These issues will be addressed in this part, with a commentary of any measures taken by the HRCSL, if any, to respond to these issues, while also exploring possible recommendations that can be adopted.

4.1 Lack of Sufficient Staff

In analysing the performance in the functioning of the HRCSL during the year 2016, an issue that arises, across the board, is the major shortage of staff of the HRCSL. At present the HRCSL has 159 officers, which is barely sufficient to effectively exercise the mandates of the HRCSL. The lack of staff, compounded by the malaise and bureaucracy that had crept into the machinery of the HRCSL due to the lack of dynamism and minimum productivity of the HRCSL over the last 10 years, has substantially curtailed the capacity of the HRCSL to effectively carry out its mandates. As such, the lack of sufficient staff is the most substantial hindrance, at present, to boosting efficiency.

Measures taken by the HRCSL

The present administration of the HRCSL has undertaken to set in place robust recruitment procedures for the purposes of recruiting skilled officers and increasing the staff of the HRCSL. As such, the HRCSL has drafted a Scheme of Recruitment (SOR), which aspires to expand the number of administrative officers and specialised officers of the HRCSL, and has forwarded the same to be approved by the necessary State authorities.⁷⁴ The said SOR has been pending for approval last year, and the HRCSL has stated that the SOR is currently in its final stages of approval, and expects the SOR to be finalized and given force shortly.

⁷³ *Ibid.*

⁷⁴ See HRCSL Response to LST Questionnaire, *supra* note 17

Before delving into possible recommendations, it must be noted that the HRCSL itself has noted that the enforcement of the new SOR alone will not bring about a team of skilled and productive staff. The HRCSL has noted, distressingly, that being employed in the HRCSL is not viewed with great enthusiasm by public officers due to the fact that the HRCSL itself has functioned over almost a decade with low public legitimacy and even lower public influence owing to a multiplicity of issues including the lack of cooperation with the HRCSL by successive governments, and the lack of incentives for staff.

Over the last 10 years the employees of the HRCSL received low wages and minimal benefits. Additionally, employees of the HRCSL are not even pensionable.⁷⁵ As such, the financial incentives to join the HRCSL are hardly attractive. The fact that the HRCSL was virtually defunct over a decade has resulted in many potential recruits being further dissuaded from being appointed to the HRCSL. This is partly due to public perceptions that postings in the HRCSL will not expose recruits to meaningful work.

Recommendations

In light of these systemic problems *vis-a-vis* the staff of the HRCSL, the following recommendations are proposed:

- The issue of a lack of competent staff is a problem faced by several independent commissions in Sri Lanka. As such, it is recommended that special schemes of recruitment be crafted by the Government with a view to establishing a specialised staff within the public service with the skills required for the functioning of independent commissions such as the HRCSL;
- While it must be noted that the Government had allocated Rs. 181 million (USD 1.2 million) in 2016 to the HRCSL, and has committed to increasing the budget of the HRCSL by a further Rs. 10 million (USD 65,000) in 2017. However, the budget of the HRCSL pales in comparison to the budgets of NHRIs in other jurisdictions such as New Zealand (NZD 9.496 million, approximately Rs. 977 million/USD 6.4 million),⁷⁶ South Africa (ZAR 146.411 million, approximately Rs. 1.610 billion/USD 10.5 million),⁷⁷ and Malaysia (MYR 11 million, approximately Rs. 363 million/USD 2.4 million);⁷⁸
- It is recommended that the Government increase budgetary allocations to the HRCSL and design schemes of recruitment that include enhanced financial incentives and benefits to attract and retain competent staff with the capacity to grapple with and effectively execute the various functions of the HRCSL;
- The Government must make significant investments in training and equipping the staff of the independent commission with a view of enhancing investigative capacities, language proficiency, IT skills, administrative efficiency, and gender & youth sensitivity. It is further recommended that budgetary grants to the

⁷⁵ See HRCSL Response to LST Questionnaire, *supra* note 17

⁷⁶ Human Rights Commission of New Zealand, *Annual Report 2015/2016*, found at <https://www.hrc.co.nz/files/8314/8529/3642/Final_HRC_Annual_Report_15-16.pdf>, p.39

⁷⁷ Human Rights Commission of South Africa, *Annual Report 2016*, found at <<http://www.sahrc.org.za/home/21/files/SAHRC%20Annual%20Report%202016%20full%20report%20low%20res%20for%20web.pdf>>, p.76

⁷⁸ Human Rights Commission of Malaysia, *Annual Report 2015*, found at <https://drive.google.com/file/d/0B_iu0JnQlclBOW5OZTRhTF9XTnc/view?pref=2&pli=1>, p.273

- HRCSL must include allocations for conducting training and development programs for its officers;
- It is recommended that the Government revamp existing administrative training and development programs for public officers for the purpose of enhancing the level of engagement of State authorities with the HRCSL, as NHRIs cannot function effectively if they are isolated from the State apparatus;
 - It is also recommended that the HRCSL implement mechanisms to regularly train its staff so that they are exposed to contemporary trends in human rights and provided with opportunities to learn effective investigating, monitoring and engagement skills with State actors.

4.2 Slow Rate of Processing and Concluding Complaints

Receiving and investigating into complaints is one of the primary functions of the HRCSL. The slow rate of processing and concluding complaints by the HRCSL substantially hinders it from fulfilling its mandate effectively. It leads to negative perception of the public towards the efficiency of the HRCSL and, in turn, tarnishes its reputation and legitimacy. While the slow rate of processing and concluding complaints by the HRCSL can be attributed to the lack of sufficient staff, it can also be attributed to the outdated and unproductive internal processes and mechanisms that had been prevalent in the HRCSL over the last decade.

Measures taken by the HRCSL

The HRCSL has undergone significant institutional reform with a view to enhance its capacity to respond to complaints faster and, thereby, conclude any investigation in a shorter period of time. One of the major reforms of the HRCSL is the restructuring and revamping of the Inquiry & Investigation Division of the HRCSL, with the assistance of commissioners from the Human Rights Commission of New Zealand. As part of this restructuring of the Inquiry & Investigation Division, five specialised units were set up within the Division; the General Complaints Unit, the Torture/Custodial Violations Complaints Units, the Education Sector Complaints Unit, the Economic, Social and Cultural Rights Complaints Unit, and the *Suo Muto* & Non-Compliance Unit. The creation of these specialised units will restructure and reallocate the experts and specialised officers of the HRCSL to units that deal with specific types of complaints, thereby increasing the efficiency with which inquiries and investigations can be conducted.⁷⁹

The HRCSL has further re-drafted their standard Complaint and Summons forms, to ensure that all complaints are submitted in a standard form to ease the processing of complaints.⁸⁰

A pamphlet with detailed instructions on how to make proper complaints and append supporting documentation, as well as details of the internal processes and procedures of

⁷⁹ See HRCSL Response to LST Questionnaire, *supra* note 17

⁸⁰ *Ibid.*

processing complaints, has also been drafted by the HRCSL for the benefit of complainants.⁸¹

The HRCSL has also taken steps to provide training to its officers in identifying complaints that fall within the mandate of the HRCSL. Owing to a large number of complaints being rejected by the HRCSL due to the subjects or allegations falling outside the mandate of the HRCSL, officers of the HRCSL have been instructed on the mandates of other commissions and State institutions such as the Public Service Commission, the Consumer Affairs Authority, and the Ombudsmen, so that those complaints that fall beyond the mandate of the HRCSL can be redirected to the relevant authorities in the first instance.⁸² Training on settling disputes between parties through mediation has also been given to the officers of the HRCSL, while the operating manuals of the HRCSL have also been updated.

Recommendations

While the sweeping institutional reforms ushered in by the HRCSL during the year 2016 are noteworthy, the following are recommended:

- Maintain publicly accessible databases on pending complaints and regularly update the said databases as per their progress while maintaining confidentiality of the complainants, so that the HRCSL is accountable to the complainants as well as the public;
- Expedite complaint processing proceedings by promptly disseminating information in find-finding and investigative reports and publications of the HRCSL, without permitting State authorities to delay proceedings;
- Compile recommendations and findings when processing complaints in standard forms to enable easy dissemination and comprehension of the same;
- Cooperate with civil society organisations (CSOs) and journalists in lobbying for increased cooperation by the State *vis-a-vis* assisting investigations, constructive engagement over findings, and implementation of recommendations.

4.3 Lack of Engagement with the HRCSL by the Government

The lack of substantive engagement by the Government with the HRCSL has restricted the mandates and effectiveness of the HRCSL to a great extent. The lack of a proper response by the Government to requests of the HRCSL to permit it to submit its independent observations and views of draft legislation and policy documents has already been highlighted. However, the HRCSL has stated that the Government has, on several other occasions, refused to constructively engage with the HRCSL or has dismissed the work of the HRCSL in a manner that undermines the authority and legitimacy of the HRCSL⁸³.

One such incident was the dismissal of the HRCSL observation on the proposed amendment to the *Code of Criminal Procedure Act No. 15 of 1979* by Hon. Wijeyadasa

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ HRCSL Response to LST Questionnaire, *supra* note 17

Rajapakshe, the incumbent Ministry of Justice. In a public statement, Minister Rajapakshe dismissed the observations of the HRCSL without any meaningful engagement and proceeded to label the stance of the HRCSL as that of “taking up cudgels for suspects”.⁸⁴ It is noted with regret that Minister Rajapakshe was equally dismissive of the HRCSL’s recommendation to President Maithripala Sirisena to abolish the death penalty in Sri Lanka by ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights.

These comments made against the HRCSL are symptomatic of a deep lack of understanding of the mandate and functions of the HRCSL and a dismissive attitude that prevails amongst State offices and public officials with respect to the work of the HRCSL. The HRCSL, being a NHRI, is an independent institution that is intended to be working with State institutions and officials. Instead, the HRCSL has been forced to operate in isolation, without any form of worthwhile engagement and support from the State apparatus - an insurmountable hindrance in the functionality of the HRCSL.

Recommendations

- Make calls on the Government to increase its engagement with the HRCSL in compliance with its obligations *vis-a-vis* the Fundamental Rights and Directive Principles of State Policy and Fundamental Duties of the Constitution, and Sri Lanka’s international human rights obligations;
- CSOs must work in collaboration with the HRCSL to shed light on instances of lack of cooperation/dismissal by State authorities and officers with respect to the recommendations/investigations of the HRCSL. Civil society should also publicly make demands for more cooperation with the HRCSL by the said State authorities and officers;
- The HRCSL must make use of the media and journalism to give publicity to the lack of cooperation by the Government, thereby creating public support to call for increased cooperation by the Government with the HRCSL with respect to drafting of legislation and policy, addressing recommendations and observations of the HRCSL, and international human rights reporting;
- Actively attend and monitor parliamentary proceedings in relation to human rights issues;
- Make available all annual reports and official publications of the HRCSL to the public in a prompt and timely fashion to maintain a high level of accountability.

4.4 Failures in Monitoring the Treatment of Detainees and Places of Detention

Torture and inhuman treatment being meted out to detainees while in State custody is one of the gross human rights violations that successive Sri Lankan governments have been criticised for over the last few years.⁸⁵ The Committee Against Torture, in consideration

⁸⁴ Shamindra Ferdinando, *Justice Minister flays BASL, HRC for ignoring crime victims’ rights*, The Island, 2 October 2016, found at <http://island.lk/index.php?page_cat=article-details&page=article-details&code_title=153086>

⁸⁵ UN Committee Against Torture, *Concluding Observations on the Fifth Periodic Report of Sri Lanka*, U.N. Doc. CAT/C/LKA/CO/5, (submitted on 30 November 2016, published on 27 January 2017), ¶9; U.S.

of the fifth periodic report of Sri Lanka in November 2016, stated that torture and inhuman treatment of persons in custody was “systematic, routine, and widespread”⁸⁶ and, as such, the HRCSL, as an independent institution with the mandate to monitor and report on the treatment of detainees and conditions of places of detention, must take immediate steps to ensure that routine torture and inhuman treatment of detainees is curbed.

Measures taken by the HRCSL

The HRCSL has taken a number of measures to increase its capacity to monitor the treatment and detention conditions of detainees of the police and other law enforcement institutions. One of the major reforms introduced was the creation of a special Torture/Custodial Violations Unit within the Inquiry & Investigation Division of the HRCSL. The HRCSL also plans to establish a Rapid Response Unit with the capability of responding to complaints of detention and/or custodial violations and take appropriate steps to investigate and report the said complaints within a short span of time.⁸⁷

Among the reforms introduced to the operating procedures of the staff of the HRCSL, the standard operating procedures of the HRCSL for monitoring and investigating places of detention and custodial violations is also in the process of being revamped by the HRCSL, and is expected to be finalised and implemented shortly.⁸⁸

Recommendations

- Publish quarterly reports that will be made available to members of the Government and the public on the number of complaints received by the HRCSL pertaining to torture and custodial violations, and the number of visits conducted by the HRCSL to places of detention;
- Establish systems to disseminate the findings and/or recommendations of investigations and/or monitoring processes of complaints of torture and custodial violations;
- In light of State authorities failing to implement the recommendations of the HRCSL due to differences in standards of proof required to take disciplinary/legal action against perpetrators of torture and custodial violations, invest more resources into inquiring and investigating complaints of torture and custodial violations so that the collection of information and evidence is more substantial and credible;
- Work in cooperation with CSOs, by sharing findings and information, to exert pressure on the Government to take measures to facilitate prison and custodial

Department of State, *Country Report on Human Rights Practices – Sri Lanka 2016 Report*, found at <<https://www.state.gov/documents/organization/265760.pdf>>, pp.3-8; Human Rights Watch, *World Report 2017: Events of 2016*, found at <https://www.hrw.org/sites/default/files/world_report_download/wr2017-web.pdf>, p.530

⁸⁶ OHCHR, *Committee against Torture considers report of Sri Lanka*, found at <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20880&LangID=E#sthash.zJV5QXBU.dpuf>>

⁸⁷ See HRCSL Response to LST Questionnaire, *supra* note 17

⁸⁸ See HRCSL Response to LST Questionnaire, *supra* note 17

- centre reform, training of law enforcement officials, and revamping the conditions of places of detention;
- Promote awareness amongst the general public of their rights and freedoms while in detention and/or custody, as well as the institutions and mechanisms that detainees can reach out to in order to report custodial violations or torture.

4.5 The Status of Complaints on Missing Persons

Having consistently failed to effectively investigate into and conclude numerous complaints of missing persons and/or enforced disappearances, the HRCSL was downgraded to “B Status” by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights in 2007.⁸⁹ Since 2007, the HRCSL was the subject of much criticism owing to its continued failure to investigate into and conclude the said complaints of missing persons and despite other institutions being established to deal with missing persons, such as the Presidential Commission to Investigate into Complaints Regarding Missing Persons (Paranagama Commission)⁹⁰. The status of the bulk of complaints into missing persons filed with the HRCSL still remains pending.

Measures taken by the HRCSL

The complaints of missing persons that are still pending with the HRCSL is one of the major factors that led to the HRCSL declared as being only partially in compliance with the Paris Principles. Accordingly, the HRCSL had taken steps over the years to expedite the conclusion of these complaints. In 2012, for instance, the HRCSL conducted vast public hearings to gather information regarding the said complaints of missing persons, but was unable to acquire sufficient information to reach findings that would lead to the conclusion of the matters owing to the lack of cooperation and support by other State institutions.⁹¹ Since then, however, the HRCSL had not taken any additional measures to expedite the conclusion of the complaints into missing persons.

However, with the establishment of the OMP, the HRCSL has stated that it has plans to work in cooperation with the OMP to expedite the processing and conclusion of complaints of missing persons. The HRCSL has stated that it intends to enter into a Memorandum of Understanding with the OMP, wherein the HRCSL and OMP will put in place a framework through which complaints of missing persons received by the HRCSL — both new complaints and pending complaints, will be transferred to the OMP. The HRCSL has stated that the OMP, being a specialised independent institution with a mandate that strictly relates to tracing missing persons, is far better equipped to process

⁸⁹ International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, *Report and Recommendations of the Sub-Committee on Accreditation* (Geneva, proceedings of 22 to 26 October 2007), see Section 5.3

⁹⁰ Meera Srinivasan, *Missing persons commission has received 20,000 complaints*, The Hindu, 14 August 2014, found at <<http://www.thehindu.com/news/international/south-asia/sri-lanka-missing-persons-commission-has-received-20000-complaints/article6319149.ece>>

⁹¹ See HRCSL Response to LST Questionnaire, *supra* note 17

complaints into missing persons and, as such, there was no requirement of the HRCSL to replicate the work of the OMP.⁹²

Recommendations

While the plans of the HRCSL to establish a Memorandum of Understanding with the OMP is welcome as being proactive, it must be recommended that the HRCSL continues to follow up with the OMP on the processing of the complaints so transferred, especially the complaints received during the period of conflict, and ensure that the HRCSL also arrives at its own independent findings and recommendations *vis-a-vis* any infringements and/or violations of fundamental rights and freedoms.

4.6 Accessibility of HRCSL Mechanisms to Complainants

The HRCSL, for many years, operated only through its Head Office and its 10 Regional Offices.⁹³ However, many areas in the Central and Southern regions were not served with Regional Offices of the HRCSL, thereby drastically restricting access to the HRCSL by the people in these areas.

While the increased penetration of digital telecommunication and internet services in Sri Lanka have increased the ease of communication and accessibility, the HRCSL has not taken steps to serve the people in areas not served by a Regional Office by way of expanding its digital telecommunication and accessibility mechanisms.

Measures Taken by the HRCSL

It is pertinent to note that the HRCSL has taken measures to establish seven new Regional Offices within the course of the next year. The Regional Offices are to be set up in Polonnaruwa, Monaragala, Mathugama, Ratnapura, Nuwara-Eliya, Kilinochchi and Puttlam.⁹⁴ The HRCSL hopes that these new Regional Offices will enhance the accessibility to the HRCSL. While the HRCSL has received a number of complaints via fax and emails addressed to the Secretary and Commissioners of the HRCSL, there is no formal online complaint submitting mechanisms in place.⁹⁵ The HRCSL has however made its complaint and application forms available on its official website.

Recommendations

- Establish web-based complaint portals, where complainants can lodge complaints remotely without having to physically submit complaints with an office of the HRCSL;
- Make available all guidelines and manuals for complainants by the HRCSL on the official website of the HRCSL;
- Take measures to increase the accessibility of the website and online portals of the HRCSL, focusing on making the website and online portals disability friendly.

⁹² See HRCSL Response to LST Questionnaire, *supra* note 17

⁹³ The said 10 Regional Offices are in Kandy, Vavuniya, Jaffna, Badulla, Kalmunai, Anuradhapura, Trincomalee, Matara, Batticaloa, and Ampara.

⁹⁴ See HRCSL Response to LST Questionnaire, *supra* note 17

⁹⁵ *Ibid.*

4.7 Engagement & Interaction with non-State parties

Engagement of any NHRI with non-State parties, such as local and international CSOs and the media, is crucial for the protection of human rights and freedoms. This is fundamentally due to the possibility of such engagement becoming a platform for lobbying for human rights, disseminating information, and creating a forum for public discussion and discourse of key issues and challenges.⁹⁶ In Sri Lanka, given the minimal engagement of the Government with the HRCSL at present, it is vital that the HRCSL maintains constant association with non-State parties to consolidate support for human rights issues while attempting to invite the Government to strengthen its cooperation with the HRCSL.

Measures taken by the HRCSL

In the year 2016, the HRCSL went to great lengths to establish proper channels of engagement and discussion with CSOs. The HRCSL has established nine thematic sub-committees for the purposes of facilitating discourse on specific human rights issues. The themes of the nine sub-committees are Rights of Migrant Workers, Rights of the Differently-abled, Education Policy, Rights of Elders, Gender Issues, Custodial Violations, Rights of Plantation Workers, Economic, Social and Cultural Rights, and Rights of Lesbian, Gay, Bi-sexual, Transgender, Intersex and Questioning (LGBTIQ) Persons. The membership of the sub-committee includes representatives of CSOs. Additionally, the Regional Offices of the HRCSL have set up civil society networks. The sub-committees and civil society networks meet on a monthly basis with the Government Coordination Committee, therefore creating a public forum for the expression of different views, concerns and recommendations by CSOs and the HRCSL.⁹⁷

The HRCSL also plans on engaging with journalists and media outlets as stated in the Strategic Plan 2016- 2019 of the HRCSL, while presently engaging with organisations such as the Young Journalists Association.⁹⁸

Recommendations

The measures taken by the HRCSL in 2016 to enhance its engagement with non-State parties are indeed commendable. However, some of the recommendations made in this light are as follows:

- Make available information pertaining to the nine thematic sub-committees to the public, including any reports or findings submitted to the thematic sub-committees, as well as any resolutions, memorandums or recommendations formulated by them;
- Increase engagement with media organisations to both disseminate information on and give publicity to key human rights issues;
- Use CSOs' expertise and resources for the promotion and protection of economic, social and cultural rights, and to lobby support in urging State authorities to

⁹⁶ E. M. Hafner-Burton & K. Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 *American Journal of Sociology* 1373 (2005), p.1386

⁹⁷ See HRCSL Response to LST Questionnaire, *supra* note 17

⁹⁸ *Ibid.*

- enhance human development and the quality of economic, social and cultural rights in Sri Lanka;
- Take measures to investigate cases of harassment of human rights defenders.

5. Conclusion

In the year 2016, the HRCSL, with a fresh leadership and a political climate that is, more or less, favourable toward the protection and preservation of human rights and freedoms, received increased amounts of complaints, engaged with the Government on more issues, conducted more custodial visits, carried out several investigations into alleged violations of fundamental rights and freedoms, and increased its engagement with CSOs on a larger scale than it had in the last 10 years. In doing so, the HRCSL has made significant efforts in restoring faith and public legitimacy in the HRCSL.

Given the sweeping reforms introduced by the present administration of the HRCSL to revamp its administration, internal mechanisms and operating procedures with a view of enhancing the efficacy of the HRCSL, the year 2016 can be regarded as the year of revamping, restructuring and reforming the HRCSL. Much of these reforms are expected to be implemented within the course of the year 2017. Therefore, it is only with time that it will be revealed whether the broad scale reforms ushered in by the present administration of the HRCSL constitutes the long-awaited catalyst that will lead to the transformation of the HRCSL into an independent, accountable and efficient institution that is proactive and vigilant in the protection and preservation of human rights and freedoms.

While these reforms are commendable, there are still many issues that are yet to be addressed, as have been highlighted through the recommendations made herein. Therefore, it is imperative that the HRCSL does not fall into complacency following the implementation of these reforms, but rather regularly evaluates the newly introduced measures and take prompt steps to address any inefficiency or issues that may arise, while also considering the recommendations made herein.

Finally, it must be noted that the HRCSL, even with a gamut of reforms, will not be able to effectively function as a protector of human rights and freedoms if the Government fails to meaningful engage with the HRCSL. NHRIs are not meant to function in isolation, divorced from engagement with the State. On the contrary, it is through engagement and discourse with the State that the HRCSL can input its views, observations and recommendations with respect to key human rights issues. The failure of the present Government to engage with the HRCSL in a purposeful manner is detrimental to the full functioning of the HRCSL and, therefore, it is urged that the Government, if it is genuine in its claims to be committed toward the protection and preservation of the human rights and freedoms of the peoples in Sri Lanka, take steps to foster sustainable avenues of cooperation and engagement with the HRCSL.

HONG KONG: MORE THREATS, LESS PROTECTION

*Hong Kong Human Rights Monitor*¹

This report is prepared by the Hong Kong Human Rights Monitor, endorsed by Civil Human Right Front.² In the absence of an NHRI, this report focuses on the overall situation in Hong Kong during the report period (2016 and first quarter of 2017), and critically evaluates certain public bodies with a human rights mandate.

1. General Overview

Although some human rights safeguards survived the transfer of sovereignty of Hong Kong from the United Kingdom to China, there has been a persistent erosion of human rights and the rule of law in Hong Kong. In recent years, the regression has accelerated while the inadequate human rights protection mechanism has failed to arrest such demise.

The civil society was greatly dissatisfied by the Hong Kong and Chinese governments' categorical denial of the demand for constitutional reform for democracy and the highhanded suppression of the Umbrella Movement in 2014 by the Hong Kong Police Force.

During the reporting period, the courts had handled a number of Umbrella Movement or protests related cases. Judges and magistrates were relentlessly berated by the pro-Beijing camp for not returning decisions that they favoured. They made personal attacks, even on the grounds of the judges/magistrates' race. It was followed by state-controlled media outlets' attacks on foreign judges and lawyers' role in Hong Kong's judicial system, which is a feature widely believed to be beneficial towards Hong Kong's judicial independence and continuous development of the Common Law system in Hong Kong. It must be appreciated that given the democracy deficit in Hong Kong, the judiciary has been acting as the last and active safeguard of democratic and human rights values in Hong Kong.

Extrajudicial threats towards the exercise of protected rights have been on the rise. The case of the Causeway Bay Bookstore owners' enforced disappearances has caught global attention, where 5 booksellers who published/sold books critical of the communist party regime in China had disappeared, and later curiously reappeared in Chinese government's custody, some without passing through any immigration check points properly. They are believed to have been abducted at the instructions of the Chinese authorities, some even from Hong Kong and other countries.³ It has been revealed that the Chinese government had already abducted at least one individual from within Hong Kong's territory in due

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² Civil Human Rights Front is a platform of more than 40 Hong Kong civil society organisations interested in the promotion and protection of human rights in Hong Kong.

³ See Michael Forsythe and Alan Wong, "Bookseller's Account of Abduction Rekindles Fear of Lost Rights in Hong Kong" New York Times 17 June 2016, available at <https://nyti.ms/2x7aerw>; and a full translation by HKFP of previously missing bookseller Lam Wing-kee's own account of his disappearance from Hong Kong and detention in China, "The Missing Bookseller: Lam Wing-kee's ordeal, in full and in his own words" 11 September 2016 available at <https://www.hongkongfp.com/2016/09/11/missing-bookseller-lam-wing-kees-ordeal-full-words/>

course, in violation of the Basic Law.⁴ The loom was also over the Legislative Council General Elections within the reporting period - employing thugs to make threats has become more common.

The “mini constitution” Basic Law is, to a certain extent, an important safeguard for human rights against the arbitrary rule of the state. In the 2016 Legislative Council General Elections within the reporting period, the Hong Kong administration and Chinese Government have arbitrarily restricted the right to election in violation of the Basic Law.⁵ The Chinese Government unilaterally amended the Basic Law again in the form of “interpretation of the law”, resulting in retrospective changes and additions to the oath-taking requirement for taking office in Legislative Council (LegCo). Several pro-democracy and some pro-Hong Kong independence elected legislators were thus disqualified of their seats at the LegCo.⁶ These are cases in point that demonstrate the lack of constitutionalism and commitment to the rule of law of both governments.

2. Establishment of Watchdogs

In Hong Kong, there is no national human rights institution, or “human rights commission” in local terminology, but there are watchdogs in certain human rights areas. Each of these watchdogs has a narrow focus on certain human rights aspects. Most of the major human rights issues raised above are not covered by the mandates of these watchdogs. These include the Equal Opportunities Commission (EOC), the Privacy Commissioner for Personal Data (PCPD), the Independent Police Complaints Council (IPCC), the Ombudsman, the Independent Commission Against Corruption (ICAC), the Commissioner on Interception of Communications and Surveillance, and the Legal Aid Services Council.

2.1 Law related to Watchdogs

Legal foundation:

ICAC - *Independent Commission Against Corruption Ordinance* (Cap. 204), 1974; Ombudsman - *Ombudsman Ordinance* (Cap. 397), 1989; EOC - *Sex Discrimination Ordinance* (Cap. 480), 1996; Legal Aid Services Council - *Legal Aid Services Council Ordinance* (Cap. 489), 1996; PCPD - *Personal Data (Privacy) Ordinance* (Cap. 486), 1996; Commissioner on Interception of Communications and Surveillance - *Interception of Communications and Surveillance Ordinance* (Cap. 589), 2006; IPCC - *Independent Police Complaints Council Ordinance* (Cap. 604), 2009.

Impetus/motivation for establishment of NHRI:

Current watchdogs are of limited mandate and most human rights areas are not covered. However, the Government insists that the existing mechanism has worked well and that

⁴ See Kris Cheng, “China ignored info from HK gov’t on HK businessman ‘kidnapping’” HKFP 21 April 2016, available at <https://www.hongkongfp.com/2016/04/21/china-ignored-info-from-hk-govt-on-hk-businessman-kidnapping-report/>

⁵ See Hong Kong Human Rights Monitor’s press release on condemning the Electoral Affairs Commission for suppressing free elections (嚴斥選管會政治打壓 公平選舉不容踐踏 available in Chinese only) 2 August 2016, available at <http://www.inmediahk.net/node/1043788>

⁶ Ellie Ng, “Explainer & Timeline: The oath fallout and Beijing’s intervention in Hong Kong’s mini-constitution” HKFP 5 November 2016, available at <https://www.hongkongfp.com/2016/11/05/explainer-timeline-the-oath-fallout-and-beijings-intervention-in-hong-kongs-mini-constitution/>

there is no need for establishing an NHRI.

Selection process:

Selection processes for members of watchdogs lack transparency and public participation. The EOC is governed by a Board which is comprised of a Chairperson and 16 members, all appointed by the Chief Executive (CE). The PCPD, IPCC, the Commissioner of the ICAC, the Ombudsman, and the Legal Aid Services Council are also appointed by the CE. There is no specification of the selection process in legislation or regulations.

The Commissioner on Interception of Communications and Surveillance is appointed by the CE on the recommendation of the Chief Justice.

In the selection of EOC Chairpersons and Privacy Commissioners, the Government has started a practice of appointing a government dominated Selection Board composed of the heads of the relevant policy bureaus, Executive Councilors (the CE's cabinet members) and, only for selection of the EOC chairperson is there a board member with an NGO background, to recommend the most suitable candidate to the CE for appointment.

Qualifications for membership:

There is no clear indication of qualification or criteria of assessment for becoming a member of the watchdogs, except those brief professional background requirements and occupational exclusions in respect of the Legal Aid Services Council and the Commissioner of Interception of Communications and Surveillance.

Legal provision that reflects pluralism:

There is no provision in laws regarding the pluralism of the composition of the watchdogs. There is however a government policy adopted in 2015 to raise the appointment rate of women to government advisory and statutory bodies to 35%.

Legal provision regarding term of office:

Members of the EOC are appointed for a term not exceeding 5 years, with no limitation on the number of reappointments; the PCPD shall hold office for a period of 5 years and shall be eligible for reappointment for not more than one further period of 5 years; for IPCC, the term is not exceeding 3 years, no limitation on number of reappointments; the Commissioner on the Interception of Communications and Surveillance is appointed for a period of 3 years, no limitation on number of reappointments; the Ombudsman holds office for a period of 5 years and shall be eligible for reappointment.

Policy on secondees or appointment by government:

Appointment policy unknown.

Elements of the state that are beyond the scrutiny of the watchdogs:

Although the Government is not normally exempted from the scrutiny of the watchdogs (except under the *Race Discrimination Ordinance*, which does not fully cover government exercise of powers and functions), most government functions are beyond the watchdogs' scrutiny due to their narrow mandates. The jurisdiction of some watchdogs does not cover areas which are prejudicial to the 'security of Hong Kong'. The unlawful acts that are to be monitored by the watchdogs do not cover acts that are 'done for the purpose of safeguarding the security of Hong Kong'.

2.2 Efforts or Initiatives Undertaken to Establish an NHRI

Despite the repeated calls by UN treaty bodies to establish a fully independent national human rights institution in conformity with the Paris Principles,⁷ the Government persistently insists that there is no need for establishing a body in addition to or to duplicate the existing mechanism because the existing mechanism has worked well.⁸

While the civil society continues to demand for the establishment of a human rights commission, in the face of the current unprecedented erosion of human rights, and the lack of progress from previous efforts, it is pessimistic in the prospect of success. Therefore there had been few significant concerted efforts or initiatives undertaken by the civil society for such cause during the report period. Nevertheless, civil society continues to employ the Paris Principles and other international standards as yardsticks to criticise the Government and the existing watchdogs. They remain crucial reference points, especially for resisting the current rapid human rights regression.

3. Critique of Existing Watchdogs

The risk of not having a human rights commission in compliance with the Paris Principles is that under the regime of fragmented mandate of various statutory bodies, human rights enshrined under the Basic Law, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are not offered full-fledge protection.⁹ Moreover, the powers and independence of these government watchdogs have been called into question. The crippled institutions may be used as ‘alibi institutions’ to legitimise Government action or performance. This part offers a critique of some existing watchdogs.

3.1 Equal Opportunity Commission (EOC)

3.1.1 Membership

The EOC’s main function is to implement the *Sex Discrimination Ordinance 1995*, the *Disability Discrimination Ordinance 1995*, the *Family Status Discrimination Ordinance 1997*, and the *Race Discrimination Ordinance 2008*. The Commission is not an agent or servant of the Government,¹⁰ and the law stipulates that the Chairman cannot be a public servant.¹¹

⁷ General Assembly resolution 48/134.

⁸ LegCo Question and Reply: Credibility of and recommendations made by Equal Opportunities Commission, 11 May 2016, available at <http://www.info.gov.hk/gia/general/201605/11/P201605110568.htm>

⁹ The EOC shares a similar view – response from the EOC in 2016: *Currently, there are a number of statutory bodies such as the EOC and the Office of the Privacy Commissioner for Personal Data in the HKSAR to investigate and monitor the violations of specific areas of human rights. Such fragmented arrangement fails to provide comprehensive protection of all Covenant rights. The EOC believes that a single statutory platform with a broad mandate covering all international human rights standards accepted by Hong Kong should be established. The EOC has written to International Bodies such as the United Nations Human Rights Committee and the Committee on Economic, Social and Cultural Rights of the United Nations to express this view before.*

¹⁰ Section 63(7), Sex Discrimination Ordinance.

¹¹ *Ibid.*, section 65(3).

However, the law and policy do not require Commission members and the Chairperson to have knowledge and expertise in human rights, and the Chairperson's remuneration and terms and conditions of appointment are decided by the CE.¹² It has been criticised that the members do not possess solid track records in anti-discrimination or substantial knowledge in human rights,¹³ and that the appointment process generally lacks transparency and excludes civil society participation.¹⁴

The current Chairperson of the EOC, Prof. Alfred Chan was appointed despite public outcry for his academic integrity, alleged use of threatening manner towards dissidents, and outrageous lack of knowledge and sensitivity in rights and equality issues, a stark contrast with his predecessor Dr York Chow who was heralded for pushing forward discussions on legislating anti-sexual orientation discrimination protections. Also, a current EOC member Mr. Holden Chow, who is also the vice-chairperson of a pro-Beijing political party, has repeatedly spoken against protecting the rights of sexual minorities and asylum seekers, which are seen as contravention to the values of equality. Despite public condemnation he was reappointed to the board in 2017 by the then Chief Executive CY Leung.¹⁵

The Government has no plan to improve the EOC's transparency and independence, or to take any measure to bring it in line with the Paris Principles.

3.1.2 Wide-ranging Review of Hong Kong Anti-discrimination Legislation

In March 2016, the Commission publicly released its submission to the Government on potential reforms to the anti-discrimination legislations, totaling 73 recommendations covering a wide range of equality issues, with 27 issues identified as priority for legislative reforms. It is believed that the recommendations, if implemented, would improve protection for equality. Up to March 2017, the Government has shown incentive to implement only 9 of the recommendations.

3.2 Independent Police Complaints Council (IPCC)

3.2.1 Powerlessness of the IPCC

Although the IPCC is an independent statutory body, it continues to lack essential authority of investigation, categorising complaints and meting out punishments.

¹² Ibid., Schedule 6.

¹³ Response from EOC in 2016: *The new Chairperson however had experience in race relation work in Britain and was working closely with UNESCAP on the promotion of rights of the older persons in the Asia Pacific.*

¹⁴ The Selection Board appointed to advise the Chief Executive on the recruitment was chaired by Mrs Laura Cha and comprised Mr Chow Chung-kong, Mr Bernard Chan, Mr Tsang Kin-ping, the Secretary for Labour and Welfare and the Secretary for Constitutional and Mainland Affairs (See Government Press Release on 18 March 2016, available at <http://www.info.gov.hk/gia/general/201603/18/P201603180314.htm>) Among the members, Mr Tsang Kin-ping is from an NGO.

¹⁵ "Holden Chow's gay rights stance 'problematic': EOC" RTHK 26th May 2017, available at <http://news.rthk.hk/rthk/en/component/k2/1332605-20170526.htm>; Ellie Ng "Lawmaker Holden Chow faces calls to resign from equality watchdog following anti-gay rights remarks" HKFP 25 May 2017 available at <https://www.hongkongfp.com/2017/05/25/lawmaker-holden-chow-faces-calls-resign-equality-watchdog-following-anti-gay-rights-remarks/>

All complaints against the Police are referred to the Complaints Against Police Office (CAPO) for handling and investigation under the two-tier police complaints system. CAPO categorises whether a complaint is reportable or only notifiable.¹⁶ While the CAPO must submit all investigation reports on reportable complaints to IPCC for scrutiny, a complaint categorised as “notifiable” is outside the purview of IPCC, which only receives regular summaries of these complaints. Complaints lodged by a person in his official capacity as a member of the Police Force are also investigated by CAPO. Anonymous complaints or complaints made by a third party are all categorised as notifiable complaints only, reports of which are sent to IPCC for information but not scrutiny, leaving investigation of these cases privy to CAPO without IPCC’s oversight. These restrict the IPCC from learning about actual problems that occur from shortcomings in Police practices and procedures, thus preventing it from fulfilling one of its functions - to make recommendations to the Police to avoid future reportable complaints.

As part of the police force, CAPO has jurisdiction over complaints against its fellow officers, and police commanders above it in the chain of command. The conflict of interests in a police department investigating complaints against the police continues to severely undermine the police regulatory system. It remains true that the CAPO fails to win the trust of many victims of police abuse. To them, CAPO is just a convenient place for the police and the Government to dismiss complaints. It has become another source of grievance and a key target of complaint itself in the police force.¹⁷

The IPCC is dependent on CAPO to conduct the investigation. If IPCC disagrees with CAPO's investigation report, it can only repeat the cycle of negotiating with CAPO until one side agrees with the other. Should CAPO and IPCC still fail to come to agreement, the CE may be informed and he/she may make a final decision over the case, which is expected not to avail much public confidence. The *Police Force Ordinance* (Cap. 604) stipulates that “[t]he Commissioner, who subject to the orders and control of the Chief Executive, shall be charged with the supreme direction and administration of the police force.” If the CE chooses not to intervene, CAPO’s position will prevail.¹⁸

3.2.2 No access to Police guidelines and fettered interpretation of mandate

The IPCC does not have full access to all Police guidelines and manuals. For example, regarding the procurement of riot control water cannon in process, the IPCC has not been

¹⁶ According to s.11 of the IPCCO, a complaint received by the Hong Kong Police Force must be categorised as a reportable complaint if the complaint relates to the conduct of a member of the police force while on duty or in the execution or purported execution of his duties, whether or not he identified himself as such a member, and, at the same time, meets other conditions that make it a reportable complaint under the Ordinance in that, for instance, it is made by a complainant directly affected by the police conduct, irrespective of whether the allegation involves any criminal elements. Such a complaint shall be investigated by the CAPO with the investigation report submitted to the IPCC for examination in accordance with the statutory requirements under the Ordinance. Secretary for Security Lai Tung-kuok, Reply to a question by LegCo member about Complaints Against Police system, 29 October 2014, available at <http://www.info.gov.hk/gia/general/201410/29/P201410290795.htm>.

¹⁷ Hong Kong Human Rights Monitor, *Submission of the Hong Kong Human Rights Monitor on Independent Police Complaints Council Bill* December 2007.

¹⁸ Section 4, *Police Force Ordinance*.

able to obtain information from the Police on how the water cannons would be used.¹⁹ In view of the police's lack of restraint in using unnecessary and disproportionate force in public assemblies, the evasion from scrutiny causes great concern. However, the IPCC chairperson Larry Kwok failed to make a stand for IPCC's mandate, which includes finding out potential fault or deficiency in police practices or procedure,²⁰ but conceded to the Police's refusal to disclose without protest. It seems that the IPCC welcomes the undermining and disrespect of its mandate.

3.2.3 Controversial Appointment

The then CE CY Leung continued to appoint pro-establishment and pro-Beijing individuals into the IPCC, including high-profile anti-Umbrella Movement activists. Also, no new pan-democratic legislator-members were appointed after the end of the then current members' terms.²¹ By appointing pro-government individuals and losing liberal members in the IPCC on their retirement from it, the IPCC further loses its credibility as a human rights institution.

3.2.4 Independent Investigation of the Umbrella Movement

The Government has ignored the UN Committee Against Torture's recommendation to conduct an independent investigation into the allegations of excessive use of force by the police and anti-Umbrella Movement demonstrators during the Umbrella Movement.²² It claims that relevant complaints are being processed by the CAPO and the IPCC. As revealed in the police's handling of the large scale conflict in Mong Kok in February 2016, the worry that the Police's impunity from violations of the law and guidelines would lead to continual atrocities has been proven.²³

3.3 Independent Commission Against Corruption (ICAC)

ICAC is mandated to combat corruption in public and private sectors. The Commissioner is directly responsible to the CE for his or her major duties in combating corruption; this is, however, a fundamental defect which gives rise to the question: what if the person connected with or conducive to corrupt practices is the CE himself or herself?

In February 2017, Donald Tsang Yam-kuen became Hong Kong's first ever chief executive to be convicted in a corruption trial for misconduct in public office, following

¹⁹ Per Ms Kitty CHIK of Hong Kong Police Force, "Minutes of Twenty-eighth Meeting of the Human Rights Forum" 12 July 2016 Constitutional and Mainland Affairs Bureau, para 9. 12 July 2016

²⁰ IPCCO section 8(1)(c).

²¹ Appointments to the Independent Police Complaints Council, 23 December 2016, available at <http://www.info.gov.hk/gia/general/201612/23/P2016122300235.htm>

²² UN Committee Against Torture: Concluding Observations on the fifth periodic report of China with respect to Hong Kong, China, United Kingdom of Great Britain and Northern Ireland (Hong Kong), 3 February 2016 (CAT/C/CHN-HKG/CO/5), para15(a).

²³ Follow-up of internal evaluation is confidential except suggestions on improving equipments, see for example "Evaluation of equipment after Mong Kok riot, Police procure 400 anti-riot suits (旺角暴亂後鑰匙裝備 警召標買400防暴衣)" Oriental Daily 6 February 2017, available at http://hk.on.cc/hk/bkn/cnt/news/20170206/bkn-20170206161243421-0206_00822_001.html; Police continues to beat up journalists: Hong Kong Journalists Association 2016 Annual Report: One Country, Two Nightmares - Hong Kong media caught in ideological battleground, p.8-9, available at https://www.hkja.org.hk/site/Host/hkja/UserFiles/file/annualreport/Annual_report_2016_Final%20V.pdf

the ICAC's prolonged investigation.²⁴

On the other hand, CY Leung's case was referred to the ICAC in 2014, but there seems to be no progress so far. He is being investigated for not having declared his HK\$50 million deal with Australian engineering firm UGL, part of which he received when he was Chief Executive.²⁵ The LegCo member Albert Ho Chun-yan has been following this case. He told the press in July 2016 that according to 'credible sources', the lack of progress was because neither the CE Office nor the Executive Council had responded to requests for information made by the ICAC nearly a year ago.²⁶ The delay in prosecution has cast doubt in the ICAC's ability in holding the Chief Executives accountable.

4. Conclusion

The UN Treaty Bodies' have repeatedly recommended that Hong Kong should consider establishing a human rights institution, in accordance with the Paris Principles, with adequate financial and human resources, a broad mandate covering all international human rights standards applicable to Hong Kong and with competence to consider and act on individual complaints of human rights violations by public authorities.²⁷ The UN Human Rights Committee recommends that such institutions should be empowered to enforce the *Hong Kong Bill of Rights Ordinance*, which incorporated most articles of the ICCPR.²⁸ However, the Government reiterated that it had no plan or timetable to set up a human rights institution.

The Government's claim that the existing mechanism works well is obviously unfounded, as shown in this report. In fact, human rights in Hong Kong are facing enormous challenges from within and from China. Hong Kong needs a truly independent human rights commission with a broad mandate and authority to enforce the *HK Bill of Rights Ordinance* and rights enshrined in other domestic and international instruments.

However, considering the Government's refusal to establish a human rights commission over the years despite repeated recommendations by the UN, and Beijing's strong desire to control Hong Kong in more and more aspects, the hope of establishing an oversight body that can keep the Government in proper check is slim.

²⁴ Julia Hollingsworth, Chris Lau, Stuart Lau "Donald Tsang guilty of misconduct in office, making him first Hong Kong leader convicted in criminal trial" South China Morning Post 17 February 2017, available at <http://www.scmp.com/news/hong-kong/law-crime/article/2071852/donald-tsang-guilty-misconduct-office-making-him-first-hong>.

²⁵ Jeffie Lam, Joyce Ng, Julia Hollingsworth "Will Leung Chun-ying be next in line for prosecution in Hong Kong?" South China Morning Post 21 February 2017, available at <http://www.scmp.com/news/hong-kong/law-crime/article/2072753/will-leung-chun-ying-be-next-line-prosecution-hong-kong>

²⁶ Karen Cheung, "CY ducks questions as to whether corruption watchdog shake-up is linked to his secret UGL payments", *Hong Kong Free Press*, 11 July 2016.

²⁷ The UN Human Rights Committee in CCPR/C/CHN-HKG/CO/3, para.7, reiterating its previous recommendation (CCPR/C/HKG/CO/2, para.8); The UN Committee on Economic, Social and Cultural Rights in E/C.12/CHN/CO/2, para.40; and the UN Committee on the Rights of the Child in CRC/C/CHN/CO/3-4, para.20.

²⁸ UN Human Rights Committee: Concluding Observations: Hong Kong, China, 29 April 2013 (CCPR/C/CHN-HKG/CO/3), para 7.

MONGOLIA: SEEKING GREATER RECOGNITION FOR NHRCM

Center for Human Rights and Development (CHRD)¹

The CHRD (Centre for Human Rights and Development), a member of the Asian Forum for Human Rights and Development (FORUM-ASIA) prepared this independent report on the performance of the National Human Rights Commission of Mongolia (NHRCM) for the 11th time since 2005.

The report is compiled in accordance with the Asian NGO Network on National Human Rights Institutions' (ANNI)¹ guidelines and based on the NHRCM's 16th Status Report on Human Rights and Freedoms in Mongolia, the NHRCM's 2016 Activity Report, website of NHRCM and other available information, meetings and interviews. The report covers the following subjects:

- *The role of NHRCM on promoting and protecting human rights and its performance*
- *Management of complaints of human rights violation*
- *Key human right concerns faced by the country*
- *Conclusion*
- *Proposals and recommendations*

1. Introduction

Politics of Mongolia remained active as ever throughout 2016 as well as in the first half of 2017, especially with events related to the elections of the Parliament (State Great Khural). The Mongolian People's Party (MPP) won the elections and formed the government. In June 2017, the presidential elections will take place in Mongolia. Public members have been more politically engaged due to these two elections. The main issues of public concern have been the foreign debts and offshore bank accounts involving high ranking state officials. Public calls for just resolutions to these issues in accordance with the law have been made while the ruling party is struggling to resolve the issues. Meanwhile, urban citizens of Ulaanbaatar are increasingly concerned with the problems of air pollution in this capital city of Mongolia.

Amidst dynamic political events in Mongolia, issues of human rights and freedoms remains as top priority in many circumstances. Both the Government and non-governmental organisations (NGO) have conducted active operations on human rights in the course of 2016 and 2017. Similarly, the NHRCM has also performed activities such as receiving and resolving complaints in accordance to its mandate under the law, submitted its proposals and recommendations on draft laws, provided recommendations on issues of human rights violations to the relevant parties, organized planned and unplanned inspections and audits, filed petitions on violations of rights and freedoms of individuals, organized trainings and discussions and conducted studies and surveys.

On 24 March 2017, the NHRCM submitted its 16th Report on the Human Rights and Freedoms of Mongolia to the State Great Khural. The report covers:

- Implementation of child's rights
- Implementation of labour rights for public servants and private sector employees

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- The rights of military personnels and employees to be employed
- Implementation of the right to be free from torture
- Activities on the implementation of the *Law on Promotion of Gender Equality* by the relevant state organizations.

In response to the human rights violations as highlighted, the NHRCM has also made various recommendations in the report, including, for instance, proposals on implementation of relevant legislations on child protection and domestic violence; allocation of budget and resources to strengthen the national mechanism on child protection, capacity building of joint child protection team members, creation of a national mechanism to prevent torture with adequate budget and staffing .

2. NHRCM’s Mandates to Protect and Promote Human Rights

2.1 General Overview of NHRCM’s Activities in 2016:

The NHRCM has performed its main duties in overseeing the implementation of legislations on human rights and freedoms, protect and promote human rights in accordance with its mandate under the law and available financial capacities.

Along with these, the NHRCM has specifically targeted the implementation of child’s right protection, the legalization of small scale mining activities, and submission of recommendations to government on draft laws and resolutions in 2016. For instance, the Commission had conducted a nationwide survey on “*Child’s rights and protection*” and “*Implementation of Right to Education of Children of Linguistic Minorities*” in order to find out the status of implementation of child’s right and child protection in the country.

On making recommendations on draft laws and parliamentary resolutions, the NHRCM formed a working group to provide analysis from human rights perspective on draft laws and policy decisions. The Working group reviewed on a regular basis draft laws and resolutions that were submitted to the State Great Khural. In 2016, the NHRCM had made recommendations on 22 draft laws and policy documents to the State Great Khural and the Government of Mongolia.

2.2 Activities Implemented by NHRCM to Protect and Promote Human Rights²

The NHRCM received a total of 527² complaints from individuals and entities in 2016 with 164 coming from the countryside. 495 complaints were resolved with the remaining 32 complaints are still being processed.

As of 15 December 2016, the Commission provided 34,646 minutes or 577 hours 26 minutes of legal advice to 1,784 individuals and entities, with seven of them done through online communication, 179 through telephone and 1,598 through face to face meetings. Geographically, 98 hours of legal advice were provided to 552 individuals and entities in Ulaanbaatar, 479 hours of legal advice were provided to 1,232 individuals and entities in the countryside.

The NHRCM has issued recommendations on elimination of conditions that may give rise

² Report of NHRC, 2016

to human rights violations due to decisions or activities of business entities and officials. These recommendations were delivered to 28 business entities and organisations in 2016 based on inspections and complaints submitted. The NHRCM has also sent notices to relevant authorities to restore human rights and eliminate violations in cases where business entity, organisation or public official have been found to have violated human rights. A total of 31 notices were delivered in 2016.

A business entity, organisation or public official must inform the NHRCM in writing, within 30 days after the receipt of recommendations or seven days after the receipt of notice from the NHRCM, on actions taken in response to the recommendations or notice.. If no actions are taken, the NHRCM may lodge a complaint to courts for necessary administrative measures. Ch Altangerel, Director of the working group of NHRCM revealed in an interview that “State organisations and public officials are now used to provide their responses in a timely manner upon receipt of recommendations and notices from the NHRCM. However the business entities are just starting to adopt such practice”³.

The NHRCM has also sent official letters to the relevant authorities seeking to hold accountable public officials who have violated human rights in 8 complaints that they received. With the exception of these 8 cases, the NHRCM has been able to resolve all other cases through mediation among the parties involved.

The NHRCM organized 361 sessions and a total of 628.5 hours of planned and unplanned trainings at the request of public, non-governmental and international organisations. A total of 18,733 participants were trained. The staff at the NHRCM head office organized 72 sessions and a total of 242 hours of training, for a total of 4011 participants. The local staff of NHRCM in 21 provinces of Mongolia organized 289 sessions and a total of 386.5 hours of training, for 14,722 participants.

The NHRCM published and disseminated 25 types of training and promotional printed materials such as reports, magazines, training handbooks and brochures.

Adequate budget plays a crucial role in ensuring the independence of the NHRCM in running its activities. The State Great Khural cut down the budget of the NHRCM for 2015-2016 in comparison with previous year. In 2017, the budget of NHRCM was slightly increased, however operational expenses of the NHRCM were cut by the State Great Khural (including in country per diem expenses for training, research, inspections, auditing, expenses for transportation and fuel, postal expenses). As a result, activities such as surveys, trainings, human rights open days were mostly conducted and organised through projects financed by international development organisations such as the United Nations (UN) and the Swiss Agency for Development and Cooperation.

The NHRCM is entrusted with a mandate to conduct analysis of laws, resolutions and policy documents based on human rights and submit its recommendations for the deliberation of the State Great Khural. In 2016, the NHRCM provided recommendations on 22 laws and draft policy documents³ to the State Great Khural and the Government of Mongolia.

³ Notes of meetings and interviews with the high level official of NHRC

The recommendations are made in two ways:

- The NHRCM establishes working group to develop draft laws with the support from NHRCM's staff
- The NHRCM provides recommendations directly on draft laws prepared by State institutions

In fall of 2016, a working group was formed to develop draft law on the protection of human right defenders at the initiative of the NHRCM. The working group developed a draft law and submitted to D.Tsogbaatar, a member of parliament (MP), who was also the Chair of the Subcommittee on Human rights in the Parliament, and three other MPs in April of 2017 for discussion and ratification. The NHRCM has been also included in a working group established by the Ministry of Legislation to amend the Law on NHRCM. The revised version of the law is planned to be ratified during the spring session³ of the State Great Khural in 2018.

The NHRCM is given the authority to enter any business entity or organization and to participate in their meetings and conferences, meet in person with relevant officials, obtain without any charge the necessary evidence, official documents and information from organizations and/or officials. In 2016, the NHRCM conducted 111 inspections, out of which 100 were planned inspections while 11 were follow-ups to the complaints received. Based on the inspections, the NHRCM provided recommendations to address causes and conditions that contributed to human rights violations, and requested the relevant officials to take necessary actions and report to the NHRCM within the legal period.

The NHRCM presented its 16th Status Report on Human Rights and Freedoms in Mongolia on 24 March 2017. The report's annexes include an update on the implementation of the resolutions adopted by the Standing Committee on Legislation of the State Great Khural. It serves as a guidance for the Government of Mongolia to take the necessary actions in accordance with the recommendations made in the 13th and 14th Status Report of the NHRCM. While the inclusion of such information on the implementation of recommendations in the following year's report is much appreciated, it is essential for the NHRCM to pay more attention on eliminating the violations and hold organisations and officials that failed to perform their responsibilities in the recommendations accountable.

Although the NHRCM has repeatedly proposed to the State Great Khural to discuss its Status Report on Human Rights and Freedoms, the Report is only being discussed at the level of Standing Committee on Legislation of the State Great Khural⁴. It is vital for the NHRCM to work towards having its annual Status Report debated at the plenary session of the State Great Khural.

2.3 Addressing Human Rights Violations

Based on the reports of the NHRCM, we can conclude that the NHRCM has performed satisfactory on handling of complaints, submission of recommendations on draft laws, regulations and potential issues of human rights violations; and delivery of notices to the relevant authorities on addressing human rights violations. The NHRCM has also

⁴ Notes of meetings and interviews with the high level official of NHRC

organized trainings for specific target groups as well as general public members and carried out studies on various issues in relation with human rights.

Below are some examples of cases how the NHRCM responded to human rights violations.

Case 1: Child rights and horse racing

Mongolia has a tradition of organizing horse racing in warm season (summer, fall) since ancient times. However, this tradition stopped in 1990 and horse racing started to be organized in cold season or in winter and spring, resulting in many cases of child-jockeys suffered from frostbite or serious injury after falling on frozen land.

In order to prevent such violations, the NHRCM made several recommendations on 17 February 2017 calling on the Prime Minister of Mongolia to refrain from organizing horse racing and to ban involvement of children in winter and spring (cold season) horse racing. Despite of this, the Government of Mongolia resolved to organize horse racing following the adoption of Resolution 63 dated 22 February 2017.

While the Primary Administration Court of Ulaanbaatar had partially suspended the Government's Resolution 63 with a court ruling on 3 March 2017, the Mongolian Horse Racing Sports and Trainers Association refused to implement the court decision. It proceeded with the organizing of horse racing in cold season. Many children fell from horse back and a child was injured.

Civil society organizations working on child's rights have filed a case with the court. The NHRCM has provided relevant documents and information to support the case. The case is still pending in court.

Case 2: Smog and air pollution in Ulaanbaatar

Air pollution in Ulaanbaatar was found to have significantly exceeded the acceptable standards and the rights of citizens to enjoy a healthy and safe environment was seriously being violated. In particular, the smog had negatively impacted the health of small children. Two public protests were organized in December 2016 and January 2017 respectively and an NGO called "Mothers and Fathers Against Smog" was established.

Responding to the issue, the NHRCM said: *"We are gathering studies, surveys and information conducted by the State and NGOs on the Ulaanbaatar smog issue. Also we are studying the soil and water pollution issues and working to compile an integrated analysis. As for the issue of Ulaanbaatar air pollution, its cause, its impacts to the health of citizens, actions taken by the State and its results, they are already in the public domain and well-known to the public. We considered there is no need to issue a special statement from the NHRCM. Therefore, we did not participate in the activities organized by the "Mothers and Fathers Against Smog."*

Case 3: Illegal inspection of association

The NHRCM has the authority to attend in person or appoint a representative in accordance to the procedure set by the laws to file petition or attend court sessions in relation to human rights violations committed by a business entity, organisation, official or individual. Using this mandate, the NHRCM filed four petitions to the court and the case below will demonstrate the resolution of one of the cases. On 3 November 2016, the NHRCM filed a petition on behalf of a citizen to the Soum Primary Court requesting

compensation from the State for the loss suffered by the citizen due to illegal inspection, arrest and detention made by the authorities in association with a criminal case. As a result, the Court ruled in favor of the citizen and ordered the State to pay compensation.

3. Conclusion

The NHRCM continues to perform its duties to oversee the implementation of human rights and freedoms and to protect and promote human rights in accordance to its mandate as provided by the law and within its financial capacity in 2016.

Credit should be given to some of the State institutions, officials and business entities that accepted the recommendations of the NHRCM and extended their cooperation to the NHRCM. However, the same cannot be said of the Parliament and the Prime Minister. As indicated in the issue of child jockey in horse racing, the Prime Minister has disregarded recommendations of the NHRCM and clearly failed in his duty to protect child's rights when the Government decided to go ahead and organize horse racing in spring of 2017.

Similarly, the State Great Khural has failed to implement the recommendations of the NHRCM too. The 16th Status Report of the NHRCM was not tabled and debated at the plenary session of the State Great Khural, but only at the Standing Committee on Legislation level. Although the Standing Committee has adopted resolutions in line with the recommendations of the NHRCM's report, which is a step forward, the State Great Khural as a whole should take cognizance of the NHRCM's Status Report to ensure full implementation of the NHRCM's recommendations.

4. Proposals and Recommendations

To the NHRCM:

- Ensure the Status Report on Human Rights and Freedoms in Mongolia will be debated at the plenary session of the State Great Khural;
- As the core element of national mechanisms in protecting human rights, monitor any social issues that affect the public and focus on resolving any human rights violations in a timely manner and in compliance with international human rights treaties and conventions;
- Carry out advocacy to amend relevant laws and regulations to ensure adequate funds for the operations of the Commission, and to strengthen its independence, in line with the Paris Principles;
- To continue advocacy for the approval of the Law on Protection of Human rights Defenders;
- Prioritize the implementation of proposals and recommendations in the Status Report on Human Rights and Freedoms; hold accountable any organisations or officials that failed to perform duties as stipulated by the resolutions of the Standing Committee on Legislation; and the elimination of violations.

To the State Great Khural and the Standing Committee on Legislation:

- Ensure the receipt of the Status Report on Human Rights and Freedoms in Mongolia by all members of the State Great Khural, debate of the report at the plenary session of the State Great Khural, adoption of resolutions to implement the proposals and recommendations of the Status Report and supervision of the implementation of all resolutions;

- Amend the relevant laws and regulations to bring them in line with the Paris Principles and to ensure the independence of and adequate funding for the NHRCM.

To the Government of Mongolia:

- Accept NHRCM's proposals and recommendations and perform the responsibilities to protect and promote human rights in compliance with the international human rights treaties;
- Create favorable conditions enabling the NHRCM to operate independently as mandated by international treaties and conventions, ensure adequate funding for the NHRCM and refrain from cutting down its budget in any economic conditions;
- Ensure implementation of resolutions adopted by the Standing Committee on Legislation that are in line with the NHRCM's recommendations; introduce measures to hold accountable organisations and officials that failed to implement these resolutions.

Annex 1: List of Laws and Policy Papers that Recommendations by NHRCM Submitted

1. Draft Law on Medical Assistance and Service
2. Revision of the Law on Court Decision Implementation
3. Law on Criminal Procedure
4. Draft Law on Investigation and Resolution of Offences
5. Draft agreement providing mutual legal assistance on criminal cases between Republic of Belarus and Mongolia
6. Draft agreement on providing mutual legal assistance on civil and trade matters between Republic of Belarus and Mongolia,
7. Draft agreement on transfer of prisoners between Republic of Belarus and Mongolia
8. Common requirements for elder care service MNS 5823:2013 standard
9. Common requirements for disabled care service MNS 5798:2008 standards
10. Procedure to ensure security of court and judges as approved by the decree of the Minister of Legislation
11. Procedure to organize convoyed transport during the relocation of detention centers and prisons”
12. “Procedure to supply to witness and victim; and use of special equipments and tools”
13. Individual protection procedure
14. Procedure to provide medical service
15. Provisional procedure to use physical force by marshall authority officers and the use of special equipment
16. Resolution of Government of Mongolia on approving state policy on youth development
17. Revised draft Law Against Domestic Violence
18. Draft of guidelines on improving legislation of Mongolia by 2020
19. Draft Law on Amendments to the Criminal Code
20. Draft Law on Criminal Procedure
21. Draft Law on Law Enforcement Actions

REPUBLIC OF KOREA: NEW HOPE FOR REFORMS

Korean House for International Solidarity¹

1. Introduction

The Korean people were outraged by the Park Geun-hye government's corruption scandal which came to light in October 2016. During the campaign for the impeachment of President Park Geun-hye from October 2016 to 10 March 2017, candlelight vigils were held every weekend in which more than 10 million citizens participated despite the cold winter weather. The peaceful yet passionate candlelight vigils led to the end of the Park Geun-hye administration, which was responsible for the regression of human rights in recent years. On 9 May 2017, the newly elected President Moon Jae-in took over the helm.

In relation to the National Human Rights Commission of Korea (NHRCK), the Moon government pledged to take a different approach from the previous Lee Myung-bak and Park Geun-hye administrations, and committed to actively accept recommendations of the NHRCK and strengthen its role and status. There appears to be changes taking place in the NHRCK since the "candlelight revolution" and the launch of the new administration. However, as the unqualified commissioners appointed by the previous administration remain in service, the NHRCK has yet to be able to break away from its past wrongdoings. Nevertheless, the reforms have begun within the NHRCK to revert to its original mandates.

The Korean civil society has been active in the NHRCK reform process, aiming to transform the NHRCK into a genuine national human rights mechanism. Civil society has been voicing opinions to the chairperson of the NHRCK and the government and maintaining close contact with the NHRCK trade union. Moreover, a large number of civil society activists are expected to participate in the Reform Committee established by the NHRCK, which will begin operating in November 2017.

The Government and the National Assembly are planning to initiate constitutional reforms in 2018. One of the main issues of the constitutional reform is the elevation of the NHRCK to become a constitutional institution. While the Moon administration is considering this reform, it is facing strong opposition, in particular from anti-homosexuality groups that cited the inclusion of "sexual orientation" as a ground for non-discrimination in the *National Human Rights Commission Act (NHRCK Act)* as the main reason. The designation of the NHRCK as a constitutional institution will only receive widespread support when the NHRCK seriously reflects on its past errors and implements genuine reform.

¹ *Hyun-pil Na, executive director of Korean House for International Solidarity (KHIS) is the main author of the report with assistance from Kwak, Ji-hyun and Ko, Seung-hwan, volunteers for KHIS and Kang, Eun-ji, former director of KHIS. Hong, Sung-ki, a fellow human rights defender, translated the report. This report was reviewed and supported by the executive committee of the National Human Rights Commission of Korea Watch (NHRCK Watch).*

2. NHRCK and Its Mandates to Protect and Promote Human Rights

2.1 General

The NHRCK was established under the *NHRCK Act* (No.6481, established on 24 May 2001 / Act No.14028, amended on 3 February 2016).

Under Article 19 of the *NHRCK Act*, the mandate of the NHRCK is as follows:

1. Investigation and research on statutes (including bills submitted to the National Assembly), institutions, policies and practices related to human rights, and presentation of recommendations or opinions on matters requiring improvement thereof;
2. Investigation and remedy with respect to human rights violations;
3. Investigation and remedy with respect to discriminatory acts;
4. Investigation on actual conditions of human rights;
5. Education and promotion of human rights;
6. Presentation and recommendation of guidelines as to categories of and determination standards for human rights violations, and preventive measures thereof;
7. Research and provisions of recommendations on the conclusion of any international treaty on human rights and the implementation of the said treaty, or presentation of opinions thereon;
8. Cooperation with organizations and individuals engaged in activities to protect and improve human rights;
9. Exchanges and cooperation with human rights related international organizations or foreign organizations for human rights;
10. Other matters deemed necessary to guarantee and improve human rights.

2.1.1 No Improvement in the NHRCK's Selection and Appointment Process

According to Article 5 of the *NHRCK Act* (Composition of the NHRCK):

1. The Commission shall be comprised of 11 commissioners for human rights (hereinafter referred to as "commissioners"), including one chairperson and three full-time commissioners.
2. The President of the Republic of Korea shall appoint as commissioners among those: four persons selected by the National Assembly; four persons nominated by the President of the Republic of Korea; and three persons nominated by the Chief Justice of the Supreme Court.
3. The President of the Republic of Korea shall appoint the chairperson of the Commission from among the commissioners. In such case, the chairperson shall undergo a confirmation hearing held by the National Assembly.

In January 2016, in preparation for the accreditation review of the NHRCK by the Global Alliance of National Human Rights Institution's Sub-Committee on Accreditation (GANHRI-SCA), the National Assembly passed an amendment to the *NHRCK Act* to ensure pluralism in the composition of the Commission and transparency in the appointment process of commissioners. The amended provisions on the qualifications and appointment of commissioners are as follows:

- Commissioners shall be any of the following persons who have expertise and experience in human rights issues and are deemed capable of performing duties to

protect and improve human rights fairly and independently:

1. A person who has served for at least 10 years at a university or an authorized research institute as an associate professor or higher or in a position equivalent thereto;
2. A person who has served as a judge, prosecutor, or attorney-at-law for at least 10 years;
3. A person who has been engaged in activities for human rights for at least 10 years, such as working for a non-profit, non-governmental organization, corporation, or international organization in the field of human rights;
4. Any other person highly respected in society, who is recommended by civic groups

- When selecting or nominating commissioners, the National Assembly, the President, or the Chief Justice of the Supreme Court shall receive recommendations for candidates or hear opinions from various social groups to ensure that commissioners represent each social group related to protecting and improving human rights.

- The number of commissioners of any gender shall not exceed 6/10 of the total number of commissioners.

However, much to the concern of civil society, this law has not been properly upheld. Candidates nominated after the passing of the law by then ruling Saenuri Party (standing commissioner Jeong Sang-hwan), then President (commissioner Jang Soon-ae), and even then main opposition Democratic Party (commissioner Kim Ki-jung) were all selected and appointed without gathering opinions from or consultation with civil society. The NHRCK Act was also not upheld when Choi Hye-ri (nominated by then President) was newly appointed as commissioner and commissioners Lee Sun-ae and Han Ui-soo were reappointed by the Chief Justice of the Supreme Court. Such disregard for the NHRCK Act by the President, the National Assembly, and the Supreme Court has continued even after the candlelight revolution and the coming in of the Moon Jae-in administration. In June 2017, the Chief Justice of the Supreme Court appointed Commissioner Cho Hyun-ok without any consultation with or participation of social groups.

Thus, it is necessary to amend the laws on the appointment of Commissioners. GANHRI-SCA granted the NHRCK “A” status after deferring the reaccreditation of its status three times in a row, and issued the following recommendation:²

The NHRCK Act may result in different processes being employed by each entity. The process could be improved by:

- requiring the advertisement of vacancies; and
- ensuring a consistent process is applied by a single independent selection committee.

For these reasons, in order to safeguard the independence of the NHRCK, it is necessary to amend the NHRCK Act to ensure implementation of GANHRI-SCA recommendations. NHRCK-Watch, a coalition of human rights and civil society

² GANHRI-SCA, GANHRI Sub-Committee on Accreditation Report-May 2016, p.42. <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20FINAL%20REPORT%20-%20MAY%202016-English.pdf>

organizations, has begun preparations for the legislative amendment.

2.1.2 New Administration's Policies to Strengthen the NHRCK

After the impeachment of President Park Geun-hye, the presidential election which was originally scheduled to take place in December 2017 was held in May 2017. NHRCK-Watch sent written questions to the main candidates asking for their pledges related to the NHRCK during the election campaign. With the exception of the conservative party candidates, all candidates including Moon Jae-in (Democratic Party), Ahn Cheol-soo (People's Party), Sim Sang-jung (Justice Party), and Kim Sun-dong (People's United Party) provided responses to the questions. All candidates (1) agreed to the creation of a candidate recommendation committee for the appointment of Commissioners, (2) agreed with the criticism that there are problems with the current composition of the NHRCK, including most Commissioners are legal professionals, and the practices of appointing religious persons and politicians with no expertise or experience related to human rights, and (3) promised to make public the appointment process for Commissioners and appoint Commissioners who represent social minorities when exercising the President's authority to appoint Commissioners.³

Moon Jae-in was elected as President on 9 May 2017. On 25 May 2017, Cho Kuk, senior presidential secretary for civil affairs, mentioned in a briefing that "the President is determined to redress the past human rights violations committed by the State and to conduct state affairs in a way that realizes human rights", and that "President Moon ordered all institutions to increase their acceptance of the NHRCK recommendations."⁴ This sends a strong message that the government will strengthen the status of the NHRCK.

After the briefing on the Moon administration's plans to strengthen the NHRCK, the number of communications, consultations, and complaints to the NHRCK increased. According to the statistics provided by the NHRCK,⁵ using the President Office's briefing date as a point of reference (25 May 2017), there was a significant increase in the number of complaints (48.5%), consultations (34.7%), inquiries (92.8%), and communications (35.7%) during 25 May - 9 August 2017 compared to 29 March - 24 May 2017. The NHRCK considers this to be a result of citizens' increased expectations of the NHRCK.

In particular, the government will include "human rights improvement" as one of the evaluation criteria in its governmental performance evaluation, which targets 42 central departments. The NHRCK will conduct evaluation and assessment of the number of its recommendations accepted by government departments. Accordingly, we expect the

³http://www.khis.or.kr/spaceBBS/bbs.asp?act=read&bbs=notice1&no=460&ncount=438&s_text=&s_title=&pageno=2&basic_url=

⁴ http://khnews.kheraldm.com/view.php?ud=20170525000732&md=20170812005518_BL

⁵ The NHRCK, The Statistics of Complaints · Counseling · Inquiries in the First Half of 2017. The document was distributed at the NHRCK plenary committee meeting on 28 August 2017. Na Hyun-pil participated in the meeting and obtained the document.

NHRCK recommendation acceptance rates by government departments to increase significantly.

The Moon administration promised to undertake constitutional amendments in the first half of 2018. Discussions on constitutional amendments are currently taking place and the Moon administration has pledged to elevate the NHRCK to the status of a constitutional institution.

As such, the strengthening of the NHRCK is expected to continue under the Moon administration.

2.2 Sexual Minority Rights

As pointed out in the 2016 ANNI report⁶, Commissioners Choi E-woo and Lee Eun-kyung have continued to publicly display anti-human rights attitudes regarding LGBTI issues.

According to a media report dated 29 October 2016⁷, Commissioner Choi E-woo made anti-human rights remarks on LGBTI persons at a forum organised by a Korean conservative Christian group. Choi said, "the issues regarding homosexuality have been shrouded by various human rights issues and are being left 'cleverly unaddressed' within the National Human Rights Commission. There will be great consequences if the Korean churches do not address this problem." Also, at the same forum, Kim Sung-young, Choi's predecessor and former NHRCK Commissioner, said, "the only legal basis that is being used by homosexuals and homosexuality supporters to justify homosexuality and same-sex marriage is the NHRCK Act" and "the voices of those who are against homosexuality among the 11 commissioners are being overwhelmed by the logic of former legal professionals and are merely considered as minority opinions." The Future Forum, the organiser of the event, is a member organisation of the "National Coalition Against the Anti-Discrimination Law," where Choi E-woo is the current executive director and was the former representative.

Although there is no relevant provision in the NHRCK Act, in practice the President had appointed religious leaders including protestant ministers as Commissioners in special consideration for the religious community. However, these Commissioners have shown disregard for the NHRCK Act and publicly made anti-human rights statements. Such actions have led to serious doubts about whether such appointment practices are in line with the Paris Principles and the NHRCK Act. NHRCK Watch sent written questions regarding the statements to Commissioner Choi E-woo and Chairperson Lee Sung-ho of the NHRCK, and held a press conference on 22 November 2016 in protest. In his response, Chairperson Lee wrote, "each Commissioner may have his/her own individual views, hence it is not possible nor desirable to apply uniform standards. In particular, non-standing commissioners, in addition to their roles within the NHRCK, may also take on individual roles and engage in activities accordingly, thus it is difficult for the

⁶ Korean House for International Solidarity, "REPUBLIC OF KOREA: AN ACT OF DECEPTION", 2016 ANNI Report, pp. 186-190., <https://www.forum-asia.org/uploads/wp/2016/11/11.-South-Korea-Final.pdf>

⁷ <http://www.asiatoday.co.kr/view.php?key=20161029002317242>

NHRCK to take action against statements made by an individual Commissioner at an external event,” but he added, “the NHRCK is deeply concerned over the attacks on the 'sexual orientation' provision in the NHRCK Act.”

In an article published on 21 June 2017,⁸ Commissioner Lee Eun-kyung wrote that the use of the term "gender equality" instead of “equality of the two sexes” implies the acceptance of multiple genders and that this was a result of uncritically accepting the precedents of foreign countries. Also, Lee reiterated her negative stance and added, "if we are to accept 'various genders' that may replace 'men and women' and change the foundation of the family system, a consensus must be reached among the people through deep introspection and fierce debates.” It is problematic for a current NHRCK Commissioner to have perpetuated the gender dichotomy and denied the existence of sexual minorities through the media.

LGBTI rights were one of the red-hot issues during the presidential election. The conservative party candidates had always maintained an anti-sexual minority stance. However, the Democratic Party candidate Moon Jae-in also joined the opposition against the enactment of an anti-discrimination law, despite this being among his pledges in the 2012 presidential election. Moon said during a TV debate, "I do not like homosexuality." Despite Moon's highlighted experience as a human rights lawyer, Moon's “respect for sexual minority rights” but opposition to “same-sex marriage” greatly disappointed human rights organizations.⁹ The People's Party, which claims to be a centrist reform party, also reiterated its opposition to “same-sex marriage” and view to maintain the use of the term “equality of the two sexes” instead of "gender equality.”¹⁰ Only Sim Sang-jung of the Justice Party, a progressive party, emphasized on a TV debate that homosexuality is not a matter of support or opposition.

In the midst of the heated debate regarding anti-discrimination laws and homosexuality during the presidential election, the NHRCK issued a statement on 27 April 2017,¹¹ recommending that “the new administration should enact a comprehensive anti-discrimination act that prohibits discrimination based on sexual orientation and sex, disability, age, race, national origin, etc.” In addition, the NHRCK criticized the candidates' views on homosexuality and same-sex marriage, stating that “sexual orientation is not a matter of support or opposition.”

On 15 July 2017, the NHRCK participated for the first time as a state institution in the Queer Culture Festival which was held at the Seoul City Hall Plaza. However, Commissioners Choi E-woo and Lee Eun-kyung have continued to display anti-human rights attitudes. When reviewing the NHRCK's report, which was to be submitted to the UN Committee on Economic, Social and Cultural Rights for the consideration of the Republic of Korea's periodic report, at the Plenary Committee meeting held on 24 July 2017, Choi and Lee expressed the following opinions on the enactment of an anti-discrimination law. Lee said,

⁸ <http://www.kyeonggi.com/?mod=news&act=articleView&idxno=1365726>

⁹ <http://koreajoongangdaily.joins.com/news/article/article.aspx?aid=3032710>

¹⁰ <http://news.kmib.co.kr/article/view.asp?arcid=0011427835&code=61221111&cp=nv>

¹¹ <http://v.media.daum.net/v/20170427103555451>

"the report implies that a comprehensive anti-discrimination law should be enacted and it does not include any opposing views" and "instead we should point out that, in relation to economic, social, and cultural rights, serious health problems have been caused by same-sex intercourse." Also, Choi criticized the report and said, "I was heavily criticized because the NHRCK put up a booth at the Queer Culture Festival and I was seen as 'a person working for such an institution'" and "the report mentioned 'hate speech,' but I would rather like to ask what sort of revulsion the actions of the festival participants caused to the public." In response, NHRCK Chairperson Lee Sung-ho said, "the NHRCK can only head towards a direction that promotes human rights and economic, social and cultural rights" and added, "however, in addition to a number of Protestant organizations, influential politicians and the majority of the society still do not support the enactment of an anti-discrimination law, thus we should revise the report after finding a balance between these opinions."¹²

As such, there are still anti-human rights commissioners in the NHRCK who deny the existence of sexual minority rights, and as a result, the NHRCK is not able to fulfill its mandate in protecting the rights of sexual minorities.

2.3 NHRCK Reform

The constitutional reforms planned for 2018 would elevate the NHRCK to become a constitutional institution. However, voices have grown from within the NHRCK and civil society arguing that it is first necessary for the NHRCK to undertake introspection and implement reforms. The argument was that the status of the NHRCK should not be elevated without organizational introspection on its failure to act as an independent national human rights institution (NHRI) for the past 8 years.

Kim Hyung-wan, former Director-General of the NHRCK Human Rights Policy Division, wrote in an article published on 9 June 2017¹³ that "the strengthening of the status of the NHRCK cannot be achieved by the President or by authority, but by special attention given and efforts made by the NHRCK itself regarding independence, based on the trust of the citizens". He pointed out that in the previous administration; the so-called blacklist -where his name was also listed- was delivered to the NHRCK Secretary-General directly by the Presidential Office. Kim stated that without organizational introspection on the failure to act as an independent NHRI in the past, the NHRCK should not become a constitutional institution.

The NHRCK established an internal task force to begin preparations for reform plans, and on 13 June 2017, a media reported¹⁴ that NHRCK Secretary-General, Ahn Suk-mo, who had one year left in his term, had decided to resign in order to "make room for the younger generation." In relation to this, there were opinions that more specific changes would be needed for the NHRCK reforms such as appointing an external civil society figure as the new Secretary-General.

¹² <http://v.media.daum.net/v/20170725061204669>

¹³ <http://www.seoul.co.kr/news/newsView.php?id=20170609029005>

¹⁴ <http://www.yonhapnews.co.kr/bulletin/2017/06/12/0200000000AKR20170612181551004.HTML?input=1195m>

On 22 June 2017, with the NHRCK trade union at the forefront, the NHRCK employees held a panel discussion in the NHRCK premise and demanded that the NHRCK appoints an outsider as the Secretary-General. On 28 June 2017, NHRCK-Watch also held a press conference in front of the NHRCK and delivered the recommendations of reform tasks to the NHRCK.¹⁵

The core tasks for reform proposed by NHRCK-Watch are as follows:

1. Apologize for the past human rights violations and establish preventive measures;
2. Strengthen independence of the Commission and establish a candidate recommendation committee for selecting Commissioners;
3. Overcome bureaucratisation and appoint an outsider as the Secretary-General;
4. Strengthen transparency and accountability in operation and management;
5. Engage in substantial exchange with civil society and increase involvement in current human rights issues; and
6. Resolve the issue of non-regular workers within the NHRCK.

On 29 June 2017, the NHRCK issued a press release on the results of the activities of the three-week old task force.¹⁶ Besides proposing the establishment of an advisory group with the participation of external experts, the general direction of the proposals by the task force did not differ much from that of the reform tasks proposed by NHRCK-Watch. However, the NHRCK task force failed to provide a clear position regarding appointment of outsider as the Secretary-General.

In fact, appointment of outsider as the NHRCK Secretary-General had been in practice in the early years of the NHRCK. The rationale behind such practices was the consensus that the NHRCK Secretary-General needed to act as a bridge between the NHRCK and civil society. Accordingly, former Secretary-Generals such as Choi Young-ae (Director of the Korea Sexual Violence Relief Center), Kwak No-hyun (professor), and Kim Chil-joon (attorney) were outsiders that had the trust and respect of civil society. However, since Hyun Byung-chul was appointed as Chairperson of the NHRCK in 2009, the Secretary-General was selected from within the NHRCK. The regulations on the NHRCK operation were revised in 2013 to allow only the NHRCK employees to become Secretary-General. Such 'promotion from within' was criticized for being the embodiment of dysfunctional bureaucracy such as 'showing off' for promotions, buck passing, etc. Thus, it was pointed out that one of the reasons the NHRCK failed to fulfill its mandate was because the employees surrendered to the prevailing bureaucratism, which perpetuates the mentality of fighting for promotion at all cost.

The NHRCK was a topic of denunciation at the Jeju Human Rights Conference held from 29 June to 1 July 2017. The NHRCK and many human rights activists participated in the Jeju Human Rights Conference and a session titled 'The Role and Tasks of the NHRCK'

¹⁵http://www.khis.or.kr/spaceBBS/bbs.asp?act=read&bbs=notice1&no=472&ncount=448&s_text=&s_title=&pageno=1&basic_url=

¹⁶<https://www.humanrights.go.kr/site/program/board/basicboard/view?currentpage=6&menuid=001004002001&pagesize=10&boardtypeid=24&boardid=7601339>

was held on 1 July 2017. At this session, the head of the NHRCK Legislative Improvement Team Lee Bal-le, argued the NHRCK should become a constitutional institution. However, other panelists fiercely criticized the NHRCK. SARANGBANG activist Myung Sook pointed out that “the NHRCK must realize human rights values and policies in our society by issuing recommendations. Recommendations become meaningful only when the NHRCK gains trust of the society. Even the police have established a reform committee with outsiders, but the NHRCK is clamoring for elevation to a constitutional institution by implementing "self-reforms." Attorney Hwang Pil-kyu of the Korean Public Interest Lawyers' Group GONG-GAM said, “the elevation of the NHRCK to a constitutional institution is the right decision in principle, but the NHRCK will become a 'monster' if this is done at this point of time. The NHRCK should not try to go over this matter irresolutely by saying that the internal task force ‘was not able to address pending issues in an adequate and timely manner.’ There must first be adequate evaluations of the past.” In response to such criticisms, the NHRCK Policy and Education Bureau Chief Sim Sang-don said, “I agree to a certain degree that the NHRCK will become a 'monster' if it becomes a constitutional institution now. We are making efforts to create mechanisms to avoid such adverse effects.” Professor Hong Song-soo of Sookmyung Women's University, College of Law pointed out that “we should not try to put things back the way they were before 2008, but we must figure out how to recover the true function and role of the NHRCK”.¹⁷

On 15 July 2017, the NHRCK sent its responses to the reform tasks proposed by NHRCK-Watch. The NHRCK agreed with the points made by NHRCK-Watch and stated that it would accept the tasks. In particular, the NHRCK replied that it would consider appointing an outsider as Secretary-General if appropriate recommendations were provided.

On 20 July 2017, several member organizations of NHRCK-Watch and the NHRCK Chairperson Lee Sung-ho held a meeting, in which NHRCK-Watch requested the NHRCK to affirmatively implement reforms and re-emphasized that an outsider should be appointed as its Secretary-General. Lee stated that he would appoint an outsider if there was a suitable candidate.

On 14 August 2017, the NHRCK decided to appoint attorney Cho Young-sun as the Secretary-General at the Plenary Committee meeting. The NHRCK Act stipulates that the Chairperson requests the appointment of the Secretary-General after internal review, and the President then appoints the Secretary-General. Cho served as the Secretary-General of “Minbyun-Lawyers for a Democratic Society,” one of the most well-known human rights organizations in Korea, and he is a well-respected and trusted human rights lawyer in civil society. NHRCK-Watch expects Cho to skillfully lead NHRCK reforms.

¹⁷ <http://www.sisain.co.kr/?mod=news&act=articleView&idxno=29570>

3. Conclusion and Recommendations

Since the beginning of the Lee Myung-bak administration in 2008, the NHRCK has regressed in all areas, from its independence to human rights work. Since July 2009 when Ahn Kyung-hwan, then NHRCK Chairperson, resigned in protest of the government's downsizing of the NHRCK, the NHRCK has become a lapdog rather than a protector and promoter of human rights. Although the NHRCK maintained “A” status for the past 8 years, it has lost the trust of civil society. The number of complaints filed to the NHRCK had continuously declined and only began to increase again in 2017; indicating that the NHRCK has started regaining the people's trust only after the candlelight revolution.

Complaints by type in the first half of the last three years¹⁸

	Cumulative		Human rights violations		Discriminations		Others	
	Received	Handled	Received	Handled	Received	Handled	Received	Handled
January - June, 2017.	6,140	5,136	4,617	3,951	1,501	1,173	22	12
January - June, 2016.	4,810	4,660	3,826	3,727	972	922	12	11
January - June, 2015.	5,430	5,047	4,247	4,140	1,180	899	3	8

Korean civil society welcomes the pledges made and actions taken by the NHRCK to implement reforms, yet there are still many problems to be solved.

The most important task is to ensure that anti-human rights figures are no longer appointed in the NHRCK, as recommended by GANHRI. A system must be established to appoint Commissioners that will carry out their work in accordance with universal human rights standards, regardless of the administration. If not, the NHRCK is bound to repeat its past mistakes.

The current NHRCK Act still allows the President, the National Assembly, and the Supreme Court to appoint Commissioners without consultation with civil society. The establishment of an independent committee to recommend candidates for Commissioners must be stipulated by law. The NHRCK and civil society must proactively raise this issue to the Moon administration and the National Assembly.

Conservative Protestant groups continue to promote hatred towards sexual minorities through different campaigns. In particular, these groups have opposed the elevation of the NHRCK to a constitutional institution by criticizing the inclusion of "sexual orientation" as ground for non-discrimination in the NHRCK Act. Helping the NHRCK fulfill its

¹⁸ The NHRCK, The Statistics of Complaints · Counseling · Inquiries in the First Half of 2017.

mandates by protecting it from groups that attack the NHRCK unreasonably and increase their political leverage, is a new task that needs to be urgently undertaken by civil society. For the past 8 years, Korean civil society had given up their hopes on the NHRCK and kept a distance from the Commission. However, since the NHRCK has begun its reforms, civil society plans to fully participate and cooperate in the reform process. It is expected that if the NHRCK begins to show a passive stance in carrying out the proposed reform tasks, civil society will fiercely criticize the NHRCK as it did in the past.

The opportunity has risen for the NHRCK to comply with the Paris Principles and transform itself into a genuine NHRI that promotes and protects human rights, and we have been able to share this information through the ANNI report. ANNI has also played an important role in creating such opportunity. Moreover, ANNI sent a strong message to the NHRCK during the meeting between ANNI and the NHRCK which took place in March 2017.

We ask ANNI for its continued attention and solidarity so that the NHRCK may continue to implement the necessary reforms.

Recommendation to the Government of Korea:

The Government of Korea should establish an independent committee to recommend candidates for Commissioners in compliance with the recommendations by GANHRI, the NHRCK, and civil society. To achieve this, the Government should cooperate with the National Assembly to amend the NHRCK Act in consultation with civil society. The Government should also fully implement the recommendations of the NHRCK.

Recommendation to the National Assembly:

The National Assembly should pass amendments to the NHRCK Act to establish an independent candidate recommendation committee for Commissioners, in which the participation of civil society is ensured, as recommended by the GANHRI-SCA.

Recommendation to the NHRCK:

1. The NHRCK should strive to ensure an amendment to the NHRCK Act is passed to establish an independent committee to recommend candidates for Commissioners.
2. The NHRCK should accept criticisms of civil society and actively implement reforms.
3. The NHRCK should introduce and publicise international human rights standards to the Government, the National Assembly, and the general public, with an aim to promote the implementation of recommendations from the international community, including the UN, and make all efforts for their implementation.

TAIWAN: MOVING FORWARD WITH AN NHRI

Covenants Watch and Taiwan Association for Human Rights¹

1. General Overview and Context

Following the Sunflower movement, more and more young generation lost their trust and confidence in the Kuomintang (KMT), the ruling party between 2008 and 2016. This political change was reflected in the Presidential and legislative elections in 2016. The Democratic Progressive Party (DPP) took power for the second time (the first in 2000-2008), and Ms. Tsai Ing-wen became the first female President of Taiwan. It was also the first time for the DPP to have won the majority seats in the Parliament. President Tsai during her election campaign made many progressive promises, such as judicial reform, establishment of a national human rights institution (NHRI), constitutional reform, legalizing gay marriage, apology to the indigenous people, and protection of labour rights, etc. However, based on her performance in the first year in office, not all of these promises were given the same priority.

As the DPP became the majority party in the Parliament, many expected that the laws made by the KMT which were barriers to the realization of human rights would be soon swept away. Furthermore, some legislators were formerly NGO workers, and many activists in the Sunflower movement became assistants to the parliamentarians. However, the reforms came much slower than expected. For example, the *Assembly and Parade Act* was known in the past to unnecessarily restrict people's rights to expression and peaceful assembly, and was to be revised and became the *Assembly and Parade Protection Act*. However, the revision was stalled because non-governmental organisations (NGOs) and some DPP legislators could not agree on the articles on "prohibited areas" and "order to dismiss assembly". Also, the legislation on monitoring cross-strait trade agreements was also suspended in the Parliament. Finally, the DPP and President Tsai had supported the revision of Civil Code to legalize same-sex marriage, but the support weakened after the mobilization of protest by conservative religious groups. How determined the DPP is regarding the implementation of political reform promises remains to be seen.

Another pertinent issue is the constitutional reform, which may affect the path to the establishment of NHRI. President Tsai and the DPP are in favour of constitutional reform with the abolishment of two constitutional organs—the Control Yuan and Examination Yuan.² It seemed reasonable to expect that in the new Constitution, an NHRI would replace the Control Yuan. However, in October 2016, President Tsai suddenly decided to nominate another 11 members for the Control Yuan (to make up for the total of 29

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² Control Yuan members conduct ombudsman functions, and exercise the powers of impeachment, censure, audit and propose corrective measures. The Examination Yuan is in charge of matters of civil servants relating to examination, employment, registration, service rating, scale of salaries, promotion and transfer, security of tenure, commendation, retirement and pension.

members). It was not made clear by the DPP government how this nomination would affect the agenda on constitutional reform and the establishment of an NHRI.

In addition, some important human rights events in 2016 also exposed the lack of human rights protection mechanism in the government structure. Firstly, due to the confusion over the “right to housing” and the “right to property” by government agencies and the judiciary, the government has failed to protect victims against forced evictions. In fact, the government was the main stakeholder in many cases of forced eviction as it was trying to claim public lands occupied by informal settlers, some with complicated history of governmental licensing and leasing. Although the processes of forced eviction appeared lawful, and many cases were brought before the courts, the matter of the fact was that legal recognition and protection of the right to housing had been inadequate. Many prominent incidents of forced evictions took place in Kaohsiung city and Tainan city, and the Mayors of the two cities were both DPP members. Neither the KMT nor the DPP could resolve the institutional factors associated with forced eviction, which has allowed corporations and construction companies to reap the benefits of land deals and construction projects despite self-help organisations had gathered in front of the Presidential Office building on 25 September 2016 to protest against forced eviction and demand for the right to housing.

Secondly, President Tsai made a formal apology on behalf of the State to indigenous peoples, and set up a “Committee on the Transitional Justice of Indigenous People” chaired by the President herself. However, many issues remain unresolved, such as the environmental impact assessment of the development project of a holiday resort in TaiTung which was carried out without the free prior informed consent of the indigenous people, continued criminalisation of traditional hunting, mining in indigenous people’s land, and the non-recognition of indigenous peoples’ traditional territories in full. It seems that up to now the President’s apology has failed to bring about substantive changes to the rights of the indigenous peoples.

In January 2017, Taiwan held the review of the State Report on the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In the concluding observations of the review, the Review Committees re-emphasized the importance of NHRI and recommended the Government of Taiwan to establish a completely independent NHRI in accordance with the Paris Principles. In an immediate response, President Tsai offered to the Review Committees that a decision would be made within the year of 2017.

2. Proposals on Establishment of an NHRI

There was a concerted effort to establish an NHRI in the early 2000s, following the first transition of governmental power from the KMT to the DPP. However, the proposal initiated by the President’s Office encountered resistance from the Executive Yuan, the Control Yuan, and the Legislative Yuan. The efforts fizzled out after a few years. In 2009, the *Implementation Act* (The Act to Implement the ICCPR and the ICESCR) was enacted. The concluding observations and recommendations following the review of

State Reports on the implementation of the ICCPR and the ICESCR on 1 March 2013 stressed the importance for the Government of Taiwan to establish an NHRI. Subsequently, a 5-member task force was established under the Presidential Office Human Rights Consultative Committee (POHRCC), the highest authority on human rights policy in the government during President Ma Ying-jeou's administration in 2009-2016. The task force was mandated to study whether Taiwan should establish an NHRI and the organisational design of the NHRI. As the issue of NHRI have been discussed in Taiwan since 1999, a consensus on a commission-type of institution seemed to have been formed over the years. The remaining issue is where to place the NHRI within the governmental structure in line with the requirement of the Constitution.

The task force had several rounds of consultations with academics and NGOs in 2013-2014. They came to the conclusion that an NHRI should be established, but as to the organisational design, the task force was divided on three different proposals: (A) To set up a completely independent institution that is not attached to either of the Executive Yuan, Legislative Yuan, Judicial Yuan or affiliated with the Presidential Office; (B) An NHRI set up organisationally "under" the Presidential Office, but the President would have no influence over its operation; (C) An NHRI set up under the Executive Yuan.

A separate proposal by the Control Yuan (a collective ombudsman system) was sent to the POHRCC in January 2016. It should be mentioned that the Vice-President of the Control Yuan is also a member of the POHRCC. This proposal recommended that all members of the Control Yuan (each member has ombudsman duties) simultaneously serve as NHRI commissioners.

A key development took place in July 2016. During a POHRCC meeting, the Chairman of the POHRCC, who is also the Vice President of Taiwan, Chen Chien-jen, devoted one whole afternoon on the deliberation of the NHRI. POHRCC members discussed thoroughly the pros and cons of different proposals on setting up the NHRI. In the end, Vice President Chen asked POHRCC members to show their hands on which proposals they deemed acceptable. (Therefore, it was not a voting to decide on a definite proposal.) The proposals of establishing the NHRI under the Presidential Office and the Control Yuan enjoyed preference over the proposal of "independent commission" and the proposal to establish it under the Executive Yuan. However, there were no follow-up actions after the meeting.

In the second review of the State Report on the two Covenants in January 2017, the NHRI issue emerged again. This paragraph in the concluding observations and recommendations was quite a succinct summary: "9. In 2013, the Review Committee recommended the establishment of an independent national human rights commission in accordance with the Paris Principles as a priority objective. Despite various initiatives taken in the period under review, Taiwan has not yet decided whether it should establish a completely independent institution or to subordinate it to either the Presidential Office or the Control Yuan. The Committee recommends establishing, without further delay, a completely independent and pluralistic national human rights commission in full compliance with the Paris Principles."

In 2017, two parliamentarians handed in new NHRI proposals to the Legislative Yuan. One came from Legislator Yu Mei-Nu, who has been working closely with Covenant Watch (CW) and the Taiwan Association for Human Rights (TAHR) on an NHRI bill in recent years. Her bill, which was modified from the bill that she sent in 2014 and was prevented from entering its first reading by KMT legislators, proposed to set up the NHRI under the Presidential Office. The other proposal was put forward by Legislator Koo, who was formerly President of TAHR. His proposal was to set up the NHRI under the Control Yuan with only 11 of the 29 members of the Control Yuan become full-time NHRI commissioners, and about a third of the Control Yuan staff to be re-assigned to the NHRI. In effect, Legislator Koo's proposal would split the Control Yuan into two functioning units. Both bills passed their first reading in the parliament in early July 2017.

To ease the discussion hereafter, the proposal to establish the NHRI under the Presidential Office will be abbreviated as PO, the proposal to establish the NHRI under the Control Yuan will be abbreviated as CY while the proposal of Legislator Koo will be abbreviated as LK.

Based on the three proposals that are currently being considered by the Government and the Legislative Yuan, the NHRI will most likely take the following shape:

(a) Legal Basis of the Draft Enabling Law

The legal foundation of an NHRI can be established through an act of Parliament or amendments to the Constitution. However, because of the prohibiting high threshold of constitutional reform, all the three proposals for establishment of an NHRI that are being considered (PO, CY, and LK) recommend the legal foundation of the NHRI to be established through an act of Parliament.

(b) Selection and Appointment

- i. The selection process for new members of the NHRI: In the draft laws, the members of NHRI are to be nominated by the President and approved by the Parliament. In the Parliament, there can be public hearings at the discretion of Parliament members to initiate public participation and scrutiny, but the nomination and evaluation procedures were not explicitly specified, and public participation was not guaranteed.
- ii. The qualifications for membership: The members are to meet one of the three requirements: (1) having worked as a member of NGO with particular contribution to the advancement of human rights, (2) a scholar with specialty in human rights, (3) a judge, prosecutor, lawyer or a person affiliated with other legal profession. The criteria were predetermined and publicly available, but there remain some room of interpretation as to, for example, the "particular contribution to the advancement of human rights". It was left to the discretion of the President during nomination and the Parliament's decision to endorse.
- iii. Pluralism of the composition of the NHRI: All the different versions of draft law, with the exception of the one proposed by the Control Yuan, included

pluralism in terms of gender, ethnicity, and areas of expertise. No specific indication was given as to representation of minorities and vulnerable groups such as indigenous peoples or persons with disabilities.

- iv. Term of the office: In the draft laws the term is for 6 years, and there is a clear process for removal or impeachment. Removal and impeachment cannot take place unless the member of the NHRC is penalised under criminal law, impeached for misconduct as a governmental official, or has a severe mental disability.
- v. The appointments of commissioners: In the three proposals, all members of the NHRC will be full-time commissioners. In the LK proposal, the commissioners are prohibited from participation in any activities of political parties, government, or public enterprises, including serving in a formal position or as consultant. In the PO proposal (Article 4), the commissioners cannot work for political parties or hold a position in the government. The Control Yuan has proposed that all the 29 ombudsmen will serve as human rights commissioners.
- vi. Mandates of the NHRI: The NHRC can start investigation on its own initiative or act upon a complaint; it has access to documents, witnesses, and locations. In the draft bills of the NGO and POHRCC, no elements of the State are beyond the scrutiny of the NHRI, there are no exceptions or limitations on “national security” grounds, and no exclusion of armed forces, police, prisons, etc. This is already a function of the Control Yuan, and likely to be preserved if the NHRC is set up under the Control Yuan. Nevertheless, there is a concern for the constitutionality of the PO proposal. The NHRI may not be to play the role of checks and balances of powers, especially the executive branch if it is placed under the Presidential Office as the Presidential Office may seek to constraint the powers of NHRI.

3. Key Initiatives Undertaken by Civil Society

Civil society in Taiwan has advocated for the establishment of a National Human Rights Commission (NHRC) since 1999. The actions of the government in recent years were primarily a response toward the concluding observations and recommendations of the review of the State Reports on the implementation of the ICCPR and the ICESCR in 2013. With the election of the new Legislative Yuan (which took office in March 2016), there was an expectation that the new ruling party, the DPP, will be more proactive in dealing with human rights issues. However, as discussed in Section 2 above, the progress has been slow.

In contrast to the slow motion within the government, CW reviewed and updated the civil society version of the NHRC bill (first edition in 2002 and revised in 2008), and sent the bill to the Legislative Yuan through Legislator Yu in December 2014. However, the bill never made it to the plenary session as it was blocked by KMT lawmakers.

As discussed in the 2015 Asian NGO Network on National Human Rights Institutions (ANNI) Report, in preparation for the establishment of an NHRI, the POHRCC convened four panel sessions of consultation between May and July 2014. The major points of

debate were: (1) The possible overlaps and even conflicts among governmental bodies, especially the power of investigation. It was argued that the power of NHRI to conduct investigation would create conflict of jurisdiction between NHRI and the judicial system, or between NHRI and the Control Yuan. (2) Some scholars insisted that the NHRI did not fit into the traditional division of power: legislative, judiciary, and executive. (3) Some insisted that it would require a constitutional reform to place the NHRI in the Constitution in order to give it a strong legitimacy. Others thought that a parliamentary act would be quite enough. (4) Some insisted that the Control Yuan could play the roles of the NHRI, and there was no need for a new institution. This view was not well received, partly because of the dismal track record of the former. (5) There was no consensus on where to place the NHRI within the governmental structure. (6) It was mentioned that the government had gone through a series of downsizing in recent years, and it was not the right time to talk about creating a new institution. In the intervening three years, no action was taken by either the government or the Legislative Yuan (LY) to address these concerns.

In May 2016, CW made minor modifications of the civil society's version of the bill and requested Legislator Yu to submit again to the Legislative Yuan. However, due to the slow progress and the failure of the Government to make decision, CW decided to bring in the expertise of regional networks.

In the strategic planning meeting in 2017, CW decided to take advantage of its connection with international and regional networks. A request was made to ANNI proposing ANNI to send a scoping mission to Taiwan with the aim to accelerate the campaign. Following the review of the State Reports on the Covenants, diplomats of foreign offices in Taipei also offered their assistance.

In addition, CW identified the President (through the POHRCC), the Legislature, and the Control Yuan as the primary targets in the campaigns and advocacy on the establishment of an NHRI. The secondary targets will be the legal scholars and civil society organisations.

CW decided to take the following actions in future:

- (a) Convince the POHRCC to invite international experts to come to Taiwan and help assess the situation and provide their expert opinions on the establishment of NHRI. In addition to the assessment, it is important that the POHRCC designate a task force supported with staff to outline the mandates of the NHRI and study legal and administrative arrangement, in particularly, the interface of the NHRI with other governmental agencies. For example, the current draft bills on NHRI do not explicitly regulate how it should interact with the Legislative Yuan and the Judicial Yuan.
- (b) Continue to keep a collaborative partnership with legislators on human rights issues.
- (c) Communicate and coordinate with the Control Yuan on the issues of NHRI with the aim of clarifying the stark differences between an NHRI and the Control Yuan and to refute the argument that "there is no need to establish an NHRI because

- there is already a Control Yuan in Taiwan”.
- (d) Hold activities including public talks and to produce educational materials on social media in order to raise public awareness on NHRI among the public.

4. Conclusion and Recommendations

President Tsai’s administration has demonstrated stronger political will towards the establishment of an NHRI than her predecessors; and the envisaged institution might comply with the Paris Principles. There is a need to jump-start the governmental processes, and an assessment by a delegation of international experts may provide the necessary impetus for the Government to move forward. In addition to substantive advices, the international delegation may also boost the Government’s interest to ensure the NHRI established is in line with international human rights norms.

The public is not informed enough about the reason to establish an NHRI, its functions and potential contributions. With a strong political will, the Legislative Yuan might be able to pass the *NHRC Act*, but the idea of an independent and effective NHRC may not go through the whole process unscathed, for example, the NHRC may be criticised as redundant or ineffective, and the budget/personnel requirement may be compromised. Damages can only be minimised if the Government deliver carefully well-crafted position statements.

CW and TAHR will continue to champion the establishment of NHRI. With the support and from international and regional organisations, the two organisations strongly believe the establishment of an NHRI in Taiwan is possible to achieve.

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);
- Bytes for All – Pakistan;
- Cambodian Human Rights and Development Association (ADHOC) – Cambodia;
- 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;
- Civil Society and Human Rights Network (CSHRN) – Afghanistan;
- Commission for Disappearances and Victims of Violence (KontraS) – Indonesia;
- Covenant Watch-Taiwan
- 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 Organization of Kurdistan (ALKARAMA);
- 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;
- Peoples' Empowerment Foundation (PEF) – Thailand;
- Philippine Alliance of Human Rights Advocates (PAHRA) – Philippines;
- Potohar Organization for Development Advocacy (PODA) – Pakistan;
- Progressive Voice-Burma;
- Suara Rakyat Malaysia (SUARAM) – Malaysia;
- Universal Periodical Review - Human Rights Forum (UPRHRF) – Bangladesh;

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