

# 2018 ANNI REPORT



On the Performance and Establishment  
of National Human Rights Institutions  
in ASIA

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Asian NGO Network  
on National Human Rights Institutions 

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## On the Performance and Establishment of National Human Rights Institutions in Asia

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



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## Foreword

The Asian Forum for Human Rights and Development (FORUM-ASIA), as the Secretariat of the Asian NGO Network on National Human Rights Institutions (ANNI), is delighted to present the publication of the 2018 ANNI Report on the Performance and Establishment of the National Human Rights Institutions in Asia. We would like to express our sincere gratitude and appreciation for all the indefatigable work carried out and the dedication shown by all 36 member-organisations of ANNI. We would also like to extend our sincere gratitude to the NHRIs that have contributed to the publication.

Similarly to what we have been doing for more than ten years, the 2018 ANNI Report is based on country reports with analysis of the performance of each country's national human rights institution, or the progress made towards the possible establishment of a national human rights institution, during 2017 and the first quarter of 2018. The country reports are structured according to ANNI Reporting Guidelines that were consulted on, discussed, and framed by the ANNI members at the 11th Regional Consultation of ANNI held in Kathmandu, Nepal in March 2018.

The 2018 ANNI Report analyses the performance and effectiveness of national human rights institutions across the Asia-Pacific region by employing the lens of the Paris Principles together with the General Observations of the GANHRI Sub-Committee on Accreditation (SCA) including, for instance, an examination of the mandates of the NHRIs, the pluralism of the national human rights Commissioners, and NHRIs' engagement with civil society.

We believe that this ANNI Report will continue to serve as a potent advocacy tool to enhance the performance and effectiveness of NHRIs as public defenders and protectors of human rights on the ground.

FORUM-ASIA would like to acknowledge the contributions of all friends and colleagues to the publication of this annual report, namely: Democracy Development, Burma Monitor Group, Future Light Center, Generation Wave, Genuine People's Servants, Human Rights Defenders and Promoters Network (HRDP), Human Rights Foundation of Monland, Kachin Women's Association – Thailand, Loka Ahlinn, Progressive Voice, Synergy (Social Harmony Organization), and Smile Education and Development Foundation (Myanmar), Chalida Tajaroensuk and Thai Coalition for National Human Rights Institutions (Thailand), Chew Chuang Yang and Sevan Doraisamy (Malaysia), Commission for Disappearances and Victims of Violence (KontraS), Indonesian Human Rights Monitor (IMPARSIAL), Institute for Policy Research and Advocacy (ELSAM), and Indonesian NGO Coalition for International Human Rights Advocacy (HRWG) (Indonesia), Jose Pereira and Jose Moniz (Timor-Leste), Nir Lama and Rose Trajano (Philippines), Bijay Raj Gautam, Rajesh Mishra, and Madan Paudel (Nepal), Ashiqur Rahman, Adilur Rahman, and Odhikar (Bangladesh), Shahinda Ismail and Ahmed Naaif Mohamed (Maldives), Haroon Baloch and Marvi Mumtaz (Pakistan), Song-Lih Huang, Yibee Huang, Eeling Chiu, and Yi-hsiang Shih (Taiwan), Urantsooj Gombosuren, Mandkhaitsetsen Urantulkhur, and Tumenbayar Chuluunbaatar (Mongolia), and Hyun-Phil Na (South Korea).

This report would not have happened without the efforts of our editor, Heather Collister, who worked closely with the ANNI Secretariat. Our sincere thanks extend to the ANNI advisors,

Dr. Khoo Ying Hooi, Prof. Nohyun Kwak, Rosslyn Noonan, and Sushil Pyakurel for the insightful inputs. Our thanks are also due to Sutawan Chanprasert, National Human Rights Institution (NHRI) Programme Officer, Shanna Priangka Ramadhanti, National Human Rights Institution (NHRI) Programme Associate, and Chertalay Suwanpanich, National Human Rights Institution (NHRI) Programme Intern, for inputs and coordination throughout the publication. And special thanks to other colleagues who have been part of the process. Finally, we would like to acknowledge the financial support from the European Union in the publication of this report.



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

## Glossary

**AIHRC:** Afghanistan Independent Human Rights Commission

**CHRP:** Commission on Human Rights of the Philippines

**GANHRI:** Global Alliance for National Human Rights Institutions, formerly known as the International Coordinating Committee of National Human Rights Institutions (ICC)

**General Observations:** The SCA develops General Observations on interpretative issues regarding the Paris Principles

**HRCM:** Human Rights Commission of the Maldives

**HRCSL:** Human Rights Commission of Sri Lanka

**Komnas HAM:** The National Commission on Human Rights of Indonesia (Indonesian: *Komisi Nasional Hak Asasi Manusia*)

**MNHRC:** Myanmar National Human Rights Commission

**NCHR:** National Commission for Human Rights Pakistan

**NHRCI:** National Human Rights Commission of India

**NHRCB:** The National Human Rights Commission of Bangladesh

**NHRCK:** National Human Rights Commission of Korea

**NHRCM:** National Human Rights Commission of Mongolia

**NHRCN:** The National Human Rights Commission of Nepal

**NHRCT:** National Human Rights Commission of Thailand

**NHRI:** National human rights institution

**Paris Principles:** The United Nations Paris Principles provide the international benchmarks against which NHRIs can be accredited by GANHRI

**PDHJ:** The Office of the Provedor for Human Rights and Justice, or *Provedoria dos Direitos Humanos e Justiça*, is the NHRI of the Democratic Republic of Timor-Leste

**SCA:** Sub-Committee on Accreditation; the GANHRI, through the SCA, reviews and accredits national human rights institutions in compliance with Paris Principles

**SUKAHAM:** The Human Rights Commission of Malaysia (Malay: *Suruhanjaya Hak Asasi Manusia Malaysia*)



## **EXECUTIVE SUMMARY**

This annual report of the Asian NGOs Network on National Human Rights Institutions (ANNI) is being published for another year. As important national human rights mechanisms that act as a bridge between the state agencies and public, it is crucial to have independent and effective NHRIs that are in line with the Paris Principles. The 2018 ANNI Report particularly highlights the performance of the NHRIs in the region according to the Paris Principles and the 2013 Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation (GANHRI-SCA) General Observations, since 2018 marks the 25<sup>th</sup> anniversary of the Paris Principles.

The report comprises 13 chapters written by ANNI members, with each member authoring a chapter based on their insights and advocacy. Regarding those countries that have NHRIs, ANNI has identified six criteria under which an NHRI should be assessed, according to the Paris Principles and General Observations, which are (1) broadness of mandate, (2) autonomy, (3) independence, (4) pluralism, (5) adequate funding, and (6) adequate powers of investigation.

Taiwan is the only chapter featured in this year's ANNI report in respect to those countries that are without NHRIs. Although the institution is not yet established, ANNI has seen progress towards the establishment of an NHRI in Taiwan in recent years and hopes that an institution that complies with the Paris Principles can be established in a timely manner.

The aim of this report is to help the audience better understand to what extent the NHRIs in the region are in line with the international standards mentioned, as well as to strengthen understanding of the Paris Principles and General Observations. It also aims to help readers to see that the Paris Principles can apply broadly to the situation of NHRIs in these countries and territories, and that there are more challenges in some countries than others when it comes to NHRIs being compatible with the Paris Principles. ANNI hopes that the report serves its purpose.

## **METHODOLOGY**

This report is written by ANNI members situated in countries in which they are carrying out national human rights institution (NHRI) advocacy. The report is written on the basis of both first-hand experiences from the members' NHRI advocacy and in-depth interviews with NHRIs and stakeholders, as well as existing secondary sources. Some chapters are integrated with comments from the National Human Rights Commission (NHRC) of that country where the NHRC responded to the members contacting them and sending the report to them for their consideration. Where chapters do not have comments from the NHRI of that country, it is because those NHRIs did not respond. Despite feedback from NHRIs, the report retains its independence by being cross-checked by the editorial team for accuracy. Some chapters are also written by more than one author which helps with the factual accuracy of the content. The analysis in this report is based primarily on the Paris Principles and the 2013 General Observations.

## **KEY RECOMMENDATIONS**

1. The composition of the NHRIs' Commissioners should reflect diversity. It should also consider gender-balance and include representatives of those who are minorities.
2. The selection and appointment process of the NHRIs' Commissioners should be transparent. The Commissioners should be selected based on their human rights experience and background. The appointment and selection of a Commissioner should not be hindered because they hold politically uncomfortable individual human rights stances that are in accordance with international human rights standards.
3. NHRIs should be encouraged to work independently on human rights protection and promotion. An NHRI should have a broad enough mandate to be able to work independently.
4. Due to a shared pattern in the region whereby NHRIs have challenges dealing with state actors such as the military and police forces, governments should ensure that NHRIs are granted powers to investigate allegations against these state actors. The composition of NHRIs should not include as Commissioners members of the military, police officers, or individuals who might have influence on the independence of the institution.
5. NHRIs should be granted adequate funding and have financial independence in their operations. Their expenses should be reviewed by a justified mechanism that does not hinder their independence in terms of the protection and promotion of human rights.
6. NHRIs should be granted adequate powers of investigation and they should have some power to enforce the recommendations that come from those investigations.



## ANNI Members in the Region :

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

### Northeast Asia

- Korean House for International Solidarity (KHIS)  
**South Korea**
- Joint Movement for NHRI and Optional Protocols (JMNOP)  
**Japan**
- Hong Kong Human Rights Monitor (HKHRM)  
**Hong Kong**
- Covenants Watch  
Taiwan Association for Human Rights (TAHR)  
**Taiwan**
- Centre for Human Rights and Development (CHRD)  
**Mongolia**

### Southeast Asia

- Cambodian Human Rights and Development of Association (ADHOC)  
Cambodian League for Promotion and Defence of Human Rights (LICADHO)  
Cambodian Working Group for the Establishment of an NHRI (CWG)  
**Cambodia**
- Commission for Disappearances and Victims of Violence (KontraS)  
Indonesian NGO Coalition for International Human Rights Advocacy (HRWG)  
Institute for Policy Research and Advocacy (ELSAM)  
Indonesian Human Rights Monitor (IMPARSIAL)  
**Indonesia**
- Education and Research Association for Consumer Education (ERA Consumer)  
Suara Rakyat Malaysia (SUARAM)  
**Malaysia**

- Judicial System Monitoring Program (JSMP)  
**Timor-Leste**
- Justice for Peace Foundation (JPF)  
Peoples' Empowerment Foundation (PEF)  
**Thailand**
- Lawyers' League for Liberty (LIBERTAS)  
Philippine Alliance of Human Rights Advocates (PAHRA)  
**Philippines**
- Progressive Voice (PV)  
**Myanmar**

### South Asia

- Ain o Salish Kendra (ASK)  
Universal Periodic Review-Human Rights Forum (UPHRF)  
Odhikar  
**Bangladesh**
- All India Network of NGOs and Individuals Working with National and State Human Rights Institutions (AINNI)  
**India**
- Bytes for All (B4A)  
Potohar Organization for Development Advocacy (PODA)  
**Pakistan**

- Civil Society and Human Rights Network (CSHRN)  
**Afghanistan**
- Informal Sector Service Center (INSEC)  
**Nepal**
- Law and Society Trust (LST)  
**Sri Lanka**
- Maldivian Democracy Network (MDN)  
**Maldives**

### Middle East

- ADVAR  
Defenders of Human Rights Centre  
International Campaign for Human Rights in Iran  
**Iran**
- Human Rights Organisations of Kurdistan (Alkarama)  
**Kurdistan\***

\*The area cannot be specified

## REGIONAL OVERVIEW

This regional overview is the analysis of the Asian NGOs Network on National Human Rights Institutions (ANNI) which has witnessed the trends, challenges, and achievements that NHRIs in the region have shared in 2017 and early 2018. The areas of adequate powers of investigation, engagement with civil society, pluralism, and adequate funding are highlighted in this overview, which aims to provide the audience with a better understanding of the performance of NHRIs in accordance with the Paris Principles and the General Observations of the Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation (GANHRI-SCA). In Northeast Asia, the National Human Rights Commission of Mongolia (NHRCM) and the National Human Rights Commission of Korea (NHRCK) are those NHRIs that have been accredited with ‘A’ status by GANHRI-SCA, while Taiwan is still in the process of establishing an NHRI that is in line with the Paris Principles. In Southeast Asia, the National Human Rights Commission of Malaysia (*Suruhanjaya Hak Asasi Manusia Malaysia* - SUHAKAM), National Human Rights Commission of Indonesia (*Komisi Nasional Hak Asasi Manusia* - Komnas HAM), The Office of the Provedor for Human Rights and Justice (*Provedoria dos Direitos Humanos e Justiça* – PDHJ), and the Commission on Human Rights of the Philippines (CHRP) have received ‘A’ status. Those that have been received ‘B’ status and need to improve their performance are the Myanmar National Human Rights Commission (MNHRC) and the National Human Rights Commission of Thailand (NHRCT). In South Asia, the Human Rights Commission of Sri Lanka (HRSL) has recently been moved from ‘B’ status to ‘A’ status in the May 2018 accreditation. Others that have ‘A’ status are the National Human Rights Commission of India (NHRCI), the National Human Rights Commission of Nepal (NHRCN), and the Afghanistan Independent Human Rights Commission (AIHRC). The National Human Rights Commission of Bangladesh (NHRCB) and the Human Rights Commission of the Maldives (HRCM) are still ranked with ‘B’ status.

Some NHRIs face the challenge of having limited mandates. There are also gaps between the mandate itself and practice. In South Asia, the NHRCB was reconstituted under the National Human Rights Commission Act 2009 as a “statutory independent body” with a broad mandate to promote and protect human rights. The mandate under Section 12 of the 2009 Act is considered comprehensive in terms of human rights promotion and protection, but the role and powers of the NHRCB are still limited to a certain extent. Despite being given *suo moto* power, it does not have the power to conduct formal investigations into allegations against state actors such as the police, military, and security forces. It can only make recommendations to the Ministry of Home Affairs to investigate and take action against such allegations of human rights violations. The Commission conducted only five fact-finding missions into human rights violations from 2016 – 2018. In Pakistan, even though the National Commission for Human Rights Act (NCHR Act) grants the NCHR enough power in terms of investigatory powers, the Commission’s practice of the provided mandate is being hindered by many factors including financial constraints, interference in its administrative affairs, its inability to investigate human rights violations against military and intelligence agencies, and absence of adequate staff and technical experts. In Nepal, the national human rights commission’s powers are purely recommendatory. In Southeast Asia, the challenges also happen in terms of gaps between the mandate and practice. Despite the MNHRC having a relatively broad mandate, the Commission has chosen to interpret it in a limited manner. It

does not act properly to respond to the serious human rights violations in the country, particularly in the case of the Myanmar military's actions towards the Rohingya, deemed by many as a "crime against humanity". Meanwhile, the MNHRC's neighbours in the region, SUHAKAM and the CHRP, also have challenges in their mandates. However, in these cases, while their mandates are limited in certain areas the Commissions have chosen to interpret those mandates in a broad manner to circumvent the gaps. In general, while many of the NHRIs are given adequate powers to investigate cases related to human rights violations, they cannot do much beyond providing recommendations. Another common trend that is shared between many NHRIs is that they are limited in how much they can investigate in cases that involve state actors, especially the military or police forces, as alleged perpetrators.

In terms of engagement with civil society, several national human rights institutions in Northeast Asia and Southeast Asia have positive engagement with civil society. In Northeast Asia, the NHRCK meets formally twice a year with representatives from civil society and has cooperated with civil society on a draft law on human rights defenders. The engagement of the NHRCK with civil society has also improved in 2017. The new Chairperson of the NHRCK has been appointed for the first time through the Candidate Recommendation Committee, a Committee created in response to recommendations from GANHRI-SCA, and which has the participation of civil society. The Commission also works with civil society in terms of responding to the issues of discrimination and hatred against minorities. In Southeast Asia, the National Human Rights Institutions of Myanmar, Malaysia, Indonesia, and the Philippines also show greater levels of engagement with civil society. The MNHRC has made a commitment to develop regular communication with civil society and is cooperating with human rights organisations working on behalf of political prisoners by consulting with them on a draft prison law. SUHAKAM also collaborates with human rights organisations on advocacy, and Komnas HAM has been more open to receiving inputs from civil society regarding human rights violations. In terms of the Philippines, the relationship between the CHRP and civil society has been strengthened through the change of leadership in the Commission. In South Asia, the NHRCN has created internal consultative mechanisms with NGOs on national issues and conducted many collaborations with civil society organisations (CSOs).

Although there are some improvements in terms of engagement with CSOs, some NHRIs have not earned their trust. In Southeast Asia, the MNHRC, despite its efforts to engage more with civil society, still cannot earn its trust due to key factors such as an opaque selection process, lack of pluralism in its membership, the unwillingness to investigate major abuses by the Myanmar military, and the backgrounds of the Commissioners which include two former military personnel. Many of the Commissioners do not have adequate experience in human rights work which affects their commitment to the universality of human rights. The NHRCT has the same problem. Most of the Commissioners lack a proven record of human rights work. Komnas HAM is also facing challenges from lack of trust from the public and civil society after allegations of corruption. However, it has made efforts to rebuild public trust through a process of institutional restructuring under the new team of Commissioners. The issue of public trust is also problematic in South Asia. The NHRCN, NHRCB, HRCM, and NCHR are seen as deficient in their performance in protecting and promoting human rights.

Moving onto pluralism, there are positive developments in terms of pluralism seen in several NHRIs across the region. In Northeast Asia, the NHRCK, for the first time in its 18 years of operation, has a female Chairperson without a legal background and with proven experience in human rights. Other NHRIs also show gender-balance in the composition of their

Commissioners such as the NHRCB, NCHR, HRCM, SUHAKAM, the NHRCT, and the CHRP. However, despite some positive developments, many NHRIs still need to improve in terms of the diversity of their Commissioners. The key factor that hinders NHRIs from achieving pluralism in accordance with the Paris Principles is the selection and appointment process where many NHRIs share the pattern of a non-transparent procedure. GANHRI-SCA has recommended the NHRCM and NHRCK to improve the selection process of the Commissioners to make it more transparent and independent. This is a problem shared by NHRIs in other regions such as the MNHRC, SUHAKAM, and Komnas HAM, which have no requirement in law for the selection procedure to be transparent. There is also a conflict of interest in the composition of the MNHRC due to the background of the Commissioners, as two are of them are former military personnel. ANNI has observed that the MNHRC is represented by only one woman out of a total of ten Commissioners even though Section 7(c) of the MNHRC Law stipulates that selection must “ensure the equitable representation of men and women and of national races”. In terms of Indonesia, the existing procedures leave Komnas HAM with hardly any diversity in its composition. To appoint a new set of Commissioners, the existing members of Komnas HAM have to send the list of candidates nominated to be the next Commissioners to the House of Representatives. The House will then select from the list. This hinders the independence of the appointment and selection process since it reveals that Komnas HAM does not have any authority to select its own members. In the Maldives, the HRCM has long been criticised for the composition of its members due to the Constitution of the Maldives which requires all the Maldivian citizens to be Muslim. This has resulted in the HRCM’s own law which also requires all the Commissioners to be Muslim. In Nepal, the NHRCN’s founding law contains only a generic requirement on inclusiveness. The current Commission has only one woman out of six Commissioners.

Another trend that is shared among NHRIs in the region is the lack of adequate funding. Several NHRIs in the region have experienced inadequate funding which prevents their operations from being fully effective. In South Asia, the budget for the NHRCB is not included in the national budget. This has resulted in the NHRCB lacking autonomy over how it spends its budget since all expenses must be approved by the Government. A similar situation has happened in Pakistan where the budget of the NCHR has to be approved by the Parliament but where in practice the Government has been interfering in the financial allocation. The HRCM too does not receive adequate funds to fulfil its mandate. Similarly, in Southeast Asia, the MNHRC, SUHAKAM, and the PDHJ do not receive adequate funding to fulfil their mandates. The worst case happened in the Philippines when the House of Representatives voted for the CHRP’s budget to be cut. However, the decision was overturned due to pressure from civil society, the international community, and the public. In terms of Northeast Asia, even though the budget of the NHRCM was increased in 2017, it was subsequently amended by the Ministry of Finance, a process which can undermine the autonomy of the Commission.

In terms of achievements of NHRIs, ANNI sees some significant moves from NHRIs in many areas during the previous years. In terms of business and human rights, the NHRCK recommended the Government to establish a National Action Plan (NAP) on Business and Human Rights in 2016 and has followed up with the development of the plan since early 2017. In Thailand, the NHRCT has done the same in terms of providing recommendations for the NAP on Business and Human Rights to the Cabinet in 2018, in line with the United Nations Guiding Principles on Business and Human Rights (UNGPs). The NHRCT has also expended a great deal of effort on the issue of extraterritorial investments in ASEAN

countries. In 2018, it will host a meeting as Chair of the Southeast Asia National Human Rights Institution Forum (SEANF), focusing particularly on this issue. Meanwhile, the NHRCB has taken in hand the drafting of the Rules for the Child Marriage Restraint Act 2017 in Bangladesh. In Pakistan, the NCHR has gained ground on several human rights themes including enforced disappearances and has been proposing amendments to the problematic blasphemy laws of the country since 2017. In Southeast Asia, SUHAKAM and the CHRP perform their function as independent bodies by challenging some of the government's stances. The CHRP has been critical of the extrajudicial killings carried out as part of the anti-drug campaign by the current Philippine administration, while SUHAKAM has challenged the Government's policy on statelessness and education based on the Convention on the Rights of the Child. It also addressed the issue of enforced disappearances and investigated the matter based on the International Convention for the Protection of All Persons from Enforced Disappearances. In Northeast Asia, the NHRCM submits specific recommendations to the Government on legislation. It also took the initiative to draft an Anti-Discrimination Act legislating against the discrimination faced by minorities.

Regarding those countries without NHRIs, ANNI has seen progress towards the establishment of an NHRI in Taiwan in recent years. ANNI has worked with members in Taiwan to advocate for this outcome, and ANNI representatives conducted an assessment mission on the establishment of an NHRI in Taiwan in 2017, as a result of which a report was presented to the President's Office Human Rights Consultative Committee (POHRCC). Aside from Taiwan, ANNI hopes that in the future it can witness progress on the establishment of NHRIs in Hong Kong, Japan, and other states that do not have NHRIs in their countries or territories, as lack of NHRIs has negative consequences on human rights protection and promotion.

In conclusion, while there have been some positive developments, there are also some challenging areas where NHRIs still need to improve. Both internal and external factors play important roles in affecting whether NHRIs are able to live up to the criteria stated in the Paris Principles and General Observations. Despite these challenges, especially from the external factors, it is important for NHRIs to take up stances on human rights issues, which can start with a set of Commissioners that have a proven record of human rights work and experience. In particular, this demands Commissioners who have enough experience to challenge their governments on policy in order to make progress on human rights development in the country. However, this cannot happen if legislation does not enable the NHRI to function effectively in accordance with the Paris Principles. NHRIs cannot survive on their own without support from the state in terms of their powers and funding. All stakeholders need to work together to achieve an effective NHRI.



## **SOUTHEAST ASIA OVERVIEW**

Globally, there are a total of 122 NHRIs, with six in Southeast Asia. Singapore, Brunei, Cambodia, Laos and Vietnam are the remaining five countries in the Southeast Asia region that have yet to establish an NHRI. Over the years, NHRIs have been conferred a certain degree of recognition in the international human rights system, with formal roles and rights given to them.

The six NHRIs established in the Southeast Asia region are the Commission on Human Rights of the Philippines (CHRP) in 1987, the Indonesia National Commission on Human Rights (Komnas HAM) in 1993, SUHAKAM in Malaysia in 2000, the National Human Rights Commission of Thailand (NHRCT) in 2001, the Provedor for Human Rights and Justice of Timor-Leste (PDHJ) in 2004, and, the latest, the Myanmar National Human Rights Commission (MNHRC) in 2011. Among these NHRIs, four are accredited with ‘A’ status by the Global Alliance on National Human Rights Institutions Sub-Committee on Accreditation (GANRHI-SCA), which reviews and accredits NHRIs in compliance with the Paris Principles, while the MNHRC and the NHRCT are accredited with ‘B’ status.

The year 2018 is particularly important as we celebrate the 25<sup>th</sup> anniversary of the Paris Principles. The Paris Principles provide the departure point for discussing the performance of NHRIs. Devised in 1991 in Paris and adopted by the United Nations General Assembly in December 1993, the Paris Principles, while open to debate, are recognised as an important document for all NHRIs because they provide an international standard for such institutions. NHRIs are statutory bodies with specific powers and a mandate to promote and protect human rights. ‘B’ status implies a failing not just on the part of the NHRI but also on the part of the state. NHRIs may be responsible for not complying with Paris Principles but much of this is due to the failure of the state to provide the necessary level of independence in its legislative text, over which NHRIs may not have any control.

Looking back at the developments and achievements among the Southeast Asian NHRIs, one of the positive developments is the greater level of engagement of SUHAKAM, Komnas HAM, and the CHRP with civil society.

Pluralism and representativeness is another crucial component in the Paris Principles. The appointment of the SUHAKAM Commissioners in recent years has largely been gender-balanced with a varied ethnic representation, while the CHRP consists of three female Commissioners out of five, and at the same time it also has 300 male employees and 312 female employees. The new batch of Komnas HAM Commissioners that came into office in October 2017 is widely recognised as more active than the previous batch.

The NHRCT has established offices in four regions of Thailand aside from its headquarters in Bangkok, and it has also conducted investigations into Thai companies’ extraterritorial investments in ASEAN countries, however the new Constitution 2017 reportedly potentially puts the mandate of the NHRCT at risk. As for the MNHRC, its lack of action in conflict-related areas in northern and eastern Myanmar and violence-hit Rakhine State remains a concern for civil society groups.

Unique among the Southeast Asian NHRIs, the PDHJ is established as an Ombudsman giving it a different structure compared to the other five. Under the Constitution and its

founding law, the PDHJ is provided with an adequate and broad set of powers to protect and promote human rights as provided for in the Paris Principles. The law also guarantees immunity to the Ombudsman in the performance of his or her functions; however, this provision is potentially a challenge for the justice sector and the effort to fight against rampant corruption in Timor-Leste.

Apart from the challenges as identified above such as the pluralism and representativeness of Commissioners, all the six NHRIs to a certain extent experience similar challenges from the political climate, public trust, funding, and mandate, to their powers of investigation.

The political climate in certain countries such as Thailand, the Philippines, and Myanmar, which are turning away from democracy, puts some hurdles in the way of the Commissions to operate effectively due to pressure within the countries itself. This is particularly evident in the case of the MNHRC, which is reported to suffer from a lack of trust not just from minority groups but also from the public as a whole.

Inadequate funding is a common issue which continues to put pressure on Southeast Asian NHRIs. For instance, the MNHRC, SUHAKAM, and the PDHJ do not receive adequate funding to fulfil their mandate. The CHRP, due to its strong criticism of the Government's anti-drug campaign, recently saw a vote by the House of Representatives for its budget to be reduced to 1000 Philippine pesos; nevertheless, the decision was reversed due to pressure from civil society, the international community, and the public.

At the same time, there remain gaps between the mandate and practice of these Commissions in term of their promotion and protection of human rights in the respective countries. For instance, the MNHRC has no power to take follow-up action if the authorities are not responsive and it also cannot access 'classified' documents. This has placed restrictions on the ability of the MNHRC to use its investigative powers into human rights violations.

The year 2018 is a challenging year for Southeast Asia. While Malaysia has recently been seen as the hope for democratic space in the region, democracy in some other countries such as Myanmar, Thailand, and the Philippines continues to be challenged. There is apparently no quick fix and there is no one-size-fits-all remedy for the Southeast Asia region, but looking forward, the creation of new NHRIs in the remaining Southeast Asian countries should remain as a priority, as this could reinforce and further extend the development of a stronger network of NHRIs at the regional level.

# INDONESIA: A RE-FORMULATED KOMNAS HAM - STILL A LONG WAY TO GO

*ELSAM, HRWG, Imparsial, KontraS*

## 1. Introduction

This report was prepared during the period July 2017 - July 2018 by a team from Lembaga Studi and Advokasi Masyarakat (ELSAM), the Human Rights Working Group (HRWG), Imparsial, and the Commission for the Disappeared and Victims of Violence (*Komisi untuk Orang Hilang dan Korban Tindak Kekerasan* or KontraS) based on research and interviews with a number of stakeholders such as the Save the National Commission on Human Rights Coalition, victims of human rights violations, the Commissioners and staff for 2017-2022 of the Indonesian National Human Rights Institution (Komnas HAM), and through media monitoring.

## 2. Overview

The year 2017 became a milestone for Komnas HAM, as it was the last year of the 2012-2017 Commissioners' terms of office. The performance of the 2012-2017 Komnas HAM leadership reached the lowest level in the history of the Commission's establishment in Indonesia. This was brought about by a number of problems encountered by Komnas HAM that gravely compromised its integrity, from internal problems such as findings of indications of financial abuse by one of its members for personal gain and several findings of fictitious financial transactions, to external problems, namely Komnas HAM's failure in advocating for and convincing the Attorney General's Office to settle gross violations of human rights of the past. Most of the time, Komnas HAM was not engaged as a human rights policy making institution by other state institutions, thus causing many of Komnas HAM's recommendations to be disregarded by them. On the other hand, Komnas HAM was not active in providing its inputs over the appointment of public officials by President Joko Widodo, even though those officials have been implicated in violating human rights.

Komnas HAM is one of the NHRIs that has been given 'A' status in the accreditation process by the Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation (GANHRI-SCA) in March 2017.<sup>1</sup> This is despite the fact that inside Komnas HAM there has been internal conflict in the past years, and it was almost given 'B' status.<sup>2</sup> GANHRI-SCA raised concerns around lack of pluralism, the need for a broad, transparent, and participatory selection process, the need to ensure protection for members of Komnas HAM for actions carried out in the course of their duties, and the fact that the President has control over the duties, responsibilities, and organisation of the Secretariat.

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<sup>1</sup> 'Report and Recommendations of the Sub-Committee on Accreditation', GANHRI, March 2017, available at [https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA\\_Final\\_Report\\_-\\_March\\_2017-English.pdf](https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA_Final_Report_-_March_2017-English.pdf).

<sup>2</sup> 'GANHRI Anugerahi Penghargaan Tertinggi Kepada Komnas HAM Akreditasi A', *Media Indonesia*, 24 February 2018, available at <http://mediaindonesia.com/read/detail/146685-ganhri-anugerahi-penghargaan-tertinggi-kepada-komnas-ham-akreditasi-a.html>.

### 3. Komnas HAM and the Paris Principles

#### 3.1 Functions, Mandate, and Structure

Komnas HAM is an independent body, which has an equal position with the other government bodies. To begin with, Komnas HAM was established by Presidential Decree No. 50/1993 The National Commission on Human Rights.<sup>3</sup> Since 1999, the existence of Komnas HAM is based on Law No. 39/1999 Concerning Human Rights<sup>4</sup> that also sets out the aims, functions, membership, principles, duties, and authority of Komnas HAM. Under this law Komnas HAM has several functions such as assessment, research, counselling, monitoring, and mediation of cases of violations of human rights.

Aside from the authority given in Law No. 39/1999 Komnas HAM is also authorised to conduct investigations into gross human rights violations under Law No. 26/2000 Establishing the Ad Hoc Human Rights Court.<sup>5</sup> Under this law, Komnas HAM can establish an *ad hoc* team that includes Komnas HAM members and “public constituents”.

According to Law No. 40/2008, Regarding the Elimination of Racial and Ethnic Discrimination, Komnas HAM has an additional role as supervisory body. In this role Komnas HAM is given the mandate of evaluating central and local government through monitoring and fact-finding, to detect racial and ethnic discrimination and to make recommendations to address any such findings.

#### *Human Rights Protection*

2018-2019 are election years in Indonesia and 2018 marks 20 years of Reformasi. The Regional Elections (*Pemilihan Kepala Daerah* or Pilkada) in 171 Indonesian regions in 2018 and the preparation for the Presidential and Legislative Elections in 2019 require Komnas HAM to play an active role to monitor potential conflicts in the field and ensure that the human rights perspective is used as a measurement to assess the General Election Commission (*Komisi Pemilihan Umum* or KPU) in its setting of the eligibility criteria of the candidates that are running for elections. Komnas HAM must be proactive in providing inputs to the KPU in establishing the criteria that must be met by presidential candidates, vice presidential candidates, as well as legislative candidates to ensure that they have not committed any human rights violations. Building on the momentum of the 20-year anniversary of Indonesian Reformasi, Komnas HAM is also expected to continue pushing efforts to resolve cases of severe human rights violations that are still pending in the Attorney General’s Office. Solving past cases of severe human rights violations is one of President Jokowi’s promises as stated in the *Nawa Cita* (Nine Priorities), shortly after he was elected in 2014.

However, it seems that Komnas HAM has not been able to push the state to form an *ad hoc* Human Rights Court for past cases of severe human rights violations. In fact, the President, through the Coordinating Minister for Political, Legal, and Security Affairs, Wiranto, instead

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<sup>3</sup> Presidential Decree 50/1993, The National Human Rights Commission, available at <https://www.hurights.or.jp/archives/database/nhri-law-indonesia.html>.

<sup>4</sup> Law No. 39/1999, Concerning Human Rights, Article 76, available at <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/55808/105633/F1716745068/IDN55808%20Eng.pdf>.

<sup>5</sup> Law No. 26/2000. Establishing the Ad Hoc Human Rights Court, Section 4, available at <https://www.ihl-databases.icrc.org/Indonesia - Act on the Human Rights Courts.pdf>.

agreed to form a Council for National Harmony (*Dewan Kerukunan Nasional* or DKN) to settle past cases of severe human rights violations, through a non-judicial mechanism, i.e. without going through a court process.<sup>6</sup> Wiranto himself, as reported in the Komnas HAM ‘*pro justisia*’ report,<sup>7</sup> as a former General in the Indonesian army, is assumed to have been involved in a number of severe human rights violations that took place in the past. The establishment of the DKN would not only potentially curtail the rights of the victims of severe human rights violations to receive justice through having their cases tried through a court mechanism, but could also be used as a tool for the Minister to avoid his own legal responsibilities.

The Indonesian Government’s commitment in the UN Universal Periodic Review (UPR) in 2017 to the establishment of an *ad hoc* Human Rights Court for the Wasior and Wamena cases,<sup>8</sup> should be used as a tool for Komnas HAM to follow-up on the release of its *pro justisia* report into these incidents and to push the President to form an *ad hoc* Human Rights Court immediately.

This same concern about Komnas HAM’s lack of proactiveness can be seen in the strenuous discussion in Parliament regarding the revisions of the Bill on the Indonesian Criminal Code (*Rancangan Kitab Undang-undang Hukum Pidana* or RKUHP). Komnas HAM is still not considered active enough in pushing the House of Representatives (DPR) to remove the article on severe human rights violations in the RKUHP, which contradicts Law No. 26/2000 on a Human Rights Court, as it accommodates settlements in cases of severe human rights violations through a non-judicial mechanism and applies the *nebis in idem*<sup>9</sup> principle for cases of severe human rights violations.

Considering that Komnas HAM has served as an investigator for past cases of serious human rights violations, such as the Wasior and Wamena cases mentioned above, it must make an active effort to provide concrete inputs to the DPR on the issue of the RKUHP provisions. If the draft article on severe human rights violations is still included in the RKUHP, it not only minimises the role and responsibility of Komnas HAM, but it also eliminates the ‘extraordinary crime’ characteristic of severe human rights violations itself.

Another matter that should be of concern for Komnas HAM is the recent enactment of the Law on Community Organisations (*Organisasi Masyarakat* or Ormas) (Law No. 16/2017) and the new Counterterrorism Law (Law No. 5/2018). The enactment of both these laws is an indication of the limited effectiveness of Komnas HAM when it comes to intervening to influence the direction of legal and human rights policies in Indonesia.

The new Law on Community Organisations (*Organisasi Masyarakat* or Ormas) (Law No. 16/2017) endangers democracy and the rule of law itself. This law not only targets intolerant

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<sup>6</sup> ‘Dewan Kerukunan Nasional Bakal Selesaikan Kasus HAM Masa Lalu Tanpa Peradilan’, *Kompas.com*, 5 June 2018, available at <https://nasional.kompas.com/read/2018/06/05/13294231/dewan-kerukunan-nasional-bakal-selesaikan-kasus-ham-masa-lalu-tanpa>.

<sup>7</sup> ‘*Pro justisia*’ is the name given to reports coming out of investigations carried out by Komnas HAM.

<sup>8</sup> The Wasior case refers to allegations of gross human rights violations including murder, torture, and abduction, committed by members of the National Police’s Mobile Brigade in Wasior Papua, in 2001. The Wamena case took place in April 2003, and involved the military response to an incident of breaking and entering at a military base.

Two military were killed and one was critically injured. In the response from the security forces in the search for the perpetrators, both the military and police officers conducted search, arrest, torture and killing of civilians.

<sup>9</sup> This principle provides that nobody should be judged twice for the same offence.

groups such as Hizbut Tahrir Indonesia (HTI)<sup>10</sup> as the Government has previously implied, but it could also be used to target any other group or mass organisation, for it gives the Government the authority to single-handedly disband them for various reasons. The reasons for disbandment are incredibly broad. For example, the Government can disband any groups perceived to be “negligent in their obligation to respect the unity of the nation and state”. This act of disbanding mass organisations single-handedly by the Government is in breach of the due process of law and will result in a discriminatory Government. Through this new law, the Government can disband any groups for reasons they deem fit to silence those that are critical of the Government, such as opposition, minority groups, religious organisations, labour unions, farmer’s unions, and others. Moreover, if or when the leadership of the country switches to a more repressive regime, this law is prone to being used to silence civil society movements in the future.

Meanwhile, the new Counterterrorism Law (Law No. 5/2018), which passed in May of 2018, poses a different threat. The new law gives broader authority to the military in the handling of terrorism and potentially undermines the state system of legal order. This greater involvement on the part of the military, unaccompanied by the obligation to abide by the general judicial system, would cause serious problems in the accountability of the military in its operations. Furthermore, by extending the period of arrest and the detention period, and giving the state greater authority regarding interception of terrorist suspects without an objective oversight mechanism, this law will likely lead to abuse of power and corresponding human rights violations. The new law also regulates hate speech in a way that could impact on freedom of opinion and expression, and potentially lead to arbitrary arrests. On top of that, this new law still imposes the death penalty for terrorism charges.

It is profoundly unfortunate that Komnas HAM was not more involved with the DPR and the Government in the formulation of these new laws. Komnas HAM should have been more proactive, as such laws have high potential to be implicated in future human rights abuses in Indonesia.

It is also a considerable regret that the Komnas HAM Special Desks, which were formed in the 2012–2017 period to handle issues on freedom of expression and religious freedom, human rights defenders, business and human rights, minority groups, etc. and that served at the forefront of the work of Komnas HAM, are no longer maintained. This is due to the limited number of Commissioners. These desks could serve as an initial port for Komnas HAM to be more active and responsive in handling complaints as well as providing dedicated space for discussions on solutions to human rights issues that frequently arise in Indonesia.

Regarding the issue of children from Timor-Leste who were separated from their parents during the Indonesian Government occupation, Komnas HAM has developed cooperation with the *Provedoria dos Direitos Humanos e Justiça* (Ombudsman for Human Rights and Justice or PDHJ) in Timor-Leste. This cooperation is based on a Memorandum of Understanding and is a response to the recommendation from the Commission of Truth and Friendship (*Komisi Kebenaran dan Persahabatan* or KKP). The KKP was set up by the Indonesian Government and Timor-Leste with the mandate to disclose the truth about any human rights violations prior to, and after, the referendum in Timor-Leste, in 1998.

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<sup>10</sup> Hizbut Tahrir Indonesia is part of an international Islamist movement banned in much of Europe and the Arab States.

Civil society in Indonesia and Timor-Leste started to initiate meetings in 2013 where Komnas HAM takes on the role of preparing official letters and providing recommendations to the Government regarding the completion of administrative documents that the stolen children need as prerequisites to obtain their passports and visas. Furthermore, Komnas HAM also facilitates dialogues with relevant state agencies such as the Ministry of Social Affairs, the Ministry of Foreign Affairs, the Ministry of Legal and Human Rights Affairs, and the Coordinating Ministry for Political, Legal, and Security Affairs, to promote strategic policies on this issue.

However, the Civil Society Working Group continues to insist that Komnas HAM should develop a more concrete strategy in dealing with this issue. One of KKP's recommendations from 2008 was the formation of a Commission for missing persons to identify every child from East Timor who was separated from their parents during the Indonesian Government occupation, and to reunite these children with their parents. Civil society has requested Komnas HAM to facilitate meetings with related institutions to immediately form such a Commission for Missing Persons.

### *Human Rights Promotion*

Komnas HAM has been involved in efforts to raise awareness around the death penalty in relation to human rights. A National Conference on '20 Years of Reformasi: Crime & Punishment in the Human Rights Discourse in Indonesia', took place on 8-9 May 2018, at the Santika Premiere Hotel, Slipi, West Jakarta. This National Conference was attended by government representatives, state agencies, former DPR members, death penalty lawyers, families of people receiving death penalties, academicians, advocates, foreign embassies, and civil society organisations with the aim of creating a discourse on the discussion of the RKUHP and organisation of death penalty practices in Indonesia, which often ignore the rights of the person receiving the death penalty.

### *Accountability and Publication of Findings and Reports*

Regarding the monitoring and investigation functions carried out by Komnas HAM, most are only done through correspondence while the time dedicated to field visits is only ten percent, with the result that most information or case data is obtained through Komnas HAM's network. The results of this monitoring and investigation are not often released to the media because there are too many cases being handled by Komnas HAM.

Reports on the results of Komnas HAM's *pro justisia* investigations can only be accessed by the Attorney General's Office because of their confidential nature. Members of the public who want information on developments in these investigations by the Komnas HAM can access the executive summary.

Every year, Komnas HAM routinely publishes Annual Reports launched at press conferences. This report should be launched every March or April but due to the limited human resources working on the report and the large number of jobs carried out by Komnas HAM, the report is always delayed until the end of the year.

Another publication released by Komnas HAM is the Suar Magazine which was published by Komnas HAM every month, but is now only published every three months. In addition, Komnas HAM has also issued journals containing data taken mostly from Komnas HAM

data. This journal is routinely accessed by students, researchers, NGOs, the Ministry of Legal and Human Rights Affairs, and local governments, who often request this information from Komnas HAM.

### **3.2 Autonomy from the Government and Independence Guaranteed by Statute or the Constitution**

#### *Budgetary Autonomy and Financial Independence*

Komnas HAM's budget process is the same as other state institutions that get their budget from the State. The budget is planned by three parties: Komnas HAM, the Ministry of National Development Planning (Bappenas), and the Ministry of Finance. In this case Komnas HAM's budget includes the budget for Komnas Perempuan (National Commission on Violence Against Women), which receives its budget jointly with Komnas HAM.

The planning of Komnas HAM is determined by several important documents. One of them, the Trilateral Meeting Document, is a document produced after the meeting of three parties: Komnas HAM, including Komnas Perempuan, the Ministry of National Development Planning (Bappenas), and the Ministry of Finance, and it contains an agreement reached among the three parties.

After the document is completed the final document is discussed and decided on through the DPR. The determination of the budget amount must be with the approval of the DPR.

#### *Interaction with, and State Submissions to, the International Human Rights System*

Regarding the Universal Periodic Review (UPR) process, in 2016 to 2017, Komnas HAM drafted its own independent submission to the UN. Komnas HAM submitted information on the situation of freedom of religion, rights of persons with disabilities, freedom of expression, and gross past human rights violations. In the UPR session in 2017, the representative from Komnas HAM set out the social conditions that are considered to demonstrate that Indonesia is still far from mainstreaming human rights.

Komnas HAM identified some important recommendations from the UPR process, reflecting the human rights situations in Indonesia, that were not yet accepted by the Indonesian Government at the times of its review. Komnas HAM was actively involved in several consultations amongst civil society organisations, the Ministry of Foreign Affairs, and the Ministry of Legal and Human Rights Affairs, before the final adoption of Indonesia's report by the Human Rights Council on 22 September 2017, in an effort to ensure that these fundamental recommendations were accepted by the Government of Indonesia.

The Commission urged the Government to take measures, among others, to eradicate impunity, prioritise the resolution of cases of gross human rights violations, guarantee freedom of religion and belief, and freedom of expression, as well as to abolish the death penalty. In addition, the Commission encouraged the Government to highlight other crucial issues such as the rights of minority groups, indigenous people, and human rights defenders, as well as the problem of torture, and to take further steps to ratify international human rights instruments including the Optional Protocol to the Convention Against Torture, which would



enable international monitoring of places of detention.<sup>11</sup>

The visit from the former UN High Commissioner for Human Rights, Zeid Ra'ad al Husein, to Jakarta, Indonesia, among other countries, aimed to initiate dialogue with civil society organisations in Indonesia and discuss issues relating to discrimination and violence, land rights and indigenous people, impunity, and accountability. The meeting could give momentum to Komnas HAM's work if followed-up advantageously. The meeting, which took place in the Komnas HAM office on 5 February 2018, should be used as a catalyst for Komnas HAM to be more proactive in pushing for the Government's commitment to resolve cases of severe human rights violations, including asking for support from the UN.<sup>12</sup>

### *Selection and Appointment*

It is important to take a look at the dynamics during the selection process of Komnas HAM's candidate members and the selection of its Secretary-General (*Sekjen*) as both issues influence the extent to which the new Komnas HAM members are able to respond to challenges and improve its reputation as an independent and progressive institution in the human rights sector. The Paris Principles and GANRHI-SCA's General Observation 1.8<sup>13</sup> call for the selection processes for NHRIs to be clear, transparent, and participatory, and to promote merit-based selection.

Before initiating the selection process for new 2017-2022 candidates, a number of members of civil society under the *Koalisi Selamatkan Komnas HAM* or Coalition to Save Komnas HAM (hereinafter referred to as *Koalisi*) submitted notes to the Selection Committee regarding the selection process.

In these notes the *Koalisi* noted, first, the public's lack of interest to become Komnas HAM members. The screening process from 22 December 2016 to 22 February 2017 had to be extended to 22 March 2017,<sup>14</sup> resulting in 200 applicants in total with only 121 declared to have passed the administrative stage, a decline compared to the selection process in 2012. The *Koalisi* noted two causes, namely a lack of publication of the vacancies, and the fact that Komnas HAM is no longer perceived as a prestigious and strategic state institution, compared to, for instance, the Corruption Eradication Commission (KPK) and *Ombudsman Republik Indonesia*. According to the *Koalisi*, the Selection Committee seemed to be 'less successful' in encouraging the best figures to participate in this selection process.

Secondly, regarding the removal of certain requirements for candidates, in particular, the requirement of being at least 40 years of age and holding a minimum education level of a bachelor's degree, the *Koalisi* appreciated that the Selection Committee accommodated inputs from civil society calling for the prerequisite for Komnas HAM candidates to be their competence and track record in human rights works. The Selection Committee subsequently

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<sup>11</sup> Komnas HAM statement to the 36<sup>th</sup> session of the UN Human Rights Council, available at [https://www.upr-info.org/sites/default/files/document/indonesia/session\\_27\\_-\\_may\\_2017/indonesian\\_national\\_commission\\_on\\_human\\_rights\\_oral\\_statement\\_indonesia\\_2017.pdf](https://www.upr-info.org/sites/default/files/document/indonesia/session_27_-_may_2017/indonesian_national_commission_on_human_rights_oral_statement_indonesia_2017.pdf).

<sup>12</sup> 'Komnas HAM: Kunjungan KT-HAM PBB kemajuan Indonesia', *Antaraneews.com*, 22 February 2018, available at <https://www.antaraneews.com/berita/687959/komnas-ham-kunjungan-kt-ham-pbb-kemajuan-indonesia>.

<sup>13</sup> General Observations of the SCA, 2013, Section 1.8, available at <https://nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC%20SCA%20General%20Observations.pdf>.

<sup>14</sup> 'Pendaftar Calon Anggota Komnas HAM Mulai Ramai', *Rmol.co*, 24 February 2017, available at <http://www.rmol.co/read/2017/02/24/281752/Pendaftar-Calon-Anggota-Komnas-HAM-Mulai-Ramai.->

focused on the requirement of having a minimum of 15 years' experience in the promotion, protection, enforcement, and fulfillment of human rights.

Thirdly, the *Koalisi* noted that the public test process gained widespread interest. This was shown by the large number of questions submitted by the public to the Komnas HAM candidate members during that stage. However, the *Koalisi* also realised that the time allocated by the Selection Committee was insufficient to undertake further enquiries into the candidates, for instance, in regard to their track records and knowledge on human rights. The candidates themselves were not able to answer all questions due to lack of time.

Fourthly, the *Koalisi* stated that the tracing process of the 60 participants' track records (who passed the administrative selection) assisted in providing sufficient data on the candidates. The *Koalisi* had independently carried out the tracing process by applying a tracing method based on identifying the candidates' track records on the aspects of competence, integrity, capacity, and independence.<sup>15</sup>

Although the tracing results were submitted to the Selection Committee, the *Koalisi* noted that of the 14 names announced as Komnas HAM candidate members by the Selection Committee there remained a number of candidates who were lacking in the four aspects assessed by the indicators. In regard to capacity, there were three candidates with negative records. Two people had problems with communication, cooperation, performance, and capabilities in implementing managerial principles; one person lacked in communication skills as his work colleagues viewed him as only seeking a good public image. The *Koalisi* criticised the Selection Committee for not openly disclosing to the public the assessment method used to determine the Komnas HAM candidate members.<sup>16</sup>

As mentioned above, the performance of the 2012-2017 Komnas HAM team, in general, was less satisfactory due to the lack of competence and teamwork of its members, as well as poor competence in administration and bureaucracy. To address this, the Selection Committee must ensure that the selected candidates who are sent to the Parliament are qualified in human rights issues, knowledgeable of the main duties and function of Komnas HAM, and have a clear stance on defending the victims of human rights violations, to satisfy the merit-based selection process called for in GANHRI-SCA's General Observation 1.8. The candidates should consist of figures who will strengthen Komnas HAM instead of burdening and weakening the credibility of the organisation.

The selection process for Komnas HAM members ('fit and proper test') at the DPR tangled the process with political interests, which compromised objectivity and deviated the process from the purpose of finding the best candidates. Based on the monitoring conducted by civil society,

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<sup>15</sup> The applied indicators were developed together with independent experts who consisted of academicians, former Commissioners, and experts in methodology. Based on the tracing and assessment results, it was found that there were 19 candidates with excellent competence, 23 candidates with good competence, and 5 candidates who needed to broaden their knowledge on human rights issues. There were five candidates who refused to provide information and seven candidates did not provide full information. In terms of independence, there were 13 people affiliated with political parties, another 13 affiliated with industry/corporates, and 9 people who had relationships with radical organisations or groups. In regard to capacity, the candidates had different problems: 11 people had issues in collaboration, 16 people lacked in communication, 9 others lacked in decision-making, 12 more lacked in performance, and another 12 lacked in implementing managerial principles. As to the aspect of integrity, 5 people were found linked to corruption/gratification cases, 11 people lacked in probity, 8 people were linked to sexual violence, and 14 others had problems with diversity issues.

from the purpose of finding the best candidates. Based on the monitoring conducted by civil society, the process at the DPR was peppered with biased questions towards, for instance, the women candidates. Some members of the DPR were absent during the question and answer session, but were present during voting, meaning that some DPR members voted without listening to the fit and proper test process. The selection results were finally announced by DPR's Commission III on 3 October 2017, with seven Commissioners named to manage Komnas HAM.<sup>17</sup>

Meanwhile, after a long period operating under an Acting Secretary-General, Komnas HAM has finally appointed a new Secretary-General. The Selection Process for the Komnas HAM Secretary-General was conducted on 2-4 August 2017. Five candidates for Secretary-General went through an assessment activity in the State Administration Agency, Jatinangor, Bandung.

In November 2017, Dr. Tasdiyanto SP, MSI<sup>18</sup> was announced as the new Secretary-General of Komnas HAM. The name Tasdiyanto is still new among the civil society community. His professional record in the Ministry of Environment is not widely known. Meanwhile, another candidate, Chatarina Muliana, SH, SE, MH<sup>19</sup> is considered by civil society to be more capable because of her satisfactory track record in the KPK. Considering in particular that Komnas HAM is undergoing problems concerning accountability and corruption issues, Chatarina Muliana SH, SE, MH would have been more appropriate for the position.

### *Dismissal Procedures*

Article 88 of Law No. 39/1999 Concerning Human Rights<sup>20</sup> states that further provisions on the obligations and rights of Komnas HAM members and its operational procedures shall be determined by the Rules of Procedure of Komnas HAM. Meanwhile, the Rules of Procedure of Komnas HAM are to be decided at plenary sessions participated in by all members of Komnas HAM. This means that, for example, the term of the 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, made possible by the fact that the term of the Komnas HAM Chairperson can be changed easily at plenary sessions of Komnas HAM.

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

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<sup>17</sup> 'Komisi III DPR Sepakati 7 Nama Jadi Komisioner Baru Komnas HAM', *Liputan 6*, 3 October 2017, available at <https://www.liputan6.com/news/read/3116684/komisi-iii-dpr-sepakati-7-nama-jadi-komisioner-baru-komnas-ham>.

<sup>18</sup> SP: Sarjana Pertanian - Bachelor of Agriculture; MSI: Magister Studi Islam - Master of Islamic Studies.

<sup>19</sup> SH: Sarjana Hukum – Bachelor of Law; SE: Sarjana Ekonomi –Bachelor of Economics; MH: Magister Hukum –Master of Law.

<sup>20</sup> Law No. 39/1999, Concerning Human Rights, Article 88, available at <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/55808/105633/F1716745068/IDN55808%20Eng.pdf>.

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 turn decided to grant Dianto Bachriadi time in office until December 2016.

### 3.3 Pluralism

#### *Pluralism of Commissioners*

The Paris Principles state that the composition of national institutions and the appointment of its members, either by election or by any other means, shall be carried out in accordance with procedures which contain all the necessary guarantees to ensure the diverse representation of the social forces (comprising civil society) involved in the promotion and protection of human rights. This is reaffirmed in GANHRI-SCA's General Observations 1.7 and 1.8.<sup>21</sup>

One of the biggest of Komnas HAM's problems is the process of selecting new members and the composition of its current membership. Based on existing procedures, diversity of membership will be difficult to obtain. The selection process of Komnas HAM is relatively unique when compared to similar institutions in other countries. Based on Presidential Decree No. 50/1993 The National Commission of Human Rights, the initial formation, or 'first generation', of the members of the Commission, is to be appointed by the President and the next membership is to be appointed by the plenary membership of Komnas HAM.

Law No. 39/1999 altered this process, but not to an adequate degree. The law states that members of Komnas HAM are elected by the House of Representatives on the recommendation of Komnas HAM and endorsed by the President.<sup>22</sup> Based on informal agreement, Komnas HAM members will send the list of candidates nominated by at least two members to the House of Representatives. The House will then select from the list. In other words, the regulation revokes the authority of Komnas HAM to select its own members giving it only the authority to nominate candidates for available seats.

Reflecting on the composition of the members of Komnas HAM in the 2012-2017 period, there are still members of Komnas HAM who show their unprofessionalism, who act from personal interest, who lack concrete strategies in handling cases, and even openly support reconciliation for cases of gross human rights violations. From observations, understanding of human rights by members is still very minimal, as a result of which Komnas HAM looks very passive in carrying out its work. Even the statements issued by its members often conflict with human rights standards.

Meanwhile, as far as the composition of Komnas HAM members for the 2017-2022 period goes, based on the monitoring results of the Save Komnas HAM Coalition, the seven Commissioners have different professional backgrounds, ranging from advocates, academics, activists, and so on. However, unfortunately, out of the seven elected members of Komnas HAM, there is only one woman representative.

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<sup>21</sup> General Observations of the SCA 2013, Sections 1.7 and 1.8, available at <https://nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC%20SCA%20General%20Observations.pdf>.

<sup>22</sup> Law No. 39/1999, Concerning Human Rights, Article 83(1), available at <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/55808/105633/F1716745068/IDN55808%20Eng.pdf>.

### *Collaboration with Civil Society and other Stakeholders*

One positive development, under the 2017-2022 leadership, is that Komnas HAM is more open to receiving inputs from civil society regarding legal cases as well as cases of human rights violations which remained unsettled in law enforcement institutions. For example, the Monitoring Committee to investigate the acid attack on Novel Baswedan, discussed in the ‘Case Studies’ section below, was formed after the case had been stuck in the police investigative system for over a year, and following strong demands from civil society.

Komnas HAM has worked closely with civil society on the issue of children from Timor-Leste who were separated from their parents during the Indonesian Government occupation, as outlined earlier. In November 2017, Komnas HAM supported another ‘Stolen Children’ reunion that was held by Asia Justice and Rights (AJAR) with KontraS, Indonesian Association for Families of Missing Persons (IKOHI), KontraS-Sulawesi, Asosiasaun HAK, ACBIT (Asosiasaun Chega Ba Ita), Fundasaun Alola, and CVTL (Timor-Leste Red Cross).<sup>23</sup>

Komnas HAM is involved with civil society to push campaigns against the death penalty in Indonesia, such as in the National Conference to commemorate 20 years of Reformasi. This event was initiated by KontraS together with the Community Legal Aid Institute (LBH Masyarakat) and Imparsial as members of the Anti-Death Penalty Asia Network (ADPAN) in Indonesia, in cooperation with the Komnas HAM and Ensemble Contre la Peine de Mort (ECPM).

The national conference, which involved cooperation between Komnas HAM and civil society, could hopefully further activate Komnas HAM's networking efforts especially with civil society for issues related to human rights.

### *Degree of Trust*

After getting hit by a whirlwind of corruption allegations, Komnas HAM under the leadership of the new Commissioners and Secretary-General, is trying to rebuild public trust through a process of institutional restructuring managed by an independent team under the coordination of the former KPK Deputy Chairperson, Erry Riyana Hadjapamekas. This development was announced in a press conference held on Monday, 26 February 2018 at the Lumire Hotel, Senen, Central Jakarta.

At this press conference, Erry, accompanied by Judhi Kristantini, founder of Saya Perempuan Anti-Korupsi (SPAK), which translates as ‘I am a woman against corruption’, stated that Komnas HAM aspires to be on the same level as other similar agencies within the country and abroad. Komnas HAM hopes to be more accountable in its institutional management and be closer to the public. He noted that as an initial step Komnas HAM will work towards restructuring their staff and information technology systems.

The Deputy Head of Internal Affairs, Hairansyah, on the same occasion mentioned that the fact that the BPK did not give an opinion for two years in a row in relation to the 2015-2016 financial management of Komnas HAM is a particular concern. This type of audit opinion is

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<sup>23</sup> ‘Reuni Anak-Anak yang Dipisahkan Secara Paksa Dengan Keluarga’, Asia Justice and Rights, 17 May 2016, available at <http://asia-ajar.org/2016/05/press-release-reuni-anak-anak-yang-dipisahkan-secara-paksa-dengan-keluarga/>.

the worst level of opinion that can be given by BPK concerning financial management in a Ministry or Agency.

The Komnas HAM team's experience of being rejected by the Wasior and Wamena victims when they were visiting both areas in 2016 should serve as an important lesson to show that leaving cases unsettled will cause the victims of severe human rights violations to lose trust in Komnas HAM.

### **3.4 Adequate Resources**

The performance of Komnas HAM staff is in decline. This decline is mainly caused by unclear career patterns and the lack of opportunity to undertake training and capacity building for their job positions.

Another consequence of the lack of resources, mentioned earlier, is the failure to maintain the Komnas HAM Special Desks to handle key human rights issues. This has been blamed on a limited number of Commissioners. The disappearance of these desks is a major setback in the active work of Komnas HAM.

The Special Desks have been eliminated due to a change in the work system. Instead there will be an 'Urgent Action Desk' to respond to emergency situations. The Special Desks were removed so that the limited human resources in Komnas HAM could be fully utilised to respond to each case more effectively. Through this rearrangement, it is hoped that the cases received by Komnas HAM will not only be collected, put into notes, then closed with Komnas HAM giving a recommendation, but moreover, Komnas HAM will be able to directly coordinate with the related stakeholders to work for an actual settlement of the cases.

Komnas HAM is currently assessing if new Special Desks are needed. Komnas HAM believes the new Special Desks will only be established if there are compelling reasons for them in responding to human rights violations or if there are specific cases which require a Special Desk; furthermore, they would be led by an expert in the field, and not a Komnas HAM Commissioner.

### **3.5 Adequate Powers of Investigation**

#### *Powers of Investigation*

Komnas HAM is authorised to conduct investigations into gross human rights violations under Law No. 26/2000 Establishing the Ad Hoc Human Rights Court.<sup>24</sup> Under this law, Komnas HAM can establish an *ad hoc pro justisia* team that includes Komnas HAM members and "public constituents". However, the full reports from these investigations are not made public for confidentiality reasons.

#### *Case Studies*

- a) *Novel Baswedan* - On 11 April 2017, Novel Baswedan allegedly was intentionally attacked with acid by a stranger causing his left eye to undergo surgery because of the

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<sup>24</sup> Law No. 26/2000. Establishing the Ad Hoc Human Rights Court, Section 4, available at <https://www.ihl-databases.icrc.org/Indonesia - Act on the Human Rights Courts.pdf>.



quite severe damage it caused to his eye's nervous system. It is suspected that the attack is connected to Novel's role as an investigator for the KPK, as he has been bringing to light corruption cases involving public officials and state executives, and he is currently handling the corruption case of Indonesia's Electronic Identity Card (E-KTP). The police investigation process has been prolonged, taking over a year. Following demands from civil society, Komnas HAM finally formed a Monitoring Team led by Commissioner Sandrayati Moniaga, based on the Komnas HAM Plenary Session Decree Number 02/SP/II/2018 on 6 and 7 February 2018.<sup>25</sup> The team is currently working to gather facts although they have yet to see any positive progress. This coming August, Komnas HAM plans to release a report regarding its monitoring results.

- b) *Zulfiqar Ali* - Zulfiqar Ali was a Pakistani citizen who was charged with possession of 300 grams of heroin and sentenced to death on 14 June 2005 by the Tangerang District Court, despite strong evidence of an unfair trial and of his innocence. From his arrest and the investigation, to his trial in court, there were numerous violations of the law which disregarded his rights as a suspect, including the torture he received during investigation. The only thing that connected him with the possession of the 300 grams of heroin with which he was charged was a statement from Gurdip Singh, the person who was actually arrested with the said heroin on him three months before Zulfiqar Ali was arrested in November 2004. Singh later retracted this statement and admitted both verbally and in a notarised written statement, that the heroin never belonged to Ali and that Ali was never involved, confessing that he had been forced to give the statement following physical intimidation by the police. Unfortunately, the judges disregarded this information. Imparsial, as Zulfiqar Ali's legal counsel, subsequently brought this case to the newly-appointed Komnas HAM in December of 2017. Later in the same month, Komnas HAM followed up on the report and, together with Imparsial, investigated the case and interviewed Gurdip Singh in Nusakambangan Island. On 28 February 2018, Komnas HAM sent an official letter to President Joko Widodo, giving a recommendation to grant clemency to Zulfiqar Ali, citing unfair trial in the case.
- c) *M. Yusuf* - On 10 June 2018, Muhammad Yusuf, a journalist for Berantas News and Kemajuan Rakyat, died while serving a period of detention at the Class IIB Kotabaru Penitentiary, Banjarmasin, South Kalimantan. Yusuf died as a 'detained prisoner' of Kotabaru District Court for his report on the land conflicts between PT Multi Agro Sarana Mandiri (MASM) and the local community in Pulau Laut, South Kalimantan. Yusuf was charged under Article 45 of Law No. 19/2016 which amended Law No. 11/2008 on Electronic Transaction and Information (ITE). He was arrested by members of the Kotabaru Police Criminal Investigation Unit at Syamsuddin Noor Banjarmasin International Airport on 5 April 2018 when he was about to fly to Jakarta with 15 other people from the local community to report the land conflict to Komnas HAM.

Komnas HAM conducted an investigation into the death of Yusuf and, on 27 July 2018, announced its investigation results. The investigation found that Yusuf's death was due to the fact that his health was deteriorating at the time he was in detention; Yusuf had heart disease and was in need of regular medical checks at the time. Unfortunately, this was not addressed either by the police or the prosecutor's office. Moreover, the

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<sup>25</sup> 'Komnas HAM Bentuk Tim Pemantauan Kasus Novel Baswedan', *Kompas.com*, 9 March 2018, available at <https://nasional.kompas.com/read/2018/03/09/15533531/komnas-ham-bentuk-tim-pemantauan-kasus-novel-baswedan>.

investigation found that prison overcrowding is also believed to have contributed.

Komnas HAM therefore recommended to the South Kalimantan Chief of Police to follow up on the handling of Yusuf's death incident objectively and professionally, and to ensure better supervision of subordinates in terms of fulfilling the human rights of prisoners, especially those who have a history of chronic diseases. Furthermore, Komnas HAM encourages the Ministry of Legal and Human Rights Affairs to evaluate prison capacity and conditions.

- d) *Kulon Progo* - On July 26 2018, Komnas HAM visited the refugees (residents) affected by the construction of the New Yogyakarta International Airport (NYIA) in Temon Subdistrict, Kulon Progo, Yogyakarta. Previously, on 27 November 2017, PT Angkasa Pura I (a state enterprise of the Indonesian Department of Transport responsible for the management of airports in Indonesia) vacated land and houses in the village of Palihan, Kulon Progo, for the construction of the NYIA project, escorted by 400 personnel consisting of Satpol PP (the municipal police in Indonesia), the national police force, and the military. Since then, many residents have fled the village and have been living in mosques and tents.

The visit in July 2018 was to follow-up complaints previously received by Komnas HAM, as well as to update and gather more information regarding the current situation of the residents. All the information obtained by Komnas HAM will be further reviewed and investigated, before formulating recommendations.

Komnas HAM is still currently collecting information from all parties, including the Government of Kulon Progo and the Province of D.I. Yogyakarta, PT Angkasa Pura I, the court district, prosecutor's office, and the police. Komnas HAM's recommendations on this matter are yet to be published.

#### **4. Conclusion**

The Komnas HAM leadership for the period of 2017–2022 will face difficult challenges, involving the resolution of some complicated problems from the previous period. One of the essential tasks to be achieved is rebuilding the public's trust in the institution by demonstrating that Komnas HAM is free from corruption and that it is committed to upholding human rights.

Central to Komnas HAM's problems in this regard is its selection and appointment process. It is crucial that the Commission has a clear, transparent, and participatory selection process in line with the Paris Principles and General Observation 1.8, which promotes the appointment of Commissioners based on merit, which in turn will ensure a Commission that acts to uphold human rights in an independent manner.

The composition of the Komnas HAM Commissioners for the period of 2017-2022 totalling seven people is considered to be far more effective than the previous period in which there were 13 people, especially in the context of issuing policies. From previous experience, having more Commissioners was not as effective as expected. Nevertheless, the pluralism of the Commissioners needs to be improved, in line with General Observation 1.7, which notes that, as for the selection process, a pluralistic Commission is also central to the independence of that Commission. As a first step the gender balance of the Commission must be improved



from the current situation in which there is only one woman out of seven members. General Observation 1.7 notes that pluralism is fundamentally linked to the independence, effectiveness, credibility, and accessibility of an NHRI.

The Secretary-General's functions should be maximised to strengthen Komnas HAM's performance from within the organisation, among others by providing capacity building and improving the relationship between the Commissioners and staff. Together with an improved process for selecting the Commissioners, this will strengthen Komnas HAM's investigation and monitoring function in particular, and the promotion and protection of human rights in general, putting it in a stronger position to fully comply with the Paris Principles.

Entering the electoral year starting from the recent 2018 Regional Elections to the upcoming 2019 General Elections demands maximum efforts from Komnas HAM to monitor potential conflicts and susceptible political situations that may arise. Komnas HAM must also be proactive in providing inputs to the General Election Commission ensuring that one of the key criteria for presidential candidates, vice presidential candidates, as well as legislative candidates is that they are free from any allegations of human rights violations.

Regarding past cases of severe human rights violations, Komnas HAM's integrity and accountability are at stake if, within the upcoming five year leadership period, the Commission does not have a concrete and well-developed advocacy strategy to encourage the President to establish an *ad hoc* Human Rights Court for past cases of severe human rights violations.

## **5. Recommendations**

### **To Komnas HAM:**

- Focus on Komnas HAM's work mandate in accordance with the Paris Principles and GANHRI-SCA General Observations to achieve an independent and strategic Komnas HAM in monitoring human rights issues;
- Conduct capacity building for Komnas HAM staff and Commissioners on human rights standards, as an initial step before they are entrusted to perform their mandates;
- Rebuild public trust following the problems that hit Komnas HAM in the previous period, through strategic steps and through actively involving the public;
- Be more active in monitoring the 2019 General Election and make sure there are no human rights violators running for President, Vice President, or to become legislative members;
- Develop a concrete advocacy strategy to encourage the state to resolve past cases of severe human rights violations through an *ad hoc* Human Rights Court;
- Open an intensive communication space with the victims of human rights violations and civil society organisations to encourage efforts to resolve cases of human rights violations;
- Actively and effectively cooperate and develop relationships with other state agencies as well as civil society organisations and victims of human rights violations to encourage efforts to resolve cases of human rights violations.

### **To the Government and DPR:**

- Bridge fundamental problems between Komnas HAM and the Attorney General's

Office which until now meant that none of the past cases of severe human rights violations could be resolved through an *ad hoc* Human Rights Court;

- Follow-up, through the President, on the four recommendations given by DPR in 2009 related to the enforced disappearance cases of 1997/98, especially on the establishment of an *ad hoc* Human Rights Court;
- Respect Komnas HAM as an independent and strategic state agency in monitoring human rights issues, and use it as a point of reference in regards to issues directly related to human rights;
- Make sure that human rights are mainstreamed in every presidential policy and DPR legislation and that the Government and DPR hold firm against any issued policy that is not in line with human rights;
- Strengthen the authority of Komnas HAM through revision of Law No. 39/1999 on Human Rights and make this a priority on the national legislative agenda in the DPR;
- Fully support and assist Komnas HAM to restore the image of the agency after several internal and external problems.

# MALAYSIA: SUHAKAM - A HUMAN RIGHTS COMMISSION SHACKLED BY EXECUTIVE'S INDIFFERENCE

*Suara Rakyat Malaysia (SUARAM)<sup>1</sup>*

## 1. Introduction

This chapter seeks to evaluate the efficacy of the Suruhanjaya Hak Asasi Manusia Malaysia (SUHAKAM), known as the Human Rights Commission of Malaysia, in discharging its duty as a National Human Rights Institution (NHRI). The chapter will examine SUHAKAM's status and performance throughout the year of 2017 until February 2018 with regard to its ability to function as an independent NHRI; its financial and resource capacity; the selection process for its Commissioners; the collaboration of the Commission with other groups including civil society; and the Commission's capacity to address or investigate human rights violations.

The content of this report is developed through on the ground observation of SUHAKAM's work and performance; engagement with SUHAKAM through its complaint mechanisms; and through a dialogue with SUHAKAM leading up to the drafting of this report.

## 2. Overview

As noted in the 2016 and 2017 ANNI reports on SUHAKAM, the Commission has to an extent gained the trust of civil society. However, at the same time, it suffered from budget cuts by the Government of Malaysia in what seemed to be an effort to curtail the work of SUHAKAM following its progressive development in 2015 and 2016. In 2017, SUHAKAM successfully secured its 'old' budget of around RM11 million under the current set of Commissioners who were appointed to office in June 2016.

Some of the key points noted in the 2017 ANNI report on SUHAKAM highlight the role of SUHAKAM in the development of government policies on issues that may infringe upon human rights; the misrepresentation of SUHAKAM's stance by the Government in Parliament; and the apathy shown to SUHAKAM's activities and recommendations by both federal and state governments.

In spite of the challenges faced by the Commission in 2015, the Commission successfully retained its 'A' rating in its review by the Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation (GANHRI-SCA) in 2015.<sup>2</sup> The key challenges of 2015 came in the form of the threat of budget cut when it was first announced in November 2015 and the consultation on security laws where SUHAKAM's objection was dismissed by the Government, which made subsequent claims that SUHAKAM was consulted on and agreed to the new security laws.<sup>3</sup>

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<sup>2</sup> 'Chart of the Status of National Institution', GANHRI, 21 February 2018, available at <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/Status%20Accreditation%20Chart.pdf>.

<sup>3</sup> 'No Zahid, we disagree with Pota, says Suhakam', *MalaysiaKini*, 17 April 2015, available at <https://www.malaysiakini.com/news/295533>.

### 3. SUHAKAM and the Paris Principles

#### 3.1 Functions, Mandate, and Structure

*“A national institution shall... submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights.” (Paris Principles, A.3(a))<sup>4</sup>*

In general, the Human Rights Commission of Malaysia Act 1999 (HRCMA), under which SUHAKAM was founded, largely complies with the Paris Principles. In brief, the HRCMA endows the Commission with the power to:

- promote awareness of and provide education in relation to human rights;
- advise and assist the Government in formulating legislation and administrative directives and procedures, and recommend the necessary measures to be taken;
- study and verify any infringement of human rights in accordance with the provisions of the HRCMA;
- visit places of detention in accordance with procedures as prescribed by the laws relating to places of detention and to make necessary recommendations.

#### *Human Rights Protection*

While the powers endowed to SUHAKAM under the HRCMA conform to the Paris Principles, there is a very fundamental problem with the HRCMA in that the interpretation given to ‘human rights’ is restrictive, referring to the fundamental liberties enshrined in Part II of the Federal Constitution of Malaysia which only provides for, liberty and security of person; prohibition of slavery and forced labour; protection against retrospective criminal law and repeated trials; equality; prohibition of banishment; freedom of movement; freedom of speech, assembly and association; freedom of religion; limited rights on education; and rights to property.

On top of the narrow scope of human rights defined under Part II of the Federal Constitution of Malaysia, many of the above-mentioned rights have been subjected to restriction, curtailment, or disregarded completely in favour of other sections of the Federal Constitution that have been used by some to advocate for discrimination and restriction of rights.

Fortunately, the restriction imposed by the HRCMA in terms of the scope of human rights is largely circumvented by SUHAKAM in practice. In addressing human rights violations, the Commission often refers to findings by Special Rapporteurs of the UN’s Human Rights Council, and to international human rights norms. Examples of this include the Commission’s stance on statelessness and education where the Commission challenged the Government’s stance<sup>5</sup> based on principles of the Convention on the Rights of the Child under

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<sup>4</sup> Principles Relating to the Status of National Institutions (the Paris Principles), General Assembly Resolution 48/134, 20 December, 1993, Section A.3(a), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

<sup>5</sup> The Government of Malaysia’s stance is that access to public schools for stateless children will only be for children whose citizenship application is pending.

which all children, regardless of citizenship, should have access to free education.<sup>6</sup> Another example is the Commission's inquiry into the disappearance of Pastor Raymond Koh, Amri Che Mat, and Joshua and Ruth Hilmy where the Commission investigated the matter based on the definition of enforced disappearances under the International Convention for the Protection of All Persons from Enforced Disappearance.<sup>7</sup>

While Ministers have demonstrated willingness to meet with SUHAKAM to discuss human rights issues put forward by the Commission, the lack of satisfactory outcomes gives the sense that these meetings happen by rote. Examples of where the Commission has been consulted include the consultation called by the Home Ministry prior to the introduction of the Prevention of Terrorism Act 2015; the tabling, in April 2017, of its proposed renewal of the Security Offences (Special Measures) Act 2012 which permits 28 days of detention without trial; and the consultation on the introduction of the Anti-Fake News Act 2018 that was passed in the final sitting of Malaysia's 13<sup>th</sup> Parliament in April 2018.

In practice, under the HRCMA, SUHAKAM is not granted any formal power to present its stance on any new laws or amendments to Parliament. Where a debate has clear implications for human rights, for example, the introduction of the Prevention of Terrorism Act 2015, which grants the executive power to detain individuals without trial,<sup>8</sup> it is often the Ministers that present the views of SUHAKAM. It is not uncommon that the Minister will simply state that the Commission has been consulted or engaged with to the Ministry's satisfaction, or the Commission's views will be misrepresented by the Ministry who claim that the Commission<sup>9</sup> has agreed to their proposal.<sup>10</sup>

In comments made to civil society organisations about SUHAKAM it has emerged that at least some ministries do not view SUHAKAM as having the necessary competence to advise on certain subject matters. SUHAKAM's competence in advising on matters related to national security and terrorism has specifically been called into question.

The comment may reflect a perception more than a reality, but at the very least it suggests that the Commission needs to do a better job of positioning itself as a body with access to various local and international resources, and civil society organisations, whose expertise it can and does avail itself of when contributing to such discussions from the human rights perspective.

The HRCMA does not provide any specific requirement for the Commission to engage with or report to state level legislatures. While many of the issues addressed by SUHAKAM go beyond the purview of state governments (e.g. the issue of the right to fair trial, and the issues of freedom of expression and freedom of assembly), several issues such as those relating to land rights and religious freedom to an extent lie within the jurisdiction of state governments,

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<sup>6</sup> 'Press Statement on Right to Education', SUHAKAM, 24 January 2018, available at <http://www.suhakam.org.my/wp-content/uploads/2018/01/Press-Statement-No.-3-of-2018.pdf>.

<sup>7</sup> 'SUHAKAM's Public Inquiry into the incidents of Disappearances of Individuals', SUHAKAM, 5 October 2017, available at <http://www.suhakam.org.my/wp-content/uploads/2017/10/Press-Statement-No.-41-of-2017.pdf>.

<sup>8</sup> 'No Zahid, we disagree with POTA, says SUHAKAM', *MalaysiaKini*, 17 April 2015, available at <https://www.malaysiakini.com/news/295533>.

<sup>9</sup> 'Suhakam refutes Zahid's claim that it agreed to Pota', *The Edge Markets*, 17 April 2015, available at <http://www.theedgemarkets.com/article/suhakam-refutes-zahid%E2%80%99s-claim-it-agreed-pota>.

<sup>10</sup> Debate on the renewal of the Security Offences (Special Measures) Act 2012, Hansard, 4 April 2017, p.150, available at [http://www.parlimen.gov.my/files/hindex/pdf/DR-04042017%20\(2\).pdf](http://www.parlimen.gov.my/files/hindex/pdf/DR-04042017%20(2).pdf).

thus SUHAKAM does have grounds for engaging state governments on these issues.

The work of SUHAKAM in the area of protecting human rights, while praiseworthy, does not change the fact that the Commission is no more than a truth commission at this juncture. As long as SUHAKAM lacks the power to compel law enforcement agencies or government agencies to implement its recommendations, and as long as it lacks even the power to compel law enforcement agencies or government agencies to report back on the implementation of the Commission's recommendations, it is unlikely that SUHAKAM will be able to elevate its role into a commission that actively prevents human rights violations.

### *Human Rights Promotion*

In general, SUHAKAM conducts human rights education programmes for enforcement agencies and their respective training schools or academies, as well as for public and private universities. Apart from its education and training programmes, SUHAKAM also holds public forums and conferences such as 'The Conference on the State of Democracy in Southeast Asia' in collaboration with the Kofi Annan Foundation;<sup>11</sup> and public outreach events such as Human Rights Day Festivals.<sup>12</sup>

Apart from public events, SUHAKAM also produces and publishes human rights related publications. Posters related to human rights issues such as torture and right to health are printed and distributed to the public at SUHAKAM's events.

### *Accountability and Publication of Findings and Reports*

As outlined in the Belgrade Principles, NHRIs are recommended to report directly to the Parliament. This aspect is captured under Section 21(2) of the HRCMA.<sup>13</sup> For the most part, the Commission produces its annual report with highlights on key human rights issues and submits it to Parliament and to all members of Parliament by the start of the first parliamentary term of the year. Despite this, since the submission to Parliament of the first annual report in 2001, none of SUHAKAM's annual reports have been tabled in Parliament for scrutiny or debate.

On some occasions the Government has responded to SUHAKAM's annual report through the Legal Affairs Division (*Bahagian Hal Ehwal Undang-Undang* or BHEUU), which is part of the Prime Minister's Office.<sup>14</sup> Unfortunately, the response by the Government has been lacklustre with many of the issues raised by the Commission either dismissed with claims

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<sup>11</sup> 'Susilo to launch Suhakam forum on democracy in Southeast Asia', *Free Malaysia Today*, 1 September 2017, available at <http://www.freemalaysiatoday.com/category/nation/2017/09/01/susilo-to-launch-suhakam-forum-on-democracy-in-southeast-asia/>.

<sup>12</sup> Adrian Phung, 'Suhakam to organize Human Rights Day Festival this Sunday', *The Sun Daily*, 5 December 2017, available at <http://www.thesundaily.my/news/2017/12/05/suhakam-organise-human-rights-day-festival-sunday>.

<sup>13</sup> HRCMA, Section 21(2), available at <http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20597%20-%20Human%20Rights%20Commission%20of%20Malaysia%20Act%201999.pdf>

<sup>14</sup> 'Maklum Balas Kerajaan Terhadap Laporan Tahunan Suruhanjaya Hak Asasi Manusia Malaysia 2016', BHEUU, 27 April 2016, available at <http://www.bheuu.gov.my/pdf/Penerbitan/MAKLUMBALASKERAJAANLAPORANTAHUNANSUHAKAM2016.pdf>.

that the violation alleged was not contrary to the existing legal provisions or brushed aside without answering the crux of the violation.

Examples include the Government's response in 2016 to complaints raised under the Prevention of Crime Act, 1959. The responses largely take the line that the complainant in question is a criminal and has been treated according to the law. Specifically, referring to the arrest of Dato R. Sri Sanjeevan,<sup>15</sup> the Government's reply was that the Government always upholds the rule of law in a transparent manner and that his arrest was approved by the Crime Prevention Board.<sup>16</sup> Another example is the case of Maria Chin Abdullah,<sup>17</sup> where the Government merely answered that the Ministry of Home Affairs is committed to ensuring that detention under the Security Offences (Special Measures) Act 2012 is compliant with the existing procedures for arrests and detention, and that her arrest was not due to her political beliefs or activities.<sup>18</sup>

With the lack of accountability on the part of the Government and the lack of official avenues afforded to SUHAKAM to present its Annual Report and to secure the Government's commitment to adopt or even engage with the Commission on its recommendations, it is unsurprising that the Commission has been unable to do more in some circumstances and that it has been branded a 'toothless tiger' by the media, civil society, academia, and former Commissioners.<sup>19</sup>

### **3.2 Autonomy from the Government and Independence Guaranteed by Statute or the Constitution**

#### *Budgetary Autonomy and Financial Independence*

The threat to the financial security of SUHAKAM in 2015 and 2016, with the stringent cut to the budget, makes it abundantly clear that the Commission is in many ways answerable to the whip of the Prime Minister's Office and the Ministry of Finance.<sup>20</sup> The discretionary power afforded to the Prime Minister's Office and the Ministry of Finance grants these offices direct power to curtail or restrict the work of the Commission without any avenue for objections or negotiations. Although the budget was increased back to its previous level in 2017, as discussed below, the fact that it could be so drastically cut demonstrates a lack of financial security and hence of financial independence.

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<sup>15</sup> R. Sri Sanjeevan is the Chairperson of MyWatch, a crime prevention NGO.

<sup>16</sup> 'Maklum Balas Kerajaan Terhadap Laporan Tahunan Suruhanjaya Hak Asasi Manusia Malaysia 2016', BHEUU, 27 April 2016, p. 19, available at <http://www.bheuu.gov.my/pdf/Penerbitan/MAKLUMBALASKERAJAANLAPORANTAHUNANSUHAKAM2016.pdf>.

<sup>17</sup> Maria Chin Abdullah was the former Chairperson of Bersih 2.0, a NGO campaigning for free and fair elections in Malaysia. She was detained for 11 days under security laws for alleged crimes of threatening parliamentary democracy.

<sup>18</sup> 'Maklum Balas Kerajaan Terhadap Laporan Tahunan Suruhanjaya Hak Asasi Manusia Malaysia 2016', BHEUU, 27 April 2016, p. 19, available at <http://www.bheuu.gov.my/pdf/Penerbitan/MAKLUMBALASKERAJAANLAPORANTAHUNANSUHAKAM2016.pdf>.

<sup>19</sup> A sentiment shared by the former Chairperson, Tan Sri HasmyAgam, see Timothy Achariam, 'Suhakam "worse than a toothless tiger"', *The Sun Daily*, 15 April 2015, available at <http://www.thesundaily.my/news/1386210>.

<sup>20</sup> In Malaysia, the Prime Minister is by practice the Finance Minister.



### *Interaction with, and State Submissions to, the International Human Rights System*

Malaysia has only ratified three international human rights treaties and does not usually submit itself to any of the treaty body review processes. The only international review process to which Malaysia has submitted itself is the Universal Periodic Review (UPR). In this context, SUHAKAM conducted stakeholder consultations with government agencies and civil society, leading up to its submission of a mid-term report on Malaysia's second cycle in 2016,<sup>21</sup> and in advance of the submission of reports for the Malaysia's third UPR cycle, which will take place in October 2018.

SUHAKAM is consistently invited to participate in consultations coordinated by the Government through the Ministry of Foreign Affairs. However, it should be noted that in many of these consultations, there are limited avenues for other stakeholders to question or inquire into the findings or stance of the Government on human rights issues.

### *Selection and Appointment*

SUHAKAM has been subject to criticism with regard to the selection process of new Commissioners. In 2008, the Sub-Committee on Accreditation (SCA) recommended to the International Coordinating Committee for NHRIs (ICC), now the Global Alliance on National Human Rights Institutions (GANHRI),<sup>22</sup> to downgrade SUHAKAM's 'A' status. The SCA recommended that the independence of the Commission be strengthened by means of establishing a clear and transparent appointment and dismissal process in the HRCMA in line with the Paris Principles, increasing the term of office for appointed Commissioners from the current two years, and improving the pluralism of the Commissioners by ensuring that the different sections of society are represented in the process of recommending candidates during the selection process.<sup>23</sup>

Soon after, in 2009, the Government of Malaysia adopted several amendments to the HRCMA<sup>24</sup> to address some of the above-mentioned recommendations, including increasing the term of office for Commissioners to three years. It did not, however, consult members of civil society on these amendments. While the amendments secured SUHAKAM's 'A' status, the SCA continued to maintain several points of concern including the fact that the amended appointment process remains opaque and lacks broad-based participation in the nomination, review, and selection of Commissioners, which could affect the independence of the Commission.<sup>25</sup>

Since the amendments to the HRCMA in 2009, there have not been any further substantial changes to the selection and appointment process. In line with the amendments, the Selection

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<sup>21</sup> 'Midterm Report by the Human Rights Commission of Malaysia (SUHAKAM) on Malaysia's Second Universal Periodic Review', SUHAKAM, 10 June 2016, available at <https://drive.google.com/file/d/0B6FQ7SONa3PRczB2YWcwS2hKcms/view>.

<sup>22</sup> Until 2016 GANRHI was known as the International Coordinating Committee for NHRIs (ICC).

<sup>23</sup> 'Report and Recommendations of the Sub-Committee on Accreditation', GANHRI, 23 April 2008, available at [https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/2008\\_April%20SCA%20Report.pdf](https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/2008_April%20SCA%20Report.pdf).

<sup>24</sup> Amendments included the increase to the term of the Commissioners from two years to three years and the introduction of the development of key performance indicators in the remit of the Prime Minister.

<sup>25</sup> 'Reports and Recommendations of the Session of the Sub-Committee on Accreditation', GANHRI, 30 March 2009, available at [https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/2009\\_March%20SCA%20REPORT.pdf](https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/2009_March%20SCA%20REPORT.pdf).



Committee comprises the Chief Secretary to the Government; the Chairperson of the Commission; and three other members of civil society with knowledge or experience in human rights matters. These three members are appointed by the Prime Minister and may include former judges or former members of the Commission. However, details of the appointments to these latter three positions are not made public. This is a stark reversal of the common practice of announcing all committee appointments in the Federal Gazette.

GANHRI-SCA highlighted this issue again in its report in November 2015, stating that the appointment process still lacks clear law prescribing the process of advertisement of vacancies, that there are no clear and uniform criteria for appointments to the selection committee, and that there is a failure to ensure broad consultation and participation in the application, screening, selection, and appointment process.

Despite the opaque process and the lack of public information (barring the open call for nomination for candidacy to be a member of the Commission), the selection process in 2016 has put in place a panel of Commissioners that are largely competent in their individual areas of expertise on human rights matters. While there are concerns about some of the positions expressed by selected Commissioners during their term, the Commission as a whole has distanced itself from any stance adopted which is not in line with SUHAKAM's vision and mission,<sup>26</sup> or retracted<sup>27</sup> its stance.<sup>28</sup>

With the SCA recommendations and the first ever change of the Federal Government of Malaysia in mind, it remains to be seen if SUHAKAM can further improve itself in this area in 2019 when the selection process starts for the appointment of replacements to the outgoing Commissioners.

#### *Dismissal Procedures and Accountability Mechanisms*

Section 5(5) of the HRCMA, stipulates "The Prime Minister may determine a suitable mechanism, including appropriate key performance indicators, to assess the performance of the members of the Commission in carrying out their functions and duties under this Act." The creation and implementation of a performance index by the Prime Minister raises substantial questions as to the influence the Prime Minister may have on the Commission if this index is developed without any consultation with relevant stakeholders or due consideration given to the independence of the Commission. When this provision was first introduced in 2009, the SCA raised concerns. It should be noted that this provision has not been exercised in practice.

When this section of the HRCMA is taken in tandem with the recent budget cut, it raises substantial concerns with regards to the capacity and resilience of the Commission to protect its independence from the executive's whip if the executive should seek to deter the Commission from exercising its duties and functions.

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<sup>26</sup> Ho Kit Yen, 'Booing racist politicians not our stand, says Suhakam chairman', *Free Malaysia Today*, 23 March 2018, available at <http://www.freemalaysiatoday.com/category/nation/2018/03/23/boo-ing-racist-politicians-not-our-stand-says-suhakam-chairman/>.

<sup>27</sup> Syed Jaymal Zahiid, 'I support Bersih's right to protest, Suhakam chief clarifies', *Malay Mail Online*, 5 August 2016, available at <https://www.malaymail.com/s/1176697/i-support-bersihs-right-to-protest-suhakam-chief-clarifies>.

<sup>28</sup> Shahanaaz Habib, 'Don't take to the streets, new Suhakam chief tells Bersih', *The Star Online*, 31 July 2016, available at <https://www.thestar.com.my/news/nation/2016/07/31/dont-take-to-the-streets-new-suhakam-chief-tells-bersih-a-diplomatic-approach-to-human-rights/>.

Practically, to the credit of the Commission, SUHAKAM as an entity has subjected itself to other external parties when it comes to its evaluation as an NHRI. For example, SUHAKAM has been proactive in engaging with the ANNI reporting processes in recent years and shows indication of willingness to engage with civil society organisations involved in the process of reviewing SUHAKAM. Furthermore, the Commission itself has engaged representatives from the United Nations Office of the High Commissioner for Human Rights (OHCHR), the Asia Pacific Forum of NHRIs (APF), the United Nations Development Programme (UNDP) and members of civil society to assess its own capacity as an NHRI and provide feedback. This approach of organising and coordinating a Commission-led evaluation is a practical alternative to the provisions of Section 5(5) of the HRCMA, which crucially preserves the independence of SUHAKAM from the executive.

### **3.3 Pluralism**

#### *Pluralism of Commissioners*

Section 5(3) of the HRCMA states “The members of the Commission shall be appointed from amongst men and women of various religious, political and racial backgrounds who have knowledge of, or practical experience in, human rights matters.” The appointment of Commissioners in recent years has largely been gender-balanced with a varied ethnic representation. The Commission is currently represented by three women and four men. The Commissioners also include representatives from the two states in East Malaysia, Sarawak and Sabah.

However, as noted earlier in this report, the appointment process of Commissioners is not transparent with little to no information available on the criteria for selection and shortlisting of potential candidates to be Commissioner. It should be noted that in spite of the lack of information and transparency on the selection process, the appointed Commissioners in the recent years have largely been gender-balanced and have a varied ethnic representation.

#### *Pluralism of Staffing*

General Observation 1.7 of the 2013 General Observations<sup>29</sup> states that diversity of staff is an important element of a National Human Rights Institution as it supports the capacity of the NHRI to engage on all human rights issues affecting the society in which it operates, as well as promoting the accessibility of the NHRI for all citizens. The diversity of the staff of an NHRI is thus an important element in ensuring the effectiveness of the institution, and supports the independence and accessibility of the institution.

In terms of Malaysia, it is challenging to ensure this aspect. Section 16 of the HRCMA which sets out the appointment of the Secretary and staff does not mention in detail how to ensure the diversity of the staff, as it only prescribes that “The Commission shall appoint a Secretary to the Commission” and “The Commission may appoint such other officers and servants as may be necessary to assist the Commission in the discharge of its functions under this Act.”

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<sup>29</sup> General Observations of the SCA, 2013, Section 1.7, available at <https://nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC%20SCA%20General%20Observations.pdf>.

### *Collaboration with Civil Society and other Stakeholders*

As noted in past ANNI reports, SUHAKAM has made commendable efforts to collaborate with civil society on human rights advocacy. However recently there has been an incident of miscommunication with regards to the Commission's collaboration with civil society. In brief, Pusat KOMAS formed a partnership with SUHAKAM in 2016 and together they had been advocating for the Malaysian Government to sign and ratify the International Convention on the Elimination of Racial Discrimination (ICERD).

This advocacy had been particularly successful with the Penang State Government where Pusat KOMAS, SUHAKAM, and the Penang Institute, working as partners, managed to convince the state government to adopt a "Code of Conduct for the Promotion of Equal Opportunities through the Elimination of Racial Discrimination" to be implemented in the state. To formalise the effort, the state government, through the Deputy Chief Minister 1, organised a press conference on 4 April 2018. Unfortunately, at the very last minute on 4 April, Pusat KOMAS was informed via tele-conversation that the Commission had made the decision to withdraw itself completely not only from the press conference but also from the drafting of the "Draft Code of Conduct" without any explanation given. The Commission further proceeded to inform the Penang State Government that they were withdrawing from the process, without prior consultation with Pusat KOMAS or the Penang Institute. The press conference proceeded without a representative from the Commission.<sup>30</sup>

Since the incident, both parties have communicated and met to resolve the miscommunication that led to the abovementioned situation.<sup>31</sup> In brief, the miscommunication occurred when some of the collaborating organisations decided to expedite a press conference to announce the Penang State Government's adoption of the Code of Conduct before all parties were ready to proceed. Furthermore, the Code of Conduct itself was still at a draft stage at that point and the Commission had yet to take a collective decision on the matter.

It is noted that the miscommunication and subsequent dispute that arose between Pusat KOMAS and SUHAKAM is an aberration. Based on other civil society engagement with the Commission within the reporting period, no similar issues or concerns were raised by any other parties. Collaborations between the Commission and other NGOs such as SUARAM, Amnesty International Malaysia, and Lawyers for Liberties, as well as with Islamic groups and indigenous peoples, have largely been positive.

Regarding other collaboration with civil society and stakeholders, the Commission had meetings with several self-proclaimed human rights NGOs that have been known to stand against human rights. While acknowledging that it is not the Commission's role nor the role of other NGOs to make a determination on whether an NGO is a human rights NGO, and nor is it the Commission's role to discriminate against and reject meetings from stakeholders, stakeholders that represent themselves as pro-human rights while acting against human rights in practice pose a substantial threat to other human rights organisations in Malaysia.

The report acknowledges that advocacy for human rights includes the need to engage the diverse groups and communities within Malaysia to ensure that voices of all groups are heard

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<sup>30</sup> Accounts of this incident are based on the testimony and accounts of Pusat KOMAS.

<sup>31</sup> Based on written response by the Commission.

and not discriminated against. However, the authors would like to caution the Commission to be cognisant of the questionable stance adopted by selected groups and to understand the threats and potential backlash faced by human rights organisations<sup>32</sup> and marginalised communities<sup>33</sup> as a direct result of their actions.

In terms of SUHAKAM's collaboration with other statutory bodies such as the Enforcement Agency Integrity Commission (EAIC),<sup>34</sup> the Commission was unable to continue its collaboration and conduct joint visits to detention centres due to the difficulty and challenges in coordinating a suitable time for Commissioners from both commissions. Joint investigations have also proved to be tricky as the EAIC has reportedly turned down offers for joint investigations into some of the cases put forward by SUHAKAM.

The recommendation for the collaboration and joint visit by both commissions was in line with the principle of mitigating resource wastage and improving the capacity of both commissions to address human rights violations by law enforcement agencies. The initial drive for an inter-commission joint investigation in 2015 was partly attributable to the broader power afforded to the EAIC in terms of investigations and spot-checks which SUHAKAM does not have under the HRCMA.

### **3.4 Adequate Resources**

According to the GANHRI-SCA General Observations, "a National Human Rights Institution must be provided with an appropriate level of funding in order to guarantee its independence and remains at the forefront of challenges faced by SUHAKAM despite Section 19(1) of the HRCMA which prescribes that "The government shall provide the Commission with adequate funds annually to enable the Commission to discharge its functions under this Act." While the budget was restored to its previous level of around RM11,000,000 (est. 275,000USD) in 2017, it is still short of what the Commission requires to perform at full capacity. The Commission has suggested that 50 percent more (at around RM15,000,000) would be ideal for the Commission to fulfil its role.

The shortfall makes it necessary for the Commission itself to source alternatives to fund its campaigns and programmes. At this juncture, the Commission has managed to secure some degree of financial support for selected campaigns by collaboration with international bodies and diplomatic missions in Malaysia. While the efforts by the Commission are commendable, it leaves much to be desired when the Commission has to expend its resources to secure its own financial means for campaigns and programmes.

In terms of other resources, the Commission reports that it is largely equipped to conduct its work with basic necessities such as electronic equipment and other office equipment provided for all staff. While there are some concerns as to the state of this equipment, the recent update of equipment that the Commission is going through has apparently been adequate for the secretariat to continue its work unhindered.

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<sup>32</sup> Azril Mohd, 'Cabaran Getir NGI', *Utusan Online*, 10 October 2017, available at <http://www.utusan.com.my/rencana/utama/cabaran-getir-ngi-1.535840>.

<sup>33</sup> 'Labelled 'militant', LGBT community says joined Bersih 5 to uphold democracy', *Malay Mail Online*, 5 December 2016, available at <https://www.malaymail.com/s/1265199/labelled-militant-lgbt-community-says-joined-bersih-5-to-uphold-democracy>.

<sup>34</sup> A commission with the mandate to investigate misconduct of enforcement agencies in Malaysia.

As a whole, the secretariat has the capacity to handle the duties and responsibilities expected of the Commission. The Commission in its annual appraisal form to members of the secretariat provides for staff to request training that they find necessary for their work. Based on the feedback, SUHAKAM provides this training and capacity building for staff according to their departmental roles. In terms of external training, the Commission leverages expertise and resources from the Asia-Pacific Forum of National Human Rights Institutions (APF). The Commission itself has also engaged experts and civil society to give thematic trainings to the secretariat in the recent past. As a result, the Commission can leverage local civil society's expertise for training and empowering its staff to improve the efficacy and capacity of the Commission. The authors of this report encourage the Commission to further explore local-based training in collaboration with civil society.

### 3.5 Adequate Powers of Investigation

#### *Powers of Investigation*

GANHRI-SCA General Observation 2.9 states that “When a NHRI is provided with a mandate to receive, consider and/or resolve complaints alleging violations of human rights, it should be provided with the necessary functions and powers to adequately fulfil this mandate.”<sup>35</sup> Section 12(1) of the HRCMA states, “The Commission may, on its own motion or on a complaint made to it by an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or a group of persons, inquire into an allegation of the infringement of human rights of such person or group of persons. The HRCMA also grants SUHAKAM powers to procure, receive, and require evidences as well as to summon any person to give evidence in Section 14(1).”<sup>36</sup> In general, SUHAKAM has acted upon complaints by victims of human rights violations or their family members, or from civil society; as well as taking up cases on their own initiative. In most of these investigations, the government agencies involved have usually cooperated with SUHAKAM's officers. However, this cooperation does not often proceed beyond the formal.

The public inquiry into the disappearance of Raymond Koh, Amri Che Mat, and Joshua and Ruth Hilmy provides an indication of SUHAKAM's current level of ability to address and investigate human rights violations. Subpoenas issued by SUHAKAM in this case were acknowledged and responded to by the relevant individuals, but those summoned did not in all cases fully cooperate with or provide any substantial help to the investigation.<sup>37</sup>

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<sup>35</sup> General Observations of the SCA, 2013, Section 2.9, available at

<https://nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC%20SCA%20General%20Observations.pdf>.

<sup>36</sup> (1) The Commission shall, for the purposes of an inquiry under this Act, have the power (a) to procure and receive all such evidence, written or oral, and to examine all such persons as witnesses, as the Commission thinks necessary or desirable to procure or examine; (b) to require that the evidence, whether written or oral, of any witness be given on oath or affirmation, such oath or affirmation being that which could be required of the witness if he were giving evidence in a court of law, and to administer or cause to be administered by an officer authorised in that behalf by the Commission an oath or affirmation to every such witness; (c) to summon any person residing in Malaysia to attend any meeting of the Commission to give evidence or produce any document or other thing in his possession, and to examine him as a witness or require him to produce any document or other thing in his possession.

<sup>37</sup> ‘Ex-IGP declines to give answers at inquiry’, *Daily Express*, 31 October 2017, available at

<http://www.dailyexpress.com.my/news.cfm?NewsID=120768>.<sup>38</sup> Rashvinjeet S. Bedi, ‘Suhakam: Suspension of inquiry into Pastor Koh's disappearance required by law’, *The Star*, 17 January 2018, available at

<https://www.thestar.com.my/news/nation/2018/01/17/suhakam-suspension-of-inquiry-into-pastor-koh-disappearance-required-by-law/>.

Furthermore, within the reporting period of this report, SUHAKAM's inquiry into the disappearance of Raymond Koh is on hold. The Commission has denied that the inquiry was suspended due to instruction received in a letter by the Royal Malaysian Police, or an injunction by the authorities.<sup>38</sup>

The reason SUHAKAM has given for the suspension of the inquiry is that an individual allegedly responsible for the kidnapping is currently being prosecuted, and that under the HRCMA, SUHAKAM is required to cease investigation into cases that become the subject of a court proceeding.<sup>39</sup>

However, the timing of the suspension, coming as it did after receipt of the letter by the Royal Malaysian Police, raises substantial concerns of police interference as two critical police witnesses were supposed to testify just before the inquiry was suspended.<sup>40</sup>

Nevertheless, it does seem that the suspension was undertaken on SUHAKAM's initiative and was not due to external pressure as the Commission maintains the opinion that the court case, which the Commission was informed about by the police letter, triggers Section 12(2)(a) of the HRCMA.<sup>41</sup> However, there is disagreement as to whether these grounds given by SUHAKAM require the inquiry to be suspended.

Lawyers representing the family members of Koh have made the point<sup>42</sup> that the inquiry should only be stopped if the subject matter is the same as that being heard in court. In this case, the subject matter being heard by the inquiry was as to whether the state was complicit in the disappearance, whereas the trial against the individual allegedly behind the kidnapping was limited to whether he had committed the act of kidnapping.

### *Inspection of Prisons, Jails, Detention Centres, and Places of Confinement*

In cases of chain-remand, a practice where the remand process is exploited by the police to extend a person's detention beyond the permitted 7 days or 14 days maximum, the Commission has sent its officers to visit those held in police custody to ascertain their condition and to identify or investigate any misconduct on the part of the police.

This has been effective in cases within the 'critical' phase immediately after a detainee is arrested, where they are subjected to intimidation and potential abuse. In past cases raised by SUARAM to the Commission, the Commission's immediate intervention in visiting and verifying the status and conditions of the detainees allowed them to secure evidence of injuries inflicted post-arrest and to ensure a degree of safety and security for the detainee by

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<sup>38</sup> Rashvinjeet S. Bedi, 'Suhakam: Suspension of inquiry into Pastor Koh's disappearance required by law', *The Star*, 17 January 2018, available at <https://www.thestar.com.my/news/nation/2018/01/17/suhakam-suspension-of-inquiry-into-pastor-koh-disappearance-required-by-law/>.

<sup>39</sup> Victoria Brown, 'Suhakam halts inquiry into Pastor Koh's disappearance on IGP's request', *The Star Online*, 16 January 2018, available at <https://www.thestar.com.my/news/nation/2018/01/16/suhakam-halts-inquiry-into-pastor-kohs-disappearance-on-igps-request/>.

<sup>40</sup> Ibid.

<sup>41</sup> Charles Ramendran and Ashwin Kumar, 'Suhakam's inquiry into Pastor Koh's disappearance halted', *The Sun Daily*, 17 January 2018, available at <http://www.thesundaily.my/news/2018/01/16/suhakam%E2%80%99s-inquiry-pastor-koh%E2%80%99s-disappearance-halted>.

<sup>42</sup> Noel Archariam, 'Family lawyer urges Suhakam to continue Pastor Koh inquiry', *Malaysian Insight*, 18 February 2018, available at <https://www.themalaysianinsight.com/s/38226/>.<sup>43</sup> Detailed information of this case is redacted from the report due to concerns for the detainees' safety and security.



raising concerns of their status to the enforcement agencies in question.<sup>43</sup>

One serious blemish in the Commission's work in this area comes in the case of Benedict A/L Thanilas. Mr. Thanilas died in police custody following the Commission's failure to respond promptly to a complaint raised by his wife regarding neglect of his state of health. In consultations leading up to the preparation of this report, SUHAKAM has stated that its internal procedure for dealing with complaints has been improved and made more responsive as a result of the case of Benedict Thanilas. Previously, the officers receiving complaints needed to refer all complaints to their superior officer before the case could be forwarded to the officer-in-charge. Under the new procedure, the SUHAKAM officer who receives the complaint can act immediately if the situation requires an urgent intervention.

#### **4. Conclusion**

Reflecting on the developments leading up to 2017 and developments in 2017, SUHAKAM as a whole has progressed substantially from the toothless tiger that did not enjoy the support or acknowledgement of civil society. While there is room to improve, many of the shortcomings of SUHAKAM within this reporting period are attributable to the inaction or policy direction by the Government of Malaysia. As a concluding remark, this report highlights four main areas in which SUHAKAM can seek to improve in the near future.

First and foremost, the Commission ought to review and identify any shortcoming in terms of gender, ethnic, and cultural representation within the Commission itself. While Commissioners are to an extent, representative due to the selection process, the secretariat itself still falls short of an ideal representation. While this area has not been examined in detail in this report, it is important that SUHAKAM review and establish an organisational plan and strategy to improve the composition of the officers within the secretariat itself.

Secondly, in light of the upcoming renewal of term of office, or appointment of new Commissioners, SUHAKAM ought to explore possibilities of democratising and strengthening the selection process. The report notes that the selection process itself is strongly linked to the Prime Minister's Office and it would require substantial amendments to SUHAKAM's founding Act in order for there to be any substantive reform. However, the Commission itself should conduct consultations with civil society and other stakeholders to develop a new model for a democratically selected panel of Commissioners which creates space for both the Commission and civil society to lobby, or advocate to, the Government of Malaysia on the composition of the Commission.

Thirdly, while SUHAKAM has improved in its capacity and efficacy in addressing human rights violations there remain several areas in which the Commission itself can seek to improve. In many ways, the complaint mechanism that initiates investigation by the Commission is still relatively passive. While the Commission has taken the initiative in investigating selected issues such as the issue of custodial death, the Commission can improve further by taking the initiative to conduct fact-finding missions to critical areas before any violations occur. As an example, the Commission could embark on fact-finding missions to the indigenous peoples, who are standing off against corporate and state agencies, as soon as the news of a stand-off surfaces; as opposed to waiting for the community to report

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<sup>43</sup> Detailed information of this case is redacted from the report due to concerns for the detainees' safety and security.

on a crackdown before taking action.

Lastly, whenever possible, SUHAKAM ought to include experts from civil society or academia in policy meetings with state agencies. As noted in some of the points raised in this report, the Commission could avail itself of the expertise possessed by civil society. This expertise can only be utilised by the Commission if there are avenues for civil society to directly engage state agencies together with the Commission, or through a more structured consultation process between the Commission and civil society. It would be ideal if the Commission were to collaborate with civil society around thematic issues to give some structure to the process, as opposed to the *ad hoc* manner in which consultations are practiced at this juncture.

With the clear improvement shown by SUHAKAM over the past few years, it is of paramount importance for the Government to echo this development and strengthen its engagement with the Commission as well as strengthening the mandate of the Commission. With Malaysia undergoing a change of government for the first time since Independence in 1957, the current Government is in the position to implement sweeping reforms to strengthen human rights. Part of this reform must be to strengthen the mandate of SUHAKAM and empower SUHAKAM with the necessary bite to achieve its aim of protecting and promoting human rights.

## **5. Recommendations**

### **To the Government of Malaysia:**

- Fully implement the HRCMA in compliance with the Paris Principles and the Belgrade Principles;
- Table and debate SUHAKAM's Annual Report in Parliament;
- Create a Parliamentary Select Committee to adopt and monitor implementation of SUHAKAM's recommendations;
- Implement the legal reform proposed by the Commission to strengthen its mandate;
- Ensure the financial independence of the Commission in law and in practice;
- Include SUHAKAM in consultations on any institutional or legal reform that may impact human rights;
- Open the selection process of the Commissioners for public scrutiny;
- Repeal Section 5(5) of the HRCMA.

### **To SUHAKAM:**

- Develop and implement an organisational plan and strategies to increase the diversity of SUHAKAM's secretariat;
- Engage with civil society to develop a democratic selection process for Commissioners;
- Improve the Commission's degree of initiative in investigating human rights violations especially on critical cases where a community is standing off against authorities on human rights issues;
- Expand and include stakeholder and civil society participation in the Commission's engagement with government agencies;
- Exercise caution in engaging with groups and stakeholders that have clearly campaigned against human rights as this may grant legitimacy to stakeholders fighting



against human rights and cast doubt on the Commission's commitment to uphold human rights;

- Standardise and formalise the consultation process with civil society and other appropriate institutions that was carried out in 2017 to assess SUHAKAM's performance as an NHRI. This approach of organising and coordinating a Commission-led evaluation should be supported to replace the provisions of Section 5(5) of the HRCMA. Findings and recommendation from these reviews should be made public with adopted recommendations and roadmaps for reform made available for scrutiny by other stakeholders to ensure that recommendations and best practices are complied with.

# MYANMAR: ‘RETURN TO SENDER’ - MNHRC ENABLING LAW MUST BE RETURNED TO PARLIAMENT FOR STRUCTURAL REFORM

*Action Committee for Democracy Development, Burma Monitor Group, Future Light Center, Generation Wave, Genuine People's Servants, Human Rights Defenders and Promoters Network (HRDP), Human Rights Foundation of Monland, Kachin Women's Association – Thailand, Loka Ahlinn, Progressive Voice, Synergy (Social Harmony Organization), Smile Education and Development Foundation<sup>1</sup>*

## 1. Introduction

This chapter seeks to analyse the performance of the Myanmar National Human Rights Commission (MNHRC) in relation to the international standards of the Paris Principles and the General Observations of 2013. This report will also utilise the 2015 findings from the Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation (GANHRI-SCA), which accredited the MNHRC with a ‘B’ status, thus indicating that it is not fully compliant with the Paris Principles. This report will be based on desk research and will also build on previous ANNI reports that employed field research in the form of key stakeholder interviews. The authors of this report are Action Committee for Democracy Development, Burma Monitor Group, Future Light Center, Generation Wave, Genuine People's Servants, Human Rights Defenders and Promoters Network (HRDP), Human Rights Foundation of Monland, Kachin Women's Association – Thailand, Loka Ahlinn, Progressive Voice, Synergy (Social Harmony Organization), and Smile Education and Development Foundation.

## 2. Overview

The MNHRC was established on 5 September 2011<sup>2</sup> by Presidential Decree and formalised through the passage of the enabling law – the Myanmar National Human Rights Commission Law (MNHRC Law) – in March 2014. As outlined in previous ANNI reports,<sup>3</sup> the Commission has suffered a public legitimacy deficit with concerns over the transparency of the selection process, the closeness of Commissioners to the previous military regime, a perceived lack of effectiveness, and lack of a human rights mindset. The GANHRI-SCA report of November 2015 did not accredit the MNHRC ‘A’ status which would denote full compliance with the Paris Principles.<sup>4</sup> The SCA listed seven aspects of the Commission and its mandate that were problematic: a) selection and appointment, b) performance in situations

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<sup>1</sup> Contact email for this chapter: [info@progressive-voice.org](mailto:info@progressive-voice.org)

<sup>2</sup> President Thein Sein, ‘Formation of Myanmar National Human Rights Commission’, 5 September 2011, available at <http://www.burmapartnership.org/2011/09/formation-of-myanmar-national-human-rights-commission/>.

<sup>3</sup> ‘Burma: All Shook Up’, Burma Partnership, Equality Myanmar, and Smile Education and Development Foundation, 18 September 2015, available at <http://www.burmapartnership.org/wp-content/uploads/2015/09/1-Burma-FINAL-04-August-2015.pdf> and ‘Suspicious Minds: The Myanmar National Human Rights Commission's Trust Deficit’, Action Committee for Democracy Development, Progressive Voice and Smile Education and Development Foundation, 29 September 2017, available at <https://www.progressivevoicemyanmar.org/2017/11/29/suspicious-minds-the-myanmar-national-human-rights-commissions-trust-deficit/>.

<sup>4</sup> Adopted by the UN General Assembly in 1993, the Paris Principles set forth minimum standards for the creation of a National Human Rights Institution (NHRI), along with its practical obligations and responsibilities.

of civil unrest or armed conflict, c) pluralism, d) adequate funding and financial independence, e) monitoring places of deprivation of liberty, f) interaction with the international human rights system, and g) annual report. In recent years, the MNHRC has made progress such as in prison monitoring and its engagement with civil society, and it has been open to assistance from international stakeholders. However, this progress has only been minimal in resolving the issues raised by GANHRI-SCA.

With reference to the GANHRI-SCA report, this report will analyse the MNHRC through the lens of the following criteria:

- mandate and competence: a broad mandate, based on universal human rights norms and standards;
- autonomy from the Government and independence guaranteed by statute or the Constitution;
- pluralism;
- adequate resources;
- adequate powers of investigation.

The report will also examine the MNHRC’s response to the human rights situation in Myanmar today, including patterns of human rights violations and abuse since the establishment of the MNHRC in 2011. It will also analyse the key document that gives the MNHRC its mandate - the Myanmar National Human Rights Commission Law - and give recommendations for both legislative amendments and performance related operations.

### **3. The Myanmar National Human Rights Commission and the Paris Principles**

#### **3.1 Functions, Mandate, and Structure**

*“A national institution shall... submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights.” (Paris Principles, A.3(a))<sup>5</sup>*

The Myanmar National Human Rights Commission was established by Presidential Decree in 2011. Its mandate was established in the Myanmar National Human Rights Commission Law of 2014 and is as follows:

- to safeguard the fundamental rights of citizens enshrined in the Constitution of the Republic of the Union of Myanmar effectively;
- to create a society where human rights are respected and protected in recognition of the Universal Declaration of Human Rights adopted by the United Nations;
- to effectively promote and protect the human rights contained in the international conventions, decisions, regional agreements, and declarations related to human rights accepted by the State;
- to coordinate and cooperate with the international organisations, regional organisations,

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<sup>5</sup> Principles Relating to the Status of National Institutions (the Paris Principles), General Assembly Resolution 48/134, 20 December 1993. Section A.3(a), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

national statutory institutions, civil society, and non-governmental organisations related to human rights.<sup>6</sup>

The MNHRC has five divisions: The Human Rights Policy and Legal Division, the Human Rights Promotion and Education Division, the Human Rights Protection Division, the International Relations Division, and the Administration and Finance Division.

While there are certain amendments to the MNHRC Law that must be made, especially in regard to the selection process, pluralism, and independence from the executive as discussed below, the mandate of the MNHRC Law is relatively broad. It gives the MNHRC far-reaching powers to investigate human rights violations, stating that it can verify and conduct “inquiries in respect of complaints and allegations of human rights violations” including “visiting the scene” of violations.<sup>7</sup> It does not specifically exclude allegations of human rights violations committed by the Myanmar military, which makes the MNHRC’s inadequate response to conflict-related human rights violations all the more disappointing.

### *Human Rights Protection*

A consistent criticism of the MNHRC from civil society is the lack of action in conflict-related areas in northern and eastern Myanmar and violence-hit Rakhine State. As the GANHRI-SCA General Observations point out, “NHRIs, in their analysis of the human rights situation in the country, should be authorized to fully investigate all alleged human rights violations, regardless of which State officials are responsible.”<sup>8</sup> A further criticism from civil society is how human rights defenders in the country are not adequately protected.

Since 2011, the Myanmar military has regularly launched military offensives against ethnic armed organisations including the Kachin Independence Army, the ethnic Kokangs, Myanmar National Democratic Alliance Army, the Ta’ang National Liberation Army, the Karen National Liberation Army, and the Shan State Army – North, displacing hundreds of thousands of civilians.<sup>9</sup> Human rights violations such as forced labour, arbitrary arrest, indiscriminate shelling, torture, rape and sexual violence, and extrajudicial killings have been documented by local and international human rights organisations for many years.<sup>10</sup> Yet, as the Chairperson U Win Mra stated early in its existence, the MNHRC would not investigate in conflict areas.<sup>11</sup> As outlined in the ‘Case Studies’ section below, two emblematic cases of the MNHRC’s response to victims of armed conflict – the cases of Ko Par Gyi and Ja Seng Ing – have further eroded trust, particularly from conflict-affected ethnic minority

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<sup>6</sup> The Myanmar National Human Rights Commission Law, 28 March 2014, Section 3, available at [http://www.burmalibrary.org/docs23/2014-03-28-Myanmar\\_Human\\_Rights\\_Commission\\_Law-21-en.pdf](http://www.burmalibrary.org/docs23/2014-03-28-Myanmar_Human_Rights_Commission_Law-21-en.pdf).

<sup>7</sup> Ibid. Section 22(c) and (d).

<sup>8</sup> General Observations of the SCA, 2013, Section 2.6, available at [https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC\\_SCA\\_General\\_Observations.pdf](https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC_SCA_General_Observations.pdf).

<sup>9</sup> ‘Myanmar: IDP Sites in Kachin and northern Shan States’, UN Office for the Coordination of Humanitarian Affairs, 28 February 2018, available at <https://www.reliefweb.int/map/myanmar/myanmar-idp-sites-kachin-and-northern-shan-states-28-feb-2018-0>.

<sup>10</sup> ‘A Far Cry From Peace: Ongoing Burma Army Offensives And Abuses In Northern Burma Under The NLD Government’, Kachin Women’s Association Thailand, 15 November 2016, available at <http://www.kachinwomen.com/far-cry-from-peace-ongoing-burma-army-offensives-abuses-northern-burma-under-nld-government/> and ‘Myanmar’s Borderlands on Fire’, Amnesty International, available at <https://www.amnesty.org/en/latest/news/2017/06/myanmars-borderlands-on-fire/>.

<sup>11</sup> Patrick Winn, ‘A Human Rights Commission’s Shaky Rise in Burma/Myanmar’, *Public Radio International*, 9 March 2012, available at <https://www.pri.org/stories/2012-03-09/human-rights-commissions-shaky-rise-burmamyanmar>.

communities. It is clear that the MNHRC has neither the political will, nor sufficient independence from the all-powerful Myanmar military, to adequately protect the rights of the victims of the military's abuse. This is compounded by the military's impunity, guaranteed in the 2008 Constitution which states that the military itself, not a civilian court, is the final arbiter on any human rights violation committed by military personnel.

The Rohingya crisis in northern Rakhine state is one of the most pressing human rights crises the country has ever faced. Two military operations have forced over 800,000 Rohingya to flee to Bangladesh, escaping what has been labelled "ethnic cleansing" by the UN,<sup>12</sup> and which bears hallmarks of genocide according to the UN Special Rapporteur on the situation of human rights in Myanmar.<sup>13</sup> Given the credible evidence of crimes against humanity that has been well documented by the UN and international and local human rights organisations, the failure of the MNHRC to even recognise the term Rohingya is shocking.<sup>14</sup> After a visit to the affected area, the MNHRC released a statement, using the word 'Bangali' throughout, focusing on the acts of the 'terrorist' group, the Arakan Rohingya Salvation Army, not once mentioning the horrific crimes committed by the Myanmar military, and even recommending more security posts to be established in the area.<sup>15</sup> The GANHRI-SCA report "encourages the NHRC to interpret its mandate in a broad, liberal and purposive manner, and to promote and protect human rights of all including the rights of Rohingya and other minority groups".<sup>16</sup> Given the MNHRC's demonstrated refusal to recognise the term, 'Rohingya' and thus their right to self-identify, this is very unlikely.

### *Human Rights Promotion*

Instead of making substantive efforts in human rights protection, recommendations towards which were made in the 2017 ANNI report, the MNHRC has focused its activities on human rights promotion and education with the Chairperson believing that "education is the best way towards peace" as it is "more sustainable than any type of ceasefire".<sup>17</sup> Many trainings and workshops have been given by the MNHRC, including to the General Administration Department, government officials, department heads, and trainees at military training centres. While this long-term strategy is encouraged, this must go hand-in-hand with - and not at the

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<sup>12</sup> Michelle Nichols, 'U.S. urges U.N. to hold Myanmar military accountable for "ethnic cleansing"', *Reuters*, 13 February 2018, available at <https://www.reuters.com/article/us-myanmar-rohingya-un/u-s-urges-u-n-to-hold-myanmar-military-accountable-for-ethnic-cleansing-idUSKCN1FX229https://news.un.org/en/audio-hub>.

<sup>13</sup> Nina Larson, 'Rakhine conflict has 'hallmarks of genocide': Yanghee Lee', *Frontier Myanmar*, 13 March 2018, available at <https://frontiermyanmar.net/en/rakhine-conflict-has-hallmarks-of-genocide-yanghee-lee>.

<sup>14</sup> The Rohingya are widely viewed as illegal Bengali immigrants attempting to gain political capital by 'creating' a new identity.

<sup>15</sup> 'Statement by the Myanmar National Human Rights Commission with regard to the terrorist attacks that occurred in MaungDaw and Buthidaung townships of Rakhine State Statement No. (11/2017)', MNHRC, 3 October 2017, available at <http://www.mnhrc.org.mm/en/statement-by-the-myanmar-national-human-rights-commission-with-regard-to-the-terrorist-attacks-that-occurred-in-maung-daw-and-buthidaung-townships-of-rakhine-state-statement-no-112017/>.

<sup>16</sup> 'Report and Recommendations of the Session of the Sub-Committee on Accreditation', GANHRI, November 2015, Section 2.3, pp.16-20, available at [https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA\\_FINAL\\_REPORT\\_-\\_NOVEMBER\\_2015-English.pdf](https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA_FINAL_REPORT_-_NOVEMBER_2015-English.pdf). At the time of this report, the Global Alliance of National Human Rights

Institutions (GANHRI) was called the International Coordination Committee of National Institutions for the Promotion and Protection of Human Rights (ICC). Henceforth the ICC will be referred to as GANHRI.

<sup>17</sup> 'Suspicious Minds: The Myanmar National Human Rights Commission's Trust Deficit', Action Committee for Democracy Development, Progressive Voice and Smile Education and Development Foundation, 29 September 2017, available at <https://www.progressivevoicemyanmar.org/2017/11/29/suspicious-minds-the-myanmar-national-human-rights-commissions-trust-deficit/>.

expense of - more robust human rights protection in the short term. Furthermore, given the continued severity of human rights violations committed by the Myanmar military, it is questionable how effective such a strategy has been thus far.

### *Accountability and Publication of Findings and Reports*

To increase the independence, transparency, and credibility of the MNHRC it must be accountable to the President, the Parliament and most importantly to the public in general, and as such its reports must be made widely available. The public and other stakeholders must be able to find out about the work of the Commission including complaints received and investigated, monitoring undertaken, and advice given to the Government.

To ensure regular, wide, and systematic dissemination of the MNHRC's reports and findings in as many local ethnic minority languages as possible, and therefore foster its transparency and credibility, several amendments to the MNHRC Law must be made. Section 22(m)<sup>18</sup> requires that special reports "on human rights issues" be submitted to the President, but this must be expanded to the Parliament, while ensuring that the public are included in the process. This is an issue that GANHRI-SCA also raised.<sup>19</sup> Also, Section 39 states that upon the completion of an inquiry, the MNHRC may disclose the findings to the public "as may be necessary".<sup>20</sup> This latter clause must be removed to make clear that the public must be aware of all inquiry findings.

While the MNHRC has asserted that it has established a relationship with Parliament, specifically the Citizens, Fundamental Rights, Democracy and Human Rights Committees from both the Upper and Lower House, this must be institutionalised as part of a legal amendment.

### **3.2 Autonomy from the Government and Independence Guaranteed by Statute or the Constitution**

*"In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured."* (Paris Principles, B.3)<sup>21</sup>

#### *Budgetary Autonomy and Financial Independence*

One area which the MNHRC has improved in relation to the Paris Principles is its autonomy regarding its budget. Previously, the annual budget was submitted to the President's Office for approval. This was an issue raised by GANHRI-SCA, which noted that the MNHRC

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<sup>18</sup> The Myanmar National Human Rights Commission Law, Section 22, available at

[http://www.burmalibrary.org/docs23/2014-03-28-Myanmar\\_Human\\_Rights\\_Commission\\_Law-21-en.pdf](http://www.burmalibrary.org/docs23/2014-03-28-Myanmar_Human_Rights_Commission_Law-21-en.pdf).

<sup>19</sup> 'Report and Recommendations of the Session of the Sub-Committee on Accreditation', GANHRI, November 2015, Section 2.7, available at

[https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA\\_FINAL\\_REPORT\\_-\\_NOVEMBER\\_2015-English.pdf](https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA_FINAL_REPORT_-_NOVEMBER_2015-English.pdf).

<sup>20</sup> The Myanmar National Human Rights Commission Law, Section 39, available at

[http://www.burmalibrary.org/docs23/2014-03-28-Myanmar\\_Human\\_Rights\\_Commission\\_Law-21-en.pdf](http://www.burmalibrary.org/docs23/2014-03-28-Myanmar_Human_Rights_Commission_Law-21-en.pdf).

<sup>21</sup> The Paris Principles, Section B.2, available at

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



“...must be provided with an appropriate level of funding in order to guarantee its independence and its ability to freely determine its priorities and activities. It must also have the power to allocate funding according to its priorities.”<sup>22</sup> In a positive development, however, since the 2016-2017 fiscal year, its budget is submitted to and allocated by the Parliament, thus giving the MNHRC financial autonomy from the executive. However, the MNHRC Law must be amended to institutionalise this procedure and also require that a specific line in the national budget be added for the MNHRC.

### *Interaction with, and State Submissions to, the International Human Rights System*

As part of the mandate for NHRIs, the MNHRC has undertaken engagement with the international human rights mechanisms, such as the Universal Periodic Review (UPR) process and the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW). It submitted a report to CEDAW in June 2016 and to the UPR in November 2015. However, despite the MNHRC’s assertion that they did submit independent reports to CEDAW and the UPR, GANHRI-SCA raised questions about the MNHRC’s autonomy regarding state submissions to international human rights mechanisms, noting that, “while it is appropriate for the NHRIs to provide information to the government in the preparation of the State report, NHRIs must maintain their independence and where they have the capacity to provide information to human rights mechanisms should do so in their own right”.<sup>23</sup>

The MNHRC has also recommended that the Myanmar Government accede to the International Covenant on Economic, Social, and Cultural Rights which Myanmar did ratify in October 2017.<sup>24</sup> While this push to the Government is welcome, given that Myanmar has only ratified the Convention on the Rights of the Child, CEDAW, and the Convention on the Rights of Persons with Disabilities, the MNHRC must now continue to push for the ratification of the remaining core international human rights treaties, including optional protocols.

### *Selection and Appointment*

The selection and appointment of Commissioners has been a problem raised by GANHRI-SCA and civil society for many years. The selection and appointment mechanism is one of the most important ways to guarantee the independence and pluralism of NHRIs.

The current Selection Board, as established by Section 5<sup>25</sup> of the legislation, does not offer such guarantees for multiple reasons. Firstly, one of the ten members of the Selection Board is the Union Minister of Home Affairs who is always a serving military general, proving problematic as many reported human rights violations are committed by the military itself. Section 5(b) must be amended so that the composition of the Selection Board does not include military or military-affiliated members. Secondly, while Section 5(f) stipulates that

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<sup>22</sup> ‘Report and Recommendations of the Session of the Sub-Committee on Accreditation’, GANHRI, November 2015, Section 2.3, available at [https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA\\_FINAL\\_REPORT\\_NOVEMBER\\_2015-English.pdf](https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA_FINAL_REPORT_NOVEMBER_2015-English.pdf).

<sup>23</sup> Ibid. Section 2.3.

<sup>24</sup> ‘The Myanmar National Human Rights Commission Annual Report 2016’ (in English), MNHRC, 9 September 2017, available at <http://www.mnhrc.org.mm/en/publication/2016-annual-report-english/>.

<sup>25</sup> The Myanmar National Human Rights Commission Law, Section 5, available at [http://www.burmalibrary.org/docs23/2014-03-28-Myanmar\\_Human\\_Rights\\_Commission\\_Law-21-en.pdf](http://www.burmalibrary.org/docs23/2014-03-28-Myanmar_Human_Rights_Commission_Law-21-en.pdf).

two Selection Board members are from the Parliament, it does not specify who the two parliament representatives should be and how they will be selected. While this selection procedure must be transparent through due parliamentary process, this is also problematic given that 25 percent of the seats in Parliament are allocated to military personnel. Thus, Section 5(f) must be amended to ensure that the two Parliament representatives, or any other number that might be depending on overall amendment of the MNHRC Law, are selected by the Parliament itself through due legislature process rather than appointment or selection by the President. Thirdly, Section 5(h) requires that two representatives of a registered non-governmental organisation (NGO) be part of the Selection Board. This is too restrictive as civil society is not limited to registered NGOs but also includes journalists, individuals, union members, and academics. The language of Section 5(h) must be changed to “independent members of civil society”.

In addition, Section 8 states that the Selection Board shall adopt “procedures for nominating prospective Members of the Commission”.<sup>26</sup> The Paris Principles recognise that it is of critical importance that the terms and conditions for selection and appointment are transparent and set out in the founding law of NHRIs. Thus, the procedures for nominating potential members of the MNHRC must not be left to be established by the Selection Board but must be set out in the law. These procedures must include broad consultations with civil society throughout the process and broad advertisement of vacancies.

In practice, the selection process has been lacking transparency. A reshuffle in September 2014 resulted in the number of Commissioners being reduced from fifteen to eleven, and seven members being replaced.<sup>27</sup> These changes were made subsequent to the passing of the MNHRC Law earlier in the year and resulted in a replacement of the Commissioners that had been in place when the MNHRC’s mandate was established by Presidential Decree in 2011. Significantly, none of the members who were replaced were aware of the process and one even questioned the legality of the reshuffle.<sup>28</sup> There was no clear indication regarding whether or not the Selection Board had been convened to appoint new Commissioners or if it had been instituted in a top-down process by then-President Thein Sein, or by another authority. This lack of transparency was also apparent in the recent appointment of three new Commissioners which was announced through a short statement on the Facebook page of the President’s Office with no details regarding the selection process.<sup>29</sup> This contradicts the explicit stipulation in the General Observations that there must be “a clear, transparent, merit-based and participatory selection and appointment process”.<sup>30</sup>

### *Dismissal Procedures*

Freedom from arbitrary dismissal is crucial to an NHRI’s independence. Since the MNHRC has the authority to comment on the government’s actions in respect to human rights, its members must be protected from retaliation. For this reason, the enabling legislation must specify in detail the circumstances under which a member may be dismissed. Dismissal must

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<sup>26</sup> Ibid. Section 8.

<sup>27</sup> Bill O’Toole, ‘Rights body shake-up under fire’, *The Myanmar Times*, 29 September 2014, available at <https://www.mmtimes.com/national-news/11803-rights-body-shake-up-under-fire.html>.

<sup>28</sup> Ibid.

<sup>29</sup> Myanmar President Office Facebook page, accessed 10 May 2018, available at <https://www.facebook.com/myanmarpresidentoffice.gov.mm/posts/1624255190955544>.

<sup>30</sup> General Observations of the SCA, 2013, Section 2.6, available at [https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC\\_SCA\\_General\\_Observations.pdf](https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC_SCA_General_Observations.pdf).



be limited to serious wrongdoing, clearly inappropriate conduct, or serious incapacity. In addition, mechanisms for dismissal must be independent from the executive. Section 18 of the MNHRC Law does not offer these guarantees. Instead, it states that the President, in coordination with the speakers of the Upper and Lower Houses of Parliament, has the authority to dismiss a member of the MNHRC.<sup>31</sup> It is imperative that Section 18 be amended so that it guarantees the establishment of an independent mechanism for dismissal. International guidelines suggest a two-third majority vote of the Parliament or an independent board of judges. However, in the specific context of Myanmar, it is important to note that the Parliament's composition (25 percent military-assigned seats) and a politically pliant judiciary that is subordinate to the military do not offer these guarantees of independence either.

### 3.3 Pluralism

*“The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights...” (Paris Principles, B.1)*<sup>32</sup>

Lack of pluralism is one of the most problematic aspects of the MNHRC, which is evident in the current composition of Commissioners, the selection process itself, and the recruitment of staff, all of which have been a major contribution towards a lack of public trust in the Commission.

#### *Pluralism of Commissioners*

As the GANHRI-SCA General Observations point out, “Where the members and staff of NHRIs are representative of a society's social, ethnic, religious and geographic diversity, the public are more likely to have confidence that the NHRI will understand and be more responsive to its specific needs.”<sup>33</sup> Myanmar is a hugely diverse country in terms of religion, ethnicity, language, and culture, and the domination by the ethnic and religious majority, Burman Buddhists, has been a key factor in the ongoing civil wars and persecution of minorities such as the Rohingya. It is thus vital that the Selection Board ensures an ethnically, religiously diverse commission that is gender-balanced, to move towards a more accurate representation of the country's population. To secure pluralism, the legislation must specify a significant number of representatives of minority backgrounds. Thus, Article 7(c) must be amended so that it clearly requires that at least one-third of the total number of the Commissioners are representatives of women, one-third are representatives of ethnic nationalities, and one-third come from religious minorities. The current composition includes one Muslim member, and two from ethnic nationalities – one Karen and one Rakhine.

One of the most striking aspects of the MNHRC's current composition is that there is only one female Commissioner out of a total of ten. In fact, for a long period of time – between

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<sup>31</sup> The Myanmar National Human Rights Commission Law, Section 18, available at [http://www.burmalibrary.org/docs23/2014-03-28-Myanmar\\_Human\\_Rights\\_Commission\\_Law-21-en.pdf](http://www.burmalibrary.org/docs23/2014-03-28-Myanmar_Human_Rights_Commission_Law-21-en.pdf).

<sup>32</sup> The Paris Principles, Section B.1, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

<sup>33</sup> General Observations of the SCA, 2013, Section 1.7, available at [https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC\\_SCA\\_General\\_Observations.pdf](https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC_SCA_General_Observations.pdf).

October 2016 and April 2018 – there were no female Commissioners. This was the situation since the Ava Tailoring case in 2016 in which MNHRC Commissioners pressured the families of two domestic workers who were tortured at the hands of a tailoring shop family to accept financial compensation rather than seek criminal justice.<sup>34</sup> After public outcry over the MNHRC’s handling of the case, four Commissioners resigned, including the only two female Commissioners. It took eighteen months after this occurred for three new Commissioners to be appointed, which included one woman.<sup>35</sup> Section 7(c) of the MNHRC Law stipulates that selection must “ensure the equitable representation of men and women, and of national races”, and it is lamentable that only one MNHRC Commissioner is female.<sup>36</sup>

### *Pluralism of Staffing*

The requirements set out in Section 7<sup>37</sup> of the MNHRC Law for the plurality of the Commissioners such as gender balance, ethnic and minority representation, and human rights experience, must also be added as requirement for staff under Chapter VIII.

### *Collaboration with Civil Society and other Stakeholders*

The Paris Principles recognise that relationships with civil society can help NHRIs to protect their independence and pluralism, and enhance their effectiveness, by deepening their public legitimacy. The MNHRC Law does give power to the MNHRC to consult and engage with civil society organisations.<sup>38</sup> However, Section 22(f) must specifically emphasise that the consultation and engagement be “regular” and “inclusive” of civil society organisations, community-based organisations, and networks regardless of their registration status, to enable meaningful engagement, instead of simply allowing engagement at the Commission’s discretion.

In practice, the MNHRC has taken steps in recent years to engage further with civil society, including making a commitment to develop regular communication with the organisation(s) that authored this report. Other activities include cooperating with a human rights organisation working on behalf of political prisoners by consulting them on a draft prison law and using training materials from a human rights education organisation. This is a welcome improvement over the years and it is recommended that the MNHRC maintains, deepens, and institutionalises this engagement with wider range of civil society groups who are working to improve various human rights situations.

### *Degree of Trust*

The opaque selection process, lack of pluralism in membership, the unwillingness to investigate major abuses by the Myanmar military, and the backgrounds of the Commissioners, including two former military personnel, are major factors in the trust deficit

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<sup>34</sup> ‘Suspicious Minds: The Myanmar National Human Rights Commission’s Trust Deficit’, Action Committee for Democracy Development, Progressive Voice and Smile Education and Development Foundation, 29 September 2017, available at <https://www.progressivevoicemyanmar.org/2017/11/29/suspicious-minds-the-myanmar-national-human-rights-commissions-trust-deficit/>.

<sup>35</sup> Myanmar President Office Facebook page, accessed 10 May 2018, available at <https://www.facebook.com/myanmarpresidentoffice.gov.mm/posts/1624255190955544>.

<sup>36</sup> The Myanmar National Human Rights Commission Law, Section 7, available at [http://www.burmalibrary.org/docs23/2014-03-28-Myanmar\\_Human\\_Rights\\_Commission\\_Law-21-en.pdf](http://www.burmalibrary.org/docs23/2014-03-28-Myanmar_Human_Rights_Commission_Law-21-en.pdf).

<sup>37</sup> Ibid. Section 7.

<sup>38</sup> Ibid. Section 22.

among the public and civil society, despite the improved efforts taken by the MNHRC to engage with civil society. Many of the Commissioners lack previous experience in human rights work, and their commitment to the universality of human rights is questionable. The terms of the current Commissioners end in 2019, and this gives the current National League for Democracy (NLD)-led Government an opportunity to amend the MNHRC Law, especially to make the Selection Board more inclusive and independent, and thus ensure a more transparent and open selection process for a more effective, representative, and action-orientated MNHRC.

### 3.4 Adequate Resources

*“The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding.”* (Paris Principles, B.2)<sup>39</sup>

The GANHRI-SCA General Observations stipulate that “to function effectively, an NHRI must be provided with an appropriate level of funding in order to guarantee its independence and its ability to freely determine its priorities and activities”.<sup>40</sup> The MNHRC Law states that “The State shall provide the Commission with adequate funding”<sup>41</sup> yet the Commission believes it is underfunded, especially as regards staffing, with Vice-Chair, Sitt Myaing, claiming in 2017 that they needed 300 staff to fulfil their mandate but only could afford to hire 57.<sup>42</sup>

In the 2016 Annual Report the MNHRC stated its intention to open regional offices in Mandalay, Naypyidaw, and one other unspecified location.<sup>43</sup> As the GANHRI-SCA General Observations point out, “Another means of increasing the accessibility of NHRIs to vulnerable groups is to ensure that their premises are neither located in wealthy areas nor in or nearby government buildings. This is particularly important where government buildings are protected by military or security forces. Where an NHRI’s offices are too close to government offices, this may not only compromise the perceived independence of the Institution but also risk deterring complainants.”<sup>44</sup> The current office is in Yangon, the wealthiest part of the country, and is difficult to access for those marginalised communities of the country.

Thus, it is a welcome move to make access to the Commission easier by opening more offices. However, a location in Naypyidaw, the custom-built and heavily militarised city for government, would likely deter victims from approaching the Commission. The proposed opening of a regional office here is thus unlikely to serve any purpose, rendering it unnecessary. Funds should be prioritised elsewhere. In Myanmar, the most marginalised populations and those that experience the most severe and regular human rights violations are

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<sup>39</sup> The Paris Principles, Section B.2, available at

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

<sup>40</sup> General Observations of the SCA, 2013, Section 1.10, available at

[https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC\\_SCA\\_General\\_Observations.pdf](https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC_SCA_General_Observations.pdf).

<sup>41</sup> The Myanmar National Human Rights Commission Law, Section, 46, available at

[http://www.burmalibrary.org/docs23/2014-03-28-Myanmar\\_Human\\_Rights\\_Commission\\_Law-21-en.pdf](http://www.burmalibrary.org/docs23/2014-03-28-Myanmar_Human_Rights_Commission_Law-21-en.pdf).

<sup>42</sup> ‘MNHRC failing to protect human rights, says NGOs’, *DVB*, 4 December 2017, available at

<http://www.dvb.no/news/mnhrc-failing-to-protect-human-rights-say-ngos/78709>.

<sup>43</sup> ‘The Myanmar National Human Rights Commission Annual Report 2016’ (in English), MNHRC, 9 September 2017, available at <http://www.mnhrc.org.mm/en/publication/2016-annual-report-english/>.

<sup>44</sup> General Observations of the SCA, 2013, Section 1.10, available at

[https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC\\_SCA\\_General\\_Observations.pdf](https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC_SCA_General_Observations.pdf).

in ethnic minority areas in the ‘borderlands’ of the country. In order to be more effective, the MNHRC must prioritise the opening of offices in each of the regional state capitals and advocate for funding for full staffing and adequate resources for these offices.

### 3.5 Adequate Powers of Investigation

*“A national institution may be authorized to hear and consider complaints and petitions concerning individual situations... In such circumstances... the functions entrusted to them may be based on the following principles:*

*...(d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.” (Paris Principles, D(d))<sup>45</sup>*

#### *Powers of Investigation*

The MNHRC Law sets out the mandate to investigate cases and make recommendations to the relevant government departments and organisations. The law also instructs these government departments and organisations to respond within 30 days, stating what action they will take based on the MNHRC’s recommendations.<sup>46</sup> In addition to this stipulation, an article must be added that would give the Commission the power to take follow-up action if the authorities are not responsive to the Commission or their answer is not satisfactory. Without such mechanisms, the Commission’s power to compel authorities to address human rights violations is seriously limited. For example, according to the 2016 annual report – the latest available – there were only 165 replies from relevant government ministries and departments out of 311 cases referred by the Commission – just over half.<sup>47</sup> As the GANHRI-SCA’s General Observation 1.6 points out, “In fulfilling its protection mandate, an NHRI must not only monitor, investigate and report on the human rights situation in the country, it should also undertake rigorous and systematic follow up activities to promote and advocate for the implementation on its recommendations and findings, and the protection of those whose rights were found to have been violated.”<sup>48</sup> Thus, an article must be added that gives the power to the MNHRC to submit memoranda to the President and the Parliament if a department or organisation does not reply in good time or does not take satisfactory action to address human rights violations.

The Paris Principles require that NHRIs have access to all documents and all persons necessary for it to conduct an investigation. This includes the power to compel the production of documents and witnesses. Section 35 of the MNHRC Law grants the MNHRC such powers. Section 36(a) and (b) further list limitations to such powers.<sup>49</sup> While acknowledging the necessity to protect classified documents for national security reasons as Section 36(a) outlines, Section 36(b) limits the Commission’s access to “classified documents in the

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<sup>45</sup> The Paris Principles, Section D(d), available at

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

<sup>46</sup> The Myanmar National Human Rights Commission Law, Section 38, available at

[http://www.burmalibrary.org/docs23/2014-03-28-Myanmar\\_Human\\_Rights\\_Commission\\_Law-21-en.pdf](http://www.burmalibrary.org/docs23/2014-03-28-Myanmar_Human_Rights_Commission_Law-21-en.pdf).

<sup>47</sup> ‘The Myanmar National Human Rights Commission Annual Report 2016’ (in English), MNHRC, 9 September 2017, available at <http://www.mnhrc.org.mm/en/publication/2016-annual-report-english/>.

<sup>48</sup> General Observations of the SCA, 2013, Section 1.6, available at

[https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC\\_SCA\\_General\\_Observations.pdf](https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC_SCA_General_Observations.pdf).

<sup>49</sup> The Myanmar National Human Rights Commission Law, Section 35, available at

[http://www.burmalibrary.org/docs23/2014-03-28-Myanmar\\_Human\\_Rights\\_Commission\\_Law-21-en.pdf](http://www.burmalibrary.org/docs23/2014-03-28-Myanmar_Human_Rights_Commission_Law-21-en.pdf).

departments and organizations of the government”.<sup>50</sup> The language used is extremely broad and such limitation could be used to seriously limit the Commission’s investigative powers. It is recommended that Section 36(b) be removed.

### *Court Cases*

Section 37 states that the Commission shall not inquire into any complaint that involves current proceedings before the court.<sup>51</sup> To acknowledge the complementarity of the Commission and the court system and to broaden the powers of the MNHRC, Section 37 must be amended so that the Commission, with authorisation of the court, can inquire into matters pending before that court. This is especially important given the lack of rule of law in the country and the weak, politically pliant judiciary. Unless moves towards establishing the rule of law are made, finding justice for human rights violations through the Myanmar court system is vulnerable to political interference, corruption, and military influence over the court system. Furthermore, judges do not act in accordance with international human rights standards. A salient example is that of child rape cases, where victims have to go through a costly, time-consuming process only for perpetrators to receive relatively light sentences.<sup>52</sup> Thus, it is vital that the MNHRC plays a role in filling this accountability gap.

### *Inspection of Prisons, Jails, Detention Centres, and Places of Confinement*

Sections 43, 44 and 45 of the MNHRC Law relate to the inspection of prisons, jails, detention centres, and places of confinement, and Section 44(a) gives the MNHRC the power to visit such places but only after notifying the relevant authorities.<sup>53</sup> However, NHRIs should have the power to enter any place of detention without prior warnings. The GANHRI-SCA report “encourages the NHRC to conduct ‘unannounced’ visits as this limits opportunities for authorities to hide or obscure human rights violations and facilitates greater scrutiny”.<sup>54</sup> It is also recommended that the requirement for the MNHRC to notify the relevant authorities of the time of its visits in Section 44(a) be removed.

In practice, this has been an area in which the MNHRC has been most active including visiting prisons and police and court detention centres, making recommendations to the Ministry of Home Affairs, and cooperating with a civil society organisation that works on the rights of political prisoners. The 2017 ANNI report gave an example of how recommendations by the MNHRC to the President’s Office and the Ministry of Home Affairs resulted in overcrowding being addressed in a prison in Kachin State by adding an extra storey to the building.<sup>55</sup> Other positive results include female prisoners now receiving regular

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<sup>50</sup> Ibid. Section 36.

<sup>51</sup> Ibid. Section 37.

<sup>52</sup> ‘Rape Victims Struggle to find Justice in Myanmar’, *Myanmar Now*, 17 February 2016, available at <http://www.myanmar-now.org/news/i/?id=aa0320cc-cb14-4750-ad79-25d085739969>.

<sup>53</sup> The Myanmar National Human Rights Commission Law, Sections 43, 44 and 45, available at [http://www.burmalibrary.org/docs23/2014-03-28-Myanmar\\_Human\\_Rights\\_Commission\\_Law-21-en.pdf](http://www.burmalibrary.org/docs23/2014-03-28-Myanmar_Human_Rights_Commission_Law-21-en.pdf).

<sup>54</sup> ‘Report and Recommendations of the Session of the Sub-Committee on Accreditation’, GANHRI, November 2015, Section 2.3, available at [https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA\\_FINAL\\_REPORT\\_NOVEMBER\\_2015-English.pdf](https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA_FINAL_REPORT_NOVEMBER_2015-English.pdf).

<sup>55</sup> ‘Suspicious Minds: The Myanmar National Human Rights Commission’s Trust Deficit’, Action Committee for Democracy Development, Progressive Voice and Smile Education and Development Foundation, 29 September 2017, available at <https://www.progressivevoicemyanmar.org/2017/11/29/suspicious-minds-the-myanmar-national-human-rights-commissions-trust-deficit/>.



supplies of sanitary items and more places of worship being made available for prisoners.<sup>56</sup> This response from the Ministry of Home Affairs and the President's Office demonstrates that more can be done and advocated for by the MNHRC for other essential reforms.

### *Cases Studies*

While the MNHRC is also criticised for its lack of will to address the cases of human rights defenders in relation to freedoms of expression and assembly, the Commission has also been dogged by three controversial cases that have represented some key failures of the use of its powers of investigation:

- a) *Brang Shawng* – In October 2012, Brang Shawng, an ethnic Kachin, submitted a complaint letter to the MNRHC after his 14-year-old daughter – Ja Seng In - was shot and killed by the Myanmar military. In addition to not conducting an investigation into the case – which independent civil society investigated on their own – the MNHRC failed even to protect the complainant from being criminally charged by the Myanmar military for making ‘false charges’.<sup>57</sup> Brang Shawng was forced to attend court 45 times before finally being convicted of the charges, and was compelled to pay a fine.<sup>58</sup> Not only does this demonstrate how the MNHRC failed to protect the complainant from retaliation, but also how powerless the MNHRC is in the face of the Myanmar military.
- b) *Ko Par Gyi* – Ko Par Gyi was a freelance journalist covering armed conflict between the Democratic Karen Benevolent Army and the Myanmar military when he was taken into custody, tortured, and killed by Myanmar army soldiers.<sup>59</sup> The MNHRC launched an investigation after a public outcry, yet the final report did not address the clear signs of torture on Ko Par Gyi's body and contained many inaccuracies.<sup>60</sup> Furthering the contention that the MNHRC is powerless in the face of the Myanmar military, despite the Commission's recommendation for the case to be tried in a civilian court, the two soldiers involved were acquitted in a closed-door military tribunal.
- c) *Ava Tailoring Case* – As outlined earlier, four Commissioners resigned after the bungling of a case in which two domestic workers had been tortured over a period of five years while working for the family of a prominent tailoring shop.<sup>61</sup> After receiving the case, Commissioners pressured the victims' families to accept financial compensation in lieu of pursuing criminal proceedings. This lack of a human rights mindset in this case and the controversy surrounding it has hugely damaged public trust

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<sup>56</sup> Correspondence with MNHRC, July 2018.

<sup>57</sup> ‘Myanmar: Overturn Wrongful Conviction of Brang Shawng’, Fortify Rights, 18 February 2015, available at <http://www.fortifyrights.org/publication-20150218.html>.

<sup>58</sup> Saw Yan Naing and Andrew D. Kaspar, ‘Kachin Man Accusing Army of Killing Daughter Found Guilty of Defamation’, *The Irrawaddy*, 17 February 2015, available at <http://www.irrawaddy.org/burma/kachin-man-accusing-army-killing-daughter-found-guilty-defamation.html>.

<sup>59</sup> ‘Missing Reporter Killed in Custody of Burma Army: Report’, *The Irrawaddy*, 24 October 2014, available at <http://www.irrawaddy.org/burma/missing-reporter-killed-custody-burma-army-report.html>.

<sup>60</sup> Kyaw Hsu Mon, ‘The Report was Fabricated’, *The Irrawaddy*, 3 December 2014, available at <http://www.irrawaddy.org/interview/report-fabricated.html>.

<sup>61</sup> Lawi Weng, ‘Rangoon Family Who ‘Enslaved’ Girls for Years Settle Case for \$4,000’, *The Irrawaddy*, 19 September 2016, available at <https://www.irrawaddy.com/news/burma/rangoon-family-who-enslaved-girls-for-years-settle-case-for-4000.html>.

in the MNHRC.<sup>62</sup>

#### **4. Conclusion**

The MNHRC has been established for nearly seven years and has yet to prove itself as an institution that is committed to defending human rights. The MNHRC Law, while flawed, does give the MNHRC a broad mandate which the Commission can exercise for the effective protection of people's rights if it has the will to do so, but it has yet to fulfil that mandate. While it has focused on promotion, especially in regard to giving trainings and human rights talks, the protection side, as evidenced by the three emblematic cases – Brang Shawng, Ko Par Gyi, and Ava Tailoring Shop – has demonstrated serious problems.

The next few years are going to be vital for the future of the MNHRC. In 2019, the terms of the current Commissioners will end or be up for renewal; there will be general elections in 2020 with a new parliament and government for 2021; and GANHRI-SCA will review the MNHRC's accreditation status in 2020.

Thus, there is still time and opportunity to prove it is fully committed to defend the rights of the people and reinvigorate its work. The starting point will be for the Parliament to amend the MNHRC Law to make it even stronger, so that it is in full compliance with the Paris Principles and other international standards for NHRIs such as the Belgrade Principles. The Selection Board can also breathe fresh air into the MNHRC by selecting candidates from a broader and more pluralistic field through an inclusive and transparent process. If these two processes go hand-in-hand while the Commission itself makes significant improvements in carrying out its protection mandate, and thus reducing the public confidence deficit, the MNHRC could potentially be accredited with an 'A' status at the next GANHRI-SCA process as an NHRI that is compliant with the Paris Principles. This would give the MNHRC voting rights in regional and international bodies of NHRIs as well as allow the MNHRC to take the floor in sessions of the UN Human Rights Council. It is also an opportunity for the NLD Government to set a benchmark for its first term in office – that of the foundations of an independent and effective MNHRC that can start to build public trust and be a genuinely progressive stakeholder in the advancement of human rights in Myanmar.

#### **5. Recommendations**

##### **To the Myanmar Government:**

- To provide support to the Parliament to reform the MNHRC Law to:
  - Explicitly mandate the MNHRC to investigate violations in conflict zones and to allow them unrestricted access to active conflict and ceasefire areas;
  - Expand the stipulation for the composition of the Selection Board to include civil society representatives from non-registered NGOs;
  - Establish a quota for different criteria regarding pluralism, such as by specifying that at least a third of both the body's membership and staff are women and are from ethnic and religious minorities respectively, as well as from civil society with human rights experience;
  - Establish an independent mechanism for dismissal of Commissioners;

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<sup>62</sup> 'Open letter to President Regarding Myanmar National Human Rights Commission Reform', by 142 Civil Society Organisations, 28 September 2016, available at <http://www.burmapartnership.org/2016/09/26837/>.

- Make the processes of selection more transparent, following due process, with a requirement to publicise the members of the Selection Board, in order to remove executive influence from the formation of the Selection Board including ensuring that the two parliament representatives of the Selection Board are selected by the Parliament itself rather than the President;
- Make the process of selection of the Commissioners transparent and open by setting out procedures for nominating potential members of the MNHRC, which should include broad consultations with civil society;
- Ensure staff recruitment procedure is open and transparent, such as advertising the positions publicly;
- Remove the clause about prior notification to allow for unannounced visits to prisons, jails, detention centres, and places of confinement;
- Allow the 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”;
- Set out procedures for nominating potential members of the MNHRC, which should include broad consultations with civil society;
- Give the MNHRC authority to take actions if the response provided by relevant ministries is not satisfactory or if there is no response at all;
- 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;
- 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);
- Refrain from interfering in MNHRC investigations and demonstrate the political will to respect and undertake recommendations from the Commission;
- Amend the 2008 Constitution to bring the military under civilian control, end impunity, and include the MNHRC as a constitutional body to enshrine its mandate of independence and impartiality to protect human rights.

#### **To Parliament:**

- Encourage meaningful, regular debate on the role of the MNHRC, and on its annual report, in parliamentary sessions, and as required where urgent and/or necessary matters arise;
- Hold public hearings on the MNHRC, including on amendments of the MNHRC Law;
- Table a motion to amend the MNHRC Law as described above.

#### **To the Myanmar National Human Rights Institution:**

- Interpret the MNHRC Law in a “broad, liberal, purposive”<sup>63</sup> manner that is more consistent with the Paris Principles;
- Be more proactive in pressuring the Government and Parliament to reform the enabling MNHRC Law in accordance with the Paris Principles;

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<sup>63</sup> ‘Report and Recommendations of the Session of the Sub-Committee on Accreditation’, GANHRI, November 2015, Section 2.3, available at [https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA\\_FINAL\\_REPORT - NOVEMBER 2015-English.pdf](https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA_FINAL_REPORT_NOVEMBER_2015-English.pdf).



- Review and implement the recommendations made by GANHRI-SCA;
- Ensure that the work of the MNHRC adheres to international agreements relevant to NHRIs such as the Paris Principles, the Merida Declaration, and the Belgrade Principles;<sup>64</sup>
- Take the initiative to seek out and act upon information about human rights abuse, rather than waiting for a complaint to be filed to the Commission;
- Ensure discretion and confidentiality when sharing information between the executive, Parliament, the Myanmar military, and branches of law enforcement to ensure that complainants and relevant witnesses are protected from reprisal;
- Accompany human rights investigations and recommendations with public pressure to ensure that relevant parties, especially government ministries, respect and implement them;
- Support programmes that provide long-term, systematic support, and rehabilitation for the victims of human rights violations;
- Solicit assistance from civil society to deal with all aspects of human rights protection, including receiving complaints and carrying out investigations;
- Open more branch offices in rural areas with sufficient resources to educate marginalised, vulnerable, and particular ethnic and religious minority communities about the MNHRC's mandate to protect and promote human rights;
- Ensure all materials produced are translated into as many non-Myanmar ethnic languages as possible and distribute widely to respective communities;
- Engage in more outreach with smaller civil society organisations and grassroots community-based organisations.

#### **To the International Donor Community:**

- Encourage the Parliament and the Government to reform the MNHRC Law and to open and recognise the space for civil society to strengthen the MNHRC;
- Assist the MNHRC to effectively advocate for the Government and the Parliament to amend the MNHRC Law and enact necessary reforms of the Commission;
- Support civil society's human rights work and their efforts to ensure the MNHRC becomes fully effective and in compliance with the Paris Principles, and all other declarations and principles relevant to NHRIs, including the Belgrade Principles, the Merida Declaration, and the Edinburgh Declaration.

#### **To Domestic Civil Society:**

- Campaign for amendment of the MNHRC Law to enhance effectiveness of the MNHRC;
- Hold the MNHRC accountable by engaging with the Commission rigorously and proactively, monitoring the Commission's performance, highlighting situations where it is failing to meet its mandate, such as by bringing issues to the attention of the media and international human rights mechanisms, and making concrete recommendations.

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<sup>64</sup> The Merida Declaration describes the role of NHRIs in implementing the Sustainable Development Goals. and the Belgrade Principles outline how NHRIs and legislative bodies should work together.

# PHILIPPINES: STANDING GROUND IN THE FACE OF GOVERNMENT ATTACKS

*Nir Lama*<sup>1</sup>

## 1. Introduction

This chapter attempts to assess the performance of the Commission on Human Rights of the Philippines (CHRP) based on its activities carried out during the period from 1 January 2017 to 31 December 2017. Important developments post-2017 are also mentioned where necessary. Information for this analysis was gathered through various methodologies: CHRP members were interviewed; a follow-up questionnaire was sent; CHRP publications and documents were reviewed; and secondary data was also analysed. The chapter focuses on the Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation's (GANHRI-SCA) reaccreditation of CHRP with A-status in 2017, and its recommendations. This analysis also builds upon GANHRI-SCA's previous accreditation of CHRP in 2012 and the last ANNI report on CHRP in 2013.

## 2. Overview

The last time the performance of the Philippines' National Human Rights Institution (NHRI) was assessed in the ANNI report was in 2013. This assessment was critical of the divided leadership and lacklustre performance of the CHRP.<sup>2</sup> A new set of Commissioners has taken charge since 2015 and the political context has also changed with President Rodrigo Duterte's election to the premier post in 2016. Though the new team at the CHRP has good experience working in the human rights field and seems to be making efforts to improve the image and functioning of the Commission, the current administration's policies against human rights have proven to be a hurdle. The Duterte administration's attempt to use its influence in the House of Representatives to defund the CHRP, by allocating a meagre 1000 Philippine pesos (Php) (\$20) budget in September 2017, was seen as an effort to abolish it. However, this move was overturned following public pressure and the Senate later approved the CHRP's budget. The Senate added Php 156.4 million Philippine pesos to the proposed 2018 budget of the CHRP, amounting to Php 693.5 million, which is more than the CHRP had originally proposed (Php 651.9 million) in the National Expenditure Program.<sup>3</sup>

GANHRI-SCA recommended that the CHRP be re-accredited with A-status in March 2017. Commending the CHRP for its continuous efforts to protect and promote human rights despite the challenging context in which it operates, GANHRI-SCA expressed its concern on seven issues: 1) Mandate, 2) Pluralism, 3) Selection and Appointment, 4) Adequate Funding, 5) Reporting, 6) Dismissal, and 7) Functional Immunity.<sup>4</sup> It should be noted that GANHRI-

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<sup>2</sup> 'Philippines: Divided Leadership and Lackluster Performance', *ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, 2013, available at <http://www.forum-asia.org/uploads/books/2013/ANNI%202013-FINAL.pdf>.

<sup>3</sup> Elemia Camille, 'Unlike in House, Senate adds P156M to CHR budget for 2018', *Rappler*, 9 October 2017, available at <https://www.rappler.com/nation/184755-senate-debates-commission-human-rights-budget-2018>.

<sup>4</sup> 'Report and Recommendations of the Session of the Sub-Committee on Accreditation', Global Alliance of National Human Rights Institutions, March 2017, available at

SCA had also expressed similar concerns on mandate, pluralism, selection and appointment, funding, and dismissal during the last accreditation of the CHRP in 2012. Though one of the few NHRIs established before the UN adopted the Paris Principles in 1993, the CHRP is yet to be supplemented by a comprehensive founding law. The 1987 Constitution of the Philippines and the Executive Order (EO) 163 provide the CHRP with a protection and promotion mandate but this does not cover all human rights issues as required by the Paris Principles. There are several versions of Commission on Human Rights (CHR) Charter Bills currently before the incumbent 17th Congress – both in the House and the Senate - which will take on the role of setting out the details of the CHRP’s mandate and powers. This offers an opportunity to address many of the concerns raised repeatedly by GANHRI-SCA; however, amendments to this proposed Charter Bill are still required to address all issues.

This chapter will look into the performance of the CHRP through the criteria established by the Paris Principles. The chapter will focus on GANHRI-SCA’s latest accreditation of the CHRP. It will further highlight the Government’s attempt to defund the CHRP and the series of attacks against the Commission and the Commissioners. Finally, the chapter will examine the provisions of the proposed CHR Charter Bill<sup>5</sup> with reference to the GANHRI-SCA recommendations.

### **3. The Commission on Human Rights of the Philippines and the Paris Principles**

The CHRP was active in responding to critical human rights issues this year. The Duterte administration attacked the Commission following criticism from the CHRP against the alleged extrajudicial killings carried out by the Government in the name of the war on drugs. The CHRP’s response and activities will be analysed based on the following criteria of the Paris Principles and the SCA’s General Observations from 2013:

#### **3.1 Functions, Mandate, and Structure**

The Constitution<sup>6</sup> and EO 163<sup>7</sup> provide a relatively broad mandate to the CHRP. Its mandate includes investigating complaints and all forms of human rights violation; providing appropriate legal measures including free legal services, filing petitions or motions in human rights cases pending before the court; exercising its power to visit all places of detention; establishing a continuing programme of research, education and information to enhance respect for the primacy of human rights; recommending to the Congress to provide compensation to victims of human rights violations or their families; monitoring the Government’s compliance with international treaty obligations on human rights; and making recommendations to relevant bodies.

Article XIII Section 18(1) of the Constitution and Section 3(i) of EO 163 provide the CHRP with a mandate to investigate, on its own or upon complaint by any party, all forms of human

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[https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA\\_Final\\_Report\\_-\\_March\\_2017-English.pdf](https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA_Final_Report_-_March_2017-English.pdf).

<sup>5</sup> There have been efforts to push for the passage of a CHR Charter for several years and the draft CHR Charter has had several versions already following consultations with the Chair and the Commissioners, and the legislators who wish to sponsor it. However, for this analysis, the CHR Charter Bill last updated on 8.10.2017 provided by the CHRP will be used.

<sup>6</sup> Constitution of the Philippines, 1987, Article XIII, available at <http://www.officialgazette.gov.ph/constitutions/1987-constitution/>.

<sup>7</sup> EO 163, Section 3, available at [http://www.hrlibrary.umn.edu/research/Philippines/Exec\\_Order\\_165\\_-\\_Order\\_Creating\\_the\\_CHR.pdf](http://www.hrlibrary.umn.edu/research/Philippines/Exec_Order_165_-_Order_Creating_the_CHR.pdf).

rights violations involving civil and political rights. It does not have an explicit protection mandate with regards to economic, social, and cultural rights. GANHRI-SCA, in its 2017 recommendation to the CHRP, has also expressed this concern. However, the CHRP interprets its mandate in a broad manner by including violations of economic, social, and cultural rights. For example, it has included investigation and monitoring of the economic, social and cultural rights situation in its Omnibus Rules of Procedures 2012.<sup>8</sup> Moreover, section 3 of the proposed CHR Charter Bill<sup>9</sup> makes a specific reference to the International Covenant on Economic, Social and Cultural Rights as forming part of the definition of human rights.

The CHRP lacks an extensive promotional mandate. This is because the CHRP was established shortly before the Paris Principles set out these promotional powers.<sup>10</sup> The CHRP has only one promotional function – education – as stipulated in its mandate, while it lacks two other powers found in other NHRI charters: the power to advise on legislation, and to produce annual reports.<sup>11</sup> The CHRP has no formal jurisdiction in terms of advising on legislation, and there is little evidence of CHRP impact on human rights law during this period.<sup>12</sup> However, the CHRP renders an advisory function to government agencies and to the legislative branch by interpreting its mandate in a broad manner according to the Paris Principles. The Constitution provides the CHRP with a mandate to "[e]stablish a continuing program of research, education, and information to enhance respect for the primacy of human rights" while further promotional prerogatives can be inferred from a mandate to "[r]ecommend to the Congress effective measures to promote human rights ..." and to "[m]onitor the Philippine Government's compliance with international treaty obligations on human rights".<sup>13</sup>

The CHRP also lacks an explicit mandate to encourage ratification or accession to international human rights instruments. Section 20(b) of the proposed CHR Charter Bill mandates the CHRP to recommend ratification, or accession to, international human rights instruments, and to ensure their implementation. Section A.1 and A.2 of the Paris Principles require that a National Institution should have "as broad a mandate as possible", which is to be "set forth in a constitutional or legislative text", and should include both "the promot[ion] and protect[ion] of human rights".<sup>14</sup> As discussed above, the current mandate given by the Constitution and EO 163 to the CHRP lacks protection functions with regards to economic, social and cultural rights and the promotional mandate is also inadequate. NHRIs are required to review relevant international laws, regulations, and policies to determine that they are

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<sup>8</sup> Guidelines and Procedures in the Investigation and Monitoring of Human Rights Violations and Abuses, and the Provision of CHR Assistance 2012 (CHR Omnibus Rules of Procedure 2012), Rule 5, available at [https://www.pinoyfilecabinet.files.wordpress.com/2014/07/chr-procedures-final\\_approved\\_8-31-2012.pdf](https://www.pinoyfilecabinet.files.wordpress.com/2014/07/chr-procedures-final_approved_8-31-2012.pdf).

<sup>9</sup> A copy of the proposed CHR Charter Bill last updated on 8.10.2017 was provided by the CHRP to the authors. According to Section 3. Definition of Human Rights – "Human rights are the supreme, inherent, and inalienable rights to life, dignity, and self-development. It is the essence of these rights that makes a person human. These rights include those guaranteed by the Philippine Constitution and other domestic laws and international human rights instruments such as, but not limited to, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights."

<sup>10</sup> K. Linos and T. Pegrarn, 'What Works in Human Rights Institutions?', *The American Journal of International Law*, vol. 112, no. 3, July 2017, pp. 1-61.

<sup>11</sup> Ibid

<sup>12</sup> Ibid

<sup>13</sup> Ibid

<sup>14</sup> General Observations of the SCA, 2013, Section 1.2, available at [https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC\\_SCA\\_General\\_Observations.pdf](https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC_SCA_General_Observations.pdf).

compatible with the obligations arising from international human rights standards and propose the amendment or repeal of any legislation, regulation or policies that are inconsistent with the requirement of these standards.<sup>15</sup> Currently, the CHRP is not legislatively empowered to carry out these tasks. The CHRP needs a comprehensive founding law to address these concerns, as a result of which it has proposed the CHR Charter Bill. However, it is highly unlikely that the current administration with its anti-human rights policies would pass a law that would strengthen the Philippines' NHRI.

The CHRP divides its mandates into three categories: human rights protection, human rights promotion, and human rights policy advisory. For the purposes of this report, the mandate of human rights policy advisory is discussed under the human rights protection category. Based on the draft 2017 CHR Annual Report,<sup>16</sup> the activities carried out by the Philippines NHRI are briefly described below.

### *Human Rights Protection*

The Commission documented a total of 7,005 complaints and requests covering different types of human rights violations involving 2,133 victims and 2,219 alleged respondents. Based on the preliminary evaluation of new complaints received, only 1,710 required a full-blown investigation, while the majority or 5,252 required various legal aid and counselling services, while some 43 complaints were pending evaluation. For 2017, the Commission resolved 1,231 cases that include cases filed in previous years. Of this number, 389 were resolved for filing and monitoring; 700 were closed, terminated, or dismissed; 67 were archived; and 75 were resolved through alternative dispute resolution.

As a result of the war on drugs of the current administration, the extrajudicial killing of minors Kian De los Santos<sup>17</sup>, Carl Arnaiz<sup>18</sup>, and Kulot De Guzman<sup>19</sup> were investigated by the Commission, aside from other notable high profile cases, such as the Barros Case<sup>20</sup>,

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<sup>15</sup> General Observations of the SCA, 2013, Section 1.3, available at [https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC\\_SCA\\_General\\_Observations.pdf](https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC_SCA_General_Observations.pdf).

<sup>16</sup> The draft of the 2017 CHR Annual Report was provided by the CHRP to the authors.

<sup>17</sup> Please see the 'Case Studies' section in this chapter for details of this case.

<sup>18</sup> The body of Carl Arnaiz, who went missing on 18 August 2017, was found at Ezekiel Funeral Homes, Caloocan City on 28 August 2017. He was last seen riding a tricycle with Reynaldo "Kulot" De Guzman, 14. According to the report of the Caloocan City Police Station, Carl rode a taxi driven by Tomas Marleo T. Bagcal to 5th Ave., in the city. Upon reaching C-3 Rd., Brgy. 28, Carl robbed Bagcal's wallet at gun point and got off the taxi after hitting the driver. Bagcal sought help from the patrolling policemen who rushed to the place of robbery. The police said that they found Carl at the site and as they were identifying themselves as law enforcers, Carl fired two shots at them. The police returned fire, killing him. The case was being investigated by the CHRP.

<sup>19</sup> Reynaldo De Guzman alias "Kulot", 14, a grade five pupil and a resident of Chico Street, Anakpawis 2, Barangay San Andres, Cainta, Rizal was declared missing since 17 August 2017 after he was seen allegedly in the company of Carl Angelo Arnaiz at a basketball court near his house. On 5 September 2017 around 12 noon a witness noticed a human body floating on the creek in Nueva Ecija, Gapan City. The cadaver was retrieved and was sent to Dariz Funeral Homes in Gapan City. Kulot's parents identified his body. At about 12 midnight, the forensic team of the CHRP arrived at the funeral home and coordinated with the National Bureau of Investigation (NBI) and the Philippine National Police (PNP) stating its intention to conduct its own autopsy. An employee of the funeral home disclosed that he was the one who received the cadaver wrapped in tape. Several stab wounds were also noticed on the body and an unmistakable smell of gasoline reeked from the body. The case was under investigation. CHRP recommended locating possible witnesses on the case and monitoring actions taken by concerned government agencies.

<sup>20</sup> CHRP Region X (Cagayan de Oro City) initiated a *motu proprio* investigation into the killing of Benildo Barros. He was killed in his farmhouse in Sta. Cruz, Claveria, Misamis Oriental, in an operation by officers

Macaundar<sup>21</sup>, Cedeno<sup>22</sup>, and Corver<sup>23</sup>, among many others.

As part of the Commission's mandate to recommend and provide appropriate and effective measures for the promotion and protection of human rights, the Commission issued 16 human rights position papers to government agencies and institutions on its stand on national as well as local issues and concerns impacting on human rights; and 16 human rights advisories to inform and provide guidance to the legislative, executive, and judicial branches of government, and to non-government sectors. The Commission also issued 39 Human Rights Situation Reports covering various thematic or sectoral issues and concerns.

The Commission set out its stand through position papers regarding policies and draft laws impacting human rights. These include position papers on the various Anti-Discrimination House Bills, the passage of which would mark a significant step in giving flesh and teeth to the constitutional guarantee against discrimination and ensuring equality of rights of all persons, according to the Commission. The Commission issued a position paper on the 'Anti-Elder Abuse Bill', in which the CHRP reminded the state that while enacting legislation prohibiting elder abuse and providing redress for such acts is a huge leap forward, the state has to undertake other measures such as awareness programmes and public campaigns, and provide adequate social services that balance the need to integrate older people into society while acknowledging their special needs. The Commission issued another position paper on the House Bill No.13 'An Act Providing for the Special Protection of Children in Situations of Armed Conflict and providing Penalties for Violation therefor', recommending to the Committee on the Welfare of Children of the House of Representatives to include reference to the Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups. In another position paper on House Bills amending and expanding the Anti-Violence against Women and their Children Act of 2004, the Commission recommended that the proposed measures include provision for training and education on emerging technological platforms and applications for government personnel tasked to implement the law, considering the speed with which technology evolves. Through a position paper on the Amendment of Republic Act No. 7877 or the Anti-Sexual Harassment Act of

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from the Philippine Drug Enforcement Agency (PDEA) – Northern Mindanao, and the Claveria Municipal Police Station. Barros was on the watchlist of the Claveria Police Station as a drug pusher and user. The CHRP investigation concluded that the killing of the victim was tantamount to an extrajudicial killing committed by law enforcement agents without due process and constituted a human rights violation. The CHRP recommended closure of the case as the wife of the victim opted to file both criminal and civil charges on her own.

<sup>21</sup> Please see the 'Case Studies' section in this chapter for details of this case.

<sup>22</sup> In the evening of 23 July 2016, police officers, without warrant or the permission of the homeowner, burst into the house of Jerald Cedeño. They searched his bedroom and found nothing illegal. Thereafter, Jerald was brought outside of his house and shot to death. Witnesses claim that Jerald was not armed as he had just taken a bath when he was accosted by the police officers. The investigation by CHRP regional office VII (Cebu City) concluded that Jerald was arbitrarily deprived of his basic and fundamental right to life. It recommended the monitoring of the case filed by the complainant before the Office of the Ombudsman through to its conclusion. It further recommended that the case be referred to the CHRP-Field Operations Office for the grant of financial assistance to the family of Jerald Cedeño.

<sup>23</sup> The Caraga regional office (Butuan City) of the CHRP conducted a *motu proprio* investigation into the killing of Rodrick "JeckJeck" Corver on 7 August 2016 at Brgy. San Agustin, Talacogon, Agusan del Sur. Though not involved in illegal drugs and not included on the watchlist, JeckJeck had already surrendered himself twice before the Talacogon Municipal Police Station. A few weeks after his second surrender, JeckJeck was killed. Based on the complainant's version and the spot report, the CHRP investigation concluded that the killing of JeckJeck was arbitrary, as exhibited by the assailant's intention to kill, and JeckJeck's life was taken without due process by state agents (police officers). The regional office recommended the endorsement / referral of the case to the Office of the Deputy Ombudsman for the Military and Other Law Enforcement Officers (MOLEO). Financial assistance was also recommended to be awarded to the immediate heirs of the victim.

1995 (House Bills nos. 194, 508, 2591, 2932, 3691, 4822 and 5213), the Commission reiterated that sexual harassment will always be unacceptable regardless of who the perpetrator is as it demeans the dignity and human rights of a person.

The Commission issued a human rights advisory reminding the Government about its commitment to abolish the death penalty by ratifying the International Covenant on Civil and Political Rights (ICCPR) and its Second Optional Protocol when the Government tried to re-impose capital punishment by introducing a bill on Death Penalty in the House of Representatives. Similarly, it issued a policy advisory on human rights standards of Internally Displaced Persons (IDPs) in the Marawi City crisis, where the President declared martial law after Islamic State sympathisers attacked the city. The regional offices of the CHRP also issued advisories calling for respect for human rights even in emergency situations. For example, Region IX (Zamboanga City) of the Commission urged the Government of the City of Pagadian to revisit the enactment of ordinance No. 2017 - 378 (The Implementation of A Curfew within the Territorial Jurisdiction of the City of Pagadian and Providing Penalties for Violations Thereof) as it was inconsistent with international human rights instruments and constitutional tenets while the Caraga office (Butuan City) reiterated the call for respect for human rights stating that the declaration of martial law did not suspend the operation of the Constitution.

The CHRP called upon the Department of Interior and Local Government (DILG), Local Government Units (LGUs), the Philippine National Police (PNP) and all other law enforcement agencies to discontinue the use of drop boxes as a mode of collecting information from the community on persons suspected of being involved in nefarious and illegal activities until such time that stringent measures are put in place to address the dangers posed by the system to human rights. The Commission warned that the use of the drop box system absent protocols, rules of procedures, and guidelines on collecting, storing, verifying, and sharing information threatens the right to privacy, presumption of innocence, due process, and other civil and political rights of people. Likewise, the CHRP issued an advisory expressing serious concern over DILG's plan of identifying drug-free homes inasmuch as it could amount to a violation of individuals' human rights to due process of law and right to privacy enshrined under the Constitution and international human rights instruments. The CHRP concern came following the DILG plan to adopt a new method of marking drug-free homes by using stickers, in line with the administration's policy to end proliferation of illegal drugs in the country.

### *Human Rights Promotion*

The central and regional offices of the CHRP collaborated to conduct various information and educational activities nationwide. Of the 1,411 information and educational activities conducted, 315 of these were seminars or trainings, 606 lectures or talks, 167 orientations and 323 were other information dissemination activities covering various topics on human rights. A total of 120,828 participants attended these information and education activities. The participants of these activities were mainly composed of the PNP, the military, National Government Agencies, LGUs, persons deprived of liberty and university students. The Commission also focused on conducting various information and education activities that give emphasis to the rights of the youth, children, lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people, and senior citizens.

With a view to further promote awareness and to celebrate the milestones of human rights,



the Commission organised 516 celebratory events or promotional events attended by 58,997 participants. These events were celebrated together with partners from government offices, non-governmental organisations (NGOs), and civil society organisations (CSOs).

The Commission developed and disseminated various Information Education Communication (IEC) materials to several parts of the Philippines in the form of flyers, bulletins, etc. The Commission also developed its online presence, producing 361 social media cards and infographics; 9 social media banners; and 37 videos for the year to educate people in human rights concepts. In order to raise public awareness and mould public opinion, the Commission issued a total of 55 press statements or press releases on pressing human rights and CHRP issues.

### *Accountability and Publication of Findings and Reports*

The current mandate of the CHRP does not make it mandatory to produce annual or other reports and publicise them. Section 32 of the proposed CHR Charter Bill provides that the Commission shall prepare and make public an annual report on its activities. The SCA noted that the annual, special, and thematic reports serve to highlight key developments in the human rights situation of the country and provide a public account, and therefore public scrutiny, of the effectiveness of an NHRI. It added that the reports further provide a means by which an NHRI can make recommendations to, and monitor respect for, human rights by government.<sup>24</sup> However, at the time of writing this report, the annual reports of the CHRP for the year 2016 and 2017 were not yet finalised.

The CHRP central office and regional offices produced 39 situation reports this year on various issues including women and children's rights, LGBTIQ rights, IDPs, persons with disabilities, persons deprived of liberty, indigenous people, the elderly, migrant workers, martial law in Mindanao, and human rights defenders. Additionally the following reports, amongst others, were produced: a CHRP report to UNESCO - *Promoting Human Rights Training for Media Professionals and Journalists*; a CHRP report prepared in response to a call for input to the General Assembly resolution on Effective Promotion of the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities; a CHRP report in response to the call for inputs on the impact of fundamentalism and extremism on the cultural rights of women, submitted to the Special Rapporteur in the field of Cultural Rights; two CHRP reports to the Special Rapporteur on the Rights of Persons with Disabilities: *The Right to Liberty and Security of Persons with Disabilities*; and *The Right to Sexual and Reproductive Health Rights of Girls with Disabilities*; and a CHRP Report to NGOs and NHRIs entitled *The Contribution of Development to the Enjoyment of All Human Rights*. However, reports on fact-finding missions, input to international resolutions and other thematic reports of the CHRP are not easily accessible and available for the public. For example, the website of the CHRP only has annual reports while other publications and reports have not been uploaded.

## **3.2 Autonomy from the Government and Independence Guaranteed by Statute or the Constitution**

Though the Commission enjoys functional autonomy from the Government, civil society and

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<sup>24</sup> 'Philippines: Divided Leadership and Lackluster Performance', *ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, 2013, available at <http://www.forum-asia.org/uploads/books/2013/ANNI%202013-FINAL.pdf>.



the SCA expressed concern over the appointment process of the Chairperson and members. The current Chairperson and members of the CHRP were appointed during the administration led by President Benigno Aquino III in 2015. Since the President has the authority to appoint the Chairperson and members, any change of administration is likely to affect the functioning of the Commission. The Government might try to use the Commission as one of its agencies while compromising its independence. This was evident when the CHRP was critical about the alleged extrajudicial killings carried out as part of the current administration's anti-drug policy. President Duterte attacked the Chairperson Chito Gascon personally and threatened to slap him over the Commission's criticism of the alleged extrajudicial killings.<sup>25</sup> The Government further tried to undermine the role of the Commission by using its influence in the House of Representatives to try to defund it.<sup>26</sup> The Commission also faced non-cooperation from government agencies following President Duterte's stand against it.<sup>27</sup> This had never been experienced before and one of the members of the Commission said that cooperation with the Government was at its lowest in the history of the CHRP.<sup>28</sup>

President Duterte, through EO 10 issued on 10 December 2017, formed a Consultative Committee to review the provisions of the 1987 Constitution including, but not limited to, the provisions on the structure and powers of the Government, local governance, and economic policies. The Committee was given a six-month period to complete the task from the day it convened. It is uncertain what the position of the CHRP would be in the federal set up of the country that the President has proposed. Since the Duterte administration is known for its anti-human rights policies, civil society fears that the role of the CHRP might be undermined in the new Constitution. Given the diverse culture in each state or region, the challenge is that there might be different interpretations of human rights and the CHRP itself in the federal set up, if it gets implemented. The Consultative Committee had a meeting and several communications with the CHRP regarding the status of the Commission in the new Constitution. The CHRP spokesperson said that there is a window of opportunity with the Consultative Committee in terms of strengthening the mandate of the CHRP.<sup>29</sup> The CHRP is hopeful that the President will respect the recommendations of the Consultative Committee.<sup>30</sup> The CHRP has proposed its existence at the national level and autonomous mechanisms at the regional level in the new Constitution and expects that the characteristics outlined in the Paris Principles would be maintained and recognised.<sup>31</sup> The Consultative Committee seemed to be supportive of strengthening the CHRP as exhibited by its voting to make it an independent constitutional commission in the proposed new Constitution.<sup>32</sup> The CHRP also issued a position paper on the proposed constitutional change calling upon the Congress and all other bodies and personalities wielding the power to initiate and influence the process of constitutional change, to apply human rights as an ultimate standard.

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<sup>25</sup> Trisha Macas, 'Duterte to CHR chair Gascon: "Di ko alam kung bakla ka... sampalin talaga kita"', *GMA News Online*, 21 November 2017, available at <http://www.gmanetwork.com/news/news/nation/634002/duterte-to-chr-chair-gascon-di-ko-alam-kung-bakla-ka-sampalin-talaga-kita/story/>.

<sup>26</sup> Audre Morallo, 'House Gives CHR a P1,000 Budget', *Philstar Global*, 12 September 2017, available at <https://www.philstar.com/headlines/2017/09/12/1738419/house-gives-chr-p1000-budget>.

<sup>27</sup> A copy of the memorandum sent by the Police regional office 11 of the PNP to its subordinate offices to inform and seek clearance first before granting interviews and providing documents for human rights activists or bodies was provided to the authors by the CHRP.

<sup>28</sup> Interview with Commissioner Karen Lucia S. Gomez-Dumpit.

<sup>29</sup> Interview with Spokesperson of CHRP & Executive Director Atty. Jacqueline Ann C. De Guia.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> Pia Ranada, 'Con-Com votes to make CHR a constitutional commission in new charter', *Rappler*, 16 April 2018, available at <https://www.rappler.com/nation/200343-consultative-committee-commission-human-rights-charter-change>.

### *Budgetary Autonomy and Financial Independence*

The Government allocates the budget for the CHRP according to the General Appropriations Act. There is no specific budget allocation for the Philippines' NHRI in the public budget.<sup>33</sup> The attempt to defund the CHRP demonstrates how vulnerable it is to interference exercised through budgetary control. The Commission and the Chairperson faced a series of attacks from the Duterte administration for criticising the alleged extrajudicial killings carried out in the name of the drug wars. The Asia Pacific Forum of NHRIs expressed grave concern over public statements attacking the work of the Philippines' NHRI and its Chairperson.<sup>34</sup> The House of Representatives of the Philippines, on 12 September 2017, voted to allocate the CHRP only Php 1000 (\$20) for the year 2018. The House, dominated by administration allies, voted 119-32 in favour of this cut in the budget.<sup>35</sup> The Asian NGO Network of NHRIs (ANNI) expressed its concern saying that insufficient funding to the CHRP would limit its ability to conduct activities to protect and promote human rights in the Philippines as mandated by the Constitution.<sup>36</sup> This House move was seen as an attempt to abolish the constitutional rights body as the President had threatened to do. The decision was later overturned following pressure from civil society, the international community and the public. The Senate approved the proposed budget of the CHRP and even increased the amount.

### *Interaction with, and State Submissions to, the International Human Rights System*

With the Government submitting its fifth and sixth periodic reports on its compliance with its international obligations to the United Nations Committee on the Rights of the Child on 19 September 2017, the CHRP produced its own independent report through mapping the services provided by the national government agencies in furtherance of the Convention on the Rights of the Child.

The Commission also participated in various international fora on human rights organised by United Nations bodies and other international organisations. The CHRP's engagement with UN and international human rights mechanisms this year included a report submitted to the 61<sup>st</sup> Session of the Commission on the Status of Women (CSW) in New York, entitled *Women's Economic Empowerment in the Changing World of Work*; participation in the Pre-Session meeting of the Universal Periodic Review (UPR) in Geneva; participation in the 27<sup>th</sup> Session of the UPR in Geneva; attendance at the 10<sup>th</sup> Conference of State Parties of the Convention on the Rights of Persons with Disabilities (CRPD), which had the theme 'The Second Decade of the CRPD: Inclusion and Full Participation of Persons with Disabilities and their Representative Organizations in the Implementation of the Convention'; and participation in the 3<sup>rd</sup> Asian Intergovernmental Commission on Human Rights (AICHR) Regional Dialogue on the Mainstreaming of the Rights of Persons with Disabilities in the ASEAN Community ('Access to Justice, Entrepreneurial Enterprises and Disaster Management'). The Commission also engaged with regional and international networks or

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<sup>33</sup> CHRP response to the follow-up questionnaire.

<sup>34</sup> 'APF concerned by attacks on Philippines' rights body', Asia Pacific Forum of NHRIs, 5 September 2017, available at <http://www.asiapacificforum.net/news/apf-concerned-attacks-philippines-nhri/>.

<sup>35</sup> 'House Gives CHR a P1,000 Budget,' *Philstar Global*, September 12 2017, available at <https://www.philstar.com/headlines/2017/09/12/1738419/house-gives-chr-p1000-budget>.

<sup>36</sup> 'ANNI Open Letter concerning the vote of the House of Representatives on the 2018 Budget for the Commission on Human Rights of the Philippines', ANNI, 13 September 2017, available at <https://www.forum-asia.org/?p=24771>.

other human rights bodies. The Chairperson, members, and staff of the CHRP participated in GANHRI's Bureau and Regional Meetings in Geneva; the Asia Pacific Forum – United Nations Development Programme (APF-UNDP) Conference on the Yogyakarta Principles, 'What Have We Learnt and Where to Now?' in Bangkok; the Regional Blended Learning Course on 'Business and Human Rights' in Bangkok; and the Asian NHRI Workshop on the Indigenous Navigator<sup>37</sup> in Chiang Mai, among other events.<sup>38</sup>

### *Selection and Appointment*

Section 2(c) of EO 163 provides that the President appoints the Chairperson and members of the CHRP. The same provision requires that the Chairperson and members be Philippine citizens of at least 35 years of age who were not candidates for any elective positions immediately preceding their appointment, and a majority must be members of the Philippine Bar. The SCA underscored that the current provision for the selection process is not sufficiently broad and transparent, expressing concern that it does not require the advertisement of vacancies; does not establish clear and uniform criteria whereby the merits of eligible candidates can be assessed by all relevant parties; and does not specify any process for achieving broad consultation and/or participation in the application, screening, selection and appointment process.<sup>39</sup> Section 8 of the proposed CHR Charter Bill retains the same appointment process. Section 7<sup>40</sup> of the proposed CHR Charter Bill does not sufficiently address the concern with respect to merit criteria, as it is specific only about the requirement for candidates to have a background in law. The SCA urged the CHRP to formalise the selection and appointment process in relevant legislation and regulations and to ensure that the process maximises the number of potential candidates from a wide range of societal groups and educational qualifications, and that it assesses applicants on the basis of pre-determined, objective, and publicly available criteria.<sup>41</sup>

### *Dismissal Procedures*

EO 163 is silent on the dismissal process for the Chairperson and the Commissioners of the

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<sup>37</sup> The Indigenous Navigator offers a range of tools and resources for monitoring Indigenous People's rights that can be used in multiple ways. It monitors the implementation of the UN Declaration on the Rights of Indigenous Peoples; core human rights conventions as they pertain to Indigenous Peoples; essential aspects of the Sustainable Development Goals; and the outcomes of the World Conference on Indigenous Peoples. The tools have two major classifications: 1) the Indigenous Navigator National Index, 2) the Indigenous Navigator Community Index.

<sup>38</sup> The draft of the 2017 CHR Annual Report was provided by the CHRP to the authors.

<sup>39</sup> 'Philippines: Divided Leadership and Lackluster Performance', *ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, 2013, available at <http://www.forum-asia.org/uploads/books/2013/ANNI%202013-FINAL.pdf>.

<sup>40</sup> SECTION 7. - *The Commission, Composition, and Qualifications*. The Commission shall be composed of a Chairperson and four (4) Members who must be natural-born citizens of the Philippines, and, at the time of their appointment, at least thirty-five years of age; must be with proven probity, integrity, and competence; must not have been convicted by final judgment of any crime involving moral turpitude; and must not have been candidates for any elective position in the elections immediately preceding their appointment. A majority thereof shall be members of the Philippine Bar, who have been engaged in the practice of law for at least ten years.

The composition must observe equal gender balance representation.

<sup>41</sup> 'Philippines: Divided Leadership and Lackluster Performance', *ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, 2013, available at <http://www.forum-asia.org/uploads/books/2013/ANNI%202013-FINAL.pdf>.

CHRP. Proposed grounds of dismissal in Section 9<sup>42</sup> of the proposed CHR Charter Bill are too broad and may be open to misuse. The SCA reminded the CHRP that in order to address the Paris Principles' requirement for a stable mandate, which is important in reinforcing independence, the enabling law of an NHRI must contain an independent and objective dismissal process.<sup>43</sup> It further recommended that the grounds for dismissal must be clearly defined and appropriately confined to only those actions which impact on the capacity of the members to fulfil their mandate. Moreover, it emphasised that dismissal should not be allowed solely on the discretion of the appointing authorities.

The Constitution and EO 163 are silent on whether and how members and staff enjoy functional immunity for actions taken in their official capacity in good faith.<sup>44</sup> The proposed CHR Charter Bill is also silent regarding this concern. The SCA warned that external parties may seek to influence the independent operation of an NHRI by initiating, or by threatening to initiate, legal proceedings against a member. In order to protect members from legal liability for acts undertaken in good faith in their official capacity, the SCA stressed the need for NHRI legislation with provisions that promote security of tenure along with the NHRI's ability to engage in critical analysis and commentary on human rights issues free from influence, and which promote independence of leadership, and public confidence in the NHRI.<sup>45</sup> To ensure accountability for the members of the CHRP and in certain exceptional circumstances, the SCA recommended that national law provide for well-defined circumstances in which the functional immunity of the decision-making body may be lifted in accordance with fair and transparent procedures.<sup>46</sup>

### 3.3 Pluralism

#### *Pluralism of Commissioners*

The Constitution and EO 163 do not require that the membership and staff be representative of broader national society. The SCA noted that section 7 of the proposed CHR Charter Bill provides that the composition of the CHRP must observe gender-balance.<sup>47</sup> The SCA emphasised that diversity in the membership and staff of an NHRI facilitates its appreciation of, and capacity to engage on, all human rights issues affecting the society in which it

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<sup>42</sup> SECTION 9. *Prohibition and Disqualification.* - The Chairperson and Members of the Commission shall not, during their tenure, hold any other office or employment. Neither shall they engage in the practice of any profession or in the active management or control of any business, which in any way may be affected by the functions of their office, nor shall they be financially interested, directly or indirectly, in any contract with, or in any franchise or privilege granted by the Government and its subdivisions, agencies, or instrumentalities, including government-owned or -controlled corporations or their subsidiaries. They shall avoid conflict of interest in the conduct of their office. They shall not be allowed to appear or practice before the Commission within one year following the completion of their term of office, resignation, or any other manner of separation from office.

No spouse, common-law partner, or relative by consanguinity or affinity within the fourth civil degree, or business or professional partner of the Chairperson or Members, may transact business directly or indirectly with the Commission or its Members or appear as counsel or agent of a party in any matter pending before the Commission.

<sup>43</sup> 'Philippines: Divided Leadership and Lackluster Performance', *ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, 2013, available at <http://www.forum-asia.org/uploads/books/2013/ANNI%202013-FINAL.pdf>.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> Section 7 of the proposed Charter Bill.

operates, and also promotes the accessibility of the NHRI for all citizens.<sup>48</sup> It further underscored that consideration must be given to ensuring pluralism in the context of gender, ethnicity, or minority status.<sup>49</sup> The current leadership of the Commission has three female members out of five.

### *Pluralism of Staffing*

The Commission has 300 male employees and 312 female employees. In the central office, 122 of them are male and 160 are female. In the regional offices, 178 are male and 152 are female.<sup>50</sup> As of 2017, the CHRP organisational structure has 851 positions, out of which 612 are filled.<sup>51</sup> The staff complement of the Commission increased in 2017 with a total of 612 as compared to 2016 when the total staff complement was only 523. Further, in June 2016, the CHR was given an additional 200 new positions to enable it to cope with the increasing demands on the Commission resulting from the passage of new laws which increased its functions.<sup>52</sup> Vacant positions were published and applicants underwent the recruitment and selection process of the Commission in accordance with the Rules on Appointment of the Civil Service Commission (CSC) of the Philippines.<sup>53</sup> These include having the qualifications set out by the CSC on education, experience, training, and eligibility. But, there is no specific criterion that ensures diversity in the staff of the CHRP during the hiring process.

### *Collaboration with Civil Society and other Stakeholders*

Collaboration and engagement between the CHRP and civil society organisations has strengthened following the change of leadership in the Commission. The series of attacks against the Commission and human rights defenders by the current administration has also resulted in bonding between the two groups as they feel that a stronger unified voice is needed to resist such attacks. Civil society has benefitted from the proactive role of the CHRP following initiatives such as providing civil society with the CHRP hall for events for free. The CHRP leadership have also made themselves easily accessible to CSOs and their events. The relationship between the CHRP and civil society has been institutionalised through projects that aim to strengthen the capacity of the CHRP through the building of partnerships with CSOs, and reinforce the human rights promotion and protection role of CSOs through strategic litigation, monitoring of human rights violations and support to victims.<sup>54</sup> Steps have been taken by civil society as well, such as the C4HR (CSO-CHR Consultative Caucus for Human Rights) initiative, which is the CSOs' way of strengthening the Commission through regular consultations and provision of platforms for dialogue so that all CSOs and the CHRP can work in partnership to conduct good promotion activities and coordinate on cases.

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<sup>48</sup> 'Philippines: Divided Leadership and Lackluster Performance', *ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, 2013, available at <http://www.forum-asia.org/uploads/books/2013/ANNI%202013-FINAL.pdf>.

<sup>49</sup> Ibid.

<sup>50</sup> The draft of the 2017 CHR Annual Report was provided by the CHRP to the authors.

<sup>51</sup> Ibid.

<sup>52</sup> CHRP response to the follow-up questionnaire.

<sup>53</sup> Ibid.

<sup>54</sup> CHR and GOJUST Chronicles, Vol. 1 Issue 1, 2018, available at [https://www.drive.google.com/drive/folders/1U-3qA9MdPVtgH9WF3V6ZX63yVdo1WL\\_](https://www.drive.google.com/drive/folders/1U-3qA9MdPVtgH9WF3V6ZX63yVdo1WL_).

## *Degree of Trust*

The President's rant against the Commission and the Commissioners has brought the Philippines' NHRI into the limelight. The current administration was able to control the narrative against human rights and the CHRP for its stance against the President's brutal war against drugs. The spokesperson of the CHRP acknowledged that the CHRP was unknown in the past years and human rights were not spoken about in the country; however, currently every Filipino knows about the CHRP.<sup>55</sup> Though the publicity is negative, the CHRP sees an opportunity to persuade the public and orient them about the true nature of the CHRP, building on the awareness that has already been generated.<sup>56</sup> There has already been a positive impact from this publicity as seen by the public pressure against the Congress' attempt to defund the CHRP during the September 2017 budget deliberations for the CHRP for the year 2018. The House representatives and Senators received calls from the public making them explain why they took such a step and the CHRP trended on Twitter that night, creating pressure that eventually led the Congress to withdraw its move.

### **3.4 Adequate Resources**

For the fiscal year 2017, the Commission received funding from the Department of Budget and Management to a total amount of Php 724,868,000. Though this is an increase from the past year's budgetary allocation, it is not sufficient for the Commission to effectively fulfil its mandate, especially in the current challenging situation. The SCA emphasised that, to function effectively, an NHRI must be provided with an appropriate level of funding in order to guarantee its ability to freely determine its priorities and activities.

Of the total budget, Php 294,414 was allocated to Personnel Services, Php 321,960 to Maintenance and Other Operating Expenses, Php 10,000 to financial expenses, and Php 105,484 to capital outlay.<sup>57</sup>

The Commission allotted Php 302,526,000 for human rights protection services, Php 71,564,000 for human rights promotion services, and Php 72,359,000 for human rights policy services. While the budget allocation for human rights protection is not sufficient due to the need to carry out more protection services in the current challenging context, the fund allotted for the promotion mandate is highly insufficient. The Commission is already reaching out actively through social media networks. But, it also has to target a mass audience through traditional media like radio and television. There is a need to reach out to a wider audience on human rights education and awareness so that there is more public outcry for the ongoing attack against human rights bodies and defenders.

The Commission also lacks adequate facilities, currently having its office in a decrepit building inside the premises of the University of the Philippines in Diliman.

### **3.5 Adequate Powers of Investigation**

#### *Powers of Investigation*

The Commission has the authority to "[a]dopt its operational guidelines and rules of

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<sup>55</sup> Interview with Spokesperson of CHRP & Executive Director Atty. Jacqueline Ann C. De Guia.

<sup>56</sup> Ibid.

<sup>57</sup> The draft of the 2017 CHR Annual Report was provided by the CHRP to the authors.



procedure, and cite for contempt for violations thereof in accordance with the Rules of Court".<sup>58</sup> According to its 2012 Omnibus Rules of Procedure, it “takes cognizance of and investigate[s], on its own or on complaint by any party, all forms of human rights violations and abuses involving civil and political rights”;<sup>59</sup> “monitor[s] the Philippine Government’s compliance with international human rights treaties and instruments to which the Philippines is a State party... [and] shall also investigate and monitor all economic, social and cultural rights violations and abuses, as well as threats of violations thereof”.<sup>60</sup>

More than 12,000 people have been killed in President Duterte's brutal drug war that started in 2016.<sup>61</sup> According to the latest data provided by the Commission, it investigated 1,106 cases of alleged drug-related extrajudicial killings that resulted in the death of 1,345 victims (see table 1). The CHRP investigated 90 percent of these cases on a *motu proprio* basis (or, on its own initiative). According to the spokesperson of the CHRP, it took the initiative in most of the cases as the families of the victims were afraid to file complaints, while witnesses were unwilling to testify out of fear.<sup>62</sup> The number of deaths in these incidents is extremely high, unprecedented for the CHRP, which has never faced such a situation before, and due to limited lawyers and investigators and the need to multi-task in the regional offices, the CHRP has not been able to investigate more cases.<sup>63</sup>

	Cases	Victims	Alleged Mode of Killing	
			Police operation	Vigilante killing
<b>TOTAL</b>	1,106	1,345	594	512

*Chart 1: Alleged Drug-Related Extrajudicial Killing Incidents Taken Cognizance of by the CHR from 10 May 2016 to 28 February 2018 (data retrieved/obtained as of 1 March 2018)*<sup>64</sup>

As per the spokesperson of the CHRP, the Commission completed investigation into about 47 cases of alleged extrajudicial killings and filed them under relevant agencies, courts, the PNP, and the Office of the Prosecutor for further action. The CHRP regional offices come up with resolutions following the completion of an investigation and the legal division oversees this process. These resolutions are the public documents with recommendations. However, neither the final reports nor these resolutions have been made public through the CHRP’s website or other platforms. Civil society is also waiting for the findings of these investigations to be made public. The case studies in the 2017 draft Annual Report of the CHRP show that at the completion of an investigation, cases were either forwarded to the Office of the Ombudsman for the filing of appropriate criminal and administrative charges against perpetrators, referred to the Office of the Deputy Ombudsman for the Military and Other Law Enforcement Officers, or recommended for close monitoring; or financial assistance was recommended to the families of the victims. The legal office and the regional offices monitor the implementation of these recommendations. But the CHRP has no data on

<sup>58</sup> Constitution of the Philippines, 1987, Section 18(2), available at <http://www.officialgazette.gov.ph/constitutions/1987-constitution/> and Executive Order No.163, Section 3(2), available at [http://www.hrlibrary.umn.edu/research/Philippines/Exec\\_Order\\_165\\_Order\\_Creating\\_the\\_CHR.pdf](http://www.hrlibrary.umn.edu/research/Philippines/Exec_Order_165_Order_Creating_the_CHR.pdf).

<sup>59</sup> Guidelines and Procedures in the Investigation and Monitoring of Human Rights Violations and Abuses, and the Provision of CHR Assistance 2012 (CHR Omnibus Rules of Procedure 2012), Rule 2, available at [https://www.pinoyfilecabinet.files.wordpress.com/2014/07/chr-procedures-final\\_approved\\_8-31-2012.pdf](https://www.pinoyfilecabinet.files.wordpress.com/2014/07/chr-procedures-final_approved_8-31-2012.pdf).

<sup>60</sup> Ibid.

<sup>61</sup> ‘Philippines: Duterte’s ‘Drug War’ Claims 12,000+ Lives’, Human Rights Watch, 2018, available at <https://www.hrw.org/news/2018/01/18/philippines-dutertes-drug-war-claims-12000-lives>.

<sup>62</sup> Interview with Spokesperson of CHRP & Executive Director Atty. Jacqueline Ann C. De Guia.

<sup>63</sup> Ibid.

<sup>64</sup> Data provided by the CHRP.

how many and what type of its recommendations have been implemented.

The CHRP has the power to protect witnesses and any persons who have provided evidence in investigations carried out by it. The Commission may grant immunity from prosecution to any person whose testimony or whose possession of documents or other evidence is necessary or convenient to determine the truth in any investigation conducted by it or under its authority involving civil, political, economic, social, or cultural rights.<sup>65</sup> Once a witness has been granted immunity, they may be admitted to the CHR Witness Protection Programme in accordance with Rule 19 of the CHR Omnibus Rules of Procedure 2012. The CHRP ensures the protection, safety, and security of the witnesses admitted in this programme and provides them necessary assistance including food, clothing, shelter in a safe house, as well as security escorts, and/or security personnel.<sup>66</sup> However, the CHRP has not made any information public regarding how many witnesses were provided with this facility.

Additionally, the Commission may summarily adjudge a person in contempt for refusal to be sworn as a witness and the person is liable for punishment in accordance with the penalties prescribed in the Rules of Court.<sup>67</sup>

The authorities that are impleaded as respondents in a human rights case investigated by the CHRP are required to submit their response, in the form of an answer, counter-affidavit or comment, including relevant documents and other evidence in support of their positions. The period within which to answer the complaint is ten days from receipt of the CHRP notice, letter-invitation, order or subpoena.<sup>68</sup> The requirement for the respondents to submit their answer on the human rights case filed against them is in accordance with their right to due process and right to defend themselves.<sup>69</sup> According to the CHRP, in practice it always gives the respondents a chance to submit their answer to the complaint (human rights case) before issuing the case resolution.

The CHRP also identified six cases of enforced disappearance this year with six victims, and 49 cases of torture with 96 victims. In the exercise of its powers to visit places of detention,<sup>70</sup> the Commission conducted 1,759 jail visitations nationwide covering 10,237 inmates, of whom 9,070 were provided legal assistance. The Commission provides financial assistance to complainants, victims, and witnesses, and their families in the course of the investigation of their complaints of human rights violations. There was a total of 19,988 persons assisted, a figure which includes 2,185 whose complaints were investigated; 6,340 who were provided with legal assistance; 2,302 who were given financial assistance; and 91 who were provided with forensic services. In addition, the Economic, Social and Cultural Rights Center of the Commission assisted 84 individuals who sought its advice and assistance on the protection and promotion of their respective rights.<sup>71</sup>

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<sup>65</sup> Guidelines and Procedures in the Investigation and Monitoring of Human Rights Violations and Abuses, and the Provision of CHR Assistance 2012 (CHR Omnibus Rules of Procedure 2012), Rule 18, Section 1, available at [https://www.pinoyfilecabinet.files.wordpress.com/2014/07/chr-procedures-final\\_approved\\_8-31-2012.pdf](https://www.pinoyfilecabinet.files.wordpress.com/2014/07/chr-procedures-final_approved_8-31-2012.pdf).

<sup>66</sup> Ibid. Rule 19, Section 11.

<sup>67</sup> Ibid. Rule 15, Section 1.

<sup>68</sup> Ibid. Rule 4, Section 13.

<sup>69</sup> CHRP response to the follow-up questionnaire.

<sup>70</sup> Constitution of the Philippines, 1987, Section 18(4), available at

<http://www.officialgazette.gov.ph/constitutions/1987-constitution/>.

<sup>71</sup> The draft of the 2017 CHR Annual Report was provided by the CHRP to the authors.



## Court Cases

According to the CHRP, it can be involved with the courts in relation to pending cases. The CHRP can involve itself in a case pending before a court even if it is not a party. When it deems that there are fundamental issues raised involving the protection and assurance of human rights, and the prevention of their violation, the CHRP can file a petition or motion to intervene or a petition to be admitted as *amicus curiae*.<sup>72</sup> The CHRP cited as examples of cases where it had intervened the following: *Ang Ladlad LGBT Party vs. Commission on Elections (COMELEC)* G.R. No. 190582, 08 April 2010; and the *Flight Attendants and Stewards Association of the Philippines vs. Philippine Airlines, Inc. and the Honorable Court of Appeal, 7th Division*, G.R. No. 212902.

Whenever there are human rights issues involved in a case pending before a court, the CHRP can intervene on its own (*motu proprio*) by filing the necessary petition or motion.<sup>73</sup> In intervening, the CHRP is guided by its constitutional mandate to provide appropriate legal measures for the protection of human rights of all persons within the Philippines, as well as Filipinos residing abroad, and provide preventive measures and legal aid services to the underprivileged whose human rights have been violated or need protection, among others.<sup>74</sup> Procedurally, particularly when it files a motion or petition for intervention in a case, the CHRP is guided by the Rules of Court.<sup>75</sup>

## Inspection of Prisons, Jails, Detention Centres, and Places of Confinement

In the exercise of its powers to visit detention centres, the Commission conducted 1,759 jail visitations nationwide. Of the total, 9,070 inmates were provided with legal assistance among the 10,237 inmates who have been visited. In the conduct of independent investigations, the Commission's Forensic Center attended to various cases requiring independent medico-legal services including autopsies and exhumations. The 91 forensic services provided include 51 medico-physical examinations, 27 exhumations/autopsies, and 13 medical examinations.<sup>76</sup>

## Case Studies<sup>77</sup>

Three of the high profile cases where the Commission has intervened are presented below:

- a) *Mascarinas-Green Case: arbitrary deprivation of life* - On 15 February 2017, Attorney Mia Mascarinas-Green, an environmental lawyer, was gunned down and killed by several men, while in the company of her three children and their nanny. In the course of the investigation by the CHRP, it was discovered that the victim had received several death threats in relation to a civil case she was handling regarding the Alona Embrace Resort in Panglao, Bohol. After reviewing the documents of the case, the CHRP found sufficient evidence to hold the respondents liable for human rights violations. CHRP said that the killing of the victim was attended by the aggravating circumstances of

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<sup>72</sup> CHRP response to the follow-up questionnaire.

<sup>73</sup> *Ibid.*

<sup>74</sup> Guidelines and Procedures in the Investigation and Monitoring of Human Rights Violations and Abuses, and the Provision of CHR Assistance 2012 (CHR Omnibus Rules of Procedure 2012), Rule 4, Section 13, available at [https://www.pinoyleftcabinet.files.wordpress.com/2014/07/chr-procedures-final\\_approved\\_8-31-2012.pdf](https://www.pinoyleftcabinet.files.wordpress.com/2014/07/chr-procedures-final_approved_8-31-2012.pdf).

<sup>75</sup> CHRP response to the follow-up questionnaire.

<sup>76</sup> Medico-physical examinations are conducted in jail visitation while medical examinations are medical consultations examined at the clinic.

<sup>77</sup> All these case studies are taken from the draft 2017 CHRP Annual Report.

treachery and abuse of strength. It also found that there was a strong intention to kill the victim as the gun shots were aimed at the head and neck to ensure the victim's death. Since a case was already filed against the respondents, the CHRP monitored the cases, i.e. murder, multiple attempted murder, and illegal possession of firearms, filed against Lloyd Lancer Gonzaga, the alleged mastermind in the killing of Mascarinas-Green. In its Resolution dated July 28, 2017, CHRP-Region VII Office (Cebu City) noted that the CCTV footage presented by the respondents as their evidence could have been tampered with. Financial assistance was also extended to the heirs of the victim.<sup>78</sup>

- b) *Killing of 17-year-old Kian De Los Santos: alleged EJK drug-related killing* - Kian De Los Santos, a 17-year-old grade 11 Student, and a resident of Caloocan City, was shot dead by policemen of the Caloocan City Police Station Drugs Enforcement Unit on 16 August 2017.

According to the police spot report the Drugs Enforcement Unit was conducting a so-called 'one-time big-time' operation (Oplan Galugad)<sup>79</sup> in the area on 16 August. When Kian Delos Santos noticed the presence of the approaching police officers, he allegedly drew his firearm and directly shot toward the police officers but missed, prompting one of them to return fire hitting Kian on his body and resulting in his instantaneous death. CCTV footage and autopsy examinations, which showed that the shots were fired at close range and while Kian was kneeling or otherwise positioned below his assailants, seemed to contradict these reports.

The CHRP investigation concluded that the policemen arbitrarily and deliberately killed the minor Kian Delos Santos without the benefit of due process.

The CHRP completed its final investigation and submitted a report recommending various actions. It was monitoring the criminal cases filed against the police officer respondents with the Department of Justice as well as the administrative case for grave misconduct filed with the Internal Affairs Service, of the PNP. It was also monitoring the ongoing preliminary investigation being conducted by the Office of the Ombudsman. The CHRP also urged the provision of immediate financial assistance to the family of Kian Delos Santos despite the lack of formal complaint. It recommended referral of the final investigation report and attached gathered facts and documents to form part of the case record or file for consideration of the Office of the Ombudsman; and the docketing and urgent final resolution of these cases by the CHRP.

- c) *Discovery of a secret detention cell in Raxabago police station* - An individual relayed information regarding the existence of a secret detention cell inside Raxabago Police Station in Manila to the CHRP on 27 April 2017. The CHRP conducted an investigation into the incident and on 10 May 2017 it filed criminal and administrative charges against the police officers of the Raxabago Police Station before the Office of

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<sup>78</sup> Under Rule 21, Sections 2 and 3, of the CHR Omnibus Rules of Procedure, the CHRP may grant financial assistance to the survivor-victim or to their legal heirs, in case the victim died, as "an ancillary measure to a case for human rights violation, with the objective of giving assistance to the victims or their families and to cushion the economic impact on the survivors or their families due to the human rights violation inflicted upon them".

<sup>79</sup> The PNP 'Oplan One-Time Big-Time Operation' is part of the 'Oplan Lambat Sibit' (a reinvigorated crime prevention effort of the PNP using "deliberate, programmatic and sustained" police operations) where all-out police operations are simultaneously conducted against illegal drugs personalities, most wanted persons, loose firearms and all other form of crimes.

the Ombudsman. Cases of arbitrary detention, grave threats, delay in the delivery of detained persons, grave coercion, robbery and extortion, violation of Republic Act no. 9745, maltreatment of prisoners, and violation of the 2013, Revised PNP Operational Procedures were docketed by the CHRP. Likewise, cases of grave misconduct and conduct prejudicial to the best interests of the police service were also docketed under a separate case number by the CHRP. The CHRP received an order dated 13 July 2017 issued by the Office of the Ombudsman directing the police respondents to submit their counter-affidavit. At the time of preparing this report, these cases were still subject to preliminary investigation by the Office of the Ombudsman.

#### **4. Conclusion**

The CHRP has been active in fulfilling its mandate, however, the current context might be the most daunting challenge it has faced in its history. Never before was there an attempt to defund this constitutional body. That even after 30 years of establishment it had to fight to survive for its existence demonstrates that the CHRP has more to do in terms of gathering mass support through human rights education. Despite a good leadership team, the CHRP has not been able to perform well, as the current administration has placed many hurdles in the way of it carrying out its human rights work. It also needs to engage with the Congress representatives as they hold deliberations on the new Constitution proposed by the Consultative Committee in order to ensure that there will not be any attempts to abolish it or undermine its role. The only positive that can be taken from the series of attacks on human rights institutions and defenders by the current administration is that this has brought civil society and the CHRP closer.

The SCA recommendations clearly express the compliance gaps in the CHRP's performance with respect to the Paris Principles. Amendments are needed to the proposed CHR Charter Bill to remove these compliance gaps. Below are recommendations in this regard to improve the performance of the CHRP and bring it into compliance with the Paris Principles.

#### **5. Recommendations**

##### **To the Government of the Philippines:**

- Stop vilifying human rights bodies and defenders;
- Establish objective criteria and ensure transparency in the selection process for members of the CHRP, including through broader consultation.

##### **To the Congress of the Philippines:**

- Immediately pass the proposed CHR Charter Bill with amendments to ensure compliance with the Paris Principles;
- Ensure sufficient budget and automatic appropriation so that the CHRP can carry out its mandate effectively;
- Debate and discuss the various reports of the CHRP including the annual report;
- Ensure the status of the CHRP as a constitutional commission and strengthen its mandate in the proposed new Constitution.

**To the Commission on Human Rights of the Philippines:**

- Create a Quick Response Team or Programme that will attend to emergencies even during holidays, weekends, and outside office hours and circulate information about this unit to the public;
- Engage with the Congress to raise awareness about the CHRP's mandate;
- Issue timely reports and resolutions, and circulate them widely among the public;
- Make all its resources, including reports and resolutions, easily accessible to the public through its website;
- Reach out to a wide audience with human rights awareness programmes and messages through the use of mass media and social media.

# **THAILAND: THE COMING OF A NEW COMMISSION – THAILAND’S HUMAN RIGHTS CHALLENGES AMIDST POLITICAL TENSION**

*People’s Empowerment Foundation*

## **1. Introduction**

This report is written to monitor the performance of the National Human Rights Commission of Thailand (NHRCT) between January 2017 and March 2018 with the intention of reflecting the opinions of civil society on the performance of the NHRCT, for the benefit of the development of the NHRCT, and to inform the general public.

This report was prepared by collecting information from documents including international level documents which relate to National Human Rights Institution (NHRI) functioning such as the Paris Principles, the General Observations of the Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation (GANHRI-SCA), a mechanism for assessing the effectiveness of NHRIs, and recommendations and concluding observations of the treaty bodies in particular the Human Rights Committee and the Committee on the Elimination of Discrimination against Women, as well as the Universal Periodic Review (UPR). At the national level, the 2017 Constitution and the 2017 Organic Law on the National Human Rights Commission (NHRC Act)<sup>1</sup> were reviewed, along with information from the NHRCT, including reports assessing the national human rights situation in 2017, the NHRCT’s 2017 Performance Report, and the NHRCT website.<sup>2</sup> In addition, information was collected from interviews with NHRCT officials, an official from the UN Office of the High Commissioner for Human Rights (OHCHR), a former official from the Ministry of Justice, four members of civil society, one member of the Selection Committee for the soon to be convened fourth NHRCT, and three NHRCT Commissioners. The interviews asked for opinions on the performance of, and problems and obstacles faced by, the third NHRCT. However, the report remains subject to limitations due to the challenge of accessing information.

The data collected was compared to the Paris Principles, the General Observations 2013 of GANRHI-SCA, the general human rights situation, and the Thai perspective and culture of human rights. The latter arguably limits the implementation of human rights standards in the country.

Since the new NHRCT (the fourth) is in the process of selection,<sup>3</sup> it is possible to undertake a comparison of the selection process between the third and fourth NHRCTs in order to identify any important changes. This report will be used as a basis for consultations and exchanges of opinion among the Thai Coalition on the NHRCT so that the civil society sector and the People's Empowerment Foundation network, which monitors the NHRCT, can also participate in reviewing this report. The People's Empowerment Foundation will submit a request to the Chairperson of the NHRCT to exchange opinions on this report and the report

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<sup>1</sup> With the promulgation of a new Constitution in Thailand in 2017 the NHRCT was reconstituted under the 2017 Organic Law on the National Human Rights Commission.

<sup>2</sup> National Human Rights Commission of Thailand website, available at [www.nhrc.or.th](http://www.nhrc.or.th).

<sup>3</sup> At the time of writing this report.

will also be sent to the Selection Committee.

## 2. Overview

It has been four years since the coup in Thailand and so it can be said that the country is under an undemocratic government. The NHRCT has come under pressure from many sides, including the downgrading of its status in October 2014 from ‘A’ to ‘B’<sup>4</sup> by GANHRI-SCA, and recommendations received from the UPR and the concluding observations of the Committee on Civil and Political Rights for the NHRCT to operate under the Paris Principles, as well as civil society activists within the country recommending that laws related to the NHRCT be amended to comply with the Paris Principles.

The NHRCT has attempted to develop through various processes. Dr. Niran Pitakwatchara, a Commissioner of the second NHRCT, explained that before the NHRCT being downgraded to ‘B’ status, the second NHRCT (25 June 2009-19 November 2015) had proposed to the Government and National Assembly that the selection process be amended to conform to the Paris Principles, but this received no interest from the Abhisit<sup>5</sup> or Yingluck<sup>6</sup> Governments at that time, which reflects that neither government understood nor gave importance to human rights. Civil society monitored the drafting of the 2017 NHRC Act and participated in the public hearing on its drafting and qualified persons were invited to give their opinions to the drafting committee. Eventually, civil society representation was added to the NHRCT Selection Committee in Section 246 of the 2017 Constitution. Therefore, there is greater credibility about the selection process for the fourth NHRCT, as compared to that of the third.

According to the NHRCT’s 2017-2022 strategy, the NHRCT aims to promote among all sections of society a respect for human rights as guaranteed in the Constitution; to work to create structural change in the state and private sectors by systematically driving prevention of and solutions to human rights problems; to work with networks in the country and allies on the international stage to mutually strengthen their work; to promote knowledge and understanding and create awareness about human rights, communicating the human rights situation in the country and the results of the work of the NHRCT to the public correctly and thoroughly; and to strengthen and develop the operational procedures and organisational administration to ensure success while maintaining morality and transparency.

The NHRCT has identified three important issues for operations in the 2017 financial year. They are business and human rights, natural resources, land, forests, and human rights defenders.

Human rights are seen by Thai national leaders as a threat to the country’s image. Many national laws still do not conform to standard international human rights principles, such as criminal laws relating to torture and enforced disappearance. There is a recommendation from the Committee against Torture (CAT) to add a definition of the word ‘torture’ in Thai

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<sup>4</sup> The downgrading of status from ‘A’ to ‘B’ reflected the fact that the NHRCT was not in accordance with the Paris Principles, which are the standards of performance of National Human Rights Institutions worldwide. ‘A’ status would mean that the NHRI operates in accordance with the Paris Principles, has the status to participate in international human rights meetings, and can express opinions in meetings. ‘B’ status means that the NHRI follows some of the Paris Principles and can attend international human rights meetings with observer status, but cannot express opinions in meetings. ‘C’ status means that operations do not follow the Paris Principles and must be improved.

<sup>5</sup> Abhisit Vejjajiva was Prime Minister of Thailand from 2008–2011.

<sup>6</sup> Yingluck Shinawatra was Prime Minister of Thailand from 2011–2014.

criminal law. Officials of the Cross Cultural Foundation and the Duay Jai (Hearty Support) Group who gave information on torture to CAT, which monitors implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which Thailand has ratified, were prosecuted by the army for allegedly providing untrue information and damaging the image of the army.

Enforcement of laws in Thailand is still mainly for the purpose of national security. Civil society performs the duty of vigorously investigating the work of the agencies and mechanisms of the state, and pushing for accountability such as by arranging for the submission of alternative reports to various treaty bodies to provide them with information on the human rights situation in the country on various issues thereby enabling the treaty bodies to give views or suggestions that will be of benefit to Thailand. Even though Thailand has ratified seven international conventions, as well as the two Optional Protocols to the Convention on the Rights of the Child, the interpretation of human rights in Thailand still does not comply with global standards. There is still distrust of civil society. Government actions have the characteristics of control more than of promotion and protection. Human rights work in Thailand is therefore difficult and must struggle conceptually with national leaders who have a poor attitude towards human rights, and with officials and a public that still have no understanding of human rights. For example, the 2017 NHRC Act was written so as to place limits on the NHRCT doing joint work with NGOs. This reflects the attitude towards human rights work in the country and the NHRCT must work to reduce these failings.

### **3. The National Human Rights Commission of Thailand and the Paris Principles**

#### **3.1 Functions, Mandate, and Structure**

Third NHRCT	Fourth NHRCT
Established under NCPO (National Council for Peace and Order) Announcement 48/2557 <sup>7</sup> and using the 1999 NHRC Act in the performance of its work.	Established under Sections 246 and 247 of the 2017 Constitution and using the 2017 NHRC Act in the performance of its work.

The establishment of the NHRCT is in line with the Paris Principles and the General Observations of GANHRI-SCA, which give importance to the establishment of NHRIs through supporting legislation or under the Constitution, to ensure the security, standing, and independence of the NHRI.

According to the Constitution and the NHRC Act, the NHRCT has the power to protect and safeguard human rights comprehensively so that the NHRCT can carry out its duty in a complete and effective manner. The powers of the third and fourth NHRCTs are specified by the respective NHRC Acts as follows:

<sup>7</sup> According to the National Council for Peace and Order Announcement 11/2557 dated 22 May 2014 on the termination of the Constitution of the Kingdom of Thailand which enabled certain independent organisations to continue functioning, in cases where there is the need to seek office-holders, this shall be done according to the criteria and methods that were originally used in selection according to the 2007 Constitution of the Kingdom of Thailand. For further information see <https://www.thairath.co.th/content/426544> (in Thai).

<b>Mandate of the third NHRCT</b>	<b>Mandate of the fourth NHRCT</b>
<p data-bbox="180 275 624 304">Article 15 of the 1999 NHRC Act</p> <p data-bbox="180 344 807 450">(1) to promote respect for, and practice in compliance with, human rights principles at domestic and international levels;</p> <p data-bbox="180 495 807 891">(2) to examine and report the commission or omission of acts which violate human rights or which do not comply with obligations under international treaties relating to human rights to which Thailand is a party, and propose appropriate remedial measures to the person or agency committing or omitting such acts; in the case where it appears that no action has been taken as proposed, the Commission shall report to the National Assembly for further proceedings;</p> <p data-bbox="180 936 807 1111">(3) to propose to the National Assembly and the Council of Ministers policies and recommendations with regard to the revision of laws, rules, or regulations for the purpose of promoting and protecting human rights;</p> <p data-bbox="180 1155 807 1220">(4) to promote education, research, and the dissemination of knowledge on human rights;</p> <p data-bbox="180 1265 807 1406">(5) to promote co-operation and co-ordination among government agencies, private organisations, and other organisations in the field of human rights;</p> <p data-bbox="180 1451 807 1626">(6) to prepare an annual report to assess the situation in the sphere of human rights in the country for submission to the National Assembly and the Council of Ministers and disclosure to the public;</p> <p data-bbox="180 1671 807 1776">(7) to assess and prepare an annual report on the performance of the Commission for submission to the National Assembly;</p> <p data-bbox="180 1821 807 1995">(8) to propose opinions to the Council of Ministers and the National Assembly in the case where Thailand is to be a party to a treaty concerning the promotion and protection of human rights;</p>	<p data-bbox="831 275 1275 304">Article 26 of the 2017 NHRC Act</p> <p data-bbox="831 344 1461 633">(1) to examine and report the true facts related to all cases of violations of human rights without delay and propose to the relevant state or private agencies appropriate measures and ways to prevent or remedy human rights violations and to provide a remedy for those who have suffered damage from human rights violations;</p> <p data-bbox="831 678 1461 853">(2) to prepare an annual report to assess the situation in the sphere of human rights in the country for submission to the National Assembly and the Council of Ministers and disclosure to the public;</p> <p data-bbox="831 898 1461 1111">(3) to propose to the National Assembly, the Council of Ministers and relevant agencies measures and ways to promote and protect human rights together with the revision of any laws, rules, or orders in order to comply with human rights principles;</p> <p data-bbox="831 1155 1461 1296">(4) to clarify and report without delay the true facts in the case of incorrect or unfair reports on the situation regarding human rights in Thailand;</p> <p data-bbox="831 1341 1461 1406">(5) to promote all sections of society to be aware of the importance of human rights.</p> <p data-bbox="831 1451 1275 1480">Article 27 of the 2017 NHRC Act</p> <p data-bbox="831 1525 1461 1630">For the purposes of carrying out the duties under Article 26, the Commission shall have the following duties and powers:</p> <p data-bbox="831 1675 1461 1921">(1) to promote, support, and cooperate with persons and state and private agencies in education, research, and the dissemination of knowledge and development of strength in the field of human rights together with the provision of assistance and remedies to those who have suffered human rights violations;</p> <p data-bbox="831 1966 1461 2031">(2) to promote and disseminate to children, youth, and the general public an awareness of</p>



<p>(9) to appoint sub-committees to perform tasks as entrusted by the Commission;</p> <p>(10) to perform other tasks under the provisions of this Act or other laws which are prescribed to be the powers and duties of the Commission.</p>	<p>the human rights of each individual equally and respect for the human rights of others who may differ in culture, traditions, way of life, and religion;</p> <p>(3) to promote co-operation and co-ordination among government agencies, private organisations and international organisations in the field of human rights;</p> <p>(4) to propose opinions to the Council of Ministers with respect to Thailand's becoming a party to or acting in compliance with an agreement concerning the promotion and protection of human rights;</p> <p>(5) to issue regulations or announcements to act in compliance with this organic law;</p> <p>(6) duties and powers which are prescribed in this organic act or other laws.</p>
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If we compare the powers of the NHRCT under the 2017 Constitution with those under the previous Constitution, and the NHRC Act of 2017 with that of 1999, it will be seen that the powers of the NHRCT have declined. For example, the 2007 Constitution empowers the NHRCT “to act on behalf of the aggrieved person in submitting charges to the Administrative Court or the Constitutional Court” for a verdict by the Administrative Court or the Constitutional Court regarding whether or not the actions of a state official, or policy and regulations of the state, conflict with the principles of human rights. These verdicts were intended to be standards for the future amendment of human rights law in the country. These powers were deleted and do not appear in the current Constitution or the 2017 NHRC Act.

The 2017 Constitution and the 2017 NHRC Act add to the powers of the NHRCT “to clarify and report without delay the true facts in the case of incorrect or unfair reports on the situation regarding human rights in Thailand”. The explanation of Meechai Ruchuphan, Chairperson of the Constitution Drafting Committee, expressed the opinion on assigning this authority to the NHRCT in the Constitution that “the NHRC is required to report the truth that exists in Thailand because each country has a different perspective according to its culture and traditions ... the NHRCT must come out and clarify that these are our traditions and not violations of human rights”.<sup>8</sup> This is the viewpoint that reflects Thai-style human rights. Under this part of its mandate, the third NHRCT had to release an NHRCT statement to ‘clarify’ a report on the human rights situation in Thailand by Human Rights Watch and to ‘clarify’ a statement by ANNI.<sup>9</sup> The role of clarifying reports from other organisations on the human rights situation in the country is not prescribed in the Paris Principles as a duty of an NHRI, rather NHRIs are required to give opinions to various agencies on their performance in accordance with the recommendations and reports from United Nations mechanisms and

<sup>8</sup> ‘NHRC Act changes investigative organisation into a mouthpiece of the state’ (in Thai), *iLaw*, 6 March 2018, available at <https://ilaw.or.th/node/4750>.

<sup>9</sup> ‘On the Opinion relating to the Statement of ANNI on 11 April 2017’, NHRCT, 18 April 2017, available at, <http://www.nhrc.or.th/NHRCT-Work/Statements-Press-Releases-Open-Letters/Statements>.

international human rights standards in general. The second NHRCT under the leadership of Dr. Amara Pongsapich expressed disagreement with this ‘clarifying’ role to the Government and the Drafting Committee of the 2017 Constitution when invited to give expert opinion on the draft 2017 NHRC Act, but the Drafting Committee still included it in the 2017 NHRC Act. This constitutes Thai-style human rights in which no one can criticise the government.

### *Human Rights Protection*

There is a duty to monitor the human rights situation without having to wait for complaints. Apart from having the authority to protect and promote human rights broadly, the role of scrutinising human rights in emergency situations of concern is another important role of the NHRCT.

#### **Articles 40-43, NHRC Act 2017**

Article 40: In the case of a situation arising that seriously affects or is a violation of human rights, the Commission shall conduct an investigation and arrange an evaluation report to the National Assembly and the Council of Ministers and disseminate it to the public. The report shall be in the form of a summary comprising problems, obstacles, and recommendations.

Article 41: The Commission shall arrange a plan of operations according to Article 40 without delay.

Article 42: In the case where the Commission believes that a solution to the problem or the prevention of the occurrence of violations makes it necessary to prescribe measures or ways to promote, protect, or amend laws, regulations and orders to be in compliance with human rights principles, the Commission shall make recommendations to the National Assembly, the Council of Ministers, or relevant agencies to proceed in accordance with this authority without delay.

Article 43: If it is impossible to operate, or if operations require time, the reason shall be communicated to the Commission without delay.

The 2017 NHRC Act gives importance to responding to situations of severe human rights violations in line with the Paris Principles. From interviews with some NHRCT and OHCHR officials, it is known that when situations arise that require close attention in order to prevent possible violence, the Chairperson and Commissioners do not give these situations sufficient importance, such as in the case of the rally of villagers in Thepa. These villagers staged a hunger strike in front of the United Nations Office on Ratchadamnoen Road, in opposition to a coal-fired power plant, to force the Electricity Generating Authority of Thailand and the Government to cancel the project. This risked a confrontation with officials in which people could be harmed or detained through the use of force. The OHCHR sent a letter to the Chairperson of the NHRCT calling for observation of the rally of the Thepa villagers. But it is known that there was no order from the Chairperson; some officials came to observe merely from a sense of conscience about human rights. In another case, a rally to follow-up on the performance of the Government in implementing solutions to problems including poverty and human rights, organised by the People's Movement for a Just Society (P-Move)<sup>10</sup>

<sup>10</sup> P-Move, or the People's Movement for a Just Society, is a coalition of people affected by unjust state policies who belong to nine networks: the Northern Peasant Federation; the Community Network for Reform of Society

and We Walk,<sup>11</sup> was not monitored by the NHRCT; there were merely some Commissioners who attended the rally and gave encouragement and support for protection of the right to freedom of public expression. The response to issues of human rights concern under emergency situations by this NHRCT has not been substantial. This NHRCT was established by the National Council for Peace and Order (NCPO) Government<sup>12</sup> and it may therefore have some reservations about investigating violations by the state, which creates an image of this NHRCT as lacking independence and appearing ineffective and unreliable.

### *Human Rights Promotion*

#### **2017 NHRC Act**

Article 26(5) of the NHRC Act specifies that the NHRCT has the duty to support all sections of society to be aware of the importance of human rights and Article 27(3) specifies that the NHRCT has the duty to promote participation and coordination among state agencies, private organisations, and international organisations.

The NHRCT carries out its duty to support and promote human rights in many ways such as arranging public information forums, setting public policy, and providing training in human rights and research. The 2017 Annual Report on the Performance of the NHRCT produced by the NHRCT itself contains the following activities to promote human rights:<sup>13</sup> providing information on human rights to youth in the Southern border provinces; providing information on human rights principles and investigation procedures for human rights violations to officials; providing information on the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment to officials enforcing the laws on migrant labour and human trafficking; running an academic seminar on ‘Legal Problems Related to Nationality and the Rights of Citizenship of the Thai State’; running an academic seminar to publicise and promote the UN Guiding Principles on Business and Human Rights; and awarding Human Rights Defenders Awards to individuals with outstanding performance in human rights, on Human Rights Day.

In addition the NHRCT ran a forum for the NHRCT to meet the people; coordinated with educational institutions; established ‘Centres for Human Rights Studies and Coordination’ (for example, in the northeast at the Faculty of Law, Khon Kaen University; in the east at the Faculty of Political Science and Law, Burapha University, Chonburi; in the south at the Faculty of Law, Rajabhat University, Surat Thani; and in the north at the Faculty of Law, Chiang Mai University); ran a programme with Parliament Radio; ran a mobile mass communications programme; and organised many human rights seminars.

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and Politics; the Southern Peasants' Federation of Thailand; the Isan Land Reform Network; the Bantad Mountain Range Land Reform Network; the Pak Mun Dam Case of the Assembly of the Poor; the Legal Status Network; the Four Regions Slum Network; and the Contract Farmers Network. P-Move held rallies on 2 May 2017 in front of a number of ministries calling for information on progress of the state's implementation of solutions to the basic problems of poverty in their networks.

<sup>11</sup> We Walk was a march of solidarity over 450 km from Bangkok to Khon Kaen starting on 20 January 2018 by the People Go Network Forum to link people affected by state policies on four issues: state welfare; food security; natural resources; and human rights and freedoms under the Constitution.

<sup>12</sup> The National Council for Peace and Order is the junta that has ruled Thailand since their 2014 Thai coup d'état on 22 May 2014.

<sup>13</sup> ‘Performance Report of the NHRCT’, NHRCT, 2017, pp.106 and 160.

The NHRCT also developed 12 policy recommendations and recommendations for amendments to laws to promote and protect human rights.<sup>14</sup> Furthermore it carried out research studies on human rights including research studies on strategies for business and human rights, and research on the principles of protecting the rights and liberties of individuals in cases of contempt of court.

The current NHRCT<sup>15</sup> is enthusiastic about human rights and business. The NHRCT Subcommittee on Economic, Social and Cultural Rights held a seminar on the ‘Tourism and Hotel Business and Respect for Human Rights according to the Principles of the United Nations’, on the 17 June 2016 at Phuket. The seminar recommended the creation of a handbook on human rights in general for the hotel and tourism industries. The NHRCT therefore had Sal Forest Co. Ltd. and Thammasat University Research and Consultancy Institute conduct research on human rights due diligence and produce a handbook to evaluate overall human rights in the hotel industry so that hotel activities are in accordance with UN recommendations on human rights and the handbook can be used to investigate and evaluate human rights in the hotel industry. Another example is when the NHRCT submitted the recommendations for the National Action Plan on Business and Human Rights (NAP) to the Cabinet on 25 April 2018 in line with the United Nations Guiding Principles on Business and Human Rights (UNGPs), which the NHRCT together with government agencies and private sector bodies on 31 May 2017.

#### *Accountability and Publication of Findings and Reports*

The NHRCT has produced annual reports on its own operations from 2002 until the present, and has also published reports assessing the country’s human rights situation from 2011-2017.<sup>16</sup> The NHRCT’s 2018 human rights situation report will be released in 2019, according to a timeline on its website. It is of benefit to all parties to learn about the work of the NHRCT and the human rights situation in the country.

### **3.2 Autonomy from the Government and Independence Guaranteed by Statute or the Constitution**

The NHRCT must maintain its neutrality and independence in its interactions with the state and civil society. The maintenance of independence is an important role of the NHRCT. Even though it receives a budget from the state, it must have the independence to investigate the actions of the state. The NHRCT must therefore have courage and the ethical will not to take the side of the state even if in its duty to investigate and monitor violations it sometimes finds violations by agents of the state or by the state itself. Maintaining neutrality, independence, and impartiality is the quality that will ensure that the NHRCT is accepted by the people and respected by different agencies.

#### *Budgetary Autonomy and Financial Independence*

The NHRCT prepares an annual budget of expenses for submission to the National Assembly. If the budget allocation is insufficient, the NHRCT shall submit an amendment directly to the Budget Scrutiny Committee of the House of Representatives and have an auditor.

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<sup>14</sup> ‘Performance Report of the NHRCT’, NHRCT, 2017, pp.128-129.

<sup>15</sup> The third set of NHRCT Commissioners.

<sup>16</sup> ‘NHRCT Work, Annual Reports’, available at <http://www.nhrc.or.th/NHRCT-Work/Annual-reports.aspx>.

The NHRCT financial report must be submitted to the Council of Ministers and the National Assembly to demonstrate transparency and accountability.

The administration of the Office of the NHRCT is in accordance with the 2017 NHRC Act, which allows the NHRCT to issue regulations to govern itself as a reflection of the independence of the Commission.

#### *Interaction with, and State Submissions to, the International Human Rights System*

The NHRCT presented reports to treaty bodies for two treaties, the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination against Women, and collaborated with NHRIs at various levels, for example, participating in the annual meeting of GANHRI, participating in the NHRIs South East Asia Forum (SEANF) of the Asia Pacific Forum (APF), and participating in the meeting on Human Rights and Business organised by the ASEAN Intergovernmental Commission on Human Rights (AICHR).

Cynthia Veliko, Regional Representative of the OHCHR South-East Asia Regional Office, met the NHRCT on the occasion of her taking office, to explore areas of cooperation and preparations for assessing the status of the NHRCT by GANHRI-SCA. The NHRCT also met UN Special Rapporteurs on human rights and the Chairperson of the Working Group on Business and Human Rights.

The NHRCT's role in cooperating with human rights institutions in the region is still limited. For example, the Indonesia Representative to AICHR organised an AICHR High Level Dialogue on 'Managing Freedom of Expression in the Information Era' in Medan, Indonesia on 11-12 April 2018. The NHRCT, in its capacity as Chair of the SEANF, was invited to provide a resource person on the topic of 'Managing Freedom of Expression in the Information Era: the Policy Framework', to speak on the perspective of NHRIs in the region on freedom of expression. No reply or explanation was received from the Chairperson of the NHRCT. The Indonesia Representative to AICHR therefore had to invite the Commission on Human Rights of the Philippines to speak instead.

Furthermore, the Chairperson of the Human Rights Commission of Malaysia (SUHAKAM) asked to meet the NHRCT to consult on cooperation on the issue of Rohingya refugees. The Chairperson of the NHRCT assigned Commissioner Dr. Surachet Satitniramai to meet the Chairperson of SUHAKAM although Dr. Surachet had no knowledge of the Rohingya issue. Cooperation between the NHRIs of the two countries therefore did not occur.

#### *Selection and Appointment*

The Government does not see a need for a different selection process for the NHRCT and other independent mechanisms, and so has established the same model for the selection of members of all independent organisations. Other independent mechanisms may have a need for persons who have good legal knowledge and expertise, such as the Constitutional Court. But the NHRCT is different from the Constitutional Court and other independent mechanisms because of the existence of the Paris Principles, which set out internationally accepted standards for selection of members to an NHRI. The Selection Committee must therefore understand the Paris Principles and interpret the Constitution and the NHRC Act so

as not to contradict the Paris Principles and General Observation 1.8, which sets out in more detail the standards for selection and appointment.<sup>17</sup> Unless it does so there will be an effect on the ability of the NHRCT to achieve independence, diversity of membership, and effectiveness in the development of human rights in the country. The Selection Committee itself must have diversity, and a good knowledge and understanding of human rights.

<b>The Selection Committee of the fourth NHRCT</b>	<b>Steps in the selection process</b>
<p>According to Article 11 of the 2017 NHRC Act, the Selection Committee for the NHRCT comprises the President of the Supreme Court, the Speaker of the House of Representatives, the President of the Supreme Administrative Court, three representatives of human rights organisations selected from among themselves, one representative of the Lawyers Council of Thailand, one representative of the Medical and Public Health Council selected from among themselves, one representative of the media profession selected from among themselves, and one academic from an institute of higher education selected by the Selection Committee, totalling ten persons.</p>	<p>There are three important steps: the call for applications; scrutiny of the candidates in terms of their qualifications; and the final selection of the best seven candidates. The entire selection procedure must be completed within 260 days after the promulgation of the 2017 NHRC Act.</p> <p>According to Article 11 of the NHRC Act, the Secretary-General of the Senate shall act as Secretary of the Selection Committee and the Secretariat of the Senate shall act as the administrator of the Selection Committee.</p> <p>According to Article 13 of the NHRC Act, an announcement shall be made to the general public on the selection process, specifying the number of positions open, and the criteria, means and timeframe for selecting the Commissioners. The Selection Committee may use interviews, express their views as to the role and authority of the Commissioners, or use any other appropriate means in the selection process.</p> <p>The candidates' names shall be made public in order to hear the views of the public.</p> <p>Selection shall be by a method of open voting and each member of the Selection Committee shall record the reasons for their selection. Those selected must receive the votes of two-thirds of the Selection Committee and be approved by at least one-half of the members of the Senate.</p> <p>Those appointed to the Commission shall select among themselves one person to be the</p>

<sup>17</sup> General Observations of the SCA, 2013, GANHRI, Section 1.8, available at <https://nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC%20SCA%20General%20Observations.pdf>.

	<p>Chairperson.</p> <p>The President of the Senate shall inform the Monarch to make the appointments and countersign the Royal Command.</p>
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The composition of the Selection Committee in the 2017 NHRC Act is better and has more diversity than the Selection Committee for the third NHRCT, and includes a satisfactory proportion of participation from civil society.<sup>18</sup> However it is inappropriate that the President of the Senate should be on the Selection Committee because the list of those selected by the Selection Committee must be submitted to the Senate for its approval. Sunee Chairros, a member of the Selection Committee, gave the opinion that the courts should also not have a role in the selection of the NHRCT, and there should be no representative of the Medical and Public Health Council because there is no need.

The entire process is fixed by the Constitution and the NHRC Act including the necessity for the selection process to be completed within 260 days from the promulgation of the 2017 NHRC Act,<sup>19</sup> and for interpretations to be in accordance with the Constitution and the 2017 NHRC Act.

GANHRI-SCA has concerns on the selection process and the ability of the NHRCT to achieve independence, effectiveness, and diversity. It has issued its General Observations<sup>20</sup> giving its interpretation of the Paris Principles, which the Selection Committee should use as a framework when interpreting its own role, in order to ensure that interpretations in accordance with the Constitution and the NHRC Act are not in conflict with the Paris Principles.

Applicants for the posts of member of the NHRCT have the short period of two weeks to prepare information. It is not indicated on the website of the NHRCT that the Secretary-General of the Senate is the body that arranges the selection process.

### *Dismissal Procedures*

<b>2017 NHRC Act</b>
Under Article 20, a member of the NHRCT vacates office on the termination of their term, death, resignation, and disqualifications as set out in the law. A new selection shall take place within 150 days. <sup>21</sup>

<sup>18</sup> Civil society representatives on the Selection Committee for the fourth NHRCT are Dr. Amara Pongsapich (formerly Chairperson of the second NHRCT), Sunee Chairros (member of the first NHRCT), Somchai Homlor, human rights activist, Chavarong Limpattamapanee, representative of the media profession and former President of the Journalist and Media Association of Thailand, Dr. Surichai Wan'gao of Chulalongkorn University, Thawan Ruyaporn, representative of the Lawyers Council, and Dr. Sukit Tassanasunthornwong, representative of the Medical Council. The other three members are the President of the Supreme Court, the President of the Supreme Administrative Court, and the Speaker of the House of Representatives.

<sup>19</sup> NHRC Act, 2017, Article 61(1)-(6).

<sup>20</sup> General Observations of the SCA, 2013, available at <https://nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC%20SCA%20General%20Observations.pdf>.

<sup>21</sup> NHRC Act, 2017, Articles 20-21.



Article 24 relates to the benefits of the office, and the requirement not to accept money, assets or any other benefits from persons who do not have Thai nationality, juristic persons under foreign law with branches registered inside or outside the kingdom, or juristic persons whose principal income is from capital or subsidies from foreign countries.<sup>22</sup> Violations may be considered as grounds for removal from office.

Article 40 requires the Commission to produce an annual report on the human rights situation in the country within 90 days of the end of the calendar year. Also, under Article 40, in the case where the abovementioned report is not submitted to the National Assembly and the Council of Ministers within the specified time with no justified reason, the entire Commission shall vacate office.

However, it is noted that the term of office of the NHRCT, in accordance with the 2017 Constitution, is bound up with the 2017NHRC Act. Hence, should another *coup d'état* be staged and the current 2017 Constitution denounced, authority and responsibility would cease with immediate effect, which could then result in the discontinuation of the NHRCT.<sup>23</sup>

### 3.3 Pluralism

#### *Pluralism of Commissioners*

According to the Paris Principles, elaborated on in Section 1.7 of the General Observations,<sup>24</sup> NHRIs must have diversity of representation. However, the interpretation of 'diversity' may not be identical in all cases. According to Article 247 of the Constitution and Article 8 of the 2017 NHRC Act,<sup>25</sup> the NHRCT shall comprise persons with knowledge and expertise in five fields, while the General Observations of GANHRI-SCA focus on the need for diversity in decision-making from the perspective of representation of different groups in society.<sup>26</sup> The composition of NHRIs should include representatives of different social groups such as women and minorities.

#### **Article 8, NHRC Act, 2017, Qualifications of Commissioners**

The NHRCT comprises seven Commissioners appointed by His Majesty the King on the recommendation of the Senate from among those who are politically neutral and have knowledge and experience in protecting the rights and liberties of the people as is evident from no less than ten years in the following fields with at least one person in each field and no more than two persons in each field:

- (1) continuous experience of work in the field of human rights;
- (2) knowledge and expertise in human rights education or research at the higher education

<sup>22</sup> Ibid. Articles 23-24.

<sup>23</sup> This is different from the practice under the 1999 NHRI Act, which did not bind the NHRI's administration with the 1997 Constitution. Therefore, any *coup d'état* and the subsequent abolition of the Constitution did not impact the NHRCT's term of office.

<sup>24</sup> General Observations of the SCA, 2013, Section 1.7, available at <https://nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC%20SCA%20General%20Observations.pdf>.

<sup>25</sup> Constitution of Thailand, 2017, Article 247 and NHRC Act, 2017, Article 8.

<sup>26</sup> General Observations of the SCA, 2013, Section 1.7, available at <https://nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC%20SCA%20General%20Observations.pdf>.

level;

(3) knowledge and expertise in both domestic and international law related to human rights that is beneficial to the performance of the NHRCT;

(4) knowledge and experience of administration in the state sector that is relevant to the promotion and protection of human rights;

(5) knowledge and the experience in Thai philosophy, culture, traditions, and way of life which is evidently beneficial to the promotion and protection of human rights.

The opinions of the NHRCT must be the opinions of the entire NHRCT. Diversity of opinions is therefore important in order to ensure comprehensive consideration and decisions. At the same time differences in Commissioners' knowledge relating to human rights can create problems in decision-making. For example, during the third NHRCT, the issue of the shackling of defendants when travelling to court revealed opinions on both sides. One side believed it was a rights violation; while the other side believed it was not and that it was part of the duty of officials. The NHRCT use the majority opinion as the criteria when deciding between opinions. However, the considerations of the NHRCT should be based on human rights principles.

In terms of gender balance, the third set of NHRCT Commissioners that will end their term in 2018 is comprised of four women and two men. There is no representation of ethnic minorities or people with disabilities.

#### *Collaboration with Civil Society and other Stakeholders*

In 2017, the NHRCT arranged to meet civil society in the west at the Regent Cha Am Beach Resort, Phetchaburi Province, on 1 September. The objectives of this meeting with civil society were to compile problems of rights violations of human rights defenders in the judicial process, and problems faced by ethnic minority communities, in order to find an approach to concrete solutions. The meeting also had the objective of preparing for the establishment of a 'Centre for Human Rights Studies and Coordination' of the NHRCT at Phetchaburi Rajabhat University.

Participants at this meeting were of the opinion that communities still had problems in accessing the NHRCT whether for reasons of language or a misunderstanding of the NHRCT mandate, and that NGOs were needed as a link between communities and the NHRCT. Communities in the west are mostly ethnic minority communities and are considered vulnerable to conflicts with the operations of state agents, especially National Park officials. There are problems when people stand up to claim rights to land on which they have lived since before the demarcation of the National Park. This has created violations of community rights and resulted in some enforced disappearances such as in the case of Porlajee 'Billy' Rakchongcharoen, a Karen community rights activist from Ban Bang Kloi, who disappeared on 17 April 2014 (for more information on this case see 'Case Studies' section).

In this case, the NHRCT undertook the role of mediator to encourage people to submit to regulations and laws by explaining that if the laws on National Parks and Reserved Forests are considered, the people are held to have encroached on the forest and broken the law. The claim to have lived there before the proclamation of the National Park cannot enable the people to win legally. It therefore wanted the people to understand and behave according to the law. Participants at the meeting that day felt that this advice from the NHRCT did not help solve the problems of the people.

### 3.4 Adequate Resources

According to the 2017 financial report for the NHRCT<sup>27</sup> it received a budget allocation in 2017 of 216,455,900 baht, divided into 125,578,200 baht for personnel and 89,988,600 baht for other expenses. The surplus of revenue over expenses is 18,986,975.08 baht, which indicates that the NHRCT received sufficient income. The NHRCT has 268 staff.<sup>28</sup>

The NHRCT has taken steps to build the capacity of its staff. It has sent officials for training in human rights at various levels; and has established a human rights archive and human rights communications centre, as part of the first library in Thailand dedicated to human rights and open to the general public.

The establishment of ‘Centres for Human Rights Studies and Coordination’ to disseminate the work of the NHRCT and to facilitate access by the people to the NHRCT makes it easier to submit complaints through the centres. However, the policy with regard to these centres, at Chiang Mai, Khon Kaen, Surat Thani, and Chonburi, is not yet clear. The centres were set up in accordance with the Paris Principles, which call for additional offices to be established where this will assist an NHRI in its work; but operational policy is not good enough, the budget is insufficient, and centres are staffed by employees with insecure tenure and high rotation. There is also no training on the mandate of the NHRCT for staff.

Each centre has only one staff member, which means that they must stay in the office all day if it is to be open. However, as many people do not know that these centres exist, staff must leave the office to visit the people to conduct public relations. The NHRCT should increase the centres’ budget to allow them to work more effectively and with more than one staff member.

### 3.5 Adequate Powers of Investigation

The protection and safeguarding of human rights is the most important responsibility of the NHRCT. The 2017 NHRC Act gives the NHRC the following investigative powers under Article 35:<sup>29</sup>

- to call on state agencies, government officials, staff or employees of these agencies, or any individual to give oral testimony or submit documents, evidence or other relevant testimony as part of its deliberations;
- to enter dwelling places or any premises to investigate the facts or collect evidence with a court order;
- to issue regulations to pay expenses and travel costs of individuals who come to give opinions or testimony.

The NHRCT may criticise its officials to act on its behalf in the conduct of the first two items listed above. Under Article 36 of the NHRC Act 2017, when after an investigation a violation is discovered, this shall be communicated to the state or private agency involved to remediate the violation and the NHRCT shall recommend appropriate prevention or remediation measures, and compensation to those who have suffered damage from the human rights

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<sup>27</sup> ‘Financial Report of the NHRCT’, NHRCT, 2017, p.169.

<sup>28</sup> Ibid. p.43.

<sup>29</sup> NHRC Act, 2017, Articles 35-39.

violation. The state or private agency involved shall proceed according to the communication from the NHRCT.

Under Article 37, in the case where the violation is a criminal offence and the injured party is not in a position to make a complaint or file charges themselves, the NHRCT shall be entrusted to make a complaint or file charges.

Under Article 38, in the case where any Commissioner sees a human rights violation and urgent action is required, the NHRCT may order administrative staff or police in the vicinity to provide assistance.

Article 39 forbids the NHRCT from accepting cases with the following characteristics:

- Cases that are the subjects of court cases or where the courts have given a final decision;
- Cases that are outside the responsibility of the NHRCT;
- Cases that are the responsibility of other independent organisations;
- Complaints that are dishonest and of no benefit to the people;
- Cases that have already been resolved;
- Cases that have already been considered.

The NHRCT shall order the dismissal of such cases.

<b>Results of investigations of complaints, 2017 financial year</b>	<b>Number</b>
Sent to other agencies with the responsibility to consider solutions	91
Investigation terminated: <ul style="list-style-type: none"> <li>- in accordance with Article 22, 1999 NHRC Act (158 cases)</li> <li>- with observation/recommendation (12 cases)</li> <li>- excluded according to the Constitution (1 case)</li> <li>- already decided by the NHRCT (3 cases)</li> <li>- complaint incomplete under Article 23, 1999 NHRC Act (4 cases)</li> <li>- resolution or reconciliation already reached (123 cases)</li> <li>- withdrawn by complainant (11 cases)</li> <li>- no violation of human rights found (288 cases)</li> <li>- complainant cannot be contacted (4 cases)</li> <li>- others (281 cases)</li> </ul>	885
Measures to resolve human rights violation problems	26
Policy recommendations or recommendations to amend laws	7
<b>Total</b>	<b>1009</b>

### *Court Cases*

Under Article 39 of the NHRC Act 2017, and also under the NHRC Act 1999, the NHRCT is not permitted to take up any case that is being considered by a court, nor is it allowed to investigate any case that has been decided by a court. In the case of the extrajudicial killing of Chaiyaphum Pasae, discussed in the ‘Case Studies’ section below, Chartchai Suthiklom, Chairperson of the Subcommittee on Rights Related to the Judicial Process which is

responsible for this case, has explained that because the case has already gone to court, the NHRCT must stop monitoring the case in accordance with the 1999 NHRC Act. The opinion of Sunee Chairios, a former Commissioner in the first NHRCT on the consideration of cases that have gone to court, is that “in the past, state agencies took cases to court in order to prevent the NHRCT from investigating, such as cases of the suppression of peaceful protests, torture, or the use of disproportionate force in arrest, or in cases when capitalist groups rushed to prosecute villagers and human rights defenders in criminal or labour cases. The NHRCT should be able to conduct an investigation if the issue is different from that of the court.”<sup>30</sup> A recommendation of the NHRCT will be of additional assistance to a comprehensive deliberation by the court and the judgement of the NHRCT can be used in court. To halt an investigation into the facts of a case denies real justice to the injured party.

### *Inspection of Prisons, Jails, Detention Centres, and Places of Confinement*

The report on the performance of the NHRCT for the financial year 2017<sup>31</sup> says that there were inspection visits to places of risk to promote respect for, and practice of, human rights principles under a project to make recommendations on legal amendments to promote and protect human rights. The results of the inspection visits to places at risk are reported in the 2017 Report on the Human Rights Situation in Thailand.<sup>32</sup>

Commissioner Angkhana Neelaphaijit inspected the case of foreign women detained for working as sex workers at the Nataree massage parlour. In this case it was found that rights in the judicial process were not properly applied. The court imposed fines which all women have already paid but they were still detained in Immigration Detention Centres under the control of the Immigration Bureau as witnesses in human trafficking cases. This is held to be inappropriate to their status as witnesses according to their rights in a judicial process.

In the case of the death in custody of Thawatchai Anukul, a former land official in Phang-nga Province, who hanged himself in a cell of the Department of Special Investigation and died in hospital, it has been impossible to find anyone who committed an offence.

The judicial process in situations where special laws are used under NCPO Orders 37/2557, 38/2557, and 50/2557 put civilians under the jurisdiction of the Military Courts. Although NCPO Order 55/2559 put civilians who have committed offences under these orders since 12 September 2016 under the jurisdiction of the Courts of Justice, those committing offences before that date remain under the jurisdiction of the Military Courts.

The NHRCT’s 2017 Report on the Human Rights Situation in Thailand,<sup>33</sup> notes that in 2017 the NHRCT received more complaints about violations of rights relating to the judicial process allegedly perpetrated by state officials than any other rights. The manner of the enforcement of laws by officials who in principle aim to maintain peace and order has an impact on the rights and freedoms of the people. The state has attempted to reform the judicial process, with the National Reform Council on Laws and Justice System Reform having made a reform plan on ten issues in the justice system.<sup>34</sup>

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<sup>30</sup> Sunee Chairios, ‘Critique of the 2017 NHRC Act’, *Transborder News*, 19 June 2017, p.4.

<sup>31</sup> ‘Performance Report of the NHRCT’, NHRCT, 2017, p.104.

<sup>32</sup> ‘Report on the Human Rights Situation in Thailand’, 2017, NHRCT, p.176.

<sup>33</sup> *Ibid.* pp.85-90.

<sup>34</sup> *Ibid.* pp.86-90.

The NHRCT has concerns about children who are in Immigration Detention Centres together with adults and who do not go to school, and has recommended implementation for stateless children of the right to primary education.<sup>35</sup>

### *Case Studies*

- a) *Chaiyaphum Pasae* – In the extrajudicial killing of Chaiyaphum Pasae, a youth activist of the Lahu ethnic minority, at a checkpoint in Mae Na Subdistrict, Chiang Dai District, Chiang Mai Province, on 17 March 2017, it is suspected that allegations that Chaiyaphum was involved in drug trafficking, that 2800 methamphetamine pills were found, and that Chaiyaphum resisted arrest and confronted officials with a hand grenade, were falsified in order to justify the killing. The NHRCT passed a resolution to put forward this case for investigation. Chartchai Suthiklom, Chairperson of the NHRCT Subcommittee on Rights Related to the Judicial Process, who is responsible for this case, set out to collect evidence on the issue of the conduct of military personnel at the checkpoint, the autopsy procedure, and the investigation by the investigating officers; on whether actions did or did not follow the Criminal Procedure Code and whether there was any delay or injustice constituting a violation of rights related to the judicial process; and by requesting the investigating officials to make information public and especially to release CCTV footage from the checkpoint. The results of the investigation by the NHRCT Subcommittee on Rights Related to the Judicial Process will be submitted to the NHRCT to publish a report and if it is found that there was a violation of human rights there will be recommendations to the relevant agencies to make amends and the case may be cited as evidence in the inquest into the death by the courts. However, as the case has already gone to court, the NHRCT has now been required to stop its investigation, as discussed above in the ‘Court Cases’ section.

The death of Chaiyaphum was news of great interest to the general public because Chaiyaphum was an ethnic Lahu, an ethnic minority, and a young person who may have been singled out and did not receive justice. Sumitchai Huttasan, a lawyer from the Centre for Protection and Revival of Local Community Rights, who is the lawyer in this case, declared that the difficulty in cases of extrajudicial execution is access to evidence and when the perpetrators are the military or police the case becomes even more difficult.

- b) *Grandfather Ko-ee* – This case is a struggle over the community rights of the Karen people of Ban Bang Kloi who had lived in the forest there for hundreds of years before the proclamation that it was in the area of Kaeng Krachan National Park in 2010. The officials of Kaeng Krachan National Park, led by Chaiwat Limlikhitaksorn, the Superintendent of Kaeng Krachan National Park at the time, carried out an operation to evict the villagers, burn the houses and rice barns, and seize agricultural tools and equipment of the Karen for a total of six times between April 2010 and July 2011, depriving 17 families with 80 members of their homes and land, and forcing them to relocate from the area. The villagers therefore filed a complaint with the Administrative Court on 4 May 2012 as case Number Black So. 58/2555 with Ko-ee Mimeo, or Grandfather Ko-ee (aged 107), and six others as plaintiffs seeking damages and the right to return to their homes and farms within the Kaeng Krachan forest.

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<sup>35</sup> Ibid. p.106.

Dr. Niran Pitakwatchara of the second NHRCT appeared as a witness in the Administrative Court even after his term as Commissioner was finished. On 12 June 2018, the Supreme Administrative Court read its verdicts in Case Number Black Oo. So. 77/2559 and Case Number Red Oo. So. 4/256<sup>36</sup> which Ko-ee Mimee had brought against the Department of National Parks, Wildlife and Plant Conservation, and ordered the Department to pay compensation of 51,407 baht to plaintiffs 1, 2, and 3; 6, 45,302 baht to plaintiff 4; and 50,407 baht to plaintiff 5. As regards the appeal of the six plaintiffs to return to their former situation before the administrative order of the National Park officials, the court believed that the plaintiffs did not have the right to live in the contested area since it was within the Kaeng Krachan National Park and the plaintiffs did not have documentation showing their right to the land or showing that they had received permission from the government to make use of the land. However, Tuenjai Deetes of the third NHRCT went to the area to visit the community on 14 June 2017 and affirmed evidence that Grandfather Ko-ee was born in Thailand according to registration documents of the survey of hill peoples in which the Department of Public Welfare states that Grandfather Ko-ee was born in 1911 in Phetchaburi Province. Commissioner Deetes subsequently took Grandfather Ko-ee to receive a National Identity Card in 2018 as verification of his status.

It can be said that in this case the NHRCT did its duty well and followed up the case even after its term of office was finished. For example, Dr. Niran Pitakwatchara served as a witness in court and Tuenjai Deetes followed up the case relentlessly, giving encouragement to the Karen community. Eventually an NHRCT meeting passed a resolution approving a recommendation of measures or approaches to promote and protect human rights and a recommendation to amend laws to the Council of Ministers and related agencies.

- c) *Porlajee 'Billy' Rakchongcharoen* – Billy was a leader of the Ban Bang Kloi Karen community who had a role in the complaint of the community against their eviction from their ancestral lands, because he was the only person in the village able to read and write the Thai language and he was one of the witnesses to the eviction and burning of the Karen houses. He disappeared while collecting information for the court. Pinnapha Phrueksapan, Billy's wife, stated that Chaiwat Limlikhitaksorn, the Superintendent of Kaeng Krachan National Park, together with his subordinates, was the person who detained Billy on 17 March 2014. Subsequently, Billy disappeared. Pinnapha Phrueksapan appealed to the NHRCT about Billy's disappearance in 2015.

#### **4. Conclusion**

In its Operational Strategy for 2017-2022, the NHRCT has set out as its primary goal that all sections of society shall have knowledge, understanding and awareness of human rights. The secondary goals include: that recommendations of the NHRCT lead to policy changes by the Government together with the enactment of laws in accordance with international human rights obligations with which Thailand must comply, and the amendment of laws to conform to human rights principles; that the work of the NHRCT is effective, especially proactive work on important issues affecting society; that through its academic strength the NHRCT

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<sup>36</sup> Black cases are those still under the consideration of the courts. Red cases are those that have been finalised and where the court has given a verdict.



will become a fundamental national institution in human rights; that the NHRCT has the trust of the people; and that the NHRCT is internationally accepted.

While these are laudable goals, the reality is that the NHRCT struggles to assert itself in a society where Government actions promote national security above human rights standards, where national leaders have a poor attitude towards human rights, and where officials and the public have no understanding of human rights. While the case of Grandfather Ko-ee above shows that the NHRCT can be proactive in pursuing human rights issues, in general this has not been the case, with Commissioners demonstrating a reluctance to criticise the Government, an attitude exacerbated by the NHRCT's mandate to 'clarify', that is to justify as not violating human rights, Thai traditions that deviate from international human rights standards.

The NHRCT's 'B' status reflects a Commission that lacks a broad, participatory, and transparent selection process, and whose members often lack independence and fail to address serious human rights violations in a timely manner. In order to move up to 'A' status, it must prove its capability to meet the standards set out by the Paris Principles for which there might be some hope in the new set of Commissioners.

## **5. Recommendations**

The annual recommendations from ANNI to the NHRCT almost never receive any interest from the NHRCT, which reflects the lack of a human rights culture in Thailand. This year ANNI in Thailand again has recommendations to various agencies in the country to develop the NHRCT.

### **To the Government and state agencies:**

- The 2017 NHRC Act contains good developments but also parts that weaken the NHRCT. Interpretations of the 2017 NHRC Act should be made in consultation with the UN Office of the High Commissioner for Human Rights on which provisions are problems and obstacles and should be amended;
- There should be no further postponement of elections and an elected government should consider amendments to the 2017 Constitution and the 2017 NHRC Act to remove problematic and obstructive provisions and promote and develop democracy and human rights in the country;
- The National Assembly should work more closely with the NHRCT because the National Assembly has the mandate to inspect the work of the state and the NHRCT has the mandate to investigate violations of human rights;
- The number of NHRCT members should be increased from 7 to 11 Commissioners – as was the case in the past.

### **To the Selection Committee for the NHRCT:**

- The Selection Committee should study the GANHRI-SCA General Observations for a correct interpretation to benefit and assist the Committee in the selection of the fourth NHRCT and also study the provisions of the 2017 Constitution and the 2017 NHRC Act.

**To the Office of the High Commissioner for Human Rights:**

- The OHCHR in Thailand is requested to assist in translating the General Observations of GANHRI-SCA for the use of the Selection Committee and the public, so that the Selection Committee can accurately understand the concerns. This will be of benefit in the journey towards a NHRI that is independent, of good quality, and effective in protecting and safeguarding human rights in Thailand, and will also be a handbook for future work.

**To the National Human Rights Commission, Thailand:**

- The transfer of officials from other agencies should be halted and those who have been successfully examined should be considered for positions in the NHRCT Office;
- There should be representations of people from minority communities, including those with disabilities, in the Commissioners and staff of the NHRCT. Diversity should be taken into account in the selection and appointment process to ensure the effectiveness of the NHRCT;
- The efficiency of the ‘Centres for Human Rights Studies and Coordination’ should be increased;
- A platform should be created by the NHRCT for civil society to interact with the SEANF meeting, to which Thailand has become a party;
- The NHRCT should participate in the court trials of politic cases, environment cases, and other cases of public interest;
- ANNI requests an opportunity for a meeting with the current NHRCT and its administration, to demonstrate its sincere intention for an exchange on the ideas presented in this report and to coordinate future joint work.

# TIMOR-LESTE: THE PDHJ MUST MAKE FULL USE OF ALL OF ITS CONSTITUTIONAL AND LEGAL COMPETENCES AND POWERS

## *Judicial System Monitoring Programme<sup>1</sup>*

### 1. Introduction

The Judicial System Monitoring Programme (JSMP), as one of the active members of the Asian NGO Network on National Human Rights Institutions (ANNI) under the Asian Forum for Human Rights Development (Forum-Asia)<sup>2</sup> has, since the establishment of ANNI, provided on an annual basis a country chapter report on the performance of the Timor-Leste National Human Rights Institution, the *Provedoria dos Direitos Humanos e Justiça* (PDHJ)<sup>3</sup> in protecting and promoting human rights in accordance with the Paris Principles and the General Observations of 2013<sup>4</sup> as well as the national legal frameworks such as the Constitution and laws.

JSMP has prepared this country chapter report based on the results of the observations of JSMP and of other local NGOs that are working on the protection and promotion of human rights, through direct interviews, including with the PDHJ itself.<sup>5</sup> The NGOs and networks with which JSMP has conducted interviews are the Human Rights Network,<sup>6</sup> *Assistência Legal ba Feto no Labarik* (ALFeLa) or Legal Assistance to Women and Children,<sup>7</sup> *Asosiasaun Chega ba Ita Hotu* (ACBIT) or Association of Enough to All of Us,<sup>8</sup> *Fundasaun Mahein* (FM) or Mahein Foundation,<sup>9</sup> FOKUPERS (Communication Forum for Women),<sup>10</sup> and Belun.<sup>11</sup>

Beside interviews, JSMP also reviewed relevant reports on human rights such as previous ANNI reports, the annual reports of the PDHJ, the 2013 report and recommendations of the Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation (GANRHI-SCA) on the accreditation of the PDHJ, and other relevant documents and reports.

The period covered in this report is from 1 January 2017 to 1 March 2018.

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<sup>2</sup> Forum-Asia website, available at <https://www.forum-asia.org/>.

<sup>3</sup> PDHJ website, available at <http://www.pdhj.tl>.

<sup>4</sup> General Observations of the SCA, 2013, available at [https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC\\_SCA\\_General\\_Observations.pdf](https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC_SCA_General_Observations.pdf).

<sup>5</sup> Interview with Dr. Horacio de Almeida, Deputy Ombudsman for Human Rights and Justice.

<sup>6</sup> Interview with Evangelino Gusmão on 14 May 2018, Coordinator of the Network.

<sup>7</sup> Interview with Laura Afonso on 21 May 2018, Programme Coordinator. Organisation's website, available at <http://www.alfela.tl>.

<sup>8</sup> Interview with Manuela Leong Perreira, Executive Director & Celestina de Almeida, Programme Coordinator on 23 May, 2018. Organisation's website available at <http://www.chegabaita.org/en/>.

<sup>9</sup> Interview with Abel Amaral on 22 May 2018. Programme & Outreach Coordinator. Organisation's website available at <http://www.fundasaunmahein.org>

<sup>10</sup> Interview with Francisca Alves on 7 June 2018. Organisation's website available at <https://www.fokupers.org/>.

<sup>11</sup> Interview with Laurensius A. Lein on 16 May, 2018. Organisation's website available at <http://www.belun.tl/en/>.

## 2. Overview

The PDHJ received its constitutional status in March 2002<sup>12</sup> as provided in Article 27 of the Constitution of the Democratic Republic of Timor-Leste (the Constitution) and was institutionally established in 2004 with the enactment of Law No. 7/2004 that approved the creation of the PDHJ as an independent body that shall not be subjected to the direction, control, or influence of any person or authority.<sup>13</sup>

Since its inception, the PDHJ has been re-accredited twice with A-status. The first re-accreditation took place in 2009 and the second in 2013. In the last review and re-accreditation in 2013, GANHRI-SCA provided comments on follow-up to the recommendations from the PDHJ, and on issues related to the coordination of the PDHJ with civil society organisations, the interaction of the PDHJ with the international human rights system, and the terms of office of the Ombudsman and Deputy Ombudsmen.

In terms of follow-up to recommendations from the PDHJ, the SCA noted that, as provided in General Observation 1.6 ‘Recommendations made by National Human Rights Institutions’ the PDHJ should monitor and publicise detailed information on responses to and implementation of its recommendations or decisions by public authorities. The SCA noted with appreciation the initiative of the PDHJ to establish a department responsible for following up on its recommendations. Following the comments from the SCA, the PDHJ has used this department to monitor and publish the status of the recommendations provided by the PDHJ to public authorities and institutions in its annual reports.<sup>14</sup>

On the issue of cooperation with civil society organisations as provided in the Paris Principles section C(g) and General Observation 1.5 on ‘Cooperation with other human rights institutions’, the SCA recommended to the PDHJ that it develop and maintain relationships and cooperation with civil society and continue to maintain systematic working relations with NGOs, including regular meetings of the Advisory Council. The SCA noted that this Advisory Council, which consists of civil society organisations and has the purpose of advising the PDHJ on its mandate, had not met for the past year, contrary to what is provided for in the law.

The SCA noted positively the interaction of the PDHJ with the international human rights system as set out in General Observation 1.4 on ‘Interaction with the International Human Rights System’ and encouraged it to ensure it maintains that level of engagement. In its 2017 Annual Report, the PDHJ detailed a number of interactions with international organisations related to the international human rights system and with international NGOs related to human rights protection and promotion.<sup>15</sup>

The comments of the SCA regarding the term of office of the Ombudsman concerned the conditions under which the term of office can be terminated. This is discussed further in the section below on ‘Dismissal Procedures’. The SCA stated that it was unclear how the terms

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<sup>12</sup> Constitution of Timor-Leste, Articles 27, 150 and 151, available at [http://www.timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution\\_RDTL\\_ENG.pdf](http://www.timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution_RDTL_ENG.pdf).

<sup>13</sup> Law No. 7/2004 on Approving the Statute of the Office of the PDHJ, available at <http://www.mj.gov.tl/jornal/lawsTL/RDTL-Law/RDTL-Laws/Law-2004-7.pdf>.

<sup>14</sup> PDHJ website, annual reports, available at <http://www.pdhj.tl/media-publications/relatoriu-anual-no-orsamentu-sira/>.

<sup>15</sup> ‘Annual Report 2017’ (in Tetun), PDHJ, 2017, pp.69 and 70, available at <http://www.pdhj.tl/wp-content/uploads/2014/06/RELATORIU-ANUAL-2017.pdf>.

for dismissal operated in practice, and sought further information, keeping in mind Paris Principles section B and General Observation 2.1 on 'Guarantee of tenure for members of the National Human Rights Institution decision-making body' which sets out the requirements for a stable mandate, without which there can be no independence, stating that the enabling legislation of an NHRI must contain an independent and objective dismissal process, similar to that accorded to members of other independent State agencies.

The SCA encouraged the PDHJ, moving forward, to seek advice and assistance from the Office of the High Commissioner for Human Rights (OHCHR) and the Asia-Pacific Network of National Human Rights Institutions.

### **3. The *Provedoria dos Direitos Humanos e Justiça* and the Paris Principles**

#### **3.1 Functions, Mandate, and Structure**

Article 9 of Law No. 7/2004 clearly describes the structure of the PDHJ. The PDHJ is composed of a governing body and a technical and administrative support body. The governing body is composed of an Ombudsman and two Deputy Ombudsmen and the technical and administrative support body is composed of a Chief of Staff, Officers, and other staff members.

Article 24 of Law No. 7/2004 provides the PDHJ with the power to monitor and advise the Government and its agencies, to conduct inquiries into systematic or widespread violations of human rights, and to submit to the Government or Parliament recommendations and reports on human rights matters. The PDHJ is also entitled to monitor and review draft laws and other regulations, for consistency with international law and ratified human rights treaties; and to recommend the adoption of new legislation or amendment of existing legislation and other regulations.

In terms of the promotion of human rights and good governance, Article 25 of Law No. 7/2004 provides the PDHJ with the power to:

- promote a culture of respect for human rights, good governance and fight against corruption;
- make recommendations on the ratification of, or accession to, international human rights instruments, and monitor the implementation of those instruments;
- advise the Government on its reporting obligations within the framework of international human rights instruments;
- contribute to the reports that Timor-Leste is required to submit to United Nations bodies and committees, and to regional institutions;
- express an independent opinion on the Government's reports;
- seek leave of the Court to intervene in legal proceedings in cases that involve matters under its competence, notably through the expression of opinions.

The PDHJ is also given the power to receive complaints and to investigate any matter falling under its competence, including by ordering a person to appear before it, accessing relevant facilities, premises, documents, equipment, goods, or information, and visiting places of detention, treatment, or care.

Article 150 of the Constitution provides the PDHJ with the power to request the Supreme

Court of Justice to declare unconstitutional any legislative measure. The Constitution also provides the PDHJ, in Article 151, the power to request the Supreme Court of Justice to review the ‘unconstitutionality by omission’ of any legislation that would be required to implement the provisions of the Constitution.

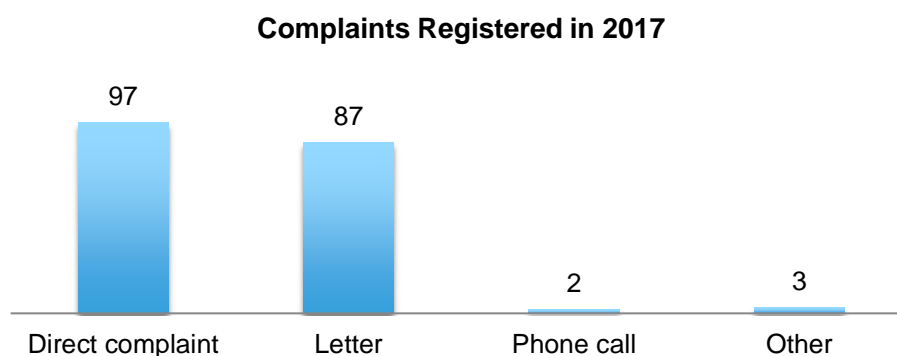
The PDHJ is permitted to exercise its powers on public entities, including the National Police of East Timor (*Polícia Nacional de Timor-Leste* or PNTL), prison service, and Timor-Leste Defence Force (*Forças de Defesa de Timor-Leste* or F-FDTL), as well as any entities that fulfill public functions, regardless whether they are private or public entities.

Law No. 7/2004 also provides limitations to the competences and powers of the PDHJ, in Article 29. These limitations include a prohibition on investigating the exercise of judicial functions or a decision issued by a Court, and on investigating any matter that is currently subject to action before the Courts. In addition, the PDHJ cannot modify or revoke any decision taken by an agency under its investigation, nor can it make compensation orders. It is limited to providing advice and recommendations.

Based on the list of the constitutional and legal provisions that provide the competences and powers of the PDHJ, the PDHJ possesses a broad mandate in compliance with the Paris Principles.

### *Human Rights Protection*

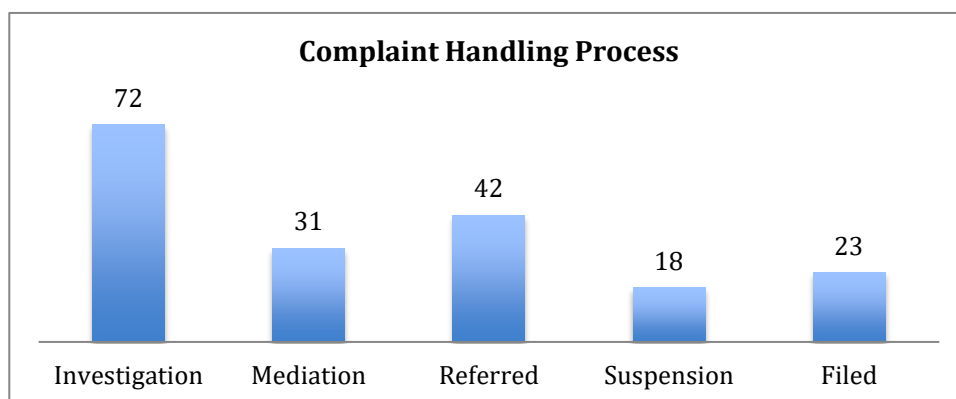
Civil society recorded several serious human rights violations during the reporting period, such as the excessive use of force by the PNTL to beat and kill people and to destroy the products of street vendors. In these cases, the voice of the PDHJ was not often heard in public, and even when the PDHJ intervened there has since been no information at all about the status of the cases. The PDHJ needs to make its voice present to the public whenever any serious human rights violation occurs and needs to ensure that the victims or families of the victims are kept informed on the status of their cases or complaints.



The PDHJ, in 2017, received a total of 189 complaints with 68 cases on human rights violations and 121 cases on good governance. These complaints were lodged to the PDHJ through the established mechanisms as shown in the following graph.<sup>16</sup>

<sup>16</sup> Information taken from interview with the Deputy Ombudsman of the PDHJ for human rights and justice. See also ‘Annual Report 2017’ (in Tetun), PDHJ, 2017, p.34, available at <http://www.pdhj.tl/wp-content/uploads/2014/06/RELATORIU-ANUAL-2017.pdf>.

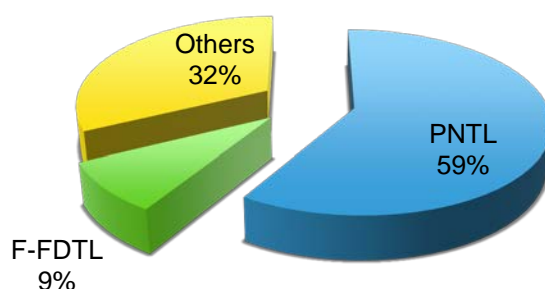
These cases have been handled through a mechanism called the Complaint Management Committee. The Complaint Management Committee makes the decision whether to investigate a complaint, refer it elsewhere, submit it to mediation, suspend it, or file it. The following graph shows the results.<sup>17</sup>



There were several types of human rights violations registered in 2017. The highest number of complaints received were about violations to the right to freedom, integrity, and security, making up around 37 percent of the total, while the second highest were complaints about violations to the right to life, making up around 18 percent of the total.<sup>18</sup>

The PNTL was the state institution that received the most allegations of human rights violations with around 59 percent, or around 40 cases, comparing with other state institutions.<sup>19</sup>

Percentage of complaint of human rights violation against public institutions



In 2017, the PDHJ produced eight recommendations with four recommendations on human rights violations and four recommendations on good governance. The PDHJ, through its Department for Follow-Up of Recommendations, was able to track the status of the recommendations that it made to relevant state institutions. Some of these recommendations have been implemented and some are still in the process of being implemented.<sup>20</sup>

<sup>17</sup> ‘Annual Report 2017’ (in Tetun), PDHJ, p.35, available at <http://www.pdhj.tl/wp-content/uploads/2014/06/RELATORIU-ANUAL-2017.pdf>.

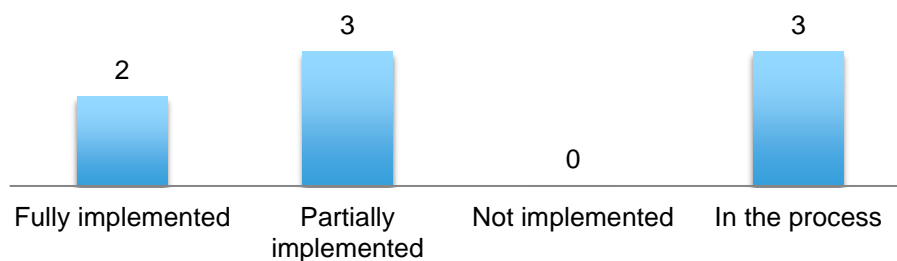
<sup>18</sup> Ibid. p.41.

<sup>19</sup> Ibid. p.38.

<sup>20</sup> Ibid. p.45.



### Process of recommendations in 2017



Although the Constitution and the law provide broad powers to the PDHJ, civil society continues to consider the actions taken by the PDHJ to respond to human rights violations as ineffective and inefficient, claiming that it does not seriously address cases of human rights violations or complaints from individuals. The response of the PDHJ has been particularly questioned given that there were people who did not know the status of their complaints or cases.<sup>21</sup>

Also, according to civil society observation, the PDHJ in practice does not fully execute all of its constitutional competencies, such as requesting the Supreme Court of Justice to review the constitutionality, and unconstitutionality by omission, of legislation. This is a point that has been raised in previous ANNI reports.

This is despite the fact that there are some laws that can open the door to human rights violations. For instance, Law No. 5/2017 on ‘the Practice of Martial Arts, Rituals, Cold Steels, Ambon Arrows’<sup>22</sup> and the Fifth Amendment to the Penal Code in its Chapter VI on Use of Force, permit the PNTL to shoot when people who violate this law do not follow orders or if they attempt to resist.<sup>23</sup> The intention of the law is good but the PTNL does not yet have the capacity to implement it effectively with due regard for human rights. Even without this law in existence, this institution has committed the majority of the annual human rights violations. This record in term of human rights violations would probably worsen in future with the existence of this law.

The main reason for the PDHJ’s failure to call for a review of constitutionality in such cases, according to the interview conducted with the Ombudsman and the Deputy Ombudsman on human rights and justice, is a lack of human resources. The PDHJ does not have a qualified legal expert on legislative and policy analysis in place. The PDHJ cannot recruit these qualified experts due to budget limitations.

However, despite the fact that the PDHJ faces a limitation of its human and financial resources and facilities, it has made some effort to address this issue.

Based on the interview with the Deputy Ombudsman of the PDHJ, the Deputy said that he himself has been in charge of executing the competence of the Ombudsman to request a review of unconstitutionality. During the reporting period, the PDHJ received three complaints

<sup>21</sup> General observation of the representatives of civil society organisations in the interviews conducted in 2018.

<sup>22</sup> Martial arts are traditional in parts of the Indonesian archipelago, however the use of Ambon, a kind of slingshot with small arrows, has resulted in injuries and deaths. This legislation aims to outlaw the use of these weapons.

<sup>23</sup> Regime Jurídico Relativo à Prática de Artes Marciais, Rituals, Armas Brancas, Rama Ambon e Quinta Alteração

ao Código Penal, Articles 35 to 40, *Jornal da República*, 19 April 2017, p.613, available at [http://www.mj.gov.tl/jornal/public/docs/2017/serie\\_1/SERIE\\_I\\_NO\\_15.pdf](http://www.mj.gov.tl/jornal/public/docs/2017/serie_1/SERIE_I_NO_15.pdf).

regarding the issue of constitutionality. The PDHJ analysed the complaints and one of them was brought to the Supreme Court of Justice, or Court of Appeal, for the review of unconstitutionality. However, the Court dismissed the case due to lack of facts regarding unconstitutionality.

### *Human Rights Promotion*

In order to more effectively promote human rights, in 2017 the PDHJ continued to provide workshops on human rights, and human rights protection and promotion, to the members of the PNTL, the F-FDTL, and to community leaders. These are the institutions and authorities that have been classified as committing the most human rights violations in Timor-Leste.

The PDHJ also produced a human rights manual for military forces in cooperation with the UN Human Rights Advisory Unit, the Ministry of Defence, the General Commander of the F-FDTL, and *Fundasaun Mahein*.<sup>24</sup> The PDHJ used the manual to train F-FDTL members in the Navy based in Hera, Baucau, and the F-FDTL Training Centre in Metinaro. In addition, the PDHJ organised a national seminar on human rights for senior ranks of the F-FDTL in Dili.

The PDHJ has been undertaking awareness raising of its roles and mandate in the whole territory since its inception, as part of its duty to keep the public informed under Article 30 of Law No. 7/2004. The PDHJ conducted a survey in 2017 on the knowledge of the public about its roles and mandate. The result showed that knowledge has increased 9 percent from 31 percent in 2014 to 40 percent in 2017. In 2014, 41 percent of respondents knew how to lodge their complaints to the PDHJ; this increased to 56 percent in 2017.<sup>25</sup>

### *Accountability and Publication of Findings and Reports*

The PDHJ in general has been satisfying its duty to report under Article 34 of Law No. 7/2004 through producing and publishing annual reports that outline the activities that have been carried out during the fiscal year.

This report is scheduled to be presented to the National Parliament no later than 30 June each year as provided for in Article 46 of Law No. 7/2004. Although the report was formally launched on 30 June 2018, it was not presented and discussed in a plenary session of the National Parliament until 16 July 2018. The Ombudsman presented the report to the Parliament and members of Parliament (MPs) raised some questions<sup>26</sup> and provided some recommendations to the PDHJ to improve its performance of its functions in protection and

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<sup>24</sup> *Fundasaun Mahein* is an NGO with the stated mission of assisting in increasing the legitimacy and capacity of the Timor-Leste security sector.

<sup>25</sup> 'Annual Report 2017' (in Tetun), PDHJ, p.66, available at <http://www.pdhj.tl/wp-content/uploads/2014/06/RELATORIU-ANUAL-2017.pdf>.

<sup>26</sup> The questions asked were on the publication in mass media of the names of people who are not yet indicted in court and still under investigation; the challenges of finding children who have been taken away or disappeared during the 24 years of Indonesian occupation; how the PDHJ evaluates the outcome of the capacity building that has been provided to the PNTL and F-FDTL; the means the PDHJ uses to apply sanctions to relevant public institutions that do not comply with the PDHJ's recommendations; and about why the PDHJ did not include in its report its activity in relation to the national action plan on violence against women and children that was recommended by Committee on the Elimination of Discrimination Against Women in Geneva. For more details see the 'Annual Report 2017' (in Tetun), PDHJ, p. 48, available at <http://www.pdhj.tl/wp-content/uploads/2014/06/RELATORIU-ANUAL-2017.pdf>.

promotion of good governance, human rights, and justice. The recommendations that the MPs provided to the PDHJ were to do more public outreach in rural areas on the roles and mandates of the PDHJ and increase the participation of women in trainings of public employees on human rights protection and promotion.

### **3.2 Autonomy from the Government and Independence Guaranteed by Statute or the Constitution**

*“The Ombudsman shall be an independent organ in charge of examining and seeking to settle citizens’ complaints against public bodies, certifying the conformity of the acts with the law, preventing and initiating the whole process to remedy injustice.”* (Article 27.1 of the Constitution)

The Constitution and law fully guarantee the independence of the PDHJ in terms of performing its role as required in the Paris Principles. It has been seen in practice that there has been no real intervention from public authorities in the work of the PDHJ since its inception.

#### *Budgetary Autonomy and Financial Independence*

In term of budgetary autonomy and financial management, Article 11.2 of Law No. 7/2004 implicitly provides that “the budget for the Office is prepared, approved and managed in accordance with the law”. “In accordance with the law” implies an oversight function. The fund that comes from the State Budget must be approved by the National Parliament. The PDHJ must then provide a report on how it spent the budget, and the unspent budget will return to the state account. The execution of the budget shall be monitored by the Administrative, Tax and Accounts Court and the National Parliament, as provided for in Article 145 of the Constitution.<sup>27</sup> This oversight function does not affect the financial independence or the overall independence of the PDHJ in performing its functions, but rather ensures the proper and effective execution of the State Budget.

#### *Interaction with, and State Submissions to, the International Human Rights System*

In Section A.3(b) and (c) of the Paris Principles it is set out that NHRIs shall have responsibilities to promote and ensure the harmonisation of national legislation, regulations, and practices with the international human rights instruments to which the State is a party, and the effective implementation of those instruments, as well as to encourage ratification of the above-mentioned instruments or accession to those instruments.

The PDHJ has been actively performing its responsibilities in this regard. The PDHJ provided a detailed submission to the Universal Periodic Review<sup>28</sup> in which it called for ratification of the International Convention on the Rights of Persons with Disabilities and the International Convention on the Protection of all Persons from Enforced Disappearance.

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<sup>27</sup> Constitution of Timor-Leste, available at [http://www.timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution\\_RDTL\\_ENG.pdf](http://www.timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution_RDTL_ENG.pdf).

<sup>28</sup> ‘NHRI submissions to the Committee on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment In relation to the Review of the Democratic Republic of Timor-Leste by the UN Committee on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’, PDHJ, October 2017, available at [https://www.tbinternet.ohchr.org/Treaties/CAT/Shared/Documents/TLS/INT\\_CAT\\_NHS\\_TLS\\_29138\\_E.docx](https://www.tbinternet.ohchr.org/Treaties/CAT/Shared/Documents/TLS/INT_CAT_NHS_TLS_29138_E.docx).

During the reporting period, the PDHJ also provided a report to the Committee Against Torture and the PDHJ was invited by the Committee to provide its reasons for its conclusions in the report and explain the status of the implementation of the Convention Against Torture.<sup>29</sup>

### *Selection and Appointment*

There is a difference in the selection process used for the governing body of the PDHJ, and that used for the administrative and technical support body, the Secretariat for Human Rights, as provided in Article 2.1 of Decree-Law No. 25/2011 on the structure of the Office of the PDHJ.<sup>30</sup> The election process and requirements for the Ombudsman are provided in Article 12 of Law No. 7/2004.

The candidates for Ombudsman shall submit their application to the Secretariat of the National Parliament, and then the President of the National Parliament will preside over a plenary session to present and discuss the applications based on the requirements provided in the law, following which the Parliament will proceed with a vote on all candidates who have submitted their applications. The candidate who receives the majority of votes will be designated as the Ombudsman.

The eligibility requirements demand sufficient and relevant experience and qualifications, integrity, sound knowledge of human rights, as well as a high level of independence and impartiality.

The Deputy Ombudsmen are appointed by the Ombudsman after taking up his or her functions according to Article 16.1 of Law No. 7/2004. As recorded in previous years' ANNI reports on Timor-Leste, the current Ombudsman, Dr. Silveiro Pinto Baptista, established a panel for this appointment process. The panel was composed of academics, members of civil society, and one representative from the PDHJ itself. JSMP was also part of this panel. Under Article 16.2 of Law No. 7/2004 "the Deputy Ombudsmen shall be appointed on the basis of transparent and objective criteria, giving consideration, notably, to their integrity, independence, impartiality and qualifications".

The term of office of the Deputy Ombudsmen is the same as the Ombudsman, that is, a renewable four-year term, which ends with the end of the term of office of the Ombudsman as provided for in Articles 16.3 and 16.4 of Law No. 7/2004.

In order to ensure the effective functioning of the PDHJ and avoid conflicts of interest, Article 17 sets out a list of positions incompatible with being an Ombudsman or Deputy Ombudsman, including holding any political office, trade union leadership or employment, corporate management, or exercising a judicial function.

The selection process for the administrative and technical support body follows the Civil

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<sup>29</sup> 'Annual Report 2017 (in Tetun)', PDHJ, p.54, available at <http://www.pdhj.tl/wp-content/uploads/2014/06/RELATORIU-ANUAL-2017.pdf>.

<sup>30</sup> "The Secretariat for Human Rights, abbreviated to Secretariat, is the entity providing technical and administrative support for the Secretary for Human Rights and Services to perform his duties, and it carries out its duties independently of the Government and other sovereign bodies, political parties and other entities and powers that might otherwise influence its work."

Service Act<sup>31</sup> as well as Law No. 7/2004 and the Decree-Law No. 25/2011.<sup>32</sup> Recruitment can be undertaken both by the Civil Service Commission and by the PDHJ.

Recruitment normally follows a process in which the PDHJ makes a request to the Civil Service Commission with the details of the number of staff required along with job descriptions. The Civil Service Commission will then undertake the recruitment.

### *Dismissal Procedures*

The Ombudsman and Deputy Ombudsmen enjoy privileges and immunities during their mandates on a par with other state organs and institutions. This is to ensure fair treatment to the PDHJ as one of the State institutions and to guarantee the protection of the Ombudsman and his or her Deputies during the exercise of their powers in the promotion and protection of human rights and justice. As a result, neither the Ombudsman nor the Deputy Ombudsmen can be held liable for any act committed in good faith in exercise of their role.

However, the National Parliament can decide to lift immunity should it consider that an offence has been committed, and it can also refer criminal offences committed outside the role of Ombudsman or Deputy Ombudsmen to the Prosecutor-General. Any motion for the removal of an Ombudsman from office must have the support of one-fifth of MPs, followed by a two-thirds majority in the subsequent vote. This applies to cases including where the Ombudsman is indicted for an offence carrying a penalty exceeding one year's imprisonment, where the National Parliament must decide whether he or she should be suspended, by a two-thirds majority as provided in Article 22 of the Law No.7/2004.

While this provision could provide a protection to the Ombudsman in performing his or her functions, but when looked at from the point of view of promoting good governance and combating corruption, this provision seems to be a challenge for the justice sector in terms of prosecuting those who are indicted for corruption cases, as the penalty for corruption cases exceeds one year's imprisonment.<sup>33</sup>

The provision would be improved if it read, "where the Ombudsman is indicted for an offence that carries a penalty exceeding one year's imprisonment he or she shall automatically be suspended from his or her office to allow the prosecution of his or her case". Only offences that carry a penalty of less than one year's imprisonment are appropriate to refer to the National Parliament to decide whether to suspend the Ombudsman if he or she is indicted as provided in Article 21.1(d) of Law No. 7/2004. In all other cases suspension should be automatic upon indictment.

The SCA has questioned how this dismissal process operates in practice. It has pointed out that the grounds for dismissal must be clearly defined and appropriately confined to only those actions that impact adversely on the capacity of the member to fulfil their mandate. This is essential to ensure the security of tenure of the members of the governing body and the independence of, and public confidence in, the senior leadership of a national human

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<sup>31</sup> Civil Service Act, Law No.7/2009, available at <http://www.pdhj.tl/wp-content/uploads/2013/11/Law-7-2009-Public-Service-Commission.pdf>.

<sup>32</sup> Decree-Law 25/2011, Article 20, available at <http://www.pdhj.tl/wp-content/uploads/2013/11/Decree-Law-25-2011-Organic-PDHJe.pdf>.

<sup>33</sup> Timor-Leste Penal Code, Articles 192, 274, 275, 281, 287, 288, 290, 292, 299, 324, and 319, available at [https://www.unodc.org/res/cld/document/penal-code\\_html/Penal\\_Code\\_Law\\_No\\_19\\_2009.pdf](https://www.unodc.org/res/cld/document/penal-code_html/Penal_Code_Law_No_19_2009.pdf).

rights institution.

According to civil society, particularly JSMP, the conditions on the term of office of the Ombudsman are fair, if amended as proposed above, considering that it is a public institution charged with the promotion of good governance, and human rights and justice. Good governance implies a government that is free from corruption and maladministration. The PDHJ is supposed to be one of the public institutions in the front line of demonstrating authority and credibility through ensuring that its members are free from any criminal charges. The authority and credibility of the PDHJ in the promotion of good governance, human rights, and justice will be gravely affected if the Ombudsman or Deputy Ombudsmen are indicted and convicted for crimes and remain in office or are legally protected to continue in office. Thus, JSMP considers the above conditions fair for the Ombudsman in performing his or her mandate. Immunity only has validity when performing functions or mandates, not in committing crimes.

Regarding the term of office of the Deputy Ombudsmen, the SCA noted that as provided in Article 16.6 of Law No. 7/2004 the Deputy Ombudsmen can be removed from office by the Ombudsman, without clear grounds being provided or an objective removal process being followed. JSMP considers that the provision on the removal of the Deputy Ombudsmen needs to be improved in terms of providing clear grounds and process for the removal.

Aside from this, as the Constitution and law provide the competence to the National Parliament to designate the Ombudsman, the National Parliament can at any time remove the Ombudsman from his or her office in cases where he or she takes up an office considered incompatible with the role of Ombudsman, suffers from a permanent mental or physical incapacity that prevents him or her from performing the role, or for incompetence, or acts or omissions contrary to the oath of office.

### 3.3 Pluralism

#### *Pluralism of the Ombudsmen*

The governing body of the PDHJ consists of the Ombudsman and two Deputy Ombudsmen who are in charge of the issues of human rights and justice, and good governance. Regarding the pluralism of representatives in the governing body, Law No. 7/2004 does not set out any requirement. In order to ensure the existence of pluralism in the governing body, JSMP, in previous ANNI previous reports on Timor-Leste, has recommended to the PDHJ, particularly the Ombudsman, to take into consideration pluralism when appointing representatives to the governing body.<sup>34</sup>

The recommendation of ANNI has been taken into account in terms of gender-balance, as there is one woman Deputy Ombudsman for Good Governance and one male Deputy Ombudsman for Human Rights and Justice. As the governing body is very small, it is difficult to go beyond gender-balance in terms of pluralism.

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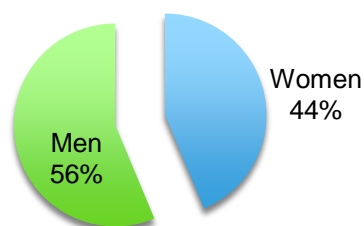
<sup>34</sup> 'Timor-Leste: The Ombudsman for Human Rights and Justice: Growing in capacity', *ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, 2012, p.232, available at [https://www.forum-asia.org/uploads/books/2012/nov/05033\\_ANNI%202012.pdf](https://www.forum-asia.org/uploads/books/2012/nov/05033_ANNI%202012.pdf).



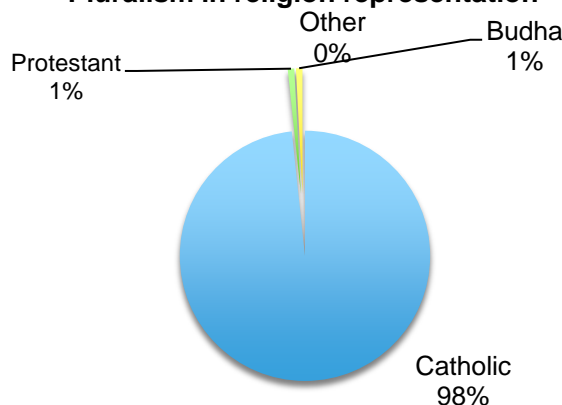
### *Pluralism of Staffing*

The administrative and support body reflects the principle of pluralism to some extent. The PDHJ has one central office and four regional offices with a total of 119 staff with 93 people as permanent staff, 24 people as non-permanent staff, and 2 people as advisers. There are 67 men and 52 women. The majority of the staff is Catholic. The gender and religious representation in the PDHJ is as shown in the following graphs:

**Pluralism in gender representation**



**Pluralism in religion representation**



The majority of the staff is Catholic because Catholicism is the dominant religion in Timor-Leste, at around 90 percent.

### *Collaboration with Civil Society and other Stakeholders*

Consultation with civil society organisations, particularly those that are actively involved in human rights protection and promotion, is important, as set out in General Observation 1.5 on 'Cooperation with other human rights bodies'.<sup>35</sup> The PDHJ through this means can strengthen its networking and improve its performance. Article 17.1 of Decree-Law No. 25/2011 established a consultation mechanism with civil society organisations, which is called the Advisory Council.

This Council does not function as provided for in Article 17.9 of Decree-Law No. 25/2011, which sets out that it shall meet ordinarily twice a year and that it can also hold extraordinary meetings as necessary.

Civil society organisations have expressed concern about the functioning of the Council and have recommended that the PDHJ ensure that it meets, so that its duties as provided by law can be carried out, including voicing its opinion on the work plans and programmes of the PDHJ, and the activities of the Secretariat of the PDHJ, evaluating the results achieved and proposing alternative measures to improve the services, legislative statutes and public policies of the Secretariat, and so on.<sup>36</sup>

<sup>35</sup> General Observations of the SCA, 2013, Section 1.5, available at

[https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC\\_SCA\\_General\\_Observations.pdf](https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC_SCA_General_Observations.pdf).

<sup>36</sup> Decree-Law 25/2011, available at <http://www.pdhj.tl/wp-content/uploads/2013/11/Decree-Law-25-2011-Organic-PDHJe.pdf>.



## *Degree of Trust*

There is a degree of trust from the public in the work of the PDHJ based on the number of complaints lodged and registered with the PDHJ, and also the comments of the civil society organisations that JSMP conducted interviews with. However, the public in general and civil society organisations in particular are still concerned about the failure of the PDHJ to immediately intervene when human rights violations are taking place and the lack of information about the status of complaints.

### **3.4 Adequate Resources**

In order to ensure the independence of the PDHJ in performing its functions, the institution needs to have adequate resources including human and financial to bring it into line with the Paris Principles and General Observation 1.10.<sup>37</sup> While the Government has provided the PDHJ with a broad range of constitutional and legal powers, in terms of executing these powers the PDHJ faces limitations in human and financial resources, including facilities.

Article 11 of Law No. 7/2004 sets out that the PDHJ should have a budget “sufficient to ensure its operation, and adequate to maintain its independence, impartiality and efficiency”. The law also provides that the “funds of the Office shall consist of all budgetary appropriations for the Office and all other funds lawfully received by the Office”. However, the Law does not clearly mention the source of these funds. The Law must require that the PDHJ is funded by a line in the state annual budget, so that the Government is obliged to provide sufficient budget to the PDHJ, otherwise there is no guarantee that funds will be provided regularly.

Further, the annual budget provided by the Government to the office of the PDHJ is not enough to cover all the needs of the institution. In 2017, the PDHJ received an allocation of the State budget for a total amount of USD \$1,616,360.00. Although the PDHJ was unable to spend all the budget, with expenditure of around USD \$1,360,458.40 or 84.3 percent of the total budget, this was due to political instability in 2017 that did not permit the recruitment of new staff or the promotion of staff as planned in the budget. The budget that was planned for use in a tender process was also not spent, as the quotations submitted by the companies were higher than the planned budget.<sup>38</sup>

The PDHJ has been providing regular capacity building for its staff in order to enhance job performance. In 2017, the PDHJ established three Memorandum of Understanding and seven work contracts with several professional institutions to provide trainings to the staff of the PDHJ. These trainings mostly took place in Indonesia and included trainings on public speaking, complaint administration and management, conflict analysis and mediation, concepts of good governance, human resources, and data research and analysis methods. Besides these outside trainings, the PDHJ also established “in-house training”. These in-house trainings were provided by the staff who had undertaken outside trainings. There were six in-house trainings in 2017.<sup>39</sup>

The PDHJ has said that it has very limited resources to support an intervention by the PDHJ

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<sup>37</sup> General Observations of the SCA, 2013, Section 1.10, available at [https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC\\_SCA\\_General\\_Observations.pdf](https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC_SCA_General_Observations.pdf).

<sup>38</sup> ‘Annual Report 2017’ (in Tetun), PDHJ, 2017, pp.12 and 23, available at <http://www.pdhj.tl/wp-content/uploads/2014/06/RELATORIU-ANUAL-2017.pdf>.

<sup>39</sup> Ibid. pp.75-76.

when there is any human rights violation. For example, the PDHJ has only two cars and the distance and conditions of roads to rural areas make access extremely difficult.

### **3.5 Adequate Powers of Investigation**

#### *Powers of Investigation*

Article 27 of the Constitution provides the PDHJ with the power to investigate, seek and settle citizens' complaints against public bodies, certifying the conformity of the acts with the law, and initiating a process to remedy injustice. Article 23 of Law No. 7/2004 provides the PDHJ the power to investigate violations of fundamental human rights, freedoms and guarantees, abuse of power, maladministration, illegality, manifest injustice, and lack of due process, as well as instances of nepotism, collusion, influence peddling, and corruption. The power to investigate corruption cases was transferred to the Commission of Anti Corruption in 2009 under Law No. 8/2009.

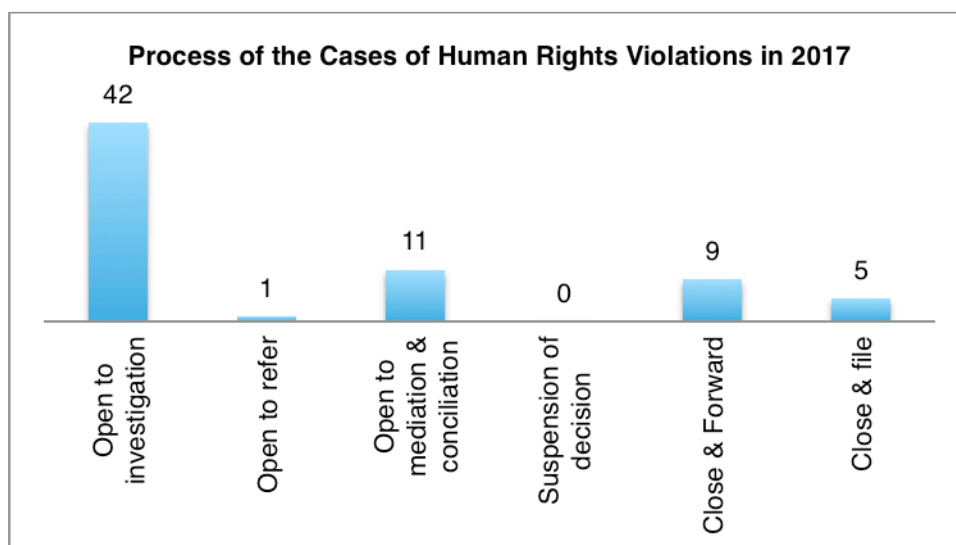
Law No. 7/2004 also provides a number of rules and procedures to guarantee and protect the rights of all parties in the process of investigation, such as permitting legal representation and enabling those who are the subject of an allegation the space to respond.

In responding to a complaint, the PDHJ has three options: immediate response, preliminary assessment, or deep investigation. The immediate response is usually used to intervene when the violation of human rights is ongoing in order to prevent further violations and to get accurate data or information regarding the violations. The preliminary assessment method is used to assess the violation before deciding to do further investigation or deep investigation.

The law requires the PDHJ to make a preliminary assessment within thirty days, and within forty-five days to notify the complainant of the decision either to investigate or to take no further action. A decision to take no further action must be substantiated. The Complaint Management Committee is in charge of the evaluation of the complaints that have been registered at the Department of Public Assistance. The decision of the Complaint Management Committee can be one of six options established by the PDHJ itself. These options are a) open to investigation; b) open to refer; d) open to mediation and conciliation; e) suspend the decision; f) close and forward; and g) close and file.

The complaint is opened to investigation when there is a strong indication of a human rights violation. The complaint is opened to investigation and then referred to other relevant state institutions when it is found that it does not fall within the mandate of the PDHJ. The complaint is opened to mediation and conciliation when it is considered an appropriate complaint to solve through mediation and conciliation. The decision to suspend a complaint is taken when there is a lack of complete information to evaluate the complaint. The complaint is immediately closed, meaning it will not be opened for investigation, and forwarded, when it does not fall under the mandate of the PDHJ. The complaint is closed and filed when it is related to cases in which the law limits the intervention of the PDHJ as provided in Article 29 of Law No. 7/2004.

The Complaints Management Committee evaluated all 68 complaints of human rights violations and decided to carry out an investigation into 36 of them. The final decisions of the Complaints Management Committee were as shown in the following graph:



In terms of investigation, the PDHJ has an abundant set of competencies and powers, as well as effective and proper methods to perform its functions. However, the limitations it faces in human and financial resources and facilities create challenges and obstacles that could negatively impact the effective protection and promotion of human rights and justice. In this regard civil society considers that some of the mechanisms that the PDHJ is using are not effective, such as the complaint boxes that are located at offices of the sub-district administration, as well as the online complaint system. What people need is immediate and direct intervention on their cases when violations are taking place and these mechanisms do not allow for that.

The failure of the PDHJ to keep parties informed as required in Article 32 of Law No. 7/2014 has also been criticised by civil society organisations. Some of the victims and the families of the victims requested information about the status of their cases from civil society organisations because they did not get that information from the PDHJ.

The duty to cooperate with other entities under Article 33 of Law No. 7/2004 is extremely important if the PDHJ is to keep parties informed, particularly the aggrieved person whose case constitutes both a human rights violation and a crime. The office of Public Prosecution is the state institution that has the mandate to investigate crime related cases. When the complaint that is lodged to the PDHJ also constitutes a crime, the PDHJ must refer the case to the office of Public Prosecution for further investigation and prosecution and the complainant must be informed that it has done so. In this case, even though the complaint has been referred, the PDHJ needs to establish good cooperation with the Office of the Prosecutor-General in order to follow up on the status of the case and inform the aggrieved person and his or her family.

The law also provides limits to the powers of the PDHJ, for example, it may not investigate matters pending before a Court, or matters involving the dealings between the Government and any other Government or international organisations. The intention of these provisions is to ensure the clear separation of competencies and powers among state organs and institutions and to avoid conflict and confusion in the execution of those powers in order to guarantee the normal function of the state. As a result, these limitations do not run contrary to the Paris Principles.

These provisions also do not impede the PDHJ in its quasi-judicial competence as provided in the Paris Principles. In practice the PDHJ has been carrying out mediation and conciliation

on many of the complaints registered annually. In 2017, the PDHJ executed its quasi-judicial competence through mediation and conciliation on around 16 percent of complaints received.<sup>40</sup>

### *Court Cases*

Article 29(c) of Law No. 7/2004 provides that the PDHJ shall not be empowered to exercise judicial functions or challenge a decision issued by a court. Article 29(e) and 42.2(a) of the law also provide that the PDHJ shall not be empowered to investigate a matter that is already the subject of an action before a court, and has not yet been determined.

The intention of these provisions is to avoid *mala fide* or conflict of interest among public institutions. Thus the law also limits the intervention of courts in the work or investigation of the PDHJ, as provided in Article 43 of Law No 7/2004, which sets out that the courts shall not arbitrarily interfere with, nor issue any writ of injunction to delay, an investigation being conducted by the PDHJ, unless there is *prima facie* evidence that the subject matter of the investigation is outside the jurisdiction of the PDHJ, or if there is *mala fide* or a conflict of interest.

### *Inspection of Prisons, Jails, Detention Centres, and Places of Confinement*

Article 28(f) of Law No. 7/2004 provides that the PDHJ is permitted “to visit any place of detention, treatment or care in order to inspect the conditions <sup>[...]</sup><sub>SEP</sub> therein and conduct a confidential interview of the persons in detention”.

The PDHJ, according to its annual reports, has been regularly visiting prisons in the territory. There are three prisons in Timor-Leste: Becora Prison in Dili, Gleno Prison in Ermera, and Suai Prison in Covalima. Based on the results of this monitoring, the PDHJ has provided some recommendations to the Ministry of Justice to improve conditions for the prisoners, including a recommendation to create separate prisons or spaces for adults, juveniles, and women.

The PDHJ also recommended that the Ministry of Justice create more places in Becora Prison, as the current numbers of places cannot accommodate all prisoners and results in overcrowding. The PDHJ recommended to the Government that it provide sufficient quality prison clothing to prisoners. The PDHJ also recommended that the Government pay attention to the conditions of the prison guards based on Decree-Law No. 10/2012 that sets out the particular provisions that need to be made to support this career.

Besides providing recommendations to the Government, the PDHJ also provided recommendations to the Public Defender encouraging them to provide good legal assistance to their clients through visiting them regularly and keeping them informed about the status of their cases in the courts.<sup>41</sup>

### *Case Studies*

The following three cases studies show the success and also the failure of the PDHJ in the

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<sup>40</sup> Ibid. p.42.

<sup>41</sup> Ibid. pp.49-50.

performance of its functions in the protection and promotion of human rights.

- a) *Killing of Mauk Moruk* - This joint operation took place between 2014 and 2015 to capture the leader and members of the Revolutionary Council of Maubere and the Popular Council for the Defense of the Democratic Republic of Timor-Leste. These groups were considered to be illegal.<sup>42</sup> During the operation, the military and police committed many human rights violations, the major one being the killing of the leader of the groups, Mauk Moruk, and his followers.

The PDHJ monitored the operation and produced reports on it, providing recommendations to relevant state organs and institutions including the National Parliament and Government. The PDHJ repeated the same recommendations to the same state organs and institutions in its 2015 Annual Report. Until now, none of the recommendation have been implemented, with the exception of a recommendation to the F-FDTL to provide human rights training to its members. The PDHJ recommended both to the National Parliament and to the Government that an investigation be opened into the violations of human rights during the operations, but this never happened. This kind of investigation should be done by the PDHJ itself as it is mandated and empowered to do so.<sup>43</sup>

- b) *Killing of Tiago Inacio Coelho in Bebonuk, Dili* - On May 6, 2017, the Timor-Leste Police Unit known as the *Brigade Ordem Pública* or Public Order Brigade (BOP) conducted an operation in Bebonuk burgh and shot to death a young person called Tiago Inacio Coelho. The BOP were wearing civilian clothing during the operation.

The PDHJ opened an investigation into the case but did not get further than identifying, on the basis of testimony from the relatives of the victims, that the car that brought the police belonged to the BOP. The PDHJ was unable to identify the specific actors. However, together with the fact that the gun and bullet used were of a type that the PNTL and the F-FDTL are authorised to use, there is clear evidence that the violation was committed by the PNTL. The PDHJ should therefore have enough information to provide a report to the PNTL with a recommendation that it not permit its members to use civilian clothing when conducting an operation. The PDHJ does not necessarily need to conduct further investigation into the individual actors who killed the victim as this is more properly the mandate of the office of Public Prosecution.

- c) *Retail Sellers* - Based on Decree-Law No. 33/2008 on Hygiene and Public Order, in 2016 and 2017 operations have been conducted by the Social Security Police (PSS) and the PNTL against retail sellers in Dili. During these operations, the PSS and PNTL have taken away money, goods, and vehicles and prevented the retailers from carrying out their economic activities, despite the fact that retail selling or trading is legal economic activity as provided in Article 4(e) of the Decree-Law No. 24/2011 on

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<sup>42</sup> The operation took place on the basis of National Parliament Resolution No. 4/2014, available at [http://www.mj.gov.tl/jornal/public/docs/2014/serie\\_1/serie1\\_no9.pdf](http://www.mj.gov.tl/jornal/public/docs/2014/serie_1/serie1_no9.pdf); Government Resolution No. 9/2014 on the establishment of a Joint Operational Commitment, available at [http://www.mj.gov.tl/jornal/public/docs/2014/serie\\_1/SERIE1\\_NO\\_13A.pdf](http://www.mj.gov.tl/jornal/public/docs/2014/serie_1/SERIE1_NO_13A.pdf); and Government Resolution No. 13/2014 on the extension of the operation, available at [http://www.mj.gov.tl/jornal/public/docs/2014/serie\\_1/SERIE1\\_NO\\_16.pdf](http://www.mj.gov.tl/jornal/public/docs/2014/serie_1/SERIE1_NO_16.pdf).

<sup>43</sup> 'Annual report 2015' (in Tetun), PDHJ, pp.65-75 in Tetun, available at <http://www.pdhj.tl/wp-content/uploads/2014/06/RELATORIU-ANUAL-2015.pdf>.

licensing of commercial activities. These retail sellers belong to communities that financially are very weak. Their only means of surviving and supporting their families is through these economic activities.

The PDHJ, in responding to the case, on 24 January 2017, facilitated mediation between the victims (retail sellers) and the PSS and PNTL. In the process of mediation, there has been no solution offered to the demand from the victims to at least return their money and some of their goods. The case remains unresolved and the complaint is still pending.

#### **4. Conclusion**

The PDHJ in general has been performing its duties to protect and promote human rights as provided in the Paris Principles, and Timor-Leste's Constitution and laws, although there are still improvements to be made.

Under the Constitution and founding law, the PDHJ has a sufficient and broad set of powers to protect and promote human rights as provided for in the Paris Principles. The law also guarantees immunity to the Ombudsman in the performance of his or her functions; however, this provision is potentially a challenge for the justice sector and its effort to fight against corruption.

The PDHJ has been trying, despite its limitations, to make use of its constitutional and legal competencies and powers and has implemented some of the recommendations of the ANNI reports of previous years, including making more effort to call for reviews of unconstitutionality in cases of human rights violating legislation. However, the limitation in terms of human and financial resources including facilities has become the major constraint to the PDHJ in fully and effectively performing its duties to protect and promote human rights.

The PDHJ needs to improve its performance in term of responding to human rights violations, carrying out investigations, keeping the public informed of the status of their complaints, and monitoring the implementation of recommendations by public institutions. The PDHJ needs to proactively intervene in cases of human rights violations and make its voice heard in public. Some civil society organisations have recommended that the PDHJ carry out an evaluation of its work in order to identify weaknesses and improve its performance.

#### **5. Recommendations**

Based on the information, findings, and analysis through this year's chapter report and on behalf of all stakeholders, JSMP provides the following recommendations to selected and relevant state organs and institutions:

##### **To the National Parliament:**

- Consider and discuss the annual report of the PDHJ, particularly the recommendations addressed to state institutions that have committed human rights violations but did not implement the recommendations, and make these state institutions accountable for their actions;

- Consider, allocate, and approve a sufficient state budget to the PDHJ in order to implement its strategic plan for 2011-2020, particularly to enable it to recruit more qualified staff in the area of investigation and legislative analysis in order to improve the performance of the PDHJ and to make full use of its constitutional and legal competencies and powers;
- Review the immunity provision in Article 22 of Law No. 7/2004, that is viewed as a challenge to the justice sector and the effort to combat corruption;
- Review the provision on the removal of the Deputy Ombudsmen as provided in the Article 16.6 of the Law No. 7/2004 and ensure inclusion of a provision on the need for proper grounds and an objective process for the removal.

**To the PNTL and other public institutions:**

- Consider and implement all recommendations on human rights violations that have been committed by their members;
- Promote capacity building in human rights protection and promotion, and professionalism, in order to better protect and promote human rights, rather than becoming the violator of human rights.

**To the *Provedoria dos Direitos Humanos e Justiça*:**

- Be more proactive in protecting and promoting human rights not only through monitoring and publishing reports, but also by making public statements or declarations against any action of state institutions or organs that violate human rights;
- Intervene in any and every situation where human rights violations occur regardless of citizenship, race, colour, religion, and ethnicity of victim;
- Ensure the rights of the victims of human rights violations to access health services, to be compensated for damage to their properties, and for speedy processing of their cases;
- Actively follow-up, and keep complainants informed on the processing of their cases or complaints, including cases that have been referred to other relevant institutions;
- Make publically available all information and reports on human rights violations particularly on the official website of the PDHJ, not only its annual reports, but also thematic reports;
- Make the Advisory Council more effective and enhance cooperation and collaboration with civil society organisations;
- Provide training or capacity building to human rights defenders to improve their capacities in the protection and promotion of human rights;
- Focus also on other human rights such as social, economic and cultural rights in order to hold the Government accountable to guarantee the rights of people to clean water, access to land, to good sanitation, education, etc.



## SOUTH ASIA OVERVIEW

In the twenty-five years since the *Principles Relating to the Status of National Institutions* (the Paris Principles) were adopted, National Human Rights Institutions (NHRIs) have grown at an unprecedented rate. While the Paris Principles have been widely recognised by the international community as the standards which frame and guide the work of NHRIs, significant efforts to push for NHRIs' full compliance with these principles are still needed in order to ensure the effective promotion and protection of human rights. The Global Alliance on National Human Rights Institutions Sub-Committee on Accreditation (GANHRI-SCA) has played a key role in reviewing the performance of these NHRIs as well as providing guidance for NHRIs to enable them to fully comply with the Paris Principles and other international instruments.

In the South Asia region today,<sup>1</sup> a total of seven NHRIs have been established. These NHRIs are the Afghanistan Independent Human Rights Commission (AIHRC) in 2002, the National Human Rights Commission of Bangladesh (NHRCB) in 2009, the National Human Rights Commission of India (NHRCI) in 1993, the Human Rights Commission of the Maldives (HRCM) in 2003, the National Human Rights Commission of Nepal (NHRCN) in 2000, the National Commission on Human Rights of Pakistan (NCHR) in 2012, and the National Human Rights Commission of Sri Lanka (HRCSL) in 1996. Among these NHRIs, the NHRIs that received an 'A' status from GANHRI-SCA are the AIHRC, the NHRCI, the NHRCN, and the HRCSL, while the NHRCB and the HRCM are accredited with 'B' status. As the latest addition to the list of NHRIs in South Asia, the NCHR has yet to be accredited by GANHRI-SCA.

Looking back over the past twenty-five years, NHRIs in South Asia have produced several achievements and milestones. Such achievements range from having dedicated human rights defender focal points or desks within the NHRIs (Nepal and India) to assuming pivotal roles such as in the drafting or amending of landmark legislation, and in conducting national inquiries to investigate human rights abuses and violations. For example, the NHRCB has taken in hand the drafting of the Rules for the Child Marriage Restraint Act 2017 and the HRCM has been reviewing laws and advising the Parliament on findings and recommendations. The NCHR has proposed amendments on the problematic blasphemy laws of that country.

There have also been positive developments on pluralistic representation, such as in the NHRCB where three out of six Commissioners are female and two members represent ethnic minorities. The most recent NHRI, the NCHR, has five women out of a total of nine members of the Commission. However, pluralism is still a challenge in the case of the Maldives as it restricts all its Commissioners to be Muslim and there is no representation of politically or economically disadvantaged groups. Moreover, in the case of Nepal, the NHRCN's mandate contains only a generic requirement on inclusiveness, and its current Commission consists of four men (from the so-called high caste community) and one woman.

Looking at the Maldives and Bangladesh, despite their attempts to give recommendations to the respective parliaments, these Commissions have remained silent while several draconian

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<sup>1</sup> The South Asia region comprises Afghanistan, Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan, and Sri Lanka.

and repressive laws have been passed. In general, recommendations given to the government are often ignored; the NHRCN's own record shows that the implementation rate of its recommendations is less than 14 percent, and it has not taken any initiative or improved its working culture to improve the rate of implementation.

Another major challenge that is seen is the gap between mandate and practice. Certain NHRIs in South Asia are provided a broad mandate in their enabling law, however the implementation of this mandate is questionable. For example, the NHRCB is mandated to undertake *suo moto* investigations but in the past two years, only five fact-finding missions have been conducted. Enforced disappearances and extrajudicial killings are two core issues with numerous incidents reported over the year, however, the NHRCB has yet to carry out investigations into reports of such cases. In the case of Pakistan, *suo moto* actions are hindered due to financial constraints, interference in the Commission's administrative affairs, and the absence of adequate human rights staff and technical staff. As for the Maldives, the Commission has yet to use its statutory power to enforce recommendations when the government and other agencies do not implement the recommendations.

There are also certain NHRIs in which the enabling law does not provide a broad mandate, especially on the protection mandate. For example, the NHRCB does not have a broad enough mandate to investigate alleged human rights violations, being excluded in particular from investigating those involving state actors such as the police, military, and security forces. This is problematic since the reason an NHRI is established is to hold the state and its actors accountable for any human rights violations. For the NHRCN, the actions it can recommend are limited to ordering compensation and ordering action to be taken against the person guilty of violating human rights. However, it cannot make recommendations for more fundamental reform.

In promoting and protecting human rights, the Paris Principles mention that NHRIs will need to cooperate with different stakeholders, including civil society. NHRIs and civil society have strengths, capacities, expertise, and experiences that they can share to their mutual advantage and, more importantly, for the better protection and promotion of human rights. However, as is seen in the reports from South Asia, there is a lack of trust from civil society in the NHRIs. The NHRCN, NHRCB, HRCM, and NCHR are facing challenges in gaining trust from civil society because they are seen as deficient in their performance. Civil society is still excluded from crucial processes such as the selection and appointment process, which requires broad consultation to ensure transparency and inclusiveness.

Despite the efforts made by NHRIs across South Asia, achieving the main goal of the promotion and protection of human rights, particularly in post-conflict settings, remains a daunting task. The performance and effectiveness of NHRIs are affected by the enabling environment, which can undermine their independence and impose restrictions on their jurisdiction and mandate. The countries in this region face common challenges of impunity, endemic violence, and institutionalised discrimination in realising their human rights goals. However, even in the most difficult environments, there is an expectation that NHRIs will realise their capacities to protect the rights of the people, especially given that there is no effective regional human rights mechanism.

# BANGLADESH: CHALLENGES FOR THE ESTABLISHMENT OF AN EFFECTIVE NHRC

*Odhikar*

## 1. Introduction

The National Human Rights Commission, Bangladesh (NHRCB) continues to face numerous challenges when it comes to complying with the Paris Principles. The fourth and latest team of the NHRCB began its work in 2016 with the same non-participatory selection process identified by the Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation (GANHRI-SCA) in 2011 and 2015 respectively.<sup>1</sup> Regrettably, the NHRCB's crucial role in advancing all aspects of the rule of law, including with regard to violations perpetrated by law enforcement agencies, is hampered due to the limited powers given to it under the National Human Rights Commission Act, 2009 (NHRC Act 2009). In particular, it is unable to investigate complaints against state forces.

This chapter will critically analyse the status of the NHRCB's compliance with the Paris Principles and the 2013 GANHRI-SCA General Observations, through examining its activities and assessing the deficiencies or flaws in its governing law. This report examines this issue for the year 2017, as well as from January to March 2018. The year 2018 is considered to be a very crucial year for the NHRCB as there is a possibility of escalating human rights violations centring around the 11<sup>th</sup> Parliamentary Elections of Bangladesh, which are expected to be held in December 2018.

This report is prepared based on verified information on the situation of human rights in Bangladesh; consultations with different stakeholders through interviews; reviews of media reports; and an analysis of previous reports on and performance of the NHRCB. *Odhikar* contacted the NHRCB several times for an appointment and asked it to provide information for the report but the NHRCB did not respond.

## 2. Overview

GANHRI-SCA ranks the NHRCB as a 'B' category institution.<sup>2</sup> The NHRCB has remained in the same position since 2011. 'B' status includes those institutions that do not fully comply with the Paris Principles or have not yet submitted sufficient documentation to make that determination.<sup>3</sup> The Paris Principles set out six main criteria that national human rights institutions are required to meet: mandate and competence based on universal human rights norms and standards; autonomy from government; independence guaranteed by statute or Constitution; pluralism; adequate resources; and adequate powers of investigation.<sup>4</sup>

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<sup>1</sup> 'Report and Recommendations of the Session of the Sub-Committee on Accreditation', GANHRI, March 2015, available at [https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA\\_MARCH\\_2015\\_FINAL\\_REPORT\\_-\\_ENGLISH.pdf](https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA_MARCH_2015_FINAL_REPORT_-_ENGLISH.pdf).

<sup>2</sup> 'NHRI must be apolitical, says ICC accreditation body', Asia Pacific Forum of National Human Rights Institutions, 5 August 2015, available at <http://www.asiapacificforum.net/news/nhris-must-be-apolitical-says-icc-accreditation-body/>.

<sup>3</sup> 'GANHRI Sub-Committee on Accreditation', GANHRI, available at <https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Pages/default.aspx>.

<sup>4</sup> Ibid.

The objective of this report is to focus on identifying the gaps between the existing mandate and practice of the NHRCB, and the benchmarks of the Paris Principles.

### **3. The National Human Rights Commission Bangladesh and the Paris Principles**

#### **3.1 Functions, Mandate, and Structure**

In the face of longstanding demands from different national and international quarters, the NHRCB was established by the military backed ‘Caretaker Government’ on 1 September 2008 with the promulgation of the National Human Rights Commission Ordinance 2007.<sup>5</sup> The ninth Parliament, on 9 July 2009, passed the NHRC Act 2009. The NHRCB was reconstituted under the NHRC Act 2009 on 22 June 2010 with a full-time Chairperson, one full-time member, and five honorary members who receive an honorarium and allowances for duties discharged including for attending the meetings of the Commission. The NHRC Act 2009 established the Commission as a ‘statutory independent body’ with a broad mandate to promote and protect human rights.

As a statutory body the NHRCB complies with Section A.2<sup>6</sup> of the Paris Principles, elaborated on in the 2013 General Observations, which demands that an NHRI be established through legislation or within a country’s constitution. The comprehensive mandate of the NHRCB is outlined in Section 12 of the NHRC Act 2009, where both promotion and protection of human rights are covered. The mandate includes conducting investigation or inquiry by receiving petitions or exercising *suo moto* power; inspection of prisons, correctional centres, and other places of confinement; making recommendations, reviewing laws, and examining new legislation to assess their compliance with international standards and norms; advising the Government regarding ratification of international human rights instruments; and providing legal aid if possible to the aggrieved party.

In terms of the promotion of human rights, the mandate incorporates developing human rights policies through conducting research on human rights issues; promoting awareness of safeguards through publications and other available means; providing necessary legal and administrative directions to the Government through advice and assistance; and raising public awareness through research, seminars, symposiums, workshops and such other activities, and publishing and disseminating the outcomes thereof.

Despite this comprehensive list, the role and powers of the NHRCB are limited to a certain extent. It has the power to investigate but no authority to sanction any action. Thus, it is considered a mere recommendatory body. Furthermore, the NHRCB cannot investigate cases involving the security forces or law enforcement agencies. General Observation 2.7 specifically points out that in order to comply with the Paris Principles’ stipulation that an NHRI should have “as broad a mandate as possible”, the NHRI should have the authority to protect the public from acts and omissions of public authorities “including officers and personnel of the military, police and special security forces. Where such public authorities,

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<sup>5</sup> ‘Annual Report 2016’, NHRCB, 2016, p.1, available at [http://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/cb8edec9\\_5aee\\_4b04\\_bf2a\\_229d9cd226a0/Annual\\_Report\\_2016.pdf](http://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/cb8edec9_5aee_4b04_bf2a_229d9cd226a0/Annual_Report_2016.pdf).

<sup>6</sup> Principles Relating to the Status of National Institutions (the Paris Principles), General Assembly Resolution 48/134, 20 December 1993. Section A.2, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

who may potentially have a great impact on human rights, are excluded from the jurisdiction of the National Institution, this may serve to undermine the credibility of the Institution.”<sup>7</sup>

### *Human Rights Protection*

Recently, a report on the rule of law in 113 countries of the world was published by the World Justice Project. The report ranked Bangladesh at 102 among 113 countries of the world, in the context of adherence to the rule of law, from the perspective of ordinary people, putting it in the bottom three in South Asia.<sup>8</sup> Furthermore, a German-based organisation, Bertelsmann Stiftung, reported in its ‘Transformation Index’ of 2018, that Bangladesh was among the countries that were under autocratic rule.<sup>9</sup> Furthermore, most cases of human rights abuse in Bangladesh cannot be reported by the media due to political and legal restrictions on freedom of expression, and due to self-censorship. Victims and their families also refrain from making incidents of violence or repression public, due to fear of reprisals. In such a context, members of civil society and human rights defenders expect to see the NHRCB functioning pro-actively to promote and protect human rights, particularly in defending persecuted human rights defenders.

However, the NHRCB is yet to institutionalise its statutory obligations and mandates. In an attempt to do so, the NHRCB has developed a second five-year strategic plan (2016-2020)<sup>10</sup> containing long-term goals towards ensuring rule of law, social justice, freedom, and human dignity through promoting and protecting human rights. To attain these goals, the NHRCB has developed corresponding five-year outcomes, and it has set some key strategies to achieve the outcomes as well as setting some key performance indicators to measure the changes. However, while the goals themselves are at least on paper worthwhile, regrettably, the NHRCB lacks the effectiveness and independence to fulfil them.

The NHRCB also has the legal mandate to review and monitor human rights-related national legislations or policies to ensure compliance with the international legal framework.<sup>11</sup> Amongst efforts in this regard, the NHRCB reviewed its own founding Act, the NHRC Act 2009, with a view to lobbying for specific changes that would bring the institution closer to complying with the Paris Principles, in particular empowering it to investigate violations of human rights by law enforcement agencies. However, these efforts were not successful.

The NHRCB also submitted specific recommendations to the Government on the Children’s

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<sup>7</sup> General Observations of the SCA, 2013, Section 2.7, available at <https://nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC%20SCA%20General%20Observations.pdf>.

<sup>8</sup> ‘Rule of Law Index: 2017-2018’, World Justice Project, 2018, available at [https://www.worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition\\_0.pdf](https://www.worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf); ‘Bangladesh ranks amongst the lowest in rule of law’, *The Daily Star*, 1 March 2018, available at <https://www.thedailystar.net/country/bangladesh-ranks-among-the-lowest-rule-of-law-in-asia-1541899>; ‘Access to civil justice in Asian countries’, *Inquirer.net*, March 2018, available at <http://www.globalnation.inquirer.net/164862/access-civil-justice-asian-countries>.

<sup>9</sup> ‘Democracy under Pressure: Polarization and Repression Are Increasing Worldwide’, Bertelsmann Stiftung, 22 March 2018, available at <https://www.bertelsmann-stiftung.de/en/topics/aktuelle-meldungen/2018/maerz/democracy-under-pressure-polarization-and-repression-are-increasing-worldwide/>.

<sup>10</sup> ‘2<sup>nd</sup> Five-Year Strategic Plan (2016-2020)’, NHRCB, available at [http://www.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](http://www.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).

<sup>11</sup> ‘Bangladesh: Becoming a Subservient to the Government’, *ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, 2017, p.79, available at <https://www.forum-asia.org/uploads/wp/2017/12/ANNI-Report-Final.pdf>.

Act, 2013, the Child Marriage Restraint Act, Child Labour Elimination Policy, Domestic Workers Protection and Welfare Policy, and the Anti-Trafficking Act following a series of consultations.<sup>12</sup> However, these recommendations are not binding and therefore were mostly ignored.<sup>13</sup>

The NHRCB took the initiative to draft an Anti-Discrimination Act legislating against the discrimination faced by excluded minority groups and marginalised sections of people. On 8 April 2018 the NHRCB submitted a draft of the proposed Anti-Discrimination Act<sup>14</sup> to the Ministry of Law, Justice and Parliamentary Affairs, four years after the Law Commission's recommendations, which in 2014 requested the Government to enact a law on the elimination of discrimination against underprivileged people. A draft Act was finalised in 2014 by the Law Commission with the assistance of the NHRCB and in consultation with various other stakeholders.<sup>15</sup> Under the currently submitted draft Anti-Discrimination Act, aggrieved persons would be able to file complaints at the NHRCB or at Court against those who have committed an offence under Section 4<sup>16</sup> of the proposed Act.<sup>17</sup> The NHRCB has also taken in hand the drafting of the Rules for the Child Marriage Restraint Act 2017.<sup>18</sup>

Despite some efforts at reviewing and drafting legislation to ensure compliance with international human rights norms and standards, the overall performance of the NHRCB has fallen short of meeting the standards of the Paris Principles with regard to reviewing legislation from a human rights perspective. Recently, for example, several repressive laws have been drafted or enacted with no opposition from the NHRCB.

For example, the Information Ministry drafted a proposed Bill for a 'National Broadcasting Act',<sup>19</sup> incorporating the provisions of imprisonment and a monetary fine for violating the rules or regulations of the act. The draft bill provides 27 types of activities that a broadcaster

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<sup>12</sup> 'Annual Report 2015', NHRCB, 2015, available at, [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](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).

<sup>13</sup> 'Bangladesh: Becoming a Subservient to the Government', *ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, 2017, p.79, <https://www.forum-asia.org/uploads/wp/2017/12/ANNI-Report-Final.pdf>.

<sup>14</sup> Draft of proposed Anti Discrimination Act, available at <http://www.nhrc.org.bd/site/notices/12c79873-4144-47fa-9885-bd7b86f3a090/Draft-of-proposed-Anti-Discrimination-Act>.

<sup>15</sup> 'Report of the National Human Rights Commission, Bangladesh, on the Government's 2015 CEDAW State Report Responding to CEDAW's 2011 Concluding Observations', NHRCB, 2015, available at [http://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/348ec5eb\\_22f8\\_4754\\_bb62\\_6a0d15ba1513/NHRC\\_Report\\_on\\_CEDAW\\_State\\_Report.pdf](http://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/348ec5eb_22f8_4754_bb62_6a0d15ba1513/NHRC_Report_on_CEDAW_State_Report.pdf).

<sup>16</sup> Section 4 of the draft law, which states that if anyone discriminates against any person, institution, religion, group, creed and colour, history, culture, profession, nation, ethnic minority, gender, disability, pregnancy, marital status and birth status, it will be considered an offence, as it will be if anyone makes any remarks against such persons for their disability and other issues.

<sup>17</sup> 'NHRC sends draft to govt', *The Daily Independent*, 21 April 2018, available at <http://www.theindependentbd.com/post/146679>.

<sup>18</sup> 'Annual Report 2016', NHRCB, 2016, available at [http://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/cb8edec9\\_5aee\\_4b04\\_bf2a\\_229d9cd226a0/Annual\\_Report\\_2016.pdf](http://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/cb8edec9_5aee_4b04_bf2a_229d9cd226a0/Annual_Report_2016.pdf).

<sup>19</sup> According to the draft, violations of any rules or provisions of this law will result in a sentence of up to three months imprisonment and at least 500,000 taka fine or both. If violations of this law continue the accused person will be fined up to 100,000 taka per day. It is also mentioned in the draft law that if someone broadcasts in violation of this law, he will be fined up to 100 million taka. Such a fine can be recovered by an administrative order. The bill also states that if anyone is harmed by an administrative order, he/she will not be able to seek legal recourse.



cannot carry out without prior approval from the authorities concerned.<sup>20</sup> The Government has also drafted a Bill for another repressive law, called ‘Distortion of the History of Bangladesh Liberation War Crimes Act’<sup>21</sup> and the Press Council has finalised the draft of a Bill for an amendment to the Press Council Act, 1974, incorporating provisions for stopping the publication of any newspaper or media for a maximum of three days or 500,000 taka fine, if the media and news agencies contravene any decision or Order of the Press Council.<sup>22</sup> To date this has not been adopted, but the NHRCB remains silent on these provisions.

On 5 October 2016, Parliament passed the Foreign Donations (Voluntary Activities) Regulation Act 2016,<sup>23</sup> which is extremely repressive and contrary to international law. As a result of this Act, an environment has been created which will strictly regulate organisations which work on civil and political rights and are vocal against corruption and the undemocratic actions of the Government. The Foreign Donation (Voluntary Activities) Regulation Act 2016 was passed by Parliament despite immense criticism from several national and international human rights organisations, including UN bodies<sup>24</sup> and the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association.<sup>25</sup> The NHRCB however remained silent. This Act makes it a punishable offence to make inimical or derogatory comments or remarks on the Constitution and constitutional bodies (which

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<sup>20</sup> ‘Draft Broadcast Act: Bangladesh broadcasters risk jail, fine if they violate rules’, *The Daily Star*, 21 April 2016, available at <https://www.thedailystar.net/frontpage/broadcasters-risk-jail-fine-if-they-violate-rules-1211977>.

<sup>21</sup> According to the draft, misinterpretation or disrespect of any documents relating to the Liberation War or disseminated or published during the Liberation War and any publication during that period, will be considered a crime. In the draft law, the period of the Liberation War was set from 1 March to 16 December, 1971. The second sub-clause of the proposed law says the denial of ‘incidents’ that occurred between 1 March and 25 March, 1971, will be considered as a crime. However, there was no explanation or discussion with regard to what those incidents are. Moreover, the liberation war started from midnight of 25 March, 1971, but the draft law states it was from 1 March. There was no explanation provided of this discrepancy. This means that the police and complainants will have the freedom to decide what constitutes an ‘incident’ and what constitutes a ‘distortion’. According to section 6(1) of the proposed Act, “if anybody was instigated or abetted in or engaged in conspiracy with someone or took any initiative or attempt, that person will be punished as per the law”. Anyone will be able to file a case under this Act. Violations of any section of this law will result in a sentence of up to five years imprisonment and 10 million taka fine. Furthermore, cases filed under this Act will be investigated and prosecuted in a short and specified period of time.

<sup>22</sup> *The Daily Jugantor*, 3 May 2016, available at <https://www.jugantor.com/first-page/2016/05/03/29050/>.

<sup>23</sup> According to this newly passed law, the government officials will be able to inspect, monitor and evaluate the activities of the voluntary organisations (and NGOs). The persons belonging to the NGOs who individually or collectively receive foreign funds for implementing projects, will come under constant surveillance under this law. According to Section 3 of this law, “Notwithstanding anything contained in any other law for the time being in force, an individual who is undertaking or operating any voluntary activity by receiving foreign donation or contribution, approval from the NGO Affairs Bureau must be taken”. As per Section 10(1), the Bureau under this Act shall have the authority to inspect, monitor and evaluate the voluntary activities of an individual and the NGO and the progress of the NGOs it has approved. Under section 10(2), to serve the purpose of subsection (1), the Bureau shall have the authority to create a monitoring committee and if necessary, appoint a third-party evaluator. It is mentioned in section 14 that if any NGO or individual makes ‘inimical’ and ‘derogatory’ remarks on the Constitution and constitutional bodies or conducts any anti state activity or is involved in terrorism and financing, patronising or assisting terrorist activities, it shall be considered an offence under this Act. For committing any offence under section 14, the Bureau may cancel or suspend the registration given to the said NGO or organisation or close down the voluntary activities undertaken or operated by the said NGO in the prescribed manner; and it may take action against the concerned NGO or person for punishment, as per existing laws of the country.

<sup>24</sup> ‘Bangladesh’, Former UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, available at <http://www.freeassembly.net/tag/bangladesh/>.

<sup>25</sup> ‘UN official urges JS: Do not pass foreign donation bill’, *The Daily Star*, 7 November 2015, available at <http://www.thedailystar.net/frontpage/do-not-pass-foreign-donation-bill-168745>.



includes the Parliament and Judiciary).

Meanwhile, the NHRCB is also not being vocal against the draft Digital Security Act (DSA) 2018. On 29 January 2018, the Cabinet approved the Bill of the draft DSA. Controversially, while the draft would revoke the controversial Section 57 of the repressive Information and Communication Technology Act 2006 (ICT Act), this section has been incorporated into the draft DSA. It provides that if any person deliberately publishes any material in electronic form that causes deterioration in law and order, prejudices the image of the State or any person, or causes hurt to religious belief, the offender will be punished with a maximum of 14 years and a minimum of 7 years imprisonment.

Furthermore, there are fears that Section 32<sup>26</sup> of the draft DSA, relating to spying on computers and other digital crimes, would be used by the Government as a weapon against human rights defenders, journalists, bloggers, and dissenting voices.

As a result, civil society activists and journalists have demanded the removal of this section. The NHRCB has remained silent regarding these demands from civil society and media activists. Without taking civil society's and journalists' demands into consideration, on 9 April 2018, the Telecommunication and Information Technology Minister Mostafa Jabbar placed the Digital Security Bill before Parliament.<sup>27</sup>

### *Human Rights Promotion*

In Bangladesh, the NHRCB's primary activity has been human rights promotion, rather than human rights protection. In this regard, it has claimed to be educating the public about human rights and advising the Government on key human rights issues.<sup>28</sup> The NHRCB is mandated to raise public awareness through research, seminars, symposiums, workshops, and relevant activities. As well as this the NHRCB is mandated to provide training to members of law enforcement agencies regarding protection of human rights. The NHRCB claims that it has already implemented a series of human rights awareness and education programmes targeting different stakeholders, including NGO representatives, national and local elected public representatives, government officials, lawyers, teachers, students, women, and children. As claimed by the NHRCB, it cannot foster a human rights culture in the country without considerable assistance from partners. Thus, the NHRCB has emphasised building partnerships with national and international organisations for the purpose of implementing a human rights education programme.<sup>29</sup>

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<sup>26</sup> Section 32 states that if anyone collects, publishes or preserves, or assists in preservation of any confidential information/reports through computer, digital device, computer network or any other electronic form, by illegally entering into an office of the Government or a semi-government, autonomous or statutory body, it will be considered a crime of computer or digital spying. The accused person will face punishment of 14 years in jail or pay taka. 2.5 million as a fine or both. If such crime is committed twice by the same person, he/she will be sentenced to life imprisonment or 10 million taka fine or both.

<sup>27</sup> 'Digital Security Bill in Parliament, Keeping Section 32', *The Daily Jugantor*, 10 April 2018, available at <https://www.jugantor.com/todays-paper/last-page/36851/>.

<sup>28</sup> 'Bangladesh: Becoming a subservient to the Government', *ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, 2017, p.79, available at <https://www.forum-asia.org/uploads/wp/2017/12/ANNI-Report-Final.pdf>.

<sup>29</sup> '2<sup>nd</sup> Five-Year Strategic Plan (2016-2020)' NHRCB, available at [http://www.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](http://www.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).

In 2016, the NHRCB published one brochure, three newsletters and one booklet titled ‘Manobadhikar Ki?’<sup>30</sup> However this booklet has not been widely circulated to educational institutions and relevant stakeholders due to a lack of initiative from the NHRCB. The NHRCB has the scope to share human rights education through television programmes, though the entire electronic media is either owned or controlled by the Government or by the people who are closely connected with the Government, to reach out to the wider population including the poor, vulnerable, and marginalised, sexual minorities, and youth. It can also promote campaigns against child marriage, violence against women etc. through television advertisements. So far, such activities have not been widely practised.

The NHRCB has organised a series of seminars and conferences on topics including gender equality, human trafficking, and the criminal justice system in Bangladesh, and a consultation on child labour in Bangladesh, where it shared findings with and sought input from key national stakeholders, including the Government, employers and workers, civil society, and NGOs.<sup>31</sup> However, the NHRCB does not have any visible promotional activities regarding extra-judicial killings, enforced disappearances, freedom of expression, and freedom of peaceful assembly and association.

In addition, the NHRCB has failed to promote international human rights standards, such as campaigning for the Government to sign and ratify the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), even though it has highlighted enforced disappearances as one of its priority areas in its latest five-year strategic plan. It could also take the initiative to translate the ICPPED and other international conventions and treaties to make outreach and advocacy to its target groups easier.

#### *Accountability and Publication of Findings and Reports*

Since its inception, the NHRCB has published annual reports on its activities in the years 2010, 2011, 2012, 2013, 2014, 2015, and 2016. It has also published its strategic plans on its website. The NHRCB provides very limited information on its website; most of the contents are under-construction and not found. This hinders access to information for the public regarding its activities, which leads to lack of accountability. Findings of fact-finding missions undertaken by the NHRCB are not released publicly. This is contrary to provisions that require the Commission, upon the conclusion of an inquiry following a complaint, to keep the aggrieved person informed by furnishing her or him, or her or his representative(s), with a copy of the inquiry report.<sup>32</sup>

On the other hand, the annual report contains only basic information on its activities. Human rights defenders have demanded that the NHRCB’s annual report be placed before the Parliament but this has not yet happened. Section 22 of the NHRC Act 2009 stipulates that the NHRCB is responsible for submitting an annual report of its activities to the President by 30 March each year. Although there is a prescribed timeline for reporting to the President, there is no legal provision for debate in Parliament.

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<sup>30</sup> ‘Manobadhikar Ki?’ translates to ‘What is the definition of human rights?’

<sup>31</sup> ‘Annual Report 2016’, NHRCB, 2016, available at

[http://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/cb8edec9\\_5aee\\_4b04\\_bf2a\\_229d9cd226a0/Annual\\_Report\\_2016.pdf](http://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/cb8edec9_5aee_4b04_bf2a_229d9cd226a0/Annual_Report_2016.pdf).

<sup>32</sup> NHRC Act, 2009, Section 19(3), available at

[http://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/law/de62d323\\_fe91\\_45f0\\_9513\\_a0d36ab77fdf/NHRC\\_Act\\_2009\\_1\\_.pdf](http://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/law/de62d323_fe91_45f0_9513_a0d36ab77fdf/NHRC_Act_2009_1_.pdf).

To make the NHRCB accountable for its activities, it is necessary to post all publications of the NHRCB on its website and to make all the information accessible to the interested parties including human rights defenders and researchers. Although the NHRCB's Annual Report of 2016 mentions nine topics on which research work was conducted and published in 2015, none of these reports are available on its website.

### **3.2 Autonomy from the Government and Independence Guaranteed by Statute or the Constitution**

#### *Budgetary Autonomy and Financial Independence*

The NHRC Act 2009 ensured the independence of the NHRCB in using its resources. Section 25 of the NHRC Act 2009 reads: “the government shall allocate a specific amount of money for the NHRCB in each fiscal year; and it shall not be necessary for the Commission to take prior approval from the government to spend such allocated money for the approved and specified purpose”.<sup>33</sup>

However, the budget of the Commission is not provided through a separate budget line item.<sup>34</sup> The NHRCB's annual expenses are not included in the national budget, but are directly granted from the Government, which is a serious flaw and in direct defiance of General Observation 1.10, which specifies that funding should be set out in a separate line item in the national budget.<sup>35</sup>

A Human Rights Commission Fund (HRCF) of the NHRCB has been formed by a grant of the Government and local authority under section 24 of the NHRC Act 2009.<sup>36</sup> The Act does not specify the meaning of local authorities. Under this arrangement the Government has in the past provided 25% and development partners 75% of funding for the NHRCB.<sup>37</sup> Current figures are not available.

However, the Commission has no authority to fix its annual expenses, but must work within the funds allocated to it, which fall short of its requirements. Adequate funding is essential for effective functioning of the Commission, as per Section 1.10 of the General Observations and the Paris Principles, both of which link lack of sufficient funds to lack of independence from the Government.<sup>38</sup> According to the former NHRCB Chair, it is sometimes very difficult to contemplate organising training, a workshop or a conference with national and international resource persons and a well-suited venue, amongst other requirements, without official funding.<sup>39</sup> The limited budget of the Commission results in it lacking an effective

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<sup>33</sup> Ibid. Section 25.

<sup>34</sup> ‘Report and Recommendations of the Session of the Sub-Committee on Accreditation’, GANHRI, March 2015, available at [https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA\\_MARCH\\_2015\\_FINAL\\_REPORT\\_-\\_ENGLISH.pdf](https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA_MARCH_2015_FINAL_REPORT_-_ENGLISH.pdf).

<sup>35</sup> General Observations of the SCA, 2013, Section 1.10, available at [https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC\\_SCA\\_General\\_Observations.pdf](https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC_SCA_General_Observations.pdf).

<sup>36</sup> Dr. Rahamat Ullah & Bayazid Hossain, ‘JAMAKON at 5: A Critique’, June 2016.

<sup>37</sup> ‘Report and Recommendations of the Session of the Sub-Committee on Accreditation’, GANHRI, March 2015, available at [https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA\\_MARCH\\_2015\\_FINAL\\_REPORT\\_-\\_ENGLISH.pdf](https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA_MARCH_2015_FINAL_REPORT_-_ENGLISH.pdf).

<sup>38</sup> General Observations of the SCA, 2013, Section 1.10, available at [https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC\\_SCA\\_General\\_Observations.pdf](https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC_SCA_General_Observations.pdf).

<sup>39</sup> Dr. Rahamat Ullah & Bayazid Hossain, ‘JAMAKON at 5: A Critique’, June, 2016.

institutional framework and adequate staffing, which in turn impacts on its autonomy. While the Commission has honorary members, they are not giving their full potential and they attend the Commission only when invited.<sup>40</sup>

### *Interaction with, and State Submissions to, the International Human Rights System*

The Paris Principles clearly establish the responsibilities of NHRIs in relation to the international human rights system in several articles. Some of these responsibilities, such as reviewing legislation for compliance with international law and recommending ratification of instruments, are reflected in Section 12 of the NHRC Act 2009.

Bangladesh is party to eight out of the nine core human rights treaties. The NHRCB has claimed that it monitors compliance with these treaties through regular data collection, the creation of well-articulated indicators to measure progress, and regular consultations.

Bangladesh underwent its third review under the Universal Periodic Review (UPR) in May 2018. The NHRCB participated in this review by creating a committee to draft a report, holding consultations, undertaking fact-finding missions, and submitting a report.<sup>41</sup> The NHRCB has thematic committees on a range of issues including women's rights, rights of persons with disability, and migrant rights.<sup>42</sup> It used these thematic committees to organise its stakeholder consultations under the UPR process. As claimed by the NHRCB, it intends to use its thematic committees as coordination forums for treaty reporting. Based on the NHRCB's annual work plan, these thematic committees carry out joint events, fact-finding missions, and research. These committees identified the priority areas of engagement based on the accepted recommendations of the UPR, concluding recommendations of the treaty bodies, the 7th five-year National Action Plan, and contemporary or emerging issues.<sup>43</sup>

Bangladesh continues to have an extremely poor record of cooperation with international human rights mechanisms, with all reports either still pending or having been submitted years late. For instance, Bangladesh submitted its initial report to the UN Human Rights Committee (CCPR) on 19 June 2015, 14 years after ratification of the International Covenant on Civil and Political Rights, and submitted its initial report to the UN Committee on Economic, Social and Cultural Rights (CESCR) on 10 July 2017, 17 years after the ratification of the International Covenant on Economic, Social and Cultural Rights. The submission of Bangladesh's initial report to the Committee on the Elimination of Racial Discrimination (CERD) has been pending since July 2002. Bangladesh has not submitted any report to the Committee Against Torture (CAT), missing its fifth deadline since ratification of the Convention Against Torture in 1998, its first report being due since November 1999. Similarly, the NHRCB has a poor record in respect of engaging with persecuted human rights defenders and family members of the victims of state violence.

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<sup>40</sup> Ibid. p.122.

<sup>41</sup> 'Stakeholder Report to UN Human Rights Council on Universal Periodic Review – 3rd Cycle, annexure 1: Methodology, UPR Consultations', NHRCB, available at [https://www.upr-info.org/sites/default/files/document/bangladesh/session\\_30\\_-\\_may\\_2018/nhrCB\\_upr30\\_bgd\\_e\\_annexe1.pdf](https://www.upr-info.org/sites/default/files/document/bangladesh/session_30_-_may_2018/nhrCB_upr30_bgd_e_annexe1.pdf).

<sup>42</sup> 'Stakeholder Report to UN Human Rights Council on Universal Periodic Review – 3rd Cycle, annexure 3: Thematic Committees, National Human Rights Commission Bangladesh', NHRCB, available at [https://www.upr-info.org/sites/default/files/document/bangladesh/session\\_30\\_-\\_may\\_2018/nhrCB\\_upr30\\_bgd\\_e\\_annexe3.pdf](https://www.upr-info.org/sites/default/files/document/bangladesh/session_30_-_may_2018/nhrCB_upr30_bgd_e_annexe3.pdf).

<sup>43</sup> 'Annual Report 2016', NHRCB, 2016, available at [https://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/cb8edec9\\_5aee\\_4b04\\_bf2a\\_229d9cd226a0/Annual%20Report%202016.pdf](https://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/cb8edec9_5aee_4b04_bf2a_229d9cd226a0/Annual%20Report%202016.pdf).

The NHRCB should focus its attention in these areas and should remind the Government repeatedly through recommendations that it should meet its obligations to submit reports in due time to the various UN bodies.

### *Selection and Appointment*

The NHRCB is, by law, considered a statutory independent body but the President appoints the Chairperson based on the recommendation of a Selection Committee and, as per the NHRC Act 2009, this Selection Committee consists of seven members including the Speaker of the Parliament, the Law Minister, the Home Minister, the Chairman of the Law Commission, the Cabinet Secretary and two members of Parliament, one from the Treasury and the other one from the Opposition (however, in the present scenario, the loyal opposition<sup>44</sup> is also part of the Government),<sup>45</sup> who are, for the major part, government officers. The SCA notes that the quorum requirements, which demand four members present for a quorum, mean that nominations can be made on the basis only of the decisions of the members who are part of the Government. As a result of such an appointment process there is a little scope for appointments other than politically motivated appointments, curtailing the independence of the NHRCB.

GANHRI-SCA in its General Observation 1.8<sup>46</sup> as well as its latest review of the NHRCB, has highlighted the importance of having 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 NHRCB to advocate for the formalisation of the selection process in relevant legislation, regulations, or binding administrative guidelines as appropriate.<sup>47</sup>

No space is ensured for human rights defenders and civil society members in the Selection Committee despite persistent demand from eminent human rights defenders and civil society groups. In August 2016, the Government appointed Kazi Reazul Hoque as the new Chairperson of the NHRCB through the same selection process that lacked transparency and had restricted civil society participation.<sup>48</sup> Since there is no space for civil society

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<sup>44</sup> The Awami League-led Government amended the Constitution, repealing the provision of an interim Caretaker Government without any consensus from opposition political parties or a referendum. The Election Commission then declared an Election Schedule, which was not shared with the then BNP-led parliamentary Opposition. The BNP-led Opposition refused to participate in the elections unless a caretaker government was reinstated. In 153 constituencies (out of 300), Awami League candidates were declared uncontested winners, even before the polling commenced, as there was no other candidate contesting. People did not even have the chance to exercise their right to franchise and the Parliament, without seeking opposition opinion had also repealed the provision of negative voting. There were also widespread reports of irregularities and election-related violence on the day of polls in the 10th Parliamentary election. The Parliamentary Opposition today is the Jatiya Party, which, incidentally, also has Ministers in the Awami League Government. As a result, the opposition party is considered to be loyal to the Government.

<sup>45</sup> NHRC Act, 2009, Section 7, available at

[http://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/law/de62d323\\_fe91\\_45f0\\_9513\\_a0d36ab77fdf/NHRC\\_Act\\_2009\\_1\\_.pdf](http://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/law/de62d323_fe91_45f0_9513_a0d36ab77fdf/NHRC_Act_2009_1_.pdf).

<sup>46</sup> General Observations of the SCA, 2013, Section 1.8, available at

[https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC\\_SCA\\_General\\_Observations.pdf](https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC_SCA_General_Observations.pdf).

<sup>47</sup> 'Report and Recommendations of the Session of the Sub-Committee on Accreditation', GANHRI, March 2015, available at [https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA\\_MARCH\\_2015\\_FINAL\\_REPORT\\_-\\_ENGLISH.pdf](https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA_MARCH_2015_FINAL_REPORT_-_ENGLISH.pdf).

<sup>48</sup> Ibid.



participation in the selection committee, the NHRCB has proposed amendments to Section 6(1) of the NHRC Act 2009 to increase membership of the Selection Committee to include: a Judge from the Appellate Division; a member of civil society to be nominated by the Speaker of the Parliament; the Chairperson of the Public Service Commission; and a Vice Chancellor of any public university nominated by the Vice Chancellor's Forum. It also proposed an amendment to Section 7(3) of the NHRC Act 2009 to increase the quorum requirement for the Selection Committee from four to six members.<sup>49</sup>

On the other hand, a question has been raised regarding the appointment of the new Chairperson as it contradicts Section 6(3) of the NHRC Act 2009. Section 6(3) states that, "the Chairman and the Members of the Commission shall hold office for a term of three years from the date on which they enter upon their office: Provided that a person shall not be appointed for more than two terms as a Chairman or a Member of the Commission." It is to be noted that the present Chair has already served as a member of the NHRCB for two terms – from 22 June 2010 to 22 June 2013, and then from 22 June 2013 to 22 June 2016.<sup>50</sup>

The NHRCB's independence has been curbed from the outset since it has essentially been founded by the Government and is steered by key individuals directly selected by the Government.<sup>51</sup>

#### *Dismissal Procedures*

The Chairperson and members of the Commission are not removable from office except in the same way as a Judge of the Supreme Court. They can only be removed by the President on the recommendation of the Supreme Judicial Council (consisting of the Chief Justice of Bangladesh and the two other next senior Judges of the Appellate Division) if the Council so recommends, after inquiry into alleged 'physical or mental incapacity' or 'gross misconduct' of the Chairperson or Member. However, if the Chairperson or any Member is judged insolvent, engages in any other profitable job (except for honorary members), is declared a person of unsound mind, or convicted of any crime involving moral turpitude, the President can remove the Chairperson or that member.<sup>52</sup>

The Commission enjoys immunity from any suit, prosecution, or other legal proceedings for any damage caused or likely to be caused by any publication, report or any other activity carried out in good faith under Section 29 of NHRC Act 2009.<sup>53</sup>

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<sup>49</sup> 'Annual Report 2016', NHRCB, 2016, p.36, available at [https://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/cb8edec9\\_5aee\\_4b04\\_bf2a\\_229d9cd226a0/Annual\\_Report\\_2016.pdf](https://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/cb8edec9_5aee_4b04_bf2a_229d9cd226a0/Annual_Report_2016.pdf).

<sup>50</sup> 'HC questions legality of NHRC chief's appointment', *Dhaka Tribune*, 20 November 2016, available at <https://www.dhakatribune.com/uncategorized/2016/11/20/hc-questions-nhrc-chiefs-appointment>.

<sup>51</sup> 'National Integrity System Assessment Bangladesh', Transparency International Bangladesh, 2014, available at [https://www.ti-bangladesh.org/beta3/images/2014/fr\\_nis\\_NICSA\\_14\\_en.pdf](https://www.ti-bangladesh.org/beta3/images/2014/fr_nis_NICSA_14_en.pdf).

<sup>52</sup> NHRC Act, 2009, Section 8, available at [http://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/law/de62d323\\_fe91\\_45f0\\_9513\\_a0d36ab77fdf/NHRC\\_Act\\_2009\\_1\\_.pdf](http://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/law/de62d323_fe91_45f0_9513_a0d36ab77fdf/NHRC_Act_2009_1_.pdf).

<sup>53</sup> *Ibid.* Section 29.

### 3.3 Pluralism

#### *Pluralism of Commissioners*

The NHRCB consists of a Chairperson and six members. The Chairperson and one member of the Commission serve the Commission on a full-time basis and the five other members are honorary. The NHRC Act 2009<sup>54</sup> demands representation from women, and ethnic groups. This is in line with General Observation 1.7.<sup>55</sup> In the present Commission, out of six members, three are female and two members represent the ethnic communities.<sup>56</sup>

#### *Pluralism of Staffing*

A fundamental requirement of the Paris Principles is that an NHRI is, and is perceived to be, able to operate independently of government interference. Staffing arrangements should reflect this. The SCA noted that the NHRCB recruited senior staff from amongst government officials. The Secretary and senior officials were seconded from the civil service, contrary to General Observation 2.4 on 'Recruitment and retention of NHRI staff'.<sup>57</sup> Such secondment of senior staff in the top levels curbed the independence and impartiality of the Commission in carrying out its functions. The SCA expressed concern about the secondment of the Commission's staff and made recommendations that no senior posts, and no more than 25 percent of all posts, should be filled by secondees, except in exceptional circumstances.<sup>58</sup>

The NHRCB has the power to formulate rules for carrying out its purposes with the prior approval of the President.<sup>59</sup> The NHRCB first drafted its rules for the recruitment of staff in 2008 and sent them to the Ministry of Law, Justice and Parliamentary Affairs for approval from the President. The Ministry then returned the rules with objections to almost every clause. The NHRCB finally gained approval of the rules in mid-2011 but regrettably made it possible for the Government to ensure that the Secretary of the Commission (a key administrative member of staff) will always be a secondee. Moreover, the rules ensure that senior positions such as Directors and Deputy Directors within the NHRCB can only be filled by seconded staff from the Government.<sup>60</sup>

Human rights defenders have recommended that the NHRCB is given the power to draft its own rules of procedure which cannot be modified by an external authority such as the Ministry of Public Administration or the Ministry of Law, Justice and Parliamentary

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<sup>54</sup> Ibid. Section 5(3)

<sup>55</sup> General Observations of the SCA, 2013, Section 1.7, available at

[https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC\\_SCA\\_General\\_Observations.pdf](https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC_SCA_General_Observations.pdf).

<sup>56</sup> 'Introduction', NHRCB, 5 February 2017, available at <http://www.nhrc.org.bd/site/page/1c65dfa1-f9c2-48e9-a66b-eab8de75d9b1/Introduce>.

<sup>57</sup> General Observations of the SCA, 2013, Section 2.4, available at

[https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC\\_SCA\\_General\\_Observations.pdf](https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC_SCA_General_Observations.pdf).

<sup>58</sup> 'Report and Recommendations of the Session of the Sub-Committee on Accreditation', GANHRI, March 2015, available at [https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA\\_MARCH\\_2015\\_FINAL\\_REPORT\\_-\\_ENGLISH.pdf](https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA_MARCH_2015_FINAL_REPORT_-_ENGLISH.pdf).

<sup>59</sup> NHRC Act, 2009, Section 30, available at

[http://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/law/de62d323\\_fe91\\_45f0\\_9513\\_a0d36ab77fdf/NHRC\\_Act\\_2009\\_1\\_.pdf](http://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/law/de62d323_fe91_45f0_9513_a0d36ab77fdf/NHRC_Act_2009_1_.pdf).

<sup>60</sup> 'Bangladesh: National Human Rights Commission is in Critical Juncture of Hype versus Real Action', *ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, 2012, p.24, available at [http://www.forum-asia.org/uploads/books/2012/nov/05033\\_ANNI%202012.pdf](http://www.forum-asia.org/uploads/books/2012/nov/05033_ANNI%202012.pdf).



Affairs.<sup>61</sup> A draft amendment 2015 has been made for the NHRC (Officers and Staff) Recruitment Rules 2012. However, the draft has not been made available on the website of the NHRCB.

### *Collaboration with Civil Society and other Stakeholders*

In order to ensure better coordination of its strategic priorities, the NHRCB has formed nine thematic committees comprising members from civil society, international NGOs, UN bodies and state actors with an NHRCB member as Chair. These include: (1) the Committee on Women's Rights, (2) Committee on CHT (Chittagong Hill Tracts) Affairs, (3) Committee on Dalits, Hijra and other Excluded Minorities, (4) Committee on Business and Human Rights and CSR (Corporate Social Responsibility), (5) Committee on Persons with Disability and Autism, (6) Committee on Migrant Worker's Rights, (7) Committee for Protection of Religious and Ethnic Minorities and Non-Citizen's Rights, (8) Committee for Child Rights, Child Labour and Anti-Trafficking and Migration, and (9) Committee on Economic, Social, Cultural, Civil and Political Rights.<sup>62</sup>

As claimed by the NHRCB, these committees have been in operation since 2011 under the umbrella of the NHRCB and have been addressing the needs of specific groups regarding human rights violations.<sup>63</sup> However, it is not stated in detail on the NHRCB's website or in any of its reports how these thematic committees are functioning or carrying out their activities. In an interview, Kazi Reazul Hoque, the present Chairperson of the NHRCB, mentioned that the NHRCB, along with the United Nations Development Programme (UNDP), had conducted a human rights perception survey to identify the most vulnerable communities in order to take concerted efforts for the protection of their human rights. Based on the findings of the survey, and after the reconstitution of membership of the Commission in August 2016, the NHRCB reformed the nine thematic committees. He also mentioned that these committees are not exclusively committees of the NHRCB; rather they are committees of human rights activists. Both government and non-government rights activists are members of these committees, which work in a focused way to report on the situation of specific human rights.<sup>64</sup>

In its 2016 Annual Report, the NHRCB raised a question from the previous ANNI report about fast-depleting space for civil society organisations and human rights defenders to engage in human rights activities. The ANNI report urged NHRIs to provide more opportunities and platforms to civil society organisations and human rights defenders to engage with and advocate for human rights.

On this basis the NHRCB stated that it engages with non-governmental organisations both at the national and regional level.<sup>65</sup> However, this engagement under the present repressive

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<sup>61</sup> Dr. Rahmat Ullah & Bayazid Hossain, 'JAMAKON at 5: A Critique', June 2016, p.106.

<sup>62</sup> 'Thematic committees', NHRCB, 11 January 2018, available at <http://www.nhrc.org.bd/site/page/268e8e39-86a9-4cd3-b32b-4e8135b576c3/Thematic-Committees>.

<sup>63</sup> 'Annual Report 2015', NHRCB, 2015, available at [http://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/annual\\_reports/5116283f\\_1970\\_4f1d\\_9c37\\_19602f176436/Annual\\_Report\\_English-2015.pdf](http://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/annual_reports/5116283f_1970_4f1d_9c37_19602f176436/Annual_Report_English-2015.pdf).

<sup>64</sup> 'NHRC Act needs to be reevaluated', *The Daily Star*, 13 December 2016, available at <https://www.thedailystar.net/law-our-rights/law-interview/nhrc-act-needs-be-reevaluated-1329358>.

<sup>65</sup> 'Annual Report 2016', NHRCB, 2016, p.34, available at [https://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/cb8edec9\\_5aee\\_4b04\\_bf2a\\_229d9cd226a0/Annual\\_Report\\_2016.pdf](https://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/cb8edec9_5aee_4b04_bf2a_229d9cd226a0/Annual_Report_2016.pdf).

political scenario is always selective, as some human rights organisations, such as Odhikar, have never been invited to any discussion meeting, or meetings related to the Universal Periodic Review on Bangladesh.

### *Degree of Trust*

In Bangladesh the Government has politicised the constitutional and statutory bodies and made them subservient to it, in addition to making the rule of law disappear. Massive human rights violations continue without any check and the institutions which are supposed to address this situation have become dysfunctional.

The NHRCB is functioning in such an ineffective manner that, coupled with a dysfunctional criminal justice system in which the victims and their families do not have faith in national institutions, policing, or justice mechanisms, there is almost no motivation to lodge complaints with the NHRCB. Most of the victims of violations come from poor and marginalised sections of the society. They do not even know what ‘NHRCB’ means.

The NHRCB’s Annual Report 2016 states that the NHRC (Complaint and Inquiry) Rules are still at the stage of finalisation. It is high time to finalise these Rules for receiving and dealing with complaints on human rights violations.

Non-availability of documents and lack of a congenial relationship with active civil society organisations contribute to a lack of trust in the NHRCB.

### **3.4 Adequate Resources**

The NHRCB faces a scarcity of resources including staffing, infrastructure, and logistical support.

The very small allocation from the state and limitation of not getting direct funding from donors as per the NHRC Act 2009 is a hindrance for the independent functioning of the NHRCB. As per law<sup>66</sup> the Commission is entitled to an annual grant from the Government and other grants provided by local authorities. The law does not however define what is meant by “local authorities”. The largest part of the amount provided by the state is being used for the salary and remuneration of the staff and members of the NHRCB.<sup>67</sup> On the other hand, funding that the NHRCB receives from donors does not come from its direct application to those partners, but is received via the Government.

The NHRCB has repeatedly urged that it cannot function properly due to shortage of staff and scarcity of resources. For independent functioning the allocation of money is necessary through a budget for the Commission that is not subject solely to Government control.<sup>68</sup>

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<sup>66</sup> NHRC Act, 2009, Section 24, available at [http://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/law/de62d323\\_fe91\\_45f0\\_9513\\_a0d36ab77fdf/NHRC\\_Act\\_2009\\_1\\_.pdf](http://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/law/de62d323_fe91_45f0_9513_a0d36ab77fdf/NHRC_Act_2009_1_.pdf).

<sup>67</sup> ‘Bangladesh: Failing to Fulfil its Commitments’, *ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, 2015, available at [https://www.forum-asia.org/uploads/wp/2015/09/ANNI\\_Report\\_2015.pdf](https://www.forum-asia.org/uploads/wp/2015/09/ANNI_Report_2015.pdf).

<sup>68</sup> ‘NHRC chief seeks authority to probe’, *The Daily Independent*, 3 September 2015, available at <http://www.theindependentbd.com/printversion/details/14201>.

### 3.5 Adequate Powers of Investigation

#### *Powers of Investigation*

The Human Rights Committee, which monitors implementation of the International Covenant on Civil and Political Rights, has expressed its concern that the NHRCB does 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 (disciplinary forces).<sup>69</sup> Rather when these agents are involved in a suspected human rights violation, the Commission must call on the Government to produce a report<sup>70</sup> into the matter.<sup>71</sup> Given that the most pressing human rights challenge for the NHRCB is addressing acts of violence by the state, this restriction severely limits the ability of the NHRCB to carry out its work effectively.

GANHRI-SCA has also drawn attention to this issue, stating that an NHRI should be provided with a broad mandate to investigate all alleged human rights violations, including those involving the military, police and security forces,<sup>72</sup> in line with General Observation 2.7.<sup>73</sup>

The NHRCB has written to the Home Ministry and the Police Headquarters, seeking explanations regarding alleged human rights violations by law enforcement and disciplinary forces. According to a NHRCB document, the Commission is waiting for the inquiry reports into 154 incidents, which include 32 incidents of custodial torture or death, 25 enforced disappearances, 12 extrajudicial killings, and some acts of harassment of civilians by disciplinary forces. Of the 154 letters dispatched asking for inquiry reports, four were sent in 2012, 10 in 2013, 51 in 2014, 73 in 2015, and 16 in 2016.<sup>74</sup> The NHRCB Chairperson, Kazi Reazul Hoque, on 5 December 2017, said that whenever the NHRCB asks for any inquiry report, the police say that the case is still under investigation. He also added that in most of the inquiry reports that the police have sent to the NHRCB, the police found no human rights violations on the part of any member of the disciplinary forces. In most cases the Commission was not informed of any action taken after such investigation.<sup>75</sup>

As long as the NHRCB does not have the power to conduct formal investigations into allegations against disciplinary forces, the Commission can do nothing more than recommend to the Ministry of Home Affairs to take action against such allegations of human rights

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<sup>69</sup> 'Concluding Observations on the Initial Report of Bangladesh', Human Rights Committee, 27 April 2017, p.2, available at [http://www.tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/BGD/CO/1&Lang=En](http://www.tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/BGD/CO/1&Lang=En).

<sup>70</sup> Procedure to be followed in case of disciplined forces. Section 18(1) states that notwithstanding anything contained in any other provisions of this Act, the Commission may, *suo-moto* or on any application, require the Government to submit a report in respect of the allegation of violation of human rights against the disciplined force or any member thereof.

<sup>71</sup> 'Report and Recommendations of the Session of the Sub-Committee on Accreditation', GANHRI, March 2015, available at [https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA\\_MARCH\\_2015\\_FINAL\\_REPORT\\_-\\_ENGLISH.pdf](https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA_MARCH_2015_FINAL_REPORT_-_ENGLISH.pdf).

<sup>72</sup> *Ibid.*

<sup>73</sup> General Observations of the SCA, 2013, Section 2.7, available at <https://nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC%20SCA%20General%20Observations.pdf>.

<sup>74</sup> 'Int'l Human Rights Day Today: Crimes grow in state's silence', *The Daily Star*, 10 December 2017, available at <http://www.thedailystar.net/frontpage/intl-human-rights-day-today-crimes-grow-states-silence-1502635>.

<sup>75</sup> *Ibid.*

violations. However, on the basis of information on the NHRCB's website, it conducted only five fact-finding missions into human rights violations from 2016 to 2018.<sup>76</sup> These fact-finding missions were in relation to the sexual harassment of two Marma girls in Rangamati; attacks on religious minority groups at Nasirnagar in Brahmanbaria; the fire in Tampaco Foils Industry; attacks on ethnic minority groups at Longdu in Rangamati; and the death of Romel Chakma in Rangamati. No fact-finding missions have been carried out regarding the reports of enforced disappearances and extrajudicial killings even though, as per information gathered by Odhikar, 190 persons were allegedly disappeared and 377 persons were allegedly extrajudicially killed from January 2016 to March 2018. Amongst the five fact-finding missions, only one incident was related to death in police custody. These fact-finding missions have proven to be ineffective, with no action taken by the appropriate authorities based on the NHRCB fact-finding reports.

Regarding the continuous reports of enforced disappearance and abduction, a meeting was organised in August 2017 where the NHRCB Chairperson Kazi Reazul Hoque referred to those incidents as no more than "condemnable".<sup>77</sup> No other action was taken by the Commission.

In 2016, the NHRCB received 11 complaints relating to disappearances but the Commission did not take any initiative to investigate any of these cases either on its own or with the assistance of other organisations. There was no information available as to how many complaints were received by the NHRCB in 2017.

The NHRCB can act as a quasi-judicial body. According to Section 16 of the NHRC Act 2009, the NHRCB has the power of a Civil Court under the Code of Civil Procedure, 1908 (Act No. V of 1908) for the purpose of inquiry and investigation. The NHRCB can call for written documents to be submitted and can summon and examine witnesses. Such witnesses are held to enjoy the same privileges as witnesses before a court, however they are held accountable for "false evidence". This is in line with the Paris Principles that require that NHRIs have access to all documents and all persons necessary for them to conduct an investigation.

The NHRCB has exercised its power to summon and examine witnesses but in cases such as enforced disappearances no visible result has been seen thus far (see the 'Case Studies' section below).

There is no obligation under the law for the Government to implement the NHRCB's recommendations. If the Government does not accept recommendations made by the NHRCB regarding a human rights violation, then the NHRCB can appeal to the High Court Division of the Supreme Court on behalf of the victim and/or the victim's family. It can file cases under Article 102 of the Constitution to compel violators to provide prompt responses to the Commission's show-cause notices.

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<sup>76</sup> 'Investigation Report', NHRCB, 11 April 2018, available at <http://www.nhrc.org.bd/site/page/ad01de85-4f14-4bfe-9b42-53fc0c570b26/%E0%A6%A4%E0%A6%A6%E0%A6%A8%E0%A7%8D%E0%A6%A4-%E0%A6%AA%E0%A7%8D%E0%A6%B0%E0%A6%A4%E0%A6%BF%E0%A6%AC%E0%A7%87%E0%A6%A6%E0%A6%A8>.

<sup>77</sup> 'Press release', NHRCB, available at [https://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/press\\_release/1f2553ae\\_0a89\\_4e8f\\_b42a\\_9718f83c5eee/PR\\_28.8.17.pdf](https://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/press_release/1f2553ae_0a89_4e8f_b42a_9718f83c5eee/PR_28.8.17.pdf).

Despite some critical gaps in the NHRC Act 2009, it does give the Commission a general capacity to protect human rights if the Commission wished to implement the legal powers given to it. Regrettably, there is no willingness or initiative from the NHRCB to take such a stand against human rights violations.

### *Court Cases*

According to Section 19(6) of the NHRC Act 2009 the Commission shall have the right to intervene as a party to any case or legal proceeding involving allegations of human rights violations pending before any court. Thus, the NHRCB has the power as given by the founding Act to be a complainant on behalf of the victim. On 19 August 2017 at the Centre on Integrated Rural Development for Asia and the Pacific (CIRDAP) auditorium in Dhaka, Kazi Reazul Hoque, Chairperson of NHRCB, said at the inaugural ceremony of the legal aid programme of the NHRCB, that the NHRCB will provide legal aid to the poor and marginalised and become a party to such cases.<sup>78</sup> The NHRCB has appointed 100 panel lawyers in 40 districts for providing legal aid to the victims of human rights violations.<sup>79</sup> Unfortunately, the NHRCB has not filed any such petition to the High Court Division of the Supreme Court nor it has provided any legal aid in relation to the cases of enforced disappearances, extra-judicial killings, and torture.<sup>80</sup>

### *Inspection of Prisons, Jails, Detention Centres, and Places of Confinement*

The NHRCB can visit any prison or correctional centre, place of custody, and such other places and make recommendations to the Government for the development of those places and the conditions therein.

According to information gathered by Odhikar around 63 persons reportedly died in jail in Bangladesh in 2016 allegedly due to the lack of treatment facilities and negligence by the prison authorities. Prisoners sometimes became ill due to the effects of torture in police remand, and subsequently died when they were sent to custody in jail. Bangladesh has still not ratified the Optional Protocol to the UN Convention against Torture (OPCAT). As a result, the corresponding treaty-based body, the Sub-Committee on the Prevention of Torture, is unable to monitor these places of detention. The NHRCB has failed to call on the Government to ratify OPCAT during the visits they have made to detention centres (see the ‘Case Studies’ section below).

### *Case Studies*

The NHRCB’s failure to use its powers of investigation effectively in the face of serious human rights violations is represented in the case studies below:

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<sup>78</sup> ‘The Human Rights Commission will assist those deterred from bringing a case’, *The Daily Bangla Tribune*, 20 August 2017, available at <http://www.banglatribune.com/national/news/235439/মামলা-চালাতে-যারা-ভয়-পান-তাদের-সহায়তা-দে>.

<sup>79</sup> ‘NHRCB Launches Legal Aid services to victims of human rights violations’, NHRCB, 13 September 2017, <http://www.nhrc.org.bd/site/news/5297afb8-c436-4df5-a004-b285275e9b97/NHRCB-Launces-Legal-Aid-services-to-victims-of-human-rights-violations>.

<sup>80</sup> ‘Annual Report 2016’ NHRCB, 2016, available at [http://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/cb8edec9\\_5aee\\_4b04\\_bf2a\\_229d9cd226a0/Annual\\_Report\\_2016.pdf](http://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/cb8edec9_5aee_4b04_bf2a_229d9cd226a0/Annual_Report_2016.pdf).

- a) *Imam Hassan* - Mohammad Ruhul Amin, father of the disappeared Imam Hassan alias Badal filed a complaint (JAMAK complaint no: 165/12) with the NHRCB but did not receive any results. The NHRCB summoned and examined Mohammad Ruhul Amin several times. The NHRCB also asked for investigation reports into the case from the Home Ministry but the Ministry as yet has not sent any such report.
- b) *Gazipur Correction Centre* - On 23 November 2016, the NHRCB Chairperson along with a team visited a Juvenile Correction Centre for girls in Gazipur. He met with the centre authorities, along with local administrators, centre officers, and the detained girls. He found that out of the 127 girls in the centre, only one had been proven guilty. Of the remainder, some were undergoing trial, but others were victims of abuse and were supposed to be in a safe home. He noted that the centre was for the purpose of juveniles who have been proven to have committed crimes.<sup>81</sup> He noted that many of the abused girls were at risk of further abuse in the centre, and outlined his plan to write to the Ministry of Social Welfare regarding the governance of safe custody for juveniles. However, it seems that this situation was never followed up.
- c) *Dhaka Central Jail* - On 23 August 2016, the Chairperson of the NHRCB, along with members and officers, visited the Dhaka Central Jail. The NHRCB found that the inmates inside the newly built jail are deprived of proper treatment. They are not served quality food and there is a habitual delay in the serving of the food. There is no area for prayer in the central jail at present and there is also a water crisis. The jail lacks a gas connection and faces a deficit in electricity supply. The Chairperson stated, “we will write to the Government to resolve the problems in order to ensure the human rights of the inmates. Inmates are to be considered innocent until they are proven guilty by the competent court.”<sup>82</sup> It is not clear that any further action has been taken by the NHRCB.

#### 4. Conclusion

Considering the catastrophic human rights situation in Bangladesh in 2017 and particularly in 2018 running up to the 11<sup>th</sup> Parliamentary Elections, the country needs a fully independent NHRI, empowered to protect the rights of the people. Unfortunately, the NHRCB is still very far from meeting these expectations.

The lack of political will of the Government to cooperate in investigations and to take into account the recommendations from the NHRCB has made the Commission a dysfunctional body, which lacks trust of the victims and the members of their families; while the controversial selection process has turned the Commission into a subservient entity of the Government.

GANHRI-SCA has acknowledged that the NHRCB is operating in particularly difficult

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<sup>81</sup> ‘Juvenile Correction Center Visit’, NHRCB, 2 November 2016, available at <http://www.nhrc.org.bd/site/news/84ca8f2b-943f-4c37-afea-122d61f4f723/Juvenile-Correction-Center-Visit>.

<sup>82</sup> ‘Annual Report 2016’, NHRCB, p.13, available at [http://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/cb8edec9\\_5aee\\_4b04\\_bf2a\\_229d9cd226a0/Annual\\_Report\\_2016.pdf](http://www.nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/cb8edec9_5aee_4b04_bf2a_229d9cd226a0/Annual_Report_2016.pdf).



circumstances,<sup>83</sup> however the NHRCB is even failing to implement its own second five-year strategic plan with regard to investigation and monitoring of cases and coordinating with state agencies and civil society organisations. Human rights defenders remain unsupported and unprotected, while the Commission itself is inaccessible to victims and remains ineffective.

## **5. Recommendations**

### **To the Government of Bangladesh:**

- Reduce the number of Government representatives in the Selection Committee for the NHRCB and include members of civil society;
- Accept the recommendations of the NHRCB and take action to implement them;
- Set up an independent secretariat by ending the practice of secondment to ensure the independent and effective functioning of the Commission, by amending the NHRC (Officers and Staff) Recruitment Rules 2012 to incorporate provisions for the recruitment of potential officials based on merit and experience in the human rights field;
- Ensure that the NHRCB has an adequate budget and improve its financial autonomy by including a separate budget line in the national budget;
- Place the annual report of the Commission before the Parliament for debate to make the Commission accountable for its activities.

### **To the National Human Rights Commission Bangladesh:**

- Exercise full power and mandates as specified in the National Human Rights Commission Act, 2009;
- Exercise its power to lodge applications to the High Court Division of the Supreme Court for filing writ petitions under the Constitution;
- Organise capacity enhancement trainings or workshops for NHRCB staff on human rights issues;
- Develop mechanisms to support persecuted human rights organisations and human rights defenders at risk by providing immediate support, safe houses, relocation, legal aid, and also by taking initiatives for creating a secure atmosphere for them to work;
- Follow-up the implementation of the UPR recommendations by the Government;
- Ensure that the method of communication of complaints to the NHRCB is widely known, especially by disadvantaged groups. To this end, the NHRCB should urgently finalise the NHRC (Complaint & Inquiry) Rules. Before finalising these rules the NHRCB should open dialogues with civil society for their recommendations;
- Develop the website, and equip it with easily accessible information for interested parties including human rights defenders and researchers.

### **To Parliament:**

- Review and make necessary changes to the NHRC Act 2009 and abolish current ambiguities such as around the selection process of the Chairperson of the Commission;

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<sup>83</sup> 'Report and Recommendations of the Session of the Sub-Committee on Accreditation', SCA, March 2015, available at [https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAcreditation/Documents/SCA\\_MARCH\\_2015\\_FINAL\\_REPORT\\_-\\_ENGLISH.pdf](https://www.nhri.ohchr.org/EN/AboutUs/GANHRIAcreditation/Documents/SCA_MARCH_2015_FINAL_REPORT_-_ENGLISH.pdf).



- Take the initiative to extend the power of the Commission to directly investigate members of the security forces and/or the police for allegations of human rights violations committed by them;
- Ensure that, for operational independence, the NHRCB has the power to draft its own rules of procedure that cannot be modified by an external authority.

**To International Human Rights Mechanisms/Bodies:**

- The Asia Pacific Forum of National Human Rights Institutions and the GANHRI-SCA should regularly monitor the activities and performance of the NHRCB and recommend the Commission to act in compliance with the Paris Principles;
- The UN Human Rights Council should strongly urge the Government of Bangladesh and the NHRCB to follow their international obligations in upholding the human rights of the people of Bangladesh and effectively implement the recommendations made during the UPR process in compliance with the Paris Principles, as well as the recommendations made by treaty bodies.

# MALDIVES: GONE MISSING

*Maldivian Democracy Network (MDN)<sup>1</sup>*

## 1. Introduction

The review of the performance of the Human Rights Commission of the Maldives (HRCM) is conducted this year in the context of the 25<sup>th</sup> anniversary of the adoption of the Paris Principles. The review has been undertaken through close analysis of the mandate and activities of the HRCM throughout 2017 and the first three months of 2018, using desk research. Sources include Act No. 6/2006 the Human Rights Commission Act (HRCA), annual reports of the HRCM, press statements, media reports, and information gathered from victims of human rights violations and civil society. Although the performance reviews that appear in this report are generally prepared in collaboration with the NHRI, it is with great disappointment that we note the HRCM did not accommodate such an engagement. This absence from the consultative process reflects a concerning reality of the lack of engagement by the HRCM with the civil society organisations of the Maldives, engagement which is direly needed at this juncture.

The purpose of this analysis is to highlight the successes and challenges faced by the HRCM with the view that civil society may be able to advocate on that basis to further strengthen the HRCM. Better cooperation from the HRCM in providing access to information is key to the success of such advocacy.

This is the 11th successive year in which the HRCM has been reviewed by the Asian NGO Network on National Human Rights Institutions (ANNI), yet to date the HRCM has not acknowledged, implemented, or engaged with civil society on the recommendations made to it over the years.

## 2. Overview

The HRCM currently falls under the ‘B’ grade category of the Global Alliance on National Human Rights Institutions Sub-Committee on Accreditation (GANHRI-SCA), dating from its accreditation in 2008 and subsequent review by GANHRI-SCA in 2010.<sup>2</sup> It has been unable to move up to the ‘A’ grade due to the failure to observe the pluralism criterion, more specifically failing to enable the presence of a representative of a different religious tradition. This is due to a limitation in the Maldives Constitution imposed by Article 9(d) stipulating that every Maldivian shall be a Muslim, which in turn appears in the HRCM’s enabling law, which prescribes that each member of the Commission must be a Muslim, in addition to being a Maldivian. While this clause in the law is clearly unnecessary, it is of concern that the SCA focuses solely on the HRCM’s enabling law in its review, and does not also examine the degree to which the HRCM is implementing, or failing to implement, its mandate to promote and protect human rights, which is the primary objective of an NHRI as the Paris Principles state.

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<sup>2</sup> ‘Status Accreditation Chart’, GANHRI, 21 February 2018, available at <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/Status%20Accreditation%20Chart.pdf>.

The ANNI report has been published with a chapter on the HRCM every year since 2007. None of the recommendations made to the HRCM, in addition to those that have been made to the Government and the Parliament, have been implemented. A reminder of all of the ANNI recommendations made to the HRCM was communicated to the Commission earlier this year by the Maldivian Democracy Network (MDN), with a request for an update on the status of the recommendations, and information about challenges the HRCM faces in implementation of the recommendations. A response has not been received from the HRCM. It is of further concern that when addressed with questions regarding activities and policies, the current HRCM claims that some of the policies, recommendations and activities were from “the previous Commission and hence cannot answer for it”. It is the view of MDN that each Commission should carry on the mandate, work, and all other business from the preceding Commission and maintain the integrity of the institution, regardless of when an individual member was appointed.

This chapter will examine the performance of the HRCM around instances of violations of human rights, examining the powers of the Commission in reference to the Paris Principles. It will analyse the composition, mandate, and methods of operation of the HRCM in light of the Paris Principles, as well as some of the recommendations made by GANHRI-SCA in this regard.

### **3. The Human Rights Commission of the Maldives and the Paris Principles**

#### **3.1 Functions, Mandate, and Structure**

The Human Rights Commission of the Maldives is established by the Constitution and the HRCMA (Act No. 6/2006).<sup>3</sup> The law clearly sets out the mandate of the HRCM as an independent institution to protect and promote human rights. The law affords the HRCM *suo moto* powers, authority around red tape such as requiring no permission or prior notice when visiting places of detention, criminal investigative powers, and the power to refer criminal cases for prosecution directly. GANHRI-SCA recommended the HRCM to expand the existing mandate of the Commission to cover all human rights and fundamental freedoms.<sup>4</sup>

#### *Human Rights Protection*

According to informal conversations with members of the Commission, the HRCM has been engaged in reviewing laws and advising the Parliament on findings and recommendations. However, MDN is not aware of how the Commission advocates to have its recommendations taken account of in the legislation. Ideally this would happen during the point in the legislative process when special parliamentary committees amend the bills in preparation for voting on the floor. Several draconian laws have been passed in the past year that restrict the fundamental freedoms ensured by the Maldivian Constitution, such as the Freedom of Expression and Right to Protection from Defamation Act, which criminalises defamation years after it was decriminalised. The HRCM is not known to have acted to prevent the passage of the bill or to protect journalists and media houses that were persecuted using the law. There have also been no instances where, save from sharing comments with the Parliament, the HRCM has sought to reach out to the courts to ensure compliance with their

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<sup>3</sup> Human Rights Commission Act, available at

<http://www.hrcm.org.mv/publications/otherdocuments/HRCMAActEnglishTranslation.pdf>.

<sup>4</sup> ‘Report and Recommendations of the Sub-Committee on Accreditation’, GANHRI, April 2018, available at [https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/2008\\_April%20SCA%20Report.pdf](https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/2008_April%20SCA%20Report.pdf).

recommendations. The HRCM has refused to respond to queries for the compilation of this report, hence the current situation could not be shared.

While the HRCA enables the Commission to inquire, make recommendations, and take measures to check and prevent the infringement of human rights, there is significant room for improvement in the HRCM's work to protect human rights. The Maldives has constantly been in political turmoil since the establishment of the HRCM, and in cases of gross violations of human rights in the country, such as human rights defenders being targeted and attacked resulting in the death of a human rights defender, as seen in the case of Yameen Rasheed, and in the case of death of detainees due to state negligence, as seen in the death of Abdulla Rasheed (both cases are discussed further in the 'Case Studies' section), the HRCM has remained silent. It is evident that this is not for lack of data as the HRCM will have sufficient information, in the form of public complaints and public statements made by local and international rights groups, of trends in the rapidly declining environment of basic human rights.

The Commission has not made public statements calling out violations of human rights by the state nor has it disclosed information (to civil society or the public) of efforts it has made to engage with the state over these incidents.

Some incidents that demonstrate the response from the HRCM from the reporting period can help to better understand the performance of the Commission, on paper one of the most powerful independent institutions in the Maldives.

#### State actions destroying environment and livelihoods

The Government of the Maldives has launched a series of development projects that have severely damaged the environment, destroyed the livelihoods of communities, and contributed to the rapidly growing problem of climate change in the Maldives. One of the most significant and recent projects that threatened livelihoods is the development of an airport at Kulhudhuffushi in the Haa Dhaalu Atoll.<sup>5</sup>

The mangroves on this wetland have been a source of natural protection from tidal waves, flooding and tsunami. A host of serious issues, in addition to the environmental and economic impact of the dredging, such as the loss of livelihoods of the women in the coir rope making community on the island, corruption, and illegitimate actions by the state such as ignoring recommendations after the Environmental Impact Assessment, have been raised by rights groups. There has been no public consultation around these high impact projects at all. The HRCM has remained silent on these issues and has not engaged with relevant stakeholders or civil society to address any of the problems.

#### State of emergency

President Abdulla Yameen imposed a state of emergency in the Maldives on 5 February

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<sup>5</sup> 'Edging towards ecocide? Mangrove destruction in Kulhudhuffushi', *Maldives Independent*, 2 November 2017, available at <http://maldivesindependent.com/environment/edging-towards-ecocide-mangrove-destruction-in-kulhudhuffushi-133925>.

2018. The emergency was declared following a Supreme Court Order<sup>6</sup> on 1 February to release nine political prisoners as their sentencing was found to be based on political motivations. The Supreme Court ordered a re-investigation into the case and a retrial. It also ordered the reinstatement of 12 MPs on the basis that their dismissal was unconstitutional.<sup>7</sup>

Refusing to implement the Supreme Court Order, the Government imposed a state of emergency and forcefully arrested the Chief Justice Abdulla Saeed and Justice Ali Hameed of the Supreme Court.<sup>8</sup> The Government then arrested several members of the United Opposition, including the former president Maumoon Abdul Gayoom, whilst the opposition was preparing for presidential elections scheduled for October 2018.

Civil society raised concerns about the unconstitutionality of the state of emergency, including the suspension of fundamental rights in contradiction to the constitutional provisions for suspension of rights in a state of emergency. Additionally, the Government used the police and army to crack down on protesters using excessive force, injuring several and arresting hundreds within the duration of the state of emergency.<sup>9</sup> An extension to the state of emergency was imposed after the initial 15 days was completed. This extension was passed through the Parliament, despite there being no quorum.<sup>10</sup>

The HRCM remained silent through these events, with the exception of a press statement that asked protesters to take care not to involve minors. None of the requests for emergency intervention into allegations of torture were acknowledged by the HRCM, which asked families of victims to lodge formal complaints with it. The families who lodged these complaints then received telephone calls from the HRCM asking them to withdraw the complaints when the victims were released by the authorities. The swift findings that the families received from the HRCM said that the police had not violated any laws. The silence of the HRCM has played into the hands of the Government that has used it to legitimise its actions in front of the people and the international community. This has disempowered the people and created a situation of impunity for the Government to use excessive force.

The HRCM has failed to protect human rights in the country. During the past few years the human rights situation has deteriorated at an unprecedented rate. In this context and in the run up to the presidential election in September 2018, the Commission has not shown the diligence and unwavering commitment to human rights that is expected from it.

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<sup>6</sup> Supreme Court Order 2018/SC-SJ/01 (unofficial translation), 1 February 2018, available at <http://judiciary.gov.mv/component/joomdoc/iulaan/unofficial-translation-of-the-sc-court-order-2018-sc-sj-01-pdf/download.html?Itemid=439>.

<sup>7</sup> On 10 July 2017, the Attorney General filed a constitutional case at the Supreme Court for a ruling on the dismissal of MPs from the parliament in a scenario where they switch or are dismissed from the party they got elected from. The court ruled in favour of the Attorney General, which led to the dismissal of the MPs. Later, on 13 March 2018, the Parliament passed an Anti-defection bill further codifying this ruling.

<sup>8</sup> 'Maldives, state of emergency: two Supreme Court judges arrested', *AsiaNews.it*, 6 February 2018, available at <http://www.asianews.it/news-en/Maldives,-state-of-emergency:-two-Supreme-Court-judges-arrested-43023.html>.

<sup>9</sup> 'Joint press release calling on the government of Maldives to end mass arrests of peaceful protestors, and lift the State of Emergency', Maldivian Democracy Network, 19 March 2018, available at <http://mdn.mv/joint-press-release-calling-on-the-government-of-maldives-to-end-mass-arrests-of-peaceful-protesters-and-lift-the-state-of-emergency/>.

<sup>10</sup> 'Maldives parliament approves extension of state of emergency by 30 days', Reuters, 20 February 2018, available at <https://www.reuters.com/article/us-maldives-politics/maldives-parliament-approves-extension-of-state-of-emergency-by-30-days-idUSKCN1G41Z9>.

Too many repeated incidents of police brutality, torture, politically motivated dismissals from employment, murders, threats to human rights defenders, and other forms of discrimination and violence have gone absolutely neglected by the HRCM. The Commission does not use its statutory power to enforce recommendations where the Government and other agencies refuse to implement those recommendations. No information was offered from the HRCM as to whether they follow up on the recommendations they make.

#### *Human Rights Promotion*

The Annual Report of the HRCM describes a multitude of training sessions conducted for various state institutions and schools, and public engagement efforts to raise awareness and instil a culture of respecting human rights in the country. The statistics show that a total of 3,620 individuals were directly engaged as part of these efforts, which is 987 individuals fewer in comparison with the HRCM's direct engagement in 2016. While these numbers show that the HRCM makes an effort to reach out to the public, the effectiveness of such interventions or engagements remains to be seen. The Annual Report falls short in that it does not examine the effectiveness of this engagement, or the appropriateness of the thematic areas focused in these discussions, given the context in the Maldives. It is worth noting that all public outreach efforts conducted in 2017 stray away from discussing contentious areas of human rights specific to the Maldives and focus on 'softer' rights (such as child rights). Unless this engagement responds to the context in the Maldives and its effectiveness is ensured, these statistics of engagement mean little in the face of deteriorating respect for fundamental human rights all across the country.

#### *Accountability and Publication of Findings and Reports*

The HRCM produces an annual report of activities against the financial allocation made to the institution. It is not clear how the Parliament uses this information. The annual reports are published on the website of the HRCM pursuant to Section 32(c) of the HRCA and comprise the topics required by Section 32(b) of the Act.

### **3.2 Autonomy from the Government and Independence Guaranteed by Statute or the Constitution**

It is particularly difficult to provide information in this section without the cooperation of the HRCM. However, the information provided is what can be relied upon at the time of writing.

#### *Budgetary Autonomy and Financial Independence*

The HRCM has financial independence. While some activities of the institution are funded independently through donors, the primary source of funding for the HRCM is from the state. However, the HRCM is exempt from the normal practice of annual budgeting and is allowed to bypass the reviews conducted by the Ministry of Finance and Treasury, so that it requests its annual budget directly from the Parliament. A specific budget line is allocated annually for the HRCM in the state budget. In common with all public institutions in the Maldives, there is a ceiling on the amount of funds the HRCM can request, which can limit the extent to which it has autonomy to determine the activities it carries out.

### *Interaction with, and State Submissions to, the International Human Rights System*

The HRCM does represent itself in different activities of international human rights mechanisms such as the submission of UPR stakeholder reports, shadow reports to treaty bodies, and participation in activities organised by regional and international human rights groups. However, it is impossible to ascertain whether the Commission assists or guides the Government in implementing recommendations made by international human rights mechanisms, as the Commission had not responded to this query at the time of writing.

The Supreme Court charged all five Commissioners of the HRCM with treason in 2015<sup>11</sup> following criticism towards the Supreme Court in a stakeholder report to the Universal Periodic Review (UPR). The Supreme Court ruling carried an 11-point guideline<sup>12</sup> that the Court mandated the Commission to follow, which includes a requirement to seek the approval of the Foreign Minister before any reports can be sent to international human rights bodies. Clearly this undermines the requirement that NHRIs should submit such reports in their own right, as set out in GANHRI-SCA's General Observation 1.4.<sup>13</sup> The then Commission declared the guidelines an impediment to their independence. However, in the first press briefing made by the current Commission, the Commission stated that the guidelines not only did not hinder the independence of the HRCM but even enhanced it.<sup>14</sup>

### *Selection and Appointment*

The selection and the appointment of the Commissioners is carried out in accordance with the HRCA, and the entire process begins with the heavy involvement of the President of the Republic. The initial application for appointment as a Commissioner of the HRCM is required to be filed at the President's Office, where applications are reviewed and sometimes applicants interviewed. Regardless of how many applications were filed, the President can choose to forward one application per vacant seat to the Parliament where the Parliament vets the applicants and puts the selection to a vote. There have been instances where names sent to the Parliament have been rejected following vetting, or at the voting stage. This would then be followed by the President sending a replacement name for the seat. The President of the Republic also appoints the Chair and Vice Chair of the Commission and has the power to dismiss them from these roles but cannot dismiss the membership of a Commissioner.

An NHRI can only fulfil its mandate effectively if its Commissioners understand basic human rights and the rule of law in great depth, which requires merit-based selection, as per GANHRI-SCA's General Observation 1.8.<sup>15</sup> The selection of the Commissioners is essential in this sense, so that the Commission may function effectively based on the Commissioners' skills, rather than through 'on the job learning'.

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<sup>11</sup> 'Translation: Supreme Court v. HRCM', *Minivan News*, 24 June 2015, available at <https://minivannewsarchive.com/politics/translation-supreme-court-v-hrcm-100080>.

<sup>12</sup> *Ibid.*

<sup>13</sup> General Observations of the SCA, 2013, Section 1.4, available at [https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC\\_SCA\\_General\\_Observations.pdf](https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC_SCA_General_Observations.pdf).

<sup>14</sup> 'HRCM: Supreme Court guideline does not constrain HRCM', *sun.mv*, 27 March 2016, available at <https://english.sun.mv/36840>.

<sup>15</sup> General Observations of the SCA, 2013, Section 1.8, available at [https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC\\_SCA\\_General\\_Observations.pdf](https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC_SCA_General_Observations.pdf).



### *Dismissal Procedures*

The HRCA of the Maldives provides for immunity for the members of the HRCM not to be sued for slander or other similar lawsuits, as a result of doing their job as required by the law. However, this immunity was effectively removed by the Supreme Court in 2010 when the court charged and tried Commissioners for treason, as discussed above, for submitting the stakeholder report to the UPR. It is a dangerous precedent, which puts all Commissioners under threat for speaking the truth. As a result, in practice neither Commissioners nor staff have immunity against harassment or malicious accusations, and subsequently these accusations can be used as a pretext to oust them.

The Parliament is the accountability mechanism for the HRCM. However, given the fact that when the Parliament has, for political reasons, rejected genuine petitions around disappearances and murders, it is apparent that any inquiry into the conduct of the HRCM would similarly take place on political grounds.

### **3.3 Pluralism**

#### *Pluralism of Commissioners*

The HRCA states that every Commissioner shall be a Maldivian. Section 6 of the Act states in addition that every Commissioner shall be a Muslim – an immediate loss of compliance with the pluralism requirement of the Paris Principles. The HRCM has not to public knowledge attempted to advocate to remove or amend this obviously unnecessary clause, and neither has it engaged with civil society in addressing it.

The announcement made inviting applications for the positions of Commissioners of the HRCM also does not indicate or encourage pluralism. In terms of gender-balance, although there is no such requirement in the HRCA, the current Commission is composed of two women and three men. However, politically or economically disadvantaged groups are not represented in the current membership and it is unlikely that this is taken into account in selection since there is no written guideline encouraging pluralism or consideration of socio-political or socio-economic elements of an applicant's background. The HRCM could approach the Parliament and the President's Office about the need for pluralism in its composition, but ultimately, as the selection process currently operates, it is the responsibility of Parliament to ensure such representation within the Commission. The selection of the Commission is carried out between the President's Office and the Parliament only. There is no consultation with stakeholders before Commissioners are voted on and give their oath.

#### *Collaboration with Civil Society and other Stakeholders*

The HRCM hosts an annual *Human Rights NGO Forum*. However, despite the fact that the Forum spends three full days with over 40 participants, it has as yet been unable to address the pressing human rights concerns of the participating NGOs. The Forum is left entirely to the staff of the HRCM to organise, and at the forum in early 2018 Commissioners had to be asked to join a session where they interacted with the participants for 15 minutes. The Forum ended with no output and no forward plan. Such a forum with human rights NGOs and the HRCM in one room should provide a wealth of opportunities for all involved and if it was conducted constructively it could produce valuable outputs.

The experience of seven human rights NGOs that met with the Commission once during the state of emergency in March 2018 and once again, in April 2018, on the one-year anniversary of the murder of Yameen Rasheed, revealed several noteworthy reactions towards civil society from the HRCM. First, the HRCM tried to avoid the NGOs, sending them away on two occasions, and only agreeing to a meeting when the group refused to leave the premises unless they had a confirmed date for a meeting. Second, throughout the meetings the HRCM was extremely defensive of instances of its own incompetence that were raised by the NGOs. The second meeting ended with some of the Commissioners meeting privately with the family of Yameen Rasheed and implying to the family that “NGOs are just trying to create problems, and that the family was better off not engaging with them”.

### *Degree of Trust*

The degree of trust that the public and civil society have in an NHRI depends greatly on the extent to which it demonstrates that it is acting on behalf of the human rights of the people in that society. As has been demonstrated throughout this report, the HRCM has failed in this, most particularly during its silence during the state of emergency where it was seen to legitimise the use of excessive force by the Government.

It has also failed in even more basic respects, for example, complainants who call the complaints hotline at the HRCM report that the staff who answer the calls are extremely unhelpful at times, and do not understand the mandate of the HRCM. Callers reporting discrimination in schools have been told that it is not the mandate of the HRCM and have been referred to the Ministry of Education. A family calling to request an urgent intervention into the psychotic behaviour of an inmate was told that the victim did not need psychological attention.

### **3.4 Adequate Resources**

The GANHRI-SCA General Observations state that an NHRI has to be provided with an appropriate level of funding so that it can maintain its independence as well as its priorities and activities.<sup>16</sup> In the case of the Maldives, it does not appear that the HRCM has adequate funds to perform all the functions set out in its mandate. Given that the Maldives relies heavily on international aid in addition to having an extremely high debt, the state has not been able to provide sufficient funds to enable the HRCM to carry out the entirety of its mandate.

At the same time, the HRCM does not appropriately prioritise the resources it is allocated. While a significant amount of funds is spent on Commissioners’ travels to participate in different national and international fora, and on the capacity building of staff, the results of this spending cannot be justified based on how the Commissioners and staff conduct themselves in situations of human rights violations or crises.

A good example of the ineffective use of resources by the Commission is seen in the annual *Human Rights NGO Forum* that the Commission hosts, previously mentioned. The total lack of output does not justify the large amount of the HRCM’s budget that is spent on this event.

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<sup>16</sup> General Observations of the SCA, 2013, Section 1.10, available at <https://nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC%20SCA%20General%20Observations.pdf>.

It is unclear how much effort the HRCM puts into raising independent funds. With several resources and opportunities for funding available from international partners and donors, the HRCM could increase its productivity and, through accessing funds separate from the state, engage in politically sensitive areas where the state may not be receptive or provide funding. Having said this, there have been no known instances where the Government has cut off funding from the HRCM due to having been critical of the Government. It should also be mentioned that General Observation 1.10 notes that while it may be necessary for an NHRI to access external funding, this should ideally not compose the bulk of funding for an NHRI, as this could undermine its role as a state institution.<sup>17</sup>

The HRCM is rather limited in the funds it receives from the state, as each institution in the Maldives has to commit to a set ceiling when requesting funds. Thus, if the HRCM is to request adequate funding, this ceiling must be raised through a change in state policy.

### **3.5 Adequate Powers of Investigation**

#### *Powers of Investigation*

According to the HRCA, the HRCM possess the power to *inter alia* summon witnesses and persons related to an ongoing investigation, and procure their statements, along with procurement and examination of relevant documents and evidence necessary for an ongoing investigation. The HRCM does not seem to have used its *suo moto* powers in some of the worst human rights situations in the past year, where individuals are left with no support unless formal complaints are filed. Complaints filed by civil society are ignored or responded to with a brief conclusion referring to the victims as recipients of information.

There is no accountability for the HRCM with respect to the gaps in the way in fulfils its investigative mandate, as Parliament supports its politicised behaviour.

Reliable sources have disclosed that the HRCM is currently required to get the Attorney General's approval before a case investigated by the Commission can be sent to the Prosecutor General's Office to charge individuals for criminal offences. This runs contrary to the HRCA itself which gives the HRCM the power to refer criminal cases for prosecution directly. In addition, it has come to the notice of NGOs that the Commission has forgone its power to visit without prior notice places where people are deprived of their liberty, by informing the authorities prior to its visits.

The HRCM rarely initiates investigations into alleged violations before a victim lodges a complaint. Even in cases where large groups of people have been subjected to similar violations each individual victim must submit a separate complaint before their particular case will be investigated. In cases where a victim does lodge a complaint, the HRCM is often swift to conclude its investigation and inform the complainant that evidence of violations on the part of the state could not be found. Given the speed with which investigations are concluded, it is unlikely that the Commission is conducting a thorough and efficient investigation, which should include questioning individuals connected to the case and obtaining the documentation necessary for an effective investigation.

In other cases, the HRCM takes an unnecessarily long time to conclude a case. There is a

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<sup>17</sup> Ibid.

trend where a case lodged may not be concluded before the term of the Commission ends, and the succeeding Commission may simply say they are unaware of the case since it was investigated by the preceding Commission. Cases lodged by civil society on behalf of victims are ignored and when inquiries are made into their status, the Commission responds by saying that a formal reply will only be sent to the victims in question.

The investigations carried out by the HRCM are incompatible with the standards set out in the Paris Principles, as the Commission lacks the proactiveness to ask questions that fall within its jurisdiction, or that are applicable to the case. This further strengthens the public notion that the HRCM operates under significant political duress. The level at which investigations are carried out by the HRCM is unacceptable, given that the HRCA grants the HRCM extensive investigative powers, including the power to compel the attendance of witnesses, to demand submission of documentation where evidence is required, and to visit all places of deprivation of liberty without prior notice. We have noted cases where requests to check places of detention for disappeared people have gone unanswered by the Commission. Police crackdowns on protesters are treated by the Commission as normal and those injured or unlawfully arrested are left to seek out the Commission, rather than the Commission taking the initiative to address the issues by looking beyond the complaints it has received to the actual number of people harmed and the actual length and extent of the violations. Investigations are conducted without the adequate involvement of those affected and human rights violations are not looked at in depth, such as when investigations into allegations of torture are concluded in a matter of days.

In 2014 the HRCM conducted a National Inquiry into Access to Education by Children with Disabilities. The report of the inquiry was not completed when the Commission ended its term in 2015, and it was expected that a report would be published by its successors. However, a report has not yet come to light. When informal inquiries were made about the delays, the Chair of the HRCM informed NGOs that it was due to changes being made to the report, including the removal of some sections (which discussed issues she stated had been resolved) and inclusion of new information. It is alarming that the Commission would choose to alter the findings of a national inquiry held publicly. Basic research ethics do not allow for such alterations on a time-bound assessment.

The HRCM has not made any efforts to address any systemic human rights issue since the 2014 National Inquiry.

It cannot be determined whether the HRCM faces any obstacles in practice that would restrict it from considering an issue within its competence, on its own initiative or in response to a petitioner, since the Commission has refused to provide this information at the time of writing.

### *Court Cases*

The HRCM effectively enforced its powers for *amicus curiae* in 2013 when it intervened in the trial of a 12-year-old girl rape victim who was charged with sexual misconduct. The Commission is not known to have intervened in any court cases since then. This is not for lack of relevant court cases, as several individuals have since been arbitrarily arrested and unfairly sentenced in politically motivated instances.

## *Inspection of Prisons, Jails, Detention Centres, and Places of Confinement*

The HRCM has failed to fully utilise its power to visit places of detention without giving notice to the authorities, by announcing its visits in advance. It has also failed to respond to requests to check places of detention for disappeared persons.

The drinking water at the police custodial centre on Dhoonidhoo Island was tested by the Police Integrity Commission in 2011, when it was stated by the Water and Sewerage Company that the water was not drinkable. The water remains contaminated and no action has been taken by the HRCM over this matter.

### *Case Studies*

- a) *Yameen Rasheed* – Yameen Rasheed,<sup>18</sup> a blogger and avid Twitter activist, was the lead human rights defender in the campaign to find disappeared journalist Ahmed Rilwan (aged 28, he was last seen on 8 August 2014 as highlighted in the 2015 ANNI report). Rasheed, like Rilwan, was a strong critic of state corruption, the lack of the rule of law, and of religious extremism in the Maldives. Rasheed publicly spoke about receiving death threats and also about lodging these threats with the Maldives Police Service. The HRCM made no effort to investigate these threats. In the fourth year of receiving death threats, Rasheed was brutally murdered by multiple stab wounds, inside his apartment building. Rasheed’s family visited the HRCM on the one-year anniversary of the murder after the institution had failed to contact the family or obtain any information from the family despite the Commission having investigated a negligence case into the police for not having investigated the death threats reported by Rasheed. It must also be noted that Rasheed’s family currently have an ongoing case against police negligence, at the High Court of the Maldives and a ruling has not been made. When human rights organisations<sup>19</sup> that accompanied the family to the meeting asked the HRCM why they had not asked for a word from Rasheed’s family before concluding the case in favour of the police, a Commissioner with the HRCM said that the HRCM does not require the word of the family in the matter and that asking the police was sufficient to reach a conclusion.
  
- b) *Abdulla Rasheed* - Abdulla Rasheed was convicted of participating in an act of violence during the 2015 May Day Protest. The family alleges that while he was in custody there was negligence that led to Rasheed’s death. The family claims that Abdulla Rasheed did not receive adequate medical attention in custody and that this led to the failure of his kidneys and lungs. The family also suggested that the medical officer who diagnosed Rasheed was unlicensed. Abdulla Rasheed passed away on 10 October 2017, and the HRCM, on 17 May 2018 announced that the investigation is still ongoing and that nobody has been charged with negligence. This specific case amounts to torture, and yet the HRCM did not seem to see it as a case in need of urgent action. Neither did the HRCM initiate an investigation on its own initiative instead waiting for a party to lodge the case, highlighting the lack of proactiveness in executing its mandate.

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<sup>18</sup> WeAreYaamyn, available at <https://weareyaamyn.com/>.

<sup>19</sup> ‘Briefer: One year without justice for murdered blogger and human rights defender Yameen Rasheed’, Maldivian Democracy Network, 23 April 2018, available at <http://mdn.mv/briefer-one-year-without-justice-for-murdered-blogger-and-human-rights-defender-yameen-rasheed/>.

#### **4. Conclusion**

The findings of this report indicate that the performance of the HRCM is severely hindered through state actions as well as by the manner in which the Commission has conducted itself around significant human rights situations. Some of the incidents highlighted in the report point to serious gaps in compliance with the Paris Principles. In some cases, such as the investigations carried out by the HRCM, the enabling law of the institution, the HRCA, already contains the needed powers, and the failure lies with the HRCM to use those powers effectively. Likewise, it is not often possible to trace the problem to a lack of financial support, but rather to a lack of will in the Commission to cure its own problems.

The HRCM has neglected its duty to human rights defenders and civil society in general, acting as a standalone power that operates without consultation or engagement with stakeholders. The Commission needs to understand that its mandate is primarily to protect and promote the human rights of all, and it should align its actions to the implementation of this mandate.

#### **5. Recommendations**

##### **To the Government of the Maldives:**

- Remove all formal and informal obligations by the HRCM to seek approval from government authorities to carry out work, and end any controlling of the work of the Commission by government authorities;
- Implement recommendations and orders made to various government authorities in a timely manner;
- Make significant efforts to promote pluralism in the composition of the HRCM, including making any legislative changes required and ensuring inclusivity of disadvantaged groups when announcing vacancies on the Commission and when recommending applicants to the Parliamentary Committee.

##### **To the Supreme Court of the Maldives:**

- Retract the Supreme Court guidelines from the court's ruling on the HRCM and ensure the independence of the institution according to the Constitution of the Maldives.

##### **To the Human Rights Commission of the Maldives:**

- Review **all** recommendations made by ANNI in previous years and provide adequate feedback on the status of each recommendation along with challenges, if any, in implementation;
- Make constructive efforts to engage with Parliament to amend specific draconian laws;
- Organise a special quarterly event for human rights NGOs to discuss and propose solutions to the existing human rights situation, and ensure full engagement between civil society organisations and decision-makers at the Commission during this event, in addition to ensuring a fully consultative and participative event;
- Make public and accessible any recommendations that the HRCM makes on legislation.

# NEPAL: QUEST FOR INDEPENDENCE AND ACCOUNTABILITY

*Informal Sector Service Centre (INSEC)*

## 1. Introduction

The major objective of this report is to examine the performance of the National Human Rights Commission, Nepal (NHRCN) in 2017 and the first three months of 2018, and its compliance with the Paris Principles. The report focuses on progress made by the NHRCN with specific reference to concerns highlighted in the recommendations of the Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation (GANHRI-SCA) in its session held on 27-31 October 2014. The report is predominantly based on information gathered by the Informal Sector Service Centre (INSEC) during regular monitoring of the performance of the NHRCN.

## 2. Overview

The NHRCN was established in the year 2000 as a statutory body under the National Human Rights Commission Act (NHRC Act), 1997. The Interim Constitution 2007 made the NHRCN a constitutional body and this was maintained in the 2015 Constitution.<sup>1</sup> The NHRC Act 2012 replaces the NHRC Act of 1997 and was widely considered a step backwards in the powers and jurisdiction of the NHRCN.<sup>2</sup>

The NHRCN retained its 'A' status in its accreditation review held in October 2014 on the recommendation of GANHRI-SCA.

GANHRI-SCA began a special review<sup>3</sup> of the NHRCN from November 2012-October 2014,<sup>4</sup> on the basis of information provided by civil society and stakeholders. The review was concluded in 2014. The SCA raised concerns that the selection and appointment process is not clear, transparent, or participatory; that the NHRCN lacks financial autonomy; and that it is unable to hire and retain sufficient staff.<sup>5</sup> These issues will be discussed in more detail in the relevant sections below.

The year 2017 saw historic local level, federal, and parliamentary elections in Nepal. The

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<sup>1</sup> Constitution of Nepal, 2015, available at [http://www.constitutionnet.org/sites/default/files/2017-07/Constitution-of-Nepal-English-with-1st-Amendment\\_2\\_0.pdf](http://www.constitutionnet.org/sites/default/files/2017-07/Constitution-of-Nepal-English-with-1st-Amendment_2_0.pdf).

<sup>2</sup> 'Submission to the United Nations Universal Period Review', Advocacy Forum-Nepal, Asian Human Rights Commission, The Redress Trust, World Organization against Torture, 22 March 2015, available at [http://www.omct.org/files/2015/03/23060/upr\\_nepal\\_22march2015.pdf](http://www.omct.org/files/2015/03/23060/upr_nepal_22march2015.pdf); 'Evaluation of Strengthening the Capacity of the National Human Rights Commission (SCNHRC) Project' UNDP Nepal, 5 May 2014, available at <https://info.undp.org/docs/pdc/Documents/NPL/FINAL%20Evaluation%20Report%2005%20May%202014.pdf>

<sup>3</sup> The special review was on concerns raised by the SCA on (1) complaints within the jurisdiction of the Army Act, (2) the selection and appointment process, (3) financial autonomy and (4) staffing.

<sup>4</sup> 'Chart of the Status of National Institutions', GANHRI, 26 May 2017, available at [http://www.ohchr.org/Documents/Countries/NHRI/Chart\\_Status\\_NIs.pdf](http://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf).

<sup>5</sup> 'Report and Recommendations of the Session of the Sub-Committee on Accreditation', GANHRI, 27-31 October 2014, available at

<https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20OCTOBER%202014%20FINAL%20REPORT%20-%20ENGLISH.pdf>.



peaceful nature of these elections was a major achievement in a process that aims to put an end to more than a decade of political instability in the country. In such a context, people are looking to the Government to consolidate political stability, create economic prosperity, and move the country forwards on its path to development. Central to this process is the protection and promotion of the people's human rights, and in this context, the NHRCN has a crucial role to play as the country looks to build stability.

### **3. The National Human Rights Commission Nepal and the Paris Principles**

#### **3.1 Functions, Mandate, and Structure**

The functions, duties and power of the Commission are clearly stated in the Constitution of 2015 and the NHRC Act, 2012.

The Commission shall “respect, protect and promote human rights and ensure effective enforcement thereof”.<sup>6</sup> In this regard it has the power to investigate complaints, to coordinate and collaborate with civil society to enhance awareness of human rights, to make recommendations on action to be taken against perpetrators of human rights violations, to monitor and make recommendations on legislation, and to monitor implementation of international treaties.<sup>7</sup>

The NHRC Act 2012 gives additional powers to the NHRCN to conduct, or to cause to conduct, inspections and monitoring of prisons, other agencies of the Government of Nepal, public or private institutions, or any other places for the protection and promotion of human rights. It is authorised to issue recommendations and guidelines for the strengthening of the human rights protection of persons deprived of their liberty.

The NHRCN can investigate cases of alleged violations of human rights and bring them to the attention of the authorities concerned as per the NHRC Act 2012. It has also the power to investigate with the permission of the court concerned any *sub judice* case in which claims concerning human rights violations have been made. Furthermore, it can undertake research into various aspects of protection, promotion, enhancement, and implementation of human rights.

The NHRCN's powers are purely recommendatory. It does not have the power or mandate to punish the perpetrators; rather it sends its opinion in writing to the concerned agency or official setting out its recommended actions.<sup>8</sup> It does however have the power to release names of offenders.<sup>9</sup>

The actions the NHRCN can recommend are for compensation and action to be taken against the person guilty of violating human rights. It can also make recommendations for more fundamental reform, including by recommending amendments to legislation to ensure compliance with international human rights standards. In this regard the NHRCN has

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<sup>6</sup> Constitution of Nepal, 2015, Section 249(1), available at <http://www.constitutionnet.org/sites/default/files/2017-07/Constitution-of-Nepal- English -with-1st-Amendment 2 0.pdf>.

<sup>7</sup> Ibid. Section 249(2).

<sup>8</sup> National Human Rights Commission Act, 2012, Section 17, available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/National+Human+Rights+Commission+Act.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/National+Human+Rights+Commission+Act.pdf).

<sup>9</sup> Ibid. Section 7.

reviewed different laws such as on peasants' rights, the Foreign Employment Act, the Child Reform Prohibition Act, the Human Rights for Persons with Disabilities Act, and on prison reform.

### *Human Rights Protection*

The level of implementation of recommendations coming from the NHRCN is dismal. This is part of a wider culture of impunity and corruption in politics in Nepal that continues unabated. Thus, recommendations pile up and no action is taken. According to the annual report of the NHRCN, of the total recommendations made in 2017, 14.3 percent have been fully implemented, 47.9 percent were partially implemented, and no action has been taken for the remaining 37.8 percent of the recommendations made to the Government. The 14.3 percent of recommendations that were fully implemented were all recommendations in which compensation to victims was urged, however this year most of the calls for compensation remain unenforced, as do most of the recommendations for legal action.<sup>10</sup>

Given the wider context within which these recommendations are not being acted on, concerted action against impunity is required not only from the NHRCN, but also from political parties, civil society, human rights workers, and the media.

### Truth and reconciliation

As an example, until now no step has been taken towards amending the Enforced Disappearances Enquiry, Truth and Reconciliation Act, 2014 (TRC Act), despite the direction by the Supreme Court in 2014 and 2015. In 2014 the Supreme Court ruled the Government Ordinance on the Truth and Reconciliation Commission, 2013 (TRC Ordinance) to be unconstitutional in its granting of amnesties for perpetrators of serious human rights abuses<sup>11</sup> and in 2015 reasserted this finding in relation to the TRC Act, 2014.<sup>12</sup> In the Court's view, cases of enforced disappearances fall under the rubric of criminal acts and perpetrators should not be given amnesty. The Court also stated that "the Truth and Reconciliation Commission should meet international standards, including with regard to guarantees of autonomy and impartiality, and ensure the involvement and protection of victims and witnesses".<sup>13</sup>

The NHRCN has been exerting constant pressure on the Government to amend the TRC Act in line with international standards and the judgments of the Supreme Court through issuing

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<sup>10</sup> 'Annual Report (Synopsis) (2073-2074)', NHRCN, 2018, available at

[http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/Annual\\_Report\\_Synopsis\\_2073\\_74\\_Eng.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/Annual_Report_Synopsis_2073_74_Eng.pdf).

<sup>11</sup> 'Nepal: Government must implement landmark Supreme Court decision against impunity', International Commission of Jurists, 27 February 2015, available at <https://www.icj.org/nepal-government-must-implement-landmark-supreme-court-decision-against-impunity/>.

<sup>12</sup> 'A Full Decision of the Supreme Court TRC: an unofficial translation of the decision', United Nations and International Commission of Jurists, February 2015, available at [https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/xsp/.ibmmodes/domino/OpenAttachment/applic/ihl/ihl-nat.nsf/3EB2FC583759622EC1257F80005B7B99/CASE\\_TEXT/Nepal%20-%20Review%20of%20the%20Investigation%20of%20Disappeared%20Persons%20and%20Truth%20and%20Reconciliation%20Commission%20Act%2C%20Supreme%20Court%20-%202026.02.2015%20%5BEng%5D.pdf](https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/xsp/.ibmmodes/domino/OpenAttachment/applic/ihl/ihl-nat.nsf/3EB2FC583759622EC1257F80005B7B99/CASE_TEXT/Nepal%20-%20Review%20of%20the%20Investigation%20of%20Disappeared%20Persons%20and%20Truth%20and%20Reconciliation%20Commission%20Act%2C%20Supreme%20Court%20-%202026.02.2015%20%5BEng%5D.pdf).

<sup>13</sup> 'Nepal: Pillay welcomes Supreme Court's decision against amnesties for serious crimes', OHCHR, 4 January 2013, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14151&LangID=E>.

comments on the TRC Ordinance 2013<sup>14</sup> calling for removal of amnesty for “crime of a serious nature, crime against humanity, and war crime” amongst other substantial recommendations, and it has repeated these calls in press releases. The NHRCN has also emphasised the need to give importance to the victims in the transitional justice process in Nepal.<sup>15</sup> In 2017, it noted that victims of human rights violations are receiving neither justice nor reparation.<sup>16</sup>

One central problem with the Truth and Reconciliation Commission that the NHRCN has pointed out,<sup>17</sup> which applies also to the Commission of Investigation on Enforced Disappeared Persons, is that in Nepal, torture and enforced disappearance are not yet criminalised. This is despite the fact that Nepal became a state party to the Convention against Torture (CAT) in 1991. As a result, these two commissions will not be able to recommend appropriate action against rights violators where torture and enforced disappearance are involved. The NHRCN has urged the Government to criminalise torture and enforced disappearance, as part of an eleven-point recommendation that it has issued on transitional justice.<sup>18</sup> Bills to criminalise torture and enforced disappearance are currently under discussion in Parliament but are yet to be finalised. As the NHRCN has pointed out in a submission to the Universal Periodic Review (UPR), the bill imposes a statutory limitation of 90 days for cases of alleged torture to be filed, which is contrary to CAT’s stipulation that no such limitations should be imposed, and the definition of torture used is not in line with CAT’s broader definition.<sup>19</sup>

### The 2015 earthquake

In another case, three years since the devastating earthquake in 2015, nearly 70 percent of the people who lost their homes in that earthquake are still living in temporary shelters.

During this period, 21,272 families received a housing grant of Rs 300,000 each in three installments, which is only 3.18 percent of the total victims.<sup>20</sup> Out of around 700,000 destroyed houses, only 79,518 houses have been reconstructed. The NHRCN has issued a

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<sup>14</sup> ‘NHRC Comments On The Truth and Reconciliation Commission (TRC) related Ordinance, 2069’, 1 April 2013, available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/875483268TRC-Press%20Meet-%20NHRC%20Eng%201Apr2013.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/875483268TRC-Press%20Meet-%20NHRC%20Eng%201Apr2013.pdf).

<sup>15</sup> ‘The Present Situation of Transitional Justice in Nepal: Commission's View’, 5 February 2018, available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/Press%20Release%20Commissions%20view%20on%20Transitional%20Justice%2010-22.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/Press%20Release%20Commissions%20view%20on%20Transitional%20Justice%2010-22.pdf) and ‘NHRC Comments On The Truth and Reconciliation Commission (TRC) related Ordinance - 2069’, 1 April 2013, available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/875483268TRC-Press%20Meet-%20NHRC%20Eng%201Apr2013.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/875483268TRC-Press%20Meet-%20NHRC%20Eng%201Apr2013.pdf).

<sup>16</sup> ‘Eleven Years of the Comprehensive Peace Accord: A Brief Report on the Human Rights Situation’, NHRCN, 21 November 2017, available at [http://nhrcnepal.org/nhrc\\_new/doc/newsletter/CPA\\_Report\\_2074\\_8\\_5\\_Eng.pdf](http://nhrcnepal.org/nhrc_new/doc/newsletter/CPA_Report_2074_8_5_Eng.pdf).

<sup>17</sup> Ibid.

<sup>18</sup> ‘The Present Situation of Transitional Justice in Nepal: Commission's View’, NHRCN, 5 February 2018, available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/Press%20Release%20Commissions%20view%20on%20Transitional%20Justice%2010-22.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/Press%20Release%20Commissions%20view%20on%20Transitional%20Justice%2010-22.pdf).

<sup>19</sup> ‘The NHRI Nepal Joint Submission for The Second Universal Periodic Review of Nepal’, NHRCN, National Women Commission, National Dalit Commission, 22 March 2015, p.8, available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/NHRI%20Nepal%20joint%20Submission%20for%202nd%20UPR%20Review-2015.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/NHRI%20Nepal%20joint%20Submission%20for%202nd%20UPR%20Review-2015.pdf).

<sup>20</sup> ‘Epicentre Gorkha: Sluggish Post-quake Reconstruction’, *Nepal Human Rights Yearbook*, 2018, available at [http://inseconline.org/en/wp-content/uploads/2018/02/Province\\_Chapter3.4\\_Gorkha.pdf](http://inseconline.org/en/wp-content/uploads/2018/02/Province_Chapter3.4_Gorkha.pdf).

188-page earthquake monitoring report urging the Government to expedite the work. The Commission's recommendation in 2015 to "immediately rehabilitate or cause to rehabilitate and also provide appropriate compensation meant for those quake survivors rendered homeless due to the damage caused to their house of habitual residence"<sup>21</sup> has clearly not been satisfied.

### National Human Rights Action Plan

The NHRCN has been involved in monitoring implementation of Nepal's National Human Rights Action Plan (NHRAP). At present, the fourth NHRAP (2014-2019) is in its implementation phase.

The Government has convened central and district implementation and monitoring committees of the NHRAP. However, the NHRCN has undertaken monitoring in 57 districts and has found that the NHRAP is not being implemented effectively. In most districts, the members of the district committees were found to be unaware of the action plan.<sup>22</sup> The NHRCN published its monitoring report on the fourth NHRAP in 2017.

In an effort to raise awareness about the NHRAP during this period, the NHRCN organised and participated in discussions, seminars,<sup>23</sup> training, and awareness raising.<sup>24</sup>

### *Accountability and Publication of Findings and Reports*

The NHRCN has published its annual report since 2000. There is a constitutional provision that this report should be presented to the President and in the Parliament.<sup>25</sup> On 8 April 2017, following tremendous pressure from the Parliamentary Committee on Social Justice and Human Rights, the Government tabled the annual report of the NHRCN for discussion in Parliament for the first time.<sup>26</sup> This year, the NHRCN has again submitted its annual report to the President but it remains to be seen whether it will be debated in Parliament.

During this financial year, the NHRCN published one annual report, thirteen sectorial reports,<sup>27</sup> and one journal. This journal, entitled 'Human Rights Messenger' in English and

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<sup>21</sup> 'Preliminary Report on Monitoring on the Overall Human Rights Situation of Earthquake Survivors, Loss of Lives and Properties including the Humanitarian Support such as Rescue and Relief Distribution following the Massive Earthquake that hit the Nation on 25 April 2015', NHRCN, 27 May 2015, available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/Earthquake%20Monitoring%20Report-English-2015.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/Earthquake%20Monitoring%20Report-English-2015.pdf).

<sup>22</sup> 'Annual Report (Synopsis) (2073-2074)', NHRCN, 2018, pp. 9-10, available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/Annual\\_Report\\_Synopsis\\_2073\\_74\\_Eng.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/Annual_Report_Synopsis_2073_74_Eng.pdf).

<sup>23</sup> 'Human Rights National Action Plan Counselling Meeting Held', INSEC, 29 December 2017, available at <http://inseconline.org/en/news/human-rights-national-action-plan-counseling-meeting-held/>.

<sup>24</sup> Annual Report (Synopsis) (2073-2074)', NHRCN, 2018, p.2, available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/Annual\\_Report\\_Synopsis\\_2073\\_74\\_Eng.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/Annual_Report_Synopsis_2073_74_Eng.pdf).

<sup>25</sup> Constitution of Nepal, 2015, Section 294, available at [http://www.constitutionnet.org/sites/default/files/2017-07/Constitution-of-Nepal-English\\_-with-1st-Amendment\\_2\\_0.pdf](http://www.constitutionnet.org/sites/default/files/2017-07/Constitution-of-Nepal-English_-with-1st-Amendment_2_0.pdf).

<sup>26</sup> 'In a first, govt tables NHRC report in House', *The Kathmandu Post*, 8 April 2017, available at <http://kathmandupost.ekantipur.com/printedition/news/2017-04-08/in-a-first-govt-tables-nhrc-report-in-house.html>.

<sup>27</sup> Sectorial reports including: 'Selected decision of the NHRCN, Nepal', 'Trafficking in persons national report 2015/2016', 'Human rights issues that one needs to know', 'Important decisions on human rights', 'National inquiry guidelines on human rights violations', 'State of national human rights action plan', 'The state of earthquake victims (third monitoring report of human rights situation)', 'Strategic plan', etc.

‘Sambahak’ in Nepali,<sup>28</sup> takes up issues such as women’s rights, transitional justice, human trafficking, smuggling, and right to food issues. It includes academic write-up and research-based articles by various thematic experts on economic, social and cultural, and civil and political rights.

As per an NHRCN source, several fact-finding reports from inquiries undertaken by the NHRCN are yet to be published. For example, the NHRCN conducted a fact-finding mission into the killing of alleged drug dealer Prabin Khatri of Kushunti Lalitpur during a so-called ‘police encounter’ but none of the findings were made public. Similarly, the killing of Manoj Pun in Rupendehi during a police encounter remains under investigation. These cases are discussed in further detail in the ‘Case Studies’ section below. The Commission has already published the fact-finding and monitoring reports of the Bethari,<sup>29</sup> Maleth,<sup>30</sup> Rangeli,<sup>31</sup> and Tikapur<sup>32</sup> incidents.

### **3.2 Autonomy from the Government and Independence Guaranteed by Statute or the Constitution**

The 2015 incorporation of the NHRCN in the Constitution of Nepal, following from its inclusion in the 2007 Interim Constitution, gives the body a greater degree of long-term security. However, there are still serious concerns regarding the lack of guarantee of the independence of the NHRCN in the Constitution.

Some of the provisions in the NHRC Act 2012 constrain the NHRCN’s independence and autonomy. Therefore, in 2015 the Commission recommended to the Government of Nepal to amend such provisions in the Act.

#### *Budgetary Autonomy and Financial Independence*

The Paris Principles provide that a National Human Rights Institution (NHRI) should have adequate funding to enable it to have its own staff and premises in order “to be independent of the government and not be subjected to its financial control”. The NHRC Act 2012, however, is silent on the NHRCN’s financial independence. The annual budget of the Commission is allocated by the Government, but according to the source at the NHRCN there is no interference by the Government in the programming of the Commission within the ceiling of the budget, i.e. the NHRCN has autonomy over how it spends its budget.

But all the expenses must be approved by the Government, all cheques are issued by the Government, and the NHRCN cannot alter the budget headings without the Government’s approval. Furthermore, if the NHRCN wants to expand its presence and outreach into new geographic areas, it needs to consult with and gain approval from the Ministry of Finance. But travel to the regions and associated expenses, for example for an urgent assessment of human rights violations, does not require any prior approval from the Government. The

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<sup>28</sup> ‘Human Rights, Sambahak’, NHRCN, Vol.5, September 2017, available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/Sambahak\\_5th\\_Edition.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/Sambahak_5th_Edition.pdf).

<sup>29</sup> A clash between police and protestors on 15 September 2015 at Bethari, in which four people died including a 4-year-old and a 13-year-old.

<sup>30</sup> Five people were killed by the police on 5 March 2017, during a political meeting.

<sup>31</sup> Three people were killed in Rangeli on 21 January 2016 after police fired on a political meeting.

<sup>32</sup> Seven policemen and a child were killed, during a clash between protestors and the police on 24 August 2015. See ‘Case Studies’ section for more information.

NHRCN itself is independent in making the policy on this issue.

In its 2013 review of the NHRCN, GANHRI-SCA raised the issue of financial autonomy and specifically the need for the NHRCN to gain the approval of the Government for how it spends the allocated budget. After a response from the NHRCN, GANHRI-SCA expressed satisfaction that this rule is a standard in Nepal, applicable to all constitutional bodies, and is intended to prevent misuse of government funds.<sup>33</sup>

### *Interaction with, and State Submissions to, the International Human Rights System*

The NHRCN has submitted reports to the UPR process and as an 'A'-rated NHRI has travelled to Geneva to make statements during the adoption of the UPR report.<sup>34</sup>

During the process of the second UPR of Nepal, the Government consulted with the NHRCN and civil society members to receive feedback on its national report. The NHRCN also organised a consultation with concerned civil society organisations on 15 February 2016 in order to collate suggestions and reasons as to whether and why the Government should accept those UPR recommendations that remained pending following the review in November 2015.<sup>35</sup>

Under Section 6 of the NHRC Act 2012, the Government is required to send any treaty body reports to the Commission for its opinion, before the reports are forwarded to the relevant treaty body. A Commission source says it has provided its opinion on reports to CAT, and the Commission on the Rights of Persons with Disabilities before those reports were forwarded to the concerned treaty bodies.

### *Selection and Appointment*

The manner by which the members are appointed to an NHRI is crucial to ensuring the independence, professionalism, integrity, and credibility of the institution, as per the GANHRI-SCA General Observations. The current process of appointment to the NHRCN provides for the President to make those appointments on the advice of the Constitutional Council.<sup>36</sup> There is no provision for consultation with stakeholders and no possibility of public nomination. An NHRCN source says that although there is not an explicit provision regarding this in the Constitution, the Government is free to consult stakeholders and stakeholders are free to provide their opinion. Thus, during the parliamentary hearing process

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<sup>33</sup> 'Report and Recommendations of the Session of the Sub-Committee on Accreditation', GANHRI, October 2014, available at

<https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20OCTOBER%202014%20FINAL%20REPORT%20-%20ENGLISH.pdf>.

<sup>34</sup> Remarks by Hon. Commissioner of National Human Rights Commission (NHRC) of Nepal, Mohna Ansari, on the occasion of 31st Session of Human Rights Council in regard to 2nd cycle of Universal Periodic Review (UPR) of Nepal as on 16th March 2016, Geneva, available at [http://www.nhrcnepal.org/nhrc\\_activities\\_details-148.html](http://www.nhrcnepal.org/nhrc_activities_details-148.html).

<sup>35</sup> Nepal Recommendations of UPR-Second Cycle, 15 February 2015, available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/NHRC\\_Nepal\\_UPR\\_Process\\_Recommendations\\_Adoption\\_Human\\_Rights\\_Council\\_16Mar2015.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/NHRC_Nepal_UPR_Process_Recommendations_Adoption_Human_Rights_Council_16Mar2015.pdf).

<sup>36</sup> The Constitutional Council is a body created under the Constitution consisting of five members: the Prime Minister as the Chairperson together with the Chief Justice, Speaker, Chairperson of the Upper House, and the Leader of the Opposition in the Lower House.



as set out in the Constitution to take place prior to the appointment being made,<sup>37</sup> the parliamentary hearing committee can consult the opinion of stakeholders and the public.

In the special review of the NHRCN undertaken by GANHRI-SCA the selection and appointment process was flagged as an area of concern.<sup>38</sup> The SCA found that the process is not sufficiently transparent or participatory. It pointed to the absence of constitutional or legislative provisions requiring advertising of vacancies for members and notes that the selection process as currently followed by the Constitutional Council does not promote merit-based appointments. The SCA has recommended the NHRCN to advocate for these improvements to be incorporated into its founding legislation. However, the NHRCN has not taken any steps towards acting on this recommendation from the SCA.

### *Dismissal Procedures*

The Paris Principles stress the need to ensure dismissal processes are clearly stipulated in the founding law, and should be open and transparent. Aside from the ending of the Commissioner's term of office, the Constitution sets out that the post of Commissioner is considered vacant only if he or she dies, if he or she tenders their resignation in writing to the President, if a motion of impeachment is passed against him or her under Article 101 of the Constitution, or if he or she is found to be incapable to work due to mental or physical illness.<sup>39</sup>

Under the NHRC Act 2012, Commissioners are protected from lawsuits against any act carried out in good faith.<sup>40</sup>

## **3.3 Pluralism**

### *Pluralism of Commissioners*

Collectively the Commissioners should reflect gender balance, ethnic diversity, and the range of vulnerable groups in the country, to comply with the Paris Principles and the GANHRI-SCA General Observations on ensuring pluralism and on the selection and appointment process.

From the time of its establishment, the NHRCN has not had representation from the Dalit community amongst its Commissioners, however other minority or 'backwards' communities are represented. The appointment process as set out in Article 131 of the Interim Constitution included a requirement for diversity among Commissioners, specifically in relation to

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<sup>37</sup> Constitution of Nepal, 2015, Section 292, available at [http://www.constitutionnet.org/sites/default/files/2017-07/Constitution-of-Nepal-English-with-1st-Amendment\\_2\\_0.pdf](http://www.constitutionnet.org/sites/default/files/2017-07/Constitution-of-Nepal-English-with-1st-Amendment_2_0.pdf).

<sup>38</sup> 'Report and Recommendations of the Session of the Sub-Committee on Accreditation', GANHRI, 27-31 October 2014, available at <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20OCTOBER%202014%20FINAL%20REPORT%20-%20ENGLISH.pdf>.

<sup>39</sup> Constitution of Nepal, 2015, Section 248.5, available at [http://www.constitutionnet.org/sites/default/files/2017-07/Constitution-of-Nepal-English-with-1st-Amendment\\_2\\_0.pdf](http://www.constitutionnet.org/sites/default/files/2017-07/Constitution-of-Nepal-English-with-1st-Amendment_2_0.pdf).

<sup>40</sup> National Human Rights Commission Act, 2012, Section 33, available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/National+Human+Rights+Commission+Act.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/National+Human+Rights+Commission+Act.pdf).



gender.<sup>41</sup> However, this specification does not appear in the 2015 Constitution, which contains only a generic requirement for appointments to constitutional bodies to be made on inclusive principles.<sup>42</sup> The current Commission has one member from the Muslim minority community.

While it is highly desirable that those appointed as Commissioners are people of status and relevant experience, it is inappropriate to specify a tertiary educational qualification as a prerequisite for membership of the Commission.<sup>43</sup>

### *Pluralism of Staffing*

In 2005 the Commission appointed its staff with, for the first time in the history of Nepal, representation from the Dalit, indigenous, and marginalised communities. Other organisations later followed this example. As the primary rights body in Nepal, with a mandate to promote equality and combat discrimination, the NHRCN has become a positive example reflecting the diversity of Nepalese society in its staffing. The NHRCN has full control over the appointment of its staff in coordination with Public Service Commission.

Total staff			<i>Dalits</i> (so called 'lower caste')			<i>Adibasi janajatis</i> (Indigenous)			<i>Madheshi</i>			Disabled Persons			Total		
	Female	Male	Female	Male	Total	Female	Male	Total	Female	Male	Total	Female	Male	Total	Female	Male	Total
209	71	138	3	10	13	17	26	43	4	17	21	0	2	2	47	83	130

*Table showing staff diversity*

Where the vacancies under the reserved categories have not been fulfilled it is because insufficiently qualified candidates applied to fill the positions for the reserved quota.

In 2010 the Supreme Court found that the NHRCN had tried to appoint its temporary staff in dozens of permanent positions, despite the constitutional provision to give equal opportunity to every citizen to compete for public posts. The Supreme Court ordered the NHRCN to begin the recruitment process again, ensuring that all qualified persons had equal opportunity to compete for each post in an open process.<sup>44</sup>

<sup>41</sup> Interim Constitution of Nepal, 2007, Section 131(2), available at <http://www.wipo.int/edocs/lexdocs/laws/en/np/np006en.pdf>.

<sup>42</sup> Constitution of Nepal, 2015, Section 283, available at [http://www.constitutionnet.org/sites/default/files/2017-07/Constitution-of-Nepal-English-with-1st-Amendment\\_2\\_0.pdf](http://www.constitutionnet.org/sites/default/files/2017-07/Constitution-of-Nepal-English-with-1st-Amendment_2_0.pdf).

<sup>43</sup> Constitution of Nepal, 2015, Section 248(c), available at [http://www.constitutionnet.org/sites/default/files/2017-07/Constitution-of-Nepal-English-with-1st-Amendment\\_2\\_0.pdf](http://www.constitutionnet.org/sites/default/files/2017-07/Constitution-of-Nepal-English-with-1st-Amendment_2_0.pdf).

<sup>44</sup> 'SC scraps NHRC staff promotion rules', *The Himalayan*, 22 January 2010, available at <https://thehimalayantimes.com/kathmandu/sc-scraps-nhrc-staff-promotion-rules/>.

## *Collaboration with Civil Society and other Stakeholders*

There are Collaboration Guidelines between the Commission and NGOs in regard to activities and initiatives. The NRHCN has created internal consultative mechanisms that could facilitate regular discussions and communication with NGOs on issues at the national level. The NHRCN in the fiscal year 2016-2017 conducted more than 30 promotional activities in coordination and collaboration with civil society organisations.<sup>45</sup> Similarly, in the fiscal year 2017-2018 approximately 50 promotional and joint monitoring programmes were conducted. Final figures will be available with the publication of the NHRCN's annual report, due soon.

The NHRCN is including civil society representatives in its planning process as well. While preparing its Strategic Plan 2015-2020, the NHRCN included representatives from almost all the districts in Nepal.<sup>46</sup>

However, the Commission can still go further to enhance its cooperation and collaboration with civil society organisations.

Section 20(3)<sup>47</sup> of the NHRC Act 2012, which states that “if any foreign institution wants to conduct programs on the protection and promotion of human rights in Nepal, they shall have to seek consent of the Commission,” is inappropriate as ruled by the Supreme Court as well as in Om Prakash Aryal's case where advocate Om Prakash Aryal, along with other advocates, sought the Supreme Court's verdict to announce *ultra vires* and non-applicable those provisions in the NHRC Act that went against the principles of independence, autonomy, and competence.<sup>48</sup> Given the complementary nature of human rights work, it would be preferable to replace this provision with one that requires such institutions to work in coordination with the NHRCN and vice versa.

## *Degree of Trust*

At this moment many of the victims of armed conflict are losing hope of getting justice. In line with calls from conflict victims, the international community has urged the Nepal Government to amend problematic provisions in the TRC Act and Commission on Enforced Disappearances (CED Act). The NHRCN must consider the valid voices of victims in correcting faulty processes and must demand victim-centric commissions by pressurising the Government to amend the TRC and CED Acts to gain more trust from victims. To accomplish this, the Commission recently sent its 48-point recommendation to the Government of Nepal.<sup>49</sup>

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<sup>45</sup> ‘Annual Report (Synopsis) (2073 - 2074)’, NHRCN, p.2, available at

[http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/Annual\\_Report\\_Synopsis\\_2073\\_74\\_Eng.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/Annual_Report_Synopsis_2073_74_Eng.pdf).

<sup>46</sup> ‘Strategic Plan 2015-2020’, NHRCN, pp.57-72, available at

[http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/NHRC%20Strategic%20Plan%20English.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/NHRC%20Strategic%20Plan%20English.pdf).

<sup>47</sup> National Human Rights Commission Act, 2012, available at

[http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/National+Human+Rights+Commission+Act.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/National+Human+Rights+Commission+Act.pdf).

<sup>48</sup> ‘Case Comment: Om Prakash Aryal and others v National Human Rights Commission (NKP 843 (2070))’, Nepalese Constitutional Law, Governance & Public Policy Issues, 1 March 2015, available at

<http://bipinadhikari.com.np/case-comment-om-prakash-aryal-and-others-v-national-human-rights-commission-nkp-843-2070-2/>.

<sup>49</sup> ‘NHRC Opinion on TJ Bill’, available at

[http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/14120847NHRC\\_Opinion\\_on\\_TJ\\_Bill\\_2075\\_4\\_22.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/14120847NHRC_Opinion_on_TJ_Bill_2075_4_22.pdf).

### 3.4 Adequate Resources

The current funding for the fiscal year 2016-2017 was 173,926,000 Nepalese rupees.<sup>50</sup> The current law under which the NHRCN operates has a provision that allows the NHRCN to explore means and resources from different agencies by way of grants as required for the performance of its functions.<sup>51</sup> To this end the NHRCN has been collaborating with a United Nations Development Programme (UNDP) -funded Strategic Plan Support Project (SPSP). This project is providing financial support to the Commission for activities such as training and publications. However, all such financial arrangements entered into with national and international organisations require approval from the Finance Ministry.<sup>52</sup>

The need to get approval from the Government also hampers the NHRCN when it comes to staffing. At present the NHRCN has 209 staff working in eleven offices at central, provincial, and branch offices. The NHRCN is expanding to open branches in all the provinces, as Nepal moves towards a federal system.

The NHRCN has consistently mentioned that it does not have adequate resources. This extends down to the most basic level, where the Commission currently lacks adequate physical infrastructure. The main building of the NHRCN was damaged by the devastating earthquake of 25 April 2015 and at present it is operating its services from makeshift huts. The Government has failed to provide the Commission with new premises.

### 3.5 Adequate Powers of Investigation

#### *Powers of Investigation*

The Commission has a wide range of powers to initiate an investigation including the power to instigate *suo moto* investigations.

The NHRCN may investigate any matter of human rights violations that is *sub judice*, with the approval of the concerned court.

The NHRCN has the following powers of investigation under the Constitution:<sup>53</sup>

- It can summon and enforce the appearance of any individual before it, and record statements or depositions, examine evidence, and produce exhibits and proofs.
- In cases where a serious human rights violation is alleged to have happened or is about to happen, the Commission may enter and search any premises, as well as search persons, and take any relevant documents.
- Where it has information that a human rights violation is being committed against an individual it may enter any building, including government offices, without notice, to affect a rescue.

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<sup>50</sup> 'Annual Report (Synopsis) (2073 - 2074)', NHRCN, p.2, available at

[http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/Annual\\_Report\\_Synopsis\\_2073\\_74\\_Eng.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/Annual_Report_Synopsis_2073_74_Eng.pdf).

<sup>51</sup> National Human Rights Commission Act, 2012, Section 20, available at

[http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/National+Human+Rights+Commission+Act.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/National+Human+Rights+Commission+Act.pdf).

<sup>52</sup> Ibid. Section 20(2).

<sup>53</sup> Constitution of Nepal, 2015, Section 249(3), available at

[http://www.constitutionnet.org/sites/default/files/2017-07/Constitution-of-Nepal-English-with-1st-Amendment\\_2\\_0.pdf](http://www.constitutionnet.org/sites/default/files/2017-07/Constitution-of-Nepal-English-with-1st-Amendment_2_0.pdf).

- It may order compensation, in accordance with the law, to be paid to any individual whose human rights are found to have been violated.

Under the 2012 NRHC Act, the Commission also has the power to conduct or cause to conduct inspection or monitoring of prisons, other government agencies, or public or private institutions, and issue suggestions and directives as to how these agencies could better protect and promote human rights.<sup>54</sup>

### *Court Cases*

The NHRCN may investigate any case before a court that involves human rights violations with the approval of the concerned court. The NHRCN may also request evidence from the court records.

It would be beneficial if the NHRCN was legally authorised to serve as *amicus curiae*. This would enable the NHRCN to complement expertise in human rights related cases to provide guidance to the court.

### *Inspection of Prisons, Jails, Detention Centres, and Places of Confinement*

The NHRCN may visit any prison or other public institution, to monitor or inspect with a view to promoting and protecting human rights. In the financial year 2017, the NHRCN conducted 350 monitoring visits<sup>55</sup> across the country, including to prisons and detention centres, to monitor the situation of inmates and detainees. The results of this monitoring have been made public in the Commission's monitoring report showing that the majority of prison buildings are in a dilapidated condition and are overcrowded.<sup>56</sup>

For example, the district prison of Mahottari in province 2, with the capacity to accommodate only 135 inmates and detainees, houses a total of 408 inmates and detainees. They are kept in a building which is in a dilapidated condition and are deprived of minimum human rights. The NHRCN has drawn the attention of the Government to these conditions through press releases<sup>57</sup> urging prison reform. The NHRCN has also included reference to the prison situation and the condition of inmates and detainees in its annual report 2017 with a recommendation to upgrade existing prison conditions and guarantee sanitation, room space, health checks, and quality food.<sup>58</sup>

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<sup>54</sup> National Human Rights Commission Act, 2012, Section 4(a), available at

[http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/National+Human+Rights+Commission+Act.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/National+Human+Rights+Commission+Act.pdf).

<sup>55</sup> 'Annual Report (Synopsis) (2073-2074)', 2018, available at

[http://nhrcnepal.org/nhrc\\_new/doc/newsletter/NHRC\\_Annual\\_Report\\_2073\\_74.pdf](http://nhrcnepal.org/nhrc_new/doc/newsletter/NHRC_Annual_Report_2073_74.pdf).

<sup>56</sup> 'NHRC paints bleak picture of prison conditions', *The Himalayan Times*, 28 December 2017, available at <https://thehimalayantimes.com/kathmandu/national-human-rights-commission-paints-bleak-picture-prison-conditions/>.

<sup>57</sup> 'Regional Prisons Cells monitored, Directive issued for Necessary Improvement', NHRCN, 16 February 2015, available at [http://nhrcnepal.org/nhrc\\_new/doc/newsletter/PR-NHRC-RO%20Jail%20monitoring%20and%20direction%20given%20for%20maintanance-Eng-16Feb2015.pdf](http://nhrcnepal.org/nhrc_new/doc/newsletter/PR-NHRC-RO%20Jail%20monitoring%20and%20direction%20given%20for%20maintanance-Eng-16Feb2015.pdf).

<sup>58</sup> 'Prisons should be turned into Rehab Centers', NHRCN, 11 February 2015, available at [http://nhrcnepal.org/nhrc\\_new/doc/newsletter/PR-Jail%20make%20be%20Rehabitation%20Centre-Eng-11Feb2015.pdf](http://nhrcnepal.org/nhrc_new/doc/newsletter/PR-Jail%20make%20be%20Rehabitation%20Centre-Eng-11Feb2015.pdf).

## Case Studies

The NHRCN has consistently failed to bring about justice through its investigations, as illustrated in the cases below.

- a) *Encounter killing of Prabin Khatri by security forces* - On 7 August 2017, an alleged drug dealer, Prabin Khatri, was gunned down by police when he reportedly opened fire on the police at Kushunti in Lalitpur. The encounter team from the Metropolitan Police Crime Division raided his house following a tip-off that he possessed contraband drugs and firearms. The NHRCN undertook a fact-finding mission into the incident, but the report was never made public. The facts about what actually happened on that day remain a mystery. In this issue, the case is officially still under investigation by the NHRCN.
- b) *Godar killings* - A team from the NHRCN conducted a fact-finding mission into the disappearance, on 5 September 2010, of five people, Sanjeev Kumar Karn, Durgesh Laav, Jitendra Jha, Pramod Narayan Mandal, and Shailendra Yadav, after a complaint was lodged with the NHRCN regarding their disappearance. The NHRCN investigation revealed that the victims had been buried on the bank of the Kamala River in Godar VDC in Dhanusha district, having allegedly been killed by the security forces in October 2003 during the armed conflict. The Commission exhumed the bodies at the suspected burial site on 8 September 2010. According to the investigation conducted by the NHRCN the victims were believed to be blind-folded and allegedly executed on the spot prior to their burial. On the basis of this and other investigations into disappearances during the armed conflict in Nepal, including eleven exhumations, the NHRCN released a report on 'Human Rights and Exhumation in the Armed Conflict'. It called on the Government to adopt the National Human Rights Commission Exhumation Guidelines 2012.<sup>59</sup> It has also called on the Government to take action against those responsible.<sup>60</sup> However to date no prosecution has taken place.
- c) *Encounter of Gangster Manoj Pun and Som Ale* - The NHRCN started an investigation into the police encounter on 23 February 2018 with the gangsters Manoj Pun and Som Bahadur Ale in Rupendehi District. The Commission collected statements from the relatives of the deceased. The case is still under investigation at the NHRCN.
- d) *Tikapur Kailali incident* - In 2015, seven policemen and a child were killed during clashes between demonstrators and police at Tikapur Kailali. The NHRCN carried out a fact-finding mission into the incident. It released recommendations via a press release. It called on the Government to carry out an impartial investigation into the incident, and take legal action against the guilty parties, as well as to provide appropriate relief and compensation to the families of the deceased and to manage treatment of the injured individuals.<sup>61</sup> However in 2017 the Government decided to withdraw charges

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<sup>59</sup>'Nepal: NHRC seeks justice for victims of enforced disappearances', Asia-Pacific Forum of National Human Rights Institutions, 2 August 2015, available at <http://www.asiapacificforum.net/news/nepal-nhrc-seeks-justice-victims-enforced-disappearances/>.

<sup>60</sup>'NHRC reminds govt to prosecute Godar massacre', *The Kathmandu Post*, 24 July 2016, available at <http://bit.ly/2a2xxIOhttp://kathmandupost.ekantipur.com/news/2016-07-24/nhrc-reminds-govt-to-prosecute-godar-massacre.html>.

<sup>61</sup> NHRCN decision on Tikapur, Rangeli and Bethari Incident' (in Nepali), NHRCN, available at [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).

against those alleged to have been involved.<sup>62</sup>

#### **4. Conclusion**

A national human rights institution can play a pivotal role in the national human rights protection mechanisms of a state, and with the amendment of some provisions of the NHRC Act 2012 the NHRCN can continue to develop with strength. To enhance and strengthen the Commission, the Commission should be fully consistent with the Paris Principles and with the highest international standards and best practices. The Constitution of Nepal vests primary responsibility in the Commission to protect and promote the human rights of its people. In order to perform these responsibilities, the Commission has a mandate to conduct inquiries and investigations, on its own or upon the petition or complaint filed to it, into violations of human rights. However, the Commission in many cases has not publicised the reports on these investigations. The level of implementation of recommendations coming from the NHRCN is dismal. This is part of a wider culture of impunity and corruption in politics in Nepal that continues unabated. So the Commission must exert further pressure on the Government and concerned authorities to amend the weak provisions of the NHRC Act, and to ensure an enforcement mechanism for recommendations from the NHRCN.

#### **5. Recommendations**

##### **To the Government of Nepal:**

- Revise the appointment procedure as set out in the Constitution to avoid the process being dominated by the Government. The revised process should ensure that vacancies are publicised widely, that the number of potential candidates from across a wide range of societal groups is maximised, that there is room for broad consultation and/or participation in the application, screening and selection process, that applicants are assessed on the basis of pre-determined, objective and publicly available criteria, and that members are selected to serve in their own individual capacity rather than on behalf of the organisation they represent;
- Ensure that the NHRCN is able to recruit its own staff, including its Secretary, and that it is obligated to guarantee that its staffing reflects the diversity of Nepali society;
- Enact a legal provision to provide adequate funding to the NHRCN;
- Clarify the status of NHRCN recommendations as binding decisions, ideally with a procedure through which these can become binding decisions of the court if necessary;
- Augment the power of the NHRCN under the NHRC Act to resolve complaints by making recommendations for the punishment of officials or awarding of compensation, with the power to suggest steps that a state body should take to provide a remedy for the cause of complaints, which will go further in resolving the grievance in question and in preventing its repetition in the future.
- Provide capacity building and training to the staff of the NHRCN;
- Ensure the effective and meaningful participation of the NHRCN in the Truth and Reconciliation process and ensure that any mechanism for transitional justice conforms to international standards;
- Promulgate necessary amendments to the NHRC Act to bring it into line with the Paris Principles and GANHRI-SCA General Observations;

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<sup>62</sup> 'Show Cause Notice for Withdrawing Cases', INSEC, 22 May 2017, available at <http://inseconline.org/en/news/show-cause-notice-for-withdrawing-cases/>.

- Prioritise the construction of NHRCN buildings for the central, provincial, and branch offices.

**To the National Human Rights Commission Nepal:**

- Exert pressure on the Government regarding the implementation of relevant recommendations;
- Continue to analyse major existing and proposed legislation, in compliance with the Constitution and NHRC Act, to make recommendations regarding consistency with international human rights norms;
- Publish periodic human rights situation reports and hold the Government accountable for the implementation of recommendations coming from the NHRCN, from the international human rights system, and from the five-year national human rights action plan of the Government;
- Publicise major fact-finding reports from missions conducted in the past.



# PAKISTAN: HANDICAPPED NCHR STRUGGLES FOR PROGRESSIVE REALISATION OF ITS MANDATE

*Bytes for All (B4A)<sup>1</sup>*

## 1. Introduction

In preparing this year's report, Bytes for All, Pakistan (B4A)<sup>2</sup> has followed a structured process of collecting responses from fellow Forum-Asia member, Potohar Organization for Development Advocacy (PODA) and other non-member civil society organisations. These include the Center for Social Justice (CSJ), Child Advocacy Network-Pakistan (CAN-Pakistan), and Forum for Dignity Initiatives (FDI). Rather than merely relying on secondary sources including newspapers, B4A preferred to engage with human rights organisations that engage with Pakistan's National Human Rights Institution (NHRI), constitutionally named as the National Commission for Human Rights (NCHR). The comprehensive input of the NCHR has also been sought to present an objective and unbiased analysis.

Through this report, Bytes for All, Pakistan is conducting an in-depth analysis on the performance of the NCHR.

## 2. Overview

In 2012, in compliance with the Paris Principles, 1991, the Pakistani government passed the National Commission for Human Rights Act (NCHR Act). In 2015, the Government announced the constitution of the Commission with Justice (Retired(R)) Ali Nawaz Chowhan, its first Chairperson. Pakistan has yet not applied for the accreditation of the Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation (GANHRI-SCA), however, the Secretary of the NCHR Mashood Ahmad Mirza affirmed that the institution has been preparing in this regard. "There is a checklist which needs to be fulfilled before the NCHR would apply for GANHRI accreditation. The homework is in progress and will be completed soon", the Secretary said.

In comparison with other NHRIs in South Asia, Southeast Asia, and North Asia regions, the Pakistani NHRI is the most recent, and so does not have a long timeline of performance as a national human rights commission.<sup>3</sup>

However, since 2017, the NCHR has gained ground on several human rights themes including enforced disappearances,<sup>4</sup> and in terms of proposing amendments in the

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<sup>3</sup> 'Pakistan: An Enabling Environment Needed', *ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, 2017, available at <https://www.forum-asia.org/uploads/wp/2017/12/ANNI-Report-Final.pdf>.

<sup>4</sup> 'Interior ministry being evasive over enforced disappearances', *The News*, 13 September 2017, available at <https://www.thenews.com.pk/print/229553-Interior-ministry-being-evasive-over-enforced-disappearances-NCHR>.

problematic blasphemy laws of the country.<sup>5</sup> Both issues are of acute sensitivity and often portrayed as matters of national security or the integrity of Islam respectively by the Government.

In terms of its administrative affairs and financial independence, the NCHR is still confronting ‘teething’ challenges. According to the Commission itself, it has been severely handicapped due to the lack of financial rules in place, and the minimal financial and logistical support available to enable it to perform its mandated function.

### **3. The Pakistan National Commission on Human Rights and the Paris Principles**

#### **3.1 Functions, Mandate, and Structure**

The Paris Principles are guiding principles for NHRIs, which provide a legal basis for independent human rights bodies at the national levels. They also speak about the need for a broad mandate with clear powers and privileges for NHRIs. According to the document, an NHRI’s mandate should include, but is not limited to, drawing the government’s and parliament’s attention to important human rights situations, necessary legislations or amendments in existing laws, policies and procedures, in order to promote and protect human rights; bringing reforms to administrative and judicial provisions; preparation of important human rights reports; encouraging the ratification of human rights instruments, cooperation with UN bodies, regional organisations, and national institutions; promotion of human rights education at schools, colleges, and universities at national level; and combating discrimination at all levels.

The basic mandate of the NCHR is to be an enabling organisation to protect against human rights violations in the country, to investigate alleged violations, report lack of implementation of a human rights-based approach in government departments and institutions, and to seek to promote human rights.

Pakistan presents a complex political landscape, where the powerful military institution meddles forcefully with the affairs of the civilian governments, clearly demonstrating a serious imbalance of power between the civilian institutions and the military. Often in this situation, the victims are the ordinary rights holders at the hands of the military or its security apparatus, acting under the dominant, yet misinterpreted, national security narrative. There are at least three thousand missing persons from all across the country whose cases are pending with the Commission of Inquiry on Enforced Disappearances (CoIED). The majority of cases are from the Baluchistan and Tribal Areas of Khyber-Pakhtunkhwa provinces<sup>6</sup> where the victims’ heirs have alleged that the perpetrators behind these abductions are none other than the security agencies.<sup>7</sup>

Investigating missing persons cases and holding security agencies accountable is a ‘no-go’ area for any human rights body in the country. Although the NCHR has a declared position against the ongoing crime of enforced disappearances, articles 14 and 15 of the NCHR Act limit the power of the Commission over complaints issued about human rights violations

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<sup>5</sup> ‘Repentance should be allowed in blasphemy cases’, *Dawn*, 28 July 2017, available at <https://www.dawn.com/news/1348131>.

<sup>6</sup> ‘Missing Persons List’, CoIED, available at <http://coioed.pk/missing-persons/>.

<sup>7</sup> S. Ijaz, ‘Dispatches: Identifying Pakistan’s “disappeared”’, 2015, available at <https://www.hrw.org/news/2015/02/12/dispatches-identifying-pakistans-disappeared>.

where the alleged perpetrators are either intelligence agencies or armed forces.<sup>8</sup> In this case, the NCHR cannot directly investigate the complaints but must request a report from the Government. These two articles of the NCHR Act are inconsistent with the Paris Principles where there is no such provision, and also with the General Observations of the GANHRI-SCA,<sup>9</sup> which specifically call for the mandate of an NHRI to include investigation of security forces, as they limit the mandate by curtailing the powers of the Commission to hear complaints against security agencies or armed forces.

The NCHR's mandate also allows it to advise the Government on measures to be taken in pursuit of the protection and promotion of human rights, however, it cannot intervene to directly fix the problems identified. It undertakes its advisory role through parliamentary bodies such as the human rights committees of the Senate, the National Assembly and the Provincial Assemblies. These forums serve as a bridge between the Commission and the Government on human rights policy matters.

### *Human Rights Protection*

In terms of human rights protection, the purely advisory status of the NCHR is clear. In such a case, the NCHR can only advise or provide recommendations to the Government and cannot force the Government to adopt a law or make amendments. With respect to the blasphemy laws, the NCHR has submitted recommendations to the Senate's Functional Committee on Human Rights. The submission thoroughly examines the issue of blasphemy in the country's specific context and suggests that repealing the law or making amendments immediately may not be feasible at this point in time. However, it calls for the legal framework to include procedural safeguards to prevent the misuse of the law regarding the offence of blasphemy. These safeguards include: that investigations of blasphemy offence under Section 295-C of the Pakistan Penal Code (PPC) 1860 be led by a police officer, not less than the rank of a Superintendent of Police; that criminal cases be registered where courts have concluded, or there are reasonable grounds to believe, that the complainants and/or the witnesses in blasphemy cases have committed perjury; that cases be tried by the District and Session Judge; that schedule II of the Criminal Procedure Code (CrPC) be amended; that section 295-A of the PPC be removed from the list of scheduled offences under the Anti-Terrorism Act 1997; that awareness raising and training on blasphemy laws be conducted for Imams, investigators, prosecution, judges and lawyers; that the aspect of repentance be introduced in the blasphemy laws, etc.<sup>10</sup>

In general, however, CAN-Pakistan stated that the NCHR is not prioritising the component of its mandate that gives it the power to review laws and policies with a human rights lens and put its recommendations to the Government.

In a report on the Okara Military Farms, the NCHR was upfront in working with the people of Okara where the farmers had been unlawfully captured by the district government. Okara Military Farms, spread across 160,000 acres of land, were established by the British Raj in 1913, and were leased to the British Military for 20 years. The lease was never renewed, but the military kept the possession. After independence in 1947, the farms were automatically

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<sup>8</sup> NCHR Act, 2012, available at [www.senate.gov.pk/uploads/documents/1358919417\\_548.pdf](http://www.senate.gov.pk/uploads/documents/1358919417_548.pdf).

<sup>9</sup> General Observations of the SCA, 2013, Section 1.2, available at [https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC\\_SCA\\_General\\_Observations.pdf](https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC_SCA_General_Observations.pdf).

<sup>10</sup> 'Submission on proposed procedural amendments to check the misuse of blasphemy law in Pakistan', NCHR, 2016, available at [http://nchr.org.pk/docs/reports/en8\\_Blasphemy.pdf](http://nchr.org.pk/docs/reports/en8_Blasphemy.pdf).

transferred to the Pakistan Military.<sup>11</sup> For years, the peasants used to give a share of the produce to the military under the *Batai* system,<sup>12</sup> however, in President General Pervez Musharraf's era, a new agreement was signed under which the peasants could be asked to vacate the land and instead of giving the military a share of the produce, they would have to pay a cash lump sum.

In the meantime, the peasants established an association for protection of their land rights, called *Anjuman-i-Mazaraeen*, while the military started demanding that the farms be vacated. This issue has been ongoing for 15 years. However, the situation got worse in 2016 when thousands of peasants working on the farms protested in Islamabad because of the skirmishes with military. The NCHR took *suo motu* notice of the situation and conducted a fact-finding mission, and the report was presented before the Senate. The NCHR was lauded for its efforts and the Senate endorsed its interim report, which presented the facts including that the Punjab government in 15 years had never paid attention to the need to resolve the conflict and that, if the situation were to remain the same, this may carry serious implications for peoples' rights to life, liberty, safety and security, right to livelihood, and employment and economic and social rights, all of which have been under threat all these years, causing people to feel alienated. The interim report recommended that the Board of Revenue Punjab should collaborate with the NCHR on an independent inquiry about the legal status of the parties involved with respect to the property and that the body so constituted should also advise on the liabilities.

The Senate's appreciation of the Commission's fact-finding mission and the interim report is an expression of trust from the Parliament in the NCHR's contribution towards conflict resolution situations.

On the issue of enforced disappearances, the NCHR Chair Justice (R) Ali Nawaz Chowhan, in a parliamentary hearing, categorically held the state responsible for recovering missing persons, and urged that when law enforcers or security agencies arrest citizens, those citizens should be tried in the courts.<sup>13</sup> The Commission, in 2017, received 15 complaints of enforced disappearances in addition to 27 complaints of missing persons. Fifty-four other complaints relating to threat to life were also reported to the NCHR.

The NCHR's 2017 annual report highlighted the enforced disappearances' category as a trend among other leading human rights violation categories in 2017. Other challenging trends include a disturbing increase in child rights violations, particularly cases of physical and sexual abuse against children, with 23 complaints registered under this category in the same year. There were 17 cases reported to the NCHR related to incidents of honour killing of women in 2017, which shows an alarming increase in this category when compared to the two cases reported in this category in the previous year. Moreover, a general increase in the complaints of violence against women received by the Commission has also been witnessed.<sup>14</sup>

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<sup>11</sup> Shahid K., Kunwer, 'This land is our land: Peasants in Okara fight for their rights', *Newsline*, June 2016, available at <http://www.newslinemagazine.com/magazine/land-land-peasants-okara-fight-rights/>.

<sup>12</sup> The *Batai* system is a system in which land is lent to another who spends money and labour working on it, with the produce then shared between the tenant and the landowner.

<sup>13</sup> I. Junaidi, 'Govt. urged to stop enforced disappearances', *Dawn*, 26 September 2017, available at [September https://www.dawn.com/news/1360116.26](https://www.dawn.com/news/1360116.26).

<sup>14</sup> 'Annual Report 2017', NCHR, 2018, available at <http://www.hrcp-web.org/publication/wp-content/uploads/2018/04/State-of-Human-Rights-in-2017.pdf>.

	<b>No. of complaints / suo motu notices</b> (Jan-December 2017)	<b>No. of complaints / suo motu notices</b> (Jan-March 2018)
<b>In-hearing<sup>15</sup></b>	154	19
<b>Initial stages<sup>16</sup></b>	328	160
<b>Disposed of</b>	249	32
<b>Total</b>	731	211

*Complaints received or suo motu notices by the NCHR on human rights violations between Jan 2017 – March 2018*

In January 2018, a seven-year-old girl, Zainab was raped and was later murdered in Kasur, a city in central Punjab that now has become notorious for repeated child abuse cases. This followed the revelation in the press, in 2015, of a high profile case of child sexual abuse and pornography, which also reportedly had the involvement of politicians and local administration.<sup>17</sup> These crimes against minors had been happening for several years. In both the cases, the NCHR carried out fact-finding missions and concluded with its recommendations.

In the child abuse and pornography case, the Commission cited the incompetency of the authorities as playing a major role in the repetition of such incidents. The Commission noted that in 2015, the Government had been provided with a concrete set of guidelines as recommendations to tackle this issue, but none of them had been incorporated as preventive measures into government policies.<sup>18</sup> In its report on the Kasur incident, the NCHR provided policy level recommendations to the district authorities, and to the federal and provincial governments. It also suggested the establishment of a Trauma and Counselling Centre in Kasur.<sup>19</sup> However, none of the recommendations were taken up seriously, which led to more heinous crimes against juveniles.

In the case of Zainab, the Chairperson of the NCHR addressed the incompetency of the Punjab Police saying that the officials were not performing well in pursuit of a resolution to the case. Such human rights violations have been attributed mostly to the lack of proficiency of the Punjab police force.<sup>20</sup>

The NCHR claims it did its job, and that the Government was incompetent in not paying attention to the recommendations. The non-governmental groups who followed both the incidents closely claimed that the NCHR failed to follow-up on the incidents, which is also

<sup>15</sup> In-hearing cases are those where the NCHR has progressed significantly but they are yet to be decided.

<sup>16</sup> A complaint or a case is referred as in initial stage where the NCHR has taken notice and parties are summoned.

<sup>17</sup> Krishan M. Gopal, 'Massive Child abuse scandal unveiled in Pakistan', *DW*, 2015, available at <https://p.dw.com/p/1GCHs>.

<sup>18</sup> S. Wasif, 'Kasur incident result of authorities' ineptitude, says NCHR', *The Express Tribune*, 11 January 2018, available at <https://www.tribune.com.pk/story/1605491/1-kasur-incident-result-authorities-ineptitude-says-nchr/>.

<sup>19</sup> 'The Kasur Incident of Child Abuse: Fact Finding Report' NCHR, 2017, available at <http://www.-web.org/hrcpweb/kasur-child-abuse-case-fact-finding-report/>.

<sup>20</sup> S. Wasif, (2018). 'Ending sexual abuse: NCHR chairman warns Punjab police to change attitude', *The Express Tribune*, 23 January 2018, available at <https://www.tribune.com.pk/story/1615546/1-ending-sexual-abuse-nchr-chairman-warns-punjab-police-change-attitude/>.



part of their responsibility. The NCHR bureaucracy responded by saying that their institution is understaffed and the absence of human rights experts is a serious challenge, which often becomes a hurdle in its effective functioning.

On the issue of an inclusive mandate covering all segments of the society, the NGOs believe that the Commission is acting with an all-encompassing understanding of its mandate, in particular by including attention to transgender issues. The FDI approved of the mandate including the attention to transgender rights. The NCHR in 2017 issued an interim report in a bid to reinforce its efforts for mainstreaming the transgender community in Pakistan, and concluded with a set of recommendations. The NCHR suggested that the Government should take specific legislative measures to protect and promote transgender rights, such as recognition of their identities, equal right to education, employment, health, political representation, accountability, etc.<sup>21</sup> According to the Secretary of the NCHR, the Parliament used these recommendations in the Transgender Persons (Protection of Rights) Act 2018.

Overall, PODA believes that despite the unfavourable political environment in the country, the NCHR has managed to work on the major human rights violation issues.

However, the NCHR is severely hampered by its reported status as under the influence of the Ministry of Human Rights (MoHR), as the ministry quite often tries to interfere in the NCHR's affairs. The Sindh High Court (SHC), in 2017, restrained the MoHR from 'meddling' in the affairs of the NCHR.<sup>22</sup> In another attempt to take control of the NCHR, the Prime Minister approved the amendments in Schedule XI of Rules of Business of the MoHR, which would transfer administrative control of the NCHR to the MoHR. Karamat Ali, a veteran civil society activist, challenged this in the SHC. The SHC ruled that the NCHR is not bound to implement the MoHR's orders.<sup>23</sup> Such interference is in stark violation of the NCHR Act and also in violation of the Paris Principles that state, "Any NHRI is not bound to act under any administration and must be independent."<sup>24</sup> In another report, it was stated that representatives of various civil society organisations were opposed to the idea of bringing the NCHR under the control of the MoHR.<sup>25</sup> The MoHR also intervenes in the Commission's organisation of its events, which disrupts the working of the NCHR.

### *Human Rights Promotion*

Promotion of human rights is one of the important objectives of an NHRI. In this regard, the NCHR has been engaging with different stakeholders, particularly civil society. From time to time, the Commission organises events on various human rights issues, new areas of human rights such as human rights intersection with technology and online spaces, trends in emerging violations, etc.

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<sup>21</sup> 'Transgender - (The Need for Mainstreaming) Interim Report', NCHR, available at [http://nchr.org.pk/docs/reports/en6\\_Interim%20Report%20on%20Transgender%20NCHR\(17.01.2017\).pdf](http://nchr.org.pk/docs/reports/en6_Interim%20Report%20on%20Transgender%20NCHR(17.01.2017).pdf).

<sup>22</sup> J. Khurshid, 'SHC restrains human rights ministry from meddling in NCHR's affairs', *The News*, 14 October 2017, available at <https://www.thenews.com.pk/print/236798-SHC-restrains-human-rights-ministry-from-meddling-in-NCHRs-affairs>.

<sup>23</sup> J. Khurshid, 'NCHR not to implement human rights ministry's orders, SHC told', *The News*, 21 June 2017, available at <https://www.thenews.com.pk/print/211919-NCHR-not-to-implement-human-rights-ministrys-order-SHC-told>.

<sup>24</sup> J. Junejo, 'In Defense of NCHR', *Daily Times*, 6 July 2017, available at <https://www.dailytimes.com.pk/3248/in-defence-of-nchr/>.

<sup>25</sup> S. Hasan, 'Call for keeping NCHR Independent', *Dawn*, 20 May 2017, available at <https://www.dawn.com/news/1334209>.

In January 2018, the NCHR, in collaboration with Bytes for All, steered an awareness-raising seminar for Islamabad-based NGO representatives, lawyers, and academicians on the pros and cons of cyberspace. This was the first time in Pakistan that the NCHR acknowledged and led the debate on technology's intersection with gender rights, child rights, and civil and political rights. In another important multi-stakeholder roundtable on the issue of network disconnections in Pakistan and the Islamabad High Court's judgement that such shutdowns are illegal,<sup>26</sup> the Chairperson of the NCHR Justice (R) Ali Nawaz Chowhan, called upon the Government to restrain its discretionary powers in this regard. "Mobile network shutdowns in few occasions can be justified but they have become rampant and a routine matter, where the Government has been found misusing its discretionary powers", the Chair said.

The Commission also collaborated with a Peshawar-based NGO, Blue Veins, on a National Human Rights Defenders' Protection Policy on 30 January 2018. Earlier, in 2017, the NCHR held discussions at its office with various civil society organisations on a draft policy on the protection of human rights defenders. Similar consultations were also steered by the NCHR on other human rights issues including anti-honour killing laws, a draft model law to eliminate economic exploitation of children in Pakistan, on the Hazara community, etc.

#### *Accountability and Publication of Findings and Reports*

Under the NCHR Act, the Commission is bound to prepare an annual report at the end of every financial year, which the Federal Government has the obligation to present before the *Majlis-e-Shoora* (the Parliament) within 90 days of its receipt. Similarly, the NCHR has also been mandated by the law to prepare special reports on any matter, which the Federal Government is bound to present before the Parliament within 30 days. Such publications must include the memoranda "indicating actions to be taken or proposed to be taken on the recommendations of the Commission and reasons for non-implementation of the recommendations if any".<sup>27</sup>

The Commission, since its establishment, has been consistent in preparing and submitting annual reports to the Parliament containing information on its activities, interventions, monitoring of human rights violations, complaints received, its engagement with different stakeholders, emerging trends and challenges, etc. Similarly, the NCHR has been issuing special reports on the human rights issues that require urgent attention such as reports on the Indigenous Kalash People, the Tharparkar Crisis, FATA Reforms, Organ Transplantation, the Hazara Community, Okara Military Farms, Honour Killing Laws, Proposed Procedural Amendments to Check the Misuse of Blasphemy Law, Interim Report on Transgenders, etc.

According to the law, it is mandatory for the Commission to make all this information accessible and within the public domain. However, it is unfortunate that the Commission has faced serious challenges with respect to hiring an Information Technology human resource who could perform these tasks. The Commission has from time to time tried to make all publications and reports available on its website, however, the unavailability of some important publications such as its annual reports, UPR reporting, and UN treaty body reporting has raised doubts about the Commission's commitment to transparency and

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<sup>26</sup> *CM Pak Limited vs The Pakistan Telecommunication Authority*, February 2018, available at <http://www.mis.ihc.gov.pk/attachments/judgements/F.A.O. 42-2016 Against Order - finalFAONo.42of2016.CMPakLimitedv.ThePTA.etc.636552442049031490.pdf>.

<sup>27</sup> NCHR Act, 2012, available at [http://www.senate.gov.pk/uploads/documents/1358919417\\_548.pdf](http://www.senate.gov.pk/uploads/documents/1358919417_548.pdf).



accountability.

### **3.2 Autonomy from the Government and Independence Guaranteed by Statute or the Constitution**

#### *Budgetary Autonomy and Financial Independence*

The NCHR was established as a body accountable for its actions to the Parliament of Pakistan, and not directly to the Government. This is in accordance with the Paris Principles. The funds given to the NCHR are allocated by the Government to the NCHR through the MoHR and then approved by the Parliament of Pakistan.<sup>28</sup> The NCHR on paper is independent of the Government in disposing of these funds and can prioritise use of its own resources according to its own needs. Section 27 of the NCHR Act states that “it is not necessary for the Commission to take prior approval from the Government to spend such allocated money for the approved and specific purposes”. The NCHR’s performance and financial reports are presented before the Parliament rather than the Government.<sup>29</sup> These conditions were all sought at the time of the establishment of the organisation. However, when it comes to the day-to-day working of the organisation, it is critical to know whether in practice it enjoys functional autonomy and financial independence from the Government or not.

The NCHR says that the establishment of the National Human Rights Commission Fund is still pending; the Government has been lingering on this matter of urgent importance for almost three years now. This fund is crucial for ensuring the financial independence and the smooth and timely implementation of the Commission’s human rights activities. As per General Observation 1.10 financial autonomy is critical for the effective and independent functioning of an NHRI.<sup>30</sup>

Additionally, a significant budgetary slash has been witnessed in the recent financial bill, which is an indication of wariness on the part of the Government about the Commission’s human rights work. According to the NCHR, the Government, on the advice of the MoHR, only approved 92 million rupees (\$771,650 approx.) for the fiscal year 2018-19, as opposed to 105 million rupees (\$880,687 approx.) for the fiscal year 2017-18. The NCHR terms it as an unhealthy sign for its financial independence that the Government seeks advice from the MoHR on the NCHR’s projected cost for annual budgets. “The institution is in the best position to propose its budgetary projections, rather than other institutions”, a higher official of the Commission expressed in anger, posing the question how an external institution would know about the NCHR’s needs. The officer says financial independence has been limited to the books only.

As long as financial resources are kept in the hands of the Government, the Government has the power to restrict the NCHR’s mandate.

According to the NCHR, the Government, unfortunately, has not let the organisation operate as a fully autonomous body as was agreed at the time of its establishment. This has been reflected at multiple instances, and has been attributed to the lengthy procedures and

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<sup>28</sup> NCHR Act, 2012, available at [http://www.senate.gov.pk/uploads/documents/1358919417\\_548.pdf](http://www.senate.gov.pk/uploads/documents/1358919417_548.pdf).

<sup>29</sup> ‘Who We Are’, NCHR, available at <http://nchr.org.pk/en/GenericText.aspx?id=3>.

<sup>30</sup> General Observations of the SCA, 2013, Section 1.10 available at <https://nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC%20SCA%20General%20Observations.pdf>.

formalities that the Government has tended to engage the organisation in whenever it wants to organise an activity or event. By the time the organisation has completed all the procedural requirements, the activity or the event, which was supposed to happen at a pre-scheduled time, has already ceased to be relevant. Furthermore, the need to comply with these procedural requirements means that the Government has influence over the detail of the Commission's activities or events. Overall, it is disappointing to view the NCHR not being run as an independent and autonomous human rights Commission, largely due to the failure to create a proper mechanism to separate the NCHR from the Government financially.

### *Interaction with, and State Submissions to, the International Human Rights System*

According to CAN-Pakistan, "The NCHR is not fully independent and does not enjoy an autonomous position especially when it engages with the international human rights mechanisms".

The Government has been found guilty of restricting the Commission's participation in global human rights events. For instance, the Chair of the Commission Justice (R) Ali Nawaz Chowhan was not given permission from the Ministry of Foreign Affairs to travel to Geneva for the 60<sup>th</sup> session of the Committee against Torture (CAT), where Pakistan's report was to be discussed. The Commission held that the reason why permission was denied was that the Government did not approve of the changes they had proposed in national laws to better protect the rights of prisoners. In particular, the NCHR raised two concerns, first that there was a need to amend the definition of torture so as to introduce psychological torture as part of the definition and second to create a mechanism for addressing grievances of the individuals who were subjected to torture.

In the legal mandate of the NCHR, the Commission is authorised to work on issues pertaining to human rights violations and can investigate in any manner.

Praising the NCHR's work, CSJ and FDI both add that the Commission has been working to create a strong voice at the Universal Periodic Review (UPR) on issues pertaining to blasphemy, the death penalty, enforced disappearances, etc. However, civil society has raised strong concerns over the flawed standard operating procedures by which officials have to seek permission from various ministries with regard to important visits to the UN and other international human rights forums. Incidents such as occurred in relation to the CAT session negatively impact the autonomous status of the Commission and pose a threat to its overall purpose.

"Lack of clarity about the roles and duties of the members of the Commission is also distressing at times for human rights organisations", believes a local NGO that works on gender issues in Pakistan. For example, at the Yogyakarta Conference to discuss sexual and reproductive rights, the Government did not allow the Chairperson of the Commission to participate; instead, the Secretary was at the eleventh hour asked by the Prime Minister to go in lieu of the Chairperson.

### *Selection and Appointment*

As far as appointment of the NCHR Chairperson and the Commissioners is concerned, the government advertises the posts and calls for suitable applications. After proper scrutiny, a list is prepared and forwarded to the Prime Minister and the Opposition Leader who on the

basis of mutual consultation decide three names for each position and forward to the parliamentary committee who finalises one name for each position. The Chairperson and the Commissioners hold their offices for a term of four years. Any of them can leave their positions by submitting their resignation to the President subject to his or her approval.

### *Dismissal Procedures*

The dismissal procedure for the NCHR follows that for judges of a High Court or the Supreme Court, under article 209 of the Constitution.<sup>31</sup> The ‘Supreme Judicial Council’, consisting of the Chief Justice of Pakistan, the two next most senior Judges of the Supreme Court, and the two most senior Chief Justices of High Courts, must decide whether a Commissioner is incapable of performing his or her duties, due to physical or mental incapacity, or may have been guilty of misconduct. On the basis of their conclusion, the President may then remove the Commissioner from office.

### **3.3 Pluralism**

#### *Pluralism of Commissioners*

The Paris Principles provide guidelines for NRHIs to ensure pluralism in their structures at different levels. NHRIs are urged to take all efforts to discourage discrimination, particularly racial discrimination, in the recruitment of Commissioners, and to avoid prejudice against any groups. Additionally, there is encouragement to promote the participation of women in NHRIs.<sup>32</sup> The Paris Principles also mention the need to include individuals from non-governmental organisations involved in human rights work, and professionals, such as journalists, lawyers, and members of Parliament and the Government. However, the latter should only be included in an advisory capacity, as per the Paris Principles.

In general, the push for pluralism must ensure that the Commission is representative of the wider society in which it operates, in terms of racial, ethnic, gender, and minority groups.

The guidelines for the Commission’s composition are given in Section 3 of the NCHR Act, 2012, which states that the Commission shall include one member representing all four provinces, i.e. Baluchistan, Khyber-Pakhtunkhwa, Punjab, and Sindh, one each representing the Islamabad Capital Territory (ICT), Federally Administered Tribal Areas (FATA), minority communities, and one member who is the Chairperson of the National Commission on the Status of Women (NCSW).

In terms of gender-balance in the constitution of the Commission, the federal Government is bound to ensure the presence of at least two women members. It is rather encouraging that the Government selected five women of a total of nine members of the Commission. On qualification grounds, all members are well-qualified for their positions with a human rights background. Currently, the Commission also includes eminent civil society representatives, for example the member from Sindh, Anis Haroon, who also served a full term as

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<sup>31</sup> Constitution of Pakistan, Article 209, available at <http://www.pakistani.org/pakistan/constitution/part7.ch4.html>.

<sup>32</sup> Principles Relating to the Status of National Institutions (the Paris Principles), General Assembly Resolution 48/134, 20 December 1993, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

Chairperson of the NCSW between 2009 and 2012. She has also worked as regional director at Aurat Foundation. Similarly, the member from Baluchistan, Fazila Aliani, previously worked in the capacity of president of Al-Nisa Women Rights Association and Anjuman Khawateen Baluchistan, an organisation for the promotion of improvement in the social and economic situation of women. Khawar Mumtaz, the *ex officio* member, is also a renowned women's rights activist in Pakistan.

However, according to PODA, there is a need to engage more ethnic minorities so as to ensure a broad base of representation. The NCHR lacks members from the regions of Gilgit-Baltistan and Azad Kashmir, which hampers the inclusivity and pluralistic principle. CSJ also provided the insight that the minority issues in the organisation have been mostly dealt with by the Commissioner belonging to that minority group and not by the provincial and national members. The case of Patras Masih and Sajid Masih, in which both were targeted on account of allegations of blasphemy, is cited by the CSJ. Patras Masih and Sajid Masih belonged to the Christian community. Allegations were made against Patras Masih, a 17-year-old boy from Shahdara, Lahore, wherein he was accused of spreading blasphemous content on the Internet. The boy and his cousin Sajid Masih were taken into custody by the Federal Investigation Agency (FIA) and were reportedly tortured.<sup>33</sup> The NCHR did not submit a full report into this case, and the case was reportedly taken up by the NCHR minority Commissioner, Advocate Ishaq Masih Naz, who belonged to the Christian minority group in Pakistan. However, the case was neither pursued by the minority Commissioner, nor did the provincial or national chapters issue a single statement on it.

The FDI provided a different view to the other organisations stating that although the NCHR had a lot of inclusivity issues in the beginning, they were dealt with by the Commission effectively in 2017, and the Commission at its top hierarchy has become pluralistic when comes to the presence of women and ethnic groups. However, it claims that some of the Commissioners are not sound enough in technical human rights expertise or in communications. In terms of leadership, the FDI believes there are well-seasoned personalities in terms of their expertise on human rights law and activism, however, many of them do not have a particular background in dealing with human rights reporting mechanisms, fact-findings, etc.

### *Pluralism of Staffing*

There is a dearth of human rights experts in the NCHR's staff. Although there have not been any complaints about bias towards certain groups on the basis of religion, caste, gender, or community, nevertheless the Commission lacks expertise to carry out its human rights work at full throttle. Since its constitution in 2015, the Commission has not been able to recruit its workforce, and therefore it is difficult to assess at this point in time whether that workforce fulfills the criteria for pluralism as enshrined in Paris Principles.

Currently, the recruitment process is stalled because of general elections (June 2018). However, the completion of this task is urgent if the Commission is to be fully functional. There is a total of 171 posts on which recruitment has been started and preliminary tests have been taken. According to the NCHR, the process will resume as soon as the process of

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<sup>33</sup> 'Demands of the civil society: We strongly condemn behaviour of law enforcement authorities in blasphemy case', Digital Rights Foundation, 26 February 2018, available at <https://www.digitalrightsfoundation.pk/demands-to-the-ministry-civil-society-strongly-condemns-behaviour-of-law-enforcement-authorities-in-blasphemy-case/>.

general elections and the installation of a new administration in the centre and all four provinces is completed. According to an official privy to the NCHR, the Commission has been using money under the administrative heading for paying the salaries to its contractual employees, while a large chunk of the annual budget of the Commission, intended to be used exclusively to pay the staff salaries, remains inaccessible. The official says that due to the Government's standard procedures money under this heading will remain inaccessible until the hiring process is completed.

“The NCHR has a strict non-discriminatory policy”, says a senior NCHR officer, adding that all ‘merits of the Government’ including quotas for persons with disability and minority groups will be followed for the recruitment process. The NCHR takes prides in the fact that up until recently a transgender human rights advocate and academician Ayesha Mughal was working with the Commission. However, she left on personal grounds.

Almost all non-governmental organisations that were approached for this report agreed with the NCHR's claim on pluralism in general. With regard to staffing overall, all the organisations believe that there is a need to bring in a mix of competencies in order to promote the mandate as enunciated in the NCHR Act.

The FDI has stated that the top management of the Commission is limited to senior professionals, and that as a result there is a dearth of young talent.

#### *Collaboration with Civil Society and other Stakeholders*

The NCHR has been extensively engaging with civil society in Pakistan, and in recent years especially the Commission's input to civil society-led initiatives for promotion and protection of human rights is laudable. The Commission's role in highlighting the plight of transgender people and the need for their mainstreaming in the law is significant.

In its interim report ‘Transgenders – The need for mainstreaming’, the Commission states that to incorporate recommendations from different stakeholders, especially the transgender community, it participated in a multi-stakeholder consultation process held by the FDI with support from Heinrich Boll Stiftung, media personnel, legal experts, educationists, trans representatives, and human rights experts.<sup>34</sup>

Similarly, the Commission played a pivotal role in formulating a draft protection policy for human rights defenders in the country. The draft was prepared after a consultative process started by civil society organisations, and is currently pending with the NCHR for its final approval.

In a separate civil society-led initiative with regard to the safety and protection of human rights defenders and NGOs in Pakistan, called the Pakistan Human Rights Defenders Network, the NCHR's Commissioner from the Islamabad Capital Territory, Muhammad Shafique Chaudhry, is part of the steering committee of the body, which meets regularly every three months, and examines the overall situation and challenges that human rights defenders and civil society confronting the country.

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<sup>34</sup> ‘Transgender – (The Need For Mainstreaming) Interim Report’, NCHR, available at [http://nchr.org.pk/docs/reports/en6\\_Interim%20Report%20on%20Transgender%20NCHR\(17.01.2017\).pdf](http://nchr.org.pk/docs/reports/en6_Interim%20Report%20on%20Transgender%20NCHR(17.01.2017).pdf).

### *Degree of Trust*

A collective sense of ineptness and lack of independence of the Commission prevails amongst the civil society organisations that frequently engage with the NCHR in human rights initiatives. CSJ also views the performance of the NCHR as being challenged by a great deal of political pressure. It views the NCHR as not being free from political influence and as in a position of having to succumb to pressure and agree half-heartedly with the proposals dictated by the Government.

### **3.4 Adequate Resources**

Having adequate resources implies the availability of funds for expenditure by the Commission without the pressure of any sort of limitation by the Government. The question is whether the challenges to the NCHR's financial independence come from a lack of funds, or from elsewhere.

In view of the Paris Principles, an NHRI must be entitled to receive resources covering both technical and financial needs in order for it to function effectively. The fund must act as an 'enabler' in order for the organisation to work without any restraint on its financial capacity, except insofar as it should comply with the financial accountability requirements applicable to other independent agencies of the state as per General Observation 1.10.<sup>35</sup> Section 23 of the NCHR Act states that there will be a National Human Rights Commission fund established for the institution and to be used by it.<sup>36</sup>

With regard to this principle, the NCHR states that it is only provided with a fund of 92 million rupees for the year 2018-19; however, the actual demand by the Commission was much higher. As discussed earlier, in 2017-18 the NCHR was provided with 105 million rupees including supplementary grants. As the Government rejected the projected budget of the NCHR for the ongoing fiscal year, this puts a serious constraint on the functioning of the organisation. The Government is evidently unaware of the level of resources needed for the Commission to carry out its work.

The NCHR itself complains about its financial dependence on the Government and interference by the MoHR. The immense constraints the NCHR faces from the financial side consequently affect spending on human rights activities. The Government's failure to provide ample funds results in a situation in which the NCHR is not free to act as it sees fit.

Non-governmental organisations hold that there is a lack of financial and to some extent administrative independence in the NCHR, as a result of which the organisation is not free from Government influence.

Both the CAN-Pakistan and FDI also pointed out the weakness of the regional offices across the country as a problem in the protection of human rights. There is no regional office of the NCHR in Baluchistan, which is a great setback for the people in that province and also for the NCHR itself. CAN-Pakistan stated that the regional office in Punjab is not well-established and lacks the basic structure of a functioning organisation. Similarly, FDI, based

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<sup>35</sup> General Observations of the SCA, 2013, Section 1.10 available at <https://nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC%20SCA%20General%20Observations.pdf>.

<sup>36</sup> NCHR Act, 2012, available at [http://www.senate.gov.pk/uploads/documents/1358919417\\_548.pdf](http://www.senate.gov.pk/uploads/documents/1358919417_548.pdf).



on its personal experience, stated that internal politics and the rift between the NCHR headquarters and the Punjab office, is putting human rights activities in the province at risk.

The regional offices suffer from a scarcity of human resources and a dearth of financial resources, a problem which derives directly from the lack of funds at national level.

If the NCHR headquarters was well-equipped and provided with sufficient funds, the regional offices of the organisation would be in a far better position to carry out their own duties. The functioning and working of both national and regional offices is seriously affected as insufficient funds and other resources pose a constraint on the ability of the institution to perform well. CAN-Pakistan, FDI, and CSJ urged the Commission to strengthen its operations at the provincial levels where the absence of competent human rights staff and technical experts has been a hindrance in the protection and promotion of human rights.

According to the General Observations of GANHRI-SCA, an NHRI's core fund should be constituted from public sources of funding. However, it may also receive funding from external sources such as donors and international community in specific and rare circumstances until the Government is fully capable of providing adequate funding for the NHRI.<sup>37</sup>

Contrary to this, both PODA and FDI believe that the funding of NHRIs should be equally driven by funds received from the international donors and agencies for human rights work. However, the institution itself claims that it is unable to receive funds from external sources because although pledged under section 23 of the NCHR Act, the long overdue NCHR Fund is yet to be constituted. PODA states that the NCHR does get funds through national and international donors and many like-minded non-governmental organisations such as PODA itself make funds available for the NCHR to function. Although different stakeholders have different points of view on this matter, there is consensus on the fact that the claim that 'adequate funding' is already available to the NCHR is not true as the Government has not been providing enough funds for it to carry out its mandated activities. The NCHR says that the approved budget for the fiscal year 2018-19 is far less than their expectation and that they will face difficulties in carrying out their human rights work.

FDI pointed to the issue of under-staffing. CAN-Pakistan shared the view that the NCHR needs to hire staff that are well-qualified and competent with a human rights background. Lack of staffing is reflected in the fact that the NCHR did not have its own fully-functional website until 2017 which restricted the level of awareness of the organisation.

### **3.5 Adequate Powers of Investigation**

#### *Powers of Investigation*

Following the Paris Principles' guidelines on investigation, the NCHR in Pakistan is empowered to take *suo motu* notice of human rights violations and negligence in the prevention of such violations by a public servant.<sup>38</sup>

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<sup>37</sup> General Observations of the SCA, 2013, Section 1.10. available at <https://nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC%20SCA%20General%20Observations.pdf>.

<sup>38</sup> NCHR Act, 2012, available at [http://www.senate.gov.pk/uploads/documents/1358919417\\_548.pdf](http://www.senate.gov.pk/uploads/documents/1358919417_548.pdf).



The national law in terms of investigatory powers is largely consistent with the Paris Principles and on paper gives enough power to the NCHR to bring about improvements in the human right situation in the country. However, in practice the realisation of the provided mandate is being hindered by the factors discussed earlier such as financial constraints, interference in its administrative affairs, its inability to investigate human rights violations where the possible perpetrators are military and intelligence agencies, and absence of adequate human rights staff and technical experts.

The NCHR itself believes that the investigative powers of the institution in practice are ineffective.

One reason for the limitation on these powers is that organisations such as the police and security agencies are in general suffering from incapacity when it comes to implementing human rights norms.

The NCHR also points to the lack of follow-up action from organisations with which it collaborates when it undertakes investigations. Due to lack of capacity the NCHR relies on such collaborations when it carries out investigations. It states that it cannot constantly prompt these organisations to provide feedback to transcribe findings.

In a similar way, any crimes that the NCHR reports in its investigative reports rely on a prosecutor to take them up. For example, if the NCHR releases an investigative report into the juvenile justice system, it will be the duty of the prosecutor to look into the history of the system and the crime that was reported at that time.

There have been fairly mixed reports by NGOs into the investigative prowess of the NCHR. Some organisations praised the NCHR for taking up investigations into controversial incidents such as transgender issues, the Kasur incident, the abduction of bloggers and activists (see ‘Case Studies’ section below), etc.

However, there is a need for the Commission to be stronger in dealing with complaints in the relevant timeframe. According to CAN-Pakistan, there is room to improve the timeliness of responses to complaints or situations. The NCHR admits the need for a robust follow-up mechanism along with the need to streamline its administrative structures in relation to investigation, both at the headquarter levels and the provincial levels so that the proper actions are ensured within the stipulated time period. Similar to CAN-Pakistan, CSJ also believes that the timeframe for the response mechanism of the NCHR should be improved.

PODA praised the efforts of the NCHR with respect to its investigative powers. According to them, the NCHR has been successful in compiling reports investigating the human rights situation in various regions such as the Kalash community in Chitral. This report was entitled ‘Protection, Preservation and Promotion of Constitutional Rights of Indigenous Kalash People’ and it was fundamental in bringing up issues that the Kalash community faces such as the lack of a school curriculum and issues of land settlements. Another issue which is deemed controversial is that of the Kalash community’s religion. There are apprehensions among Kalash people that their religion has gradually been dying because of frequent forced conversions of Kalash girls to Islam. Another issue in this regard is that Kalash children have to study Islamic Studies in schools and colleges since they have no other option available in

the curriculum.<sup>39</sup>

Another report by the NCHR entitled 'Understanding the Agonies of Ethnic Hazaras' was a step towards bringing awareness to the injustices done to the Hazara Community from the year 2012 until 2017.<sup>40</sup>

Such bold reports are vital in understanding the human rights problems of the country. However, even though the NCHR has worked on several other reports, they are not accessible on the institution's website.

### *Court Cases*

There is a provision in the NCHR Act that provides that for speedy trial of human rights violations, the Federal Government may, in consultation with the Chief Justice of the Islamabad High Court by an official notification, specify a Court of Sessions to be the Human Rights Court for that district to try human rights cases. At the district level, so far, no human rights court is notified, however, at the High Court and Supreme Court levels, separate Human Rights Cells exist.

Similarly, section 22 of the NCHR Act provides for the Federal Government, on the advice of the Commission, to appoint an advocate from the list prepared by the Commission, with minimum experience of seven years as the human rights advocate, to be the special prosecutor for the purposes of conducting cases in the Court. According to the NCHR, due to financial constraints, the Commission has to date not been able to appoint a special prosecutor for the human rights cases in the courts, but as soon as their financial rules are in place and the Government provides them with adequate funds, they will fill this position.

### *Inspection of Prisons, Jails, Detention Centres, and Places of Confinement*

The NCHR is empowered to pay frequent visits to jails, detention or internment centres, and to investigate and inquire into human rights violations in these places.<sup>41</sup> However, according to the NCHR, they are not allowed to visit jails on their own initiative but have to seek permission from the Government and may only undertake the visit if the permission is granted. A recent development involves the imprisonment of former Prime Minister Nawaz Sharif, who also appointed the first-ever, which is the sitting, Commission, along with his daughter and son-in-law. They have complained about the substandard facilities and unhygienic food. The NCHR Chairperson took notice and asked two Commissioners to investigate the matter. In an interview to a newspaper, one of the Commissioners, Chaudhary Shafique says normally their visits to jail take place in a controlled environment, and their

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<sup>39</sup> F. Kaleem, 'NCHR reports points out miseries of Kalash community in Chitral', *Daily Times*, 28 December 2017, available at

<https://dailytimes.com.pk/169078/nchr-report-points-miseries-kalash-community-chitral/>.

<sup>40</sup> A. Shah, '509 Hazaras killed in terror related incidents during last five years in Quetta: NCHR report', *Dawn*, 20 March 2018, available at

<https://www.dawn.com/news/1396273>.

<sup>41</sup> 'Pakistan's National Commission for Human Rights – A Key Step for Maintaining GSP+ Status', Democracy Reporting International, April 2015, available at

[https://democracy-reporting.org/newdri/wp-content/uploads/2016/03/dri-pk-bp\\_54\\_pakistan\\_s\\_national\\_commission\\_for\\_human\\_rights\\_04-2015.pdf](https://democracy-reporting.org/newdri/wp-content/uploads/2016/03/dri-pk-bp_54_pakistan_s_national_commission_for_human_rights_04-2015.pdf).

previous recommendations to improve jail facilities were not implemented.<sup>42</sup>

### *Case Studies*

In cognisance of its mandate, the Commission in several instances took *suo motu* actions on human rights situations. The cases illustrate some of the serious limitations that the NCHR faces in investigating human rights violations.

- a) *Daniyal alias Chukti* - A transgender Daniyal alias Chutki was shot with a friend in a rickshaw in Peshawar. The NCHR took *suo motu* notice of the murder and directed the Khyber Pakhtunkhwa (KP) Inspector General with a notice to provide an investigative report, which was submitted to the Commission.<sup>43</sup>
- b) *Bahawalpur oil tanker incident* - In 2017 a massive oil tanker incident in Bahawalpur raised serious questions on the road and vehicles safety mechanisms with regards to human rights. In the particular incident, an oil tanker crashed on the road and many were killed while stealing highly explosive petrol. The NCHR took *suo motu* action on the incident and directed the Commissioner from Bahawalpur to provide an investigative report on it.<sup>44</sup> The report was provided but to date none of the recommended changes have been made.
- c) *Road shutdown in Rawalpindi and Islamabad* - The NCHR asked for investigative reports in view of the shutdown of roads in the twin cities of Rawalpindi and Islamabad, where the free movement of millions of citizens was violated on a daily basis by an unconstitutional violent group of people. The NCHR not only viewed the shutdown of the roads as a serious breach of human rights but also urged the Government to make the effort to engage with the violent protestors.<sup>45</sup> The Islamabad administration provided the requested reports, however at the same time the Islamabad High Court took up the matter, so the NCHR did not move further.
- d) *Kidnapping of activists and bloggers* - In another event where five social media activists and bloggers were kidnapped by unknown perpetrators, although it was widely alleged that security agencies were behind their abductions, the Commission, responding to a civil society organisation's petition, took *suo moto* notice and summoned the law enforcement agencies concerned. The Commission urged the Government to work for the immediate recovery of the bloggers. Four of them were released by the perpetrators after three weeks, and the fifth has also recently been released.

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<sup>42</sup> I. Junaidi, 'NCHR to probe prison conditions at Adiala jail', *Dawn*, 25 July 2018, available at <https://www.dawn.com/news/1422344>.

<sup>43</sup> 'NCHR takes suo motu notice of transgender person's killing in Peshawar', *Pakistan Today*, 29 March 2018, available at <https://www.pakistantoday.com.pk/2018/03/29/nchr-takes-suo-motu-notice-of-transgender-persons-killing-in-peshawar/>.

<sup>44</sup> 'NCHR takes suo motu of Bahawalpur incident', *The Nation*, 2017, available at <https://nation.com.pk/04-Jul-2017/nchr-takes-suo-motu-of-bahawalpur-incident?show=660>.

<sup>45</sup> 'NCHR takes suo-motu notice of mal-administration by twin cities officials', *The News*, 10 November 2017, available at <http://tdne.thenews.com.pk/print/243155-NCHR-takes-suo-motu-notice-of-mal-administration-by-twin-cities-officials>.

#### **4. Conclusion**

The NCHR is a recent development in the overall human rights structure in Pakistan. It is not even a decade since its inception and yet it has managed to make a name for itself with regard to the promotion and protection of human rights. That the NCHR has taken up a wide range of issues needs proper acknowledgement. The institution with all its constraints, has exhibited a strong position on certain issues of human rights and civil liberties in the country such as enforced disappearances, misuse of blasphemy laws, mainstreaming of the transgender community, and providing possible human rights-based solutions to the Government. It has also managed to engage different stakeholders including non-governmental and non-profit organisations and coordinated with Government departments. The NCHR has been gradually building its reputation among civil society, however, it has been confronting challenges in the realisation of its complete mandate among different stakeholders including the state departments and institutions such as police, security agencies, courts, universities, colleges, etc. In the face of this, the Commission's resilience to the restricting tactics of the Government and other stakeholders is appreciated.

However, in all these situations, there remains a big question mark over the autonomous status of the NCHR, which is a critical element if it is to satisfy the Paris Principles. Along with administrative autonomy, the Commission's financial independence and availability of adequate funds also need to be ensured by the Government and reviewed by the Parliament, since the NCHR has been facing constraints in this regard when it comes to the progressive realisation of a human rights agenda at national level.

The NCHR has at times utilised its powers of investigation by taking up cases on its own, and by asking for inquiry reports from the concerned departments. In this way, the NCHR has paved its way to work effectively as human rights watchdog body. However, there is a consistent demand from non-governmental organisations for the NCHR to gear up and make serious efforts in terms of its follow-up mechanisms.

While the NCHR has a broad mandate of human rights work, it still needs to undergo a great deal of functional and capacity building changes to bring it up to the level of a properly functioning NHRI in compliance with the Paris Principles. There is a large gap between the powers given to the NCHR on paper and how these are being translated into action. Many areas in the provided mandate have yet to be explored such as reviewing existing legislation from a human rights perspective, promotion of human rights education at schools, colleges and universities, and Government departments, etc. Given the electioneering currently going on in the country, it is unclear at present whether the improvements that need to be made to the functioning and capacity of the NCHR will take place in good time or whether these needs will further linger on. It will be, therefore, interesting to examine how the overall picture changes with the expected reforms that will come to the NCHR vis-à-vis its rules of business, hiring of permanent staff for the Commission, and upcoming change in leadership in 2019, alongside the change of Government and the political environment in the country.

#### **5. Recommendations**

##### **To the Government:**

- Ensure that the NCHR is recognised as an independent human rights institution, acknowledging its efforts to bring changes to legislation, and facilitate structural

- reforms in its systems, in order to protect and promote human rights;
- Ensure the financial independence of the NCHR and remove hurdles in the process of establishing its own fund. Additionally, the Government should discourage all interference from other ministries and departments, and ensure adequate funds for the institution to function keeping in view the Paris Principles and GANHRI-SCA General Observations;
  - Create exceptions for the NCHR vis-à-vis its travelling protocols such as issuance of no-objection certificates, security clearances with regards to its participation in international human rights events and reporting on the UN human rights mechanisms. The need to gain unnecessary clearances and permissions from the Ministries of Foreign Affairs, Interior and Human Rights are restrictive measures in the realisation of its mandate to cooperate with the UN human rights mechanisms and other international and regional mechanisms.

**To the National Commission on Human Rights:**

- Strictly adhere to the Paris Principles and ensure adequate steps are taken in order to promote a human rights-based approach in all actions and activities;
- Revitalise efforts to maintain its independent status both administratively and financially for the progressive realisation of a human rights agenda in Pakistan;
- Expedite the process of recruitment, ensuring the institution's integrity with respect to the principles of pluralism. The institution has an immediate need for a good mix of human resource with technical expertise, sound in human rights knowledge, procedures and practices, in order to robustly carry forward the human rights agenda;
- Invest in building the capacity of its existing staff by equipping them with knowledge on the international human rights framework, cooperation with UN human rights bodies, reporting mechanisms, and others;
- Ensure measures for human rights education, by issuing adequate guidelines for schools, colleges and universities on promotion and protection of human rights;
- Strengthen its administrative structures and provide the needed support to its regional offices in order to carry forward human rights work at provincial levels. A fully functional regional office in Baluchistan province should immediately be established;
- Integrate a robust follow-up mechanism at the headquarters and all regional chapters so as to reinforce the actions taken by the Commission on human rights violations;
- Ensure proactiveness and express a timely stance on human rights violations by issuing statements or conducting press conferences;
- Arrange orientation sessions with the higher bureaucracy in the government departments through the Chief Secretary's offices, on international obligations under various human rights conventions, treaties, declarations, etc.;
- Ensure the presence of experts from diverse human rights backgrounds including civil society, lawyers, media, and others to ensure plurality and diversity in its structures;
- Ensure a tech-based, fully functional, and capable human rights complaint mechanism system on a priority basis.

## NORTHEAST ASIA OVERVIEW

In Northeast Asia, the list of countries that have an NHRI is quite short. South Korea and Mongolia are the only countries on the list so far. The most populous and powerful Asian country, China, and the most advanced and affluent Asian country, Japan, are missing. Unless and until these two pre-eminent Asian countries join the list, the overall human rights situation in Northeast Asia will remain unsatisfactory.

In the wake of the candlelight protests, the National Human Rights Commission of Korea (NHRCK) has recently regained its visibility and vitality in Korean society, while the National Human Rights Commission of Mongolia (NHRCM) has also increased its visibility and voice in Mongolian society. Meanwhile, in Japan, discourse around a potential NHRI has almost stopped since Prime Minister Shinzo Abe took office several years ago, and in Taiwan, where the incumbent President announced her willingness to establish an NHRI, political apathy still stands in the way. Although China once seriously reviewed the political feasibility of creating an NHRI ahead of the 2008 Beijing Olympic Games, the project has since met with indifference and silence. North Korea is also believed to have no chance of joining the list of countries with an NHRI in the near future.

Both the NHRCM and the NHRCK, the only two NHRIs in the region, are accredited with 'A' status by GANHRI-SCA. Both of them have also shown engagement with civil society. The NHRCM meets formally twice a year with representatives from civil society and its Chief Commissioner has also initiated and cooperated with civil society on a draft law on human rights defenders.

In terms of the NHRCK, one positive development that ANNI has witnessed is the appointment of the first female Chairperson, someone with a non-legal background and extensive human rights experience. Unprecedented in Korea, her appointment process was in line with continued demands from civil society, and in accord with the Paris Principles, that an NHRI should have a transparent and inclusive selection and appointment process. The Blue House set up the Candidate Recommendation Committee, which publicised the vacancy and collected applications. NGOs and other third-party nominations were not allowed. The Committee reviewed a dozen applications and recommended three candidates to the President, who then made a final selection. This kind of public nomination procedure was introduced for this particular appointment and is promised for all future vacancies in the NHRCK.

Regarding the relationship with the government sector, the NHRCM has provided comments to legislators when draft legislation is developed, and some of its demands and recommendations have been taken into consideration by the government sector and other stakeholders. In 2017, the Commission submitted its recommendation on the draft of the newly amended Law on Labour. In a sign that the Government values the work of the NHRCM, the NHRCM's budget was increased by the Government in early 2018.

In the case of the NHRCK, the Commission recommended the Government to establish a National Action Plan (NAP) on Business and Human Rights in 2016 and the NHRCK has been following-up on this call since early 2017.

ANNI has also seen progress on the establishment of an NHRI in Taiwan in recent years and

has worked with members in Taiwan to advocate for this establishment. In 2017, ANNI representatives conducted an assessment mission on the establishment of an NHRI in Taiwan and a report was presented to the President's Office Human Rights Consultative Committee (POHRCC). Some challenges still remain and the process of establishment has been slow, but ANNI hopes that the establishment of an NHRI that is set up according to the Paris Principles is announced in the near future.

The remaining challenge for NHRIs in the region overall is the selection process of the Commissioners, which needs to be more transparent and independent. In terms of the NHRCK, GANHRI has recommended that the law for selecting the Commissioners be revised in order to secure the independence of the NHRCK. Regarding the NHRCM, there is still no requirement for diversity in representation in the NHRCM Act.

Although the region has seen some remarkable changes to its NHRIs in the reporting period, having only two NHRIs is not good enough. It sends a message that in Northeast Asia NHRIs are seen as unnecessary. The Governments of Japan and Hong Kong, both places where ANNI has members working, still express no interest in establishing an institution. Lacking an NHRI can hinder the promotion and protection of human rights in a country or territory, and so it is critical that more NHRIs are established in the region.



# MONGOLIA: PROGRESS ON HUMAN RIGHTS DEMANDS MORE ENGAGEMENT WITH THE STATE GREAT HURAL

*Center for Human Rights and Development (CHRD)<sup>1</sup>*

## 1. Introduction

The Center for Human Rights and Development (CHRD) as a member organisation of Forum-Asia has prepared this 12<sup>th</sup> independent report on the National Human Rights Commission of Mongolia (NHRCM).

The main objective of this report is to evaluate and review all activities of the NHRCM in 2017 to promote and protect human rights at a country level and to assess how far it meets the Paris Principles.

The information in this report comes from the 17th *Status Report on Human Rights and Freedoms in Mongolia* (Status Report), the Commission's 2017 Annual Report, the Commission's website, and other relevant sources within ANNI's<sup>2</sup> guidelines. The draft report was sent by email to the members of the Mongolian Human Rights NGO Forum, and to the Director of the NHRCM secretariat. Consultations were then held with these groups for comments and feedback, which have been incorporated into the report.

## 2. Overview

The National Human Rights Commission of Mongolia Act<sup>3</sup> (NHRCM Act), under which the NHRCM was created, was approved in 2000. This law states that “the NHRCM is an institution mandated with the promotion and protection of human rights and charged with monitoring the implementation of the provisions on human rights and freedoms, provided in the Constitution of Mongolia, laws and international treaties of Mongolia”.

At the last status review of the NHRCM, undertaken by the Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation (GANHRI-SCA) in October 2014, the NHRCM was awarded ‘A’ status. In its recommendations GANHRI-SCA called for the NHRCM to advocate for a clear, transparent and participatory selection process, expressing concerns that the current process does not require advertising of vacancies or broad consultations. GANHRI-SCA also called for the NHRCM to ensure that complainants who do not speak Mongolian can submit their complaints in their own language, and to remove the requirement that complainants identify the rights that have been violated in their complaint, a requirement held to be a barrier for many complainants. Finally, GANHRI-SCA noted that more funding is likely to be needed for the NHRCM.<sup>4</sup>

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<sup>1</sup> Contact email: [chrd@mongolnet.mn](mailto:chrd@mongolnet.mn)

<sup>2</sup> ANNI –Asian NGOs Network on National Human Rights Institutions, available at [https://www.forum-asia.org/?page\\_id=19132](https://www.forum-asia.org/?page_id=19132).

<sup>3</sup> The National Human Rights Commission of Mongolia Act, 2000, available at <https://www.hurights.or.jp/archives/database/nhri-law-mongolia.html>.

<sup>4</sup> ‘Report and Recommendations of the Session of the Sub-Committee on Accreditation’, GANHRI, October 2014, pp. 24-26, available at <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20OCTOBER%202014%20FINAL%20REPORT%20-%20ENGLISH.pdf>.

### **3. The National Human Rights Commission of Mongolia and the Paris Principles**

#### **3.1 Functions, Mandate, and Structure**

In accordance with the NHRCM Act, the NHRCM has the power to put forward proposals on any human rights-related issues; to put forward recommendations and/or proposals on whether laws or administrative decisions are in conformity with the key human rights principles; and to put forward proposals on the implementation of international human rights treaties and/or drafting of Government reports on implementation of those treaties. Moreover, the NHRCM is legally empowered to carry out the following activities:

- conduct research on human rights issues and provide necessary information;
- collaborate with international, regional, and other national human rights institutions;
- produce reports on the human rights situation in Mongolia;
- increase public awareness about laws and/or international treaties relating to human rights;
- promote human rights education activities;
- encourage ratification of and/or accession to the international human rights treaties.

According to the law, the NHRCM is entitled to conduct inquiries on its own initiative on the basis of information with regard to violations of human rights and freedoms, or at the request of business entities, organisations, or officials, and to issue demands, or to make recommendations, and to ensure their implementation.

#### *Human Rights Protection*

In accordance with its mandate to protect human rights, the NHRCM has reviewed legislation submitted to the State Great Hural (Parliament), providing input both at the drafting stage and at the debate stage.

When draft legislation is being developed by the legislators, either by the members of the State Great Hural or the Cabinet, and where this legislation is considered relevant to human rights and freedoms, comments are sought from the NHRCM. A Working Group on recommendations on draft laws has been formed in the NHRCM, made up of staff of the NHRCM secretariat. Each member of this Working Group makes her or his recommendation on those draft laws. After all recommendations and proposals are presented to the three Commissioners of the NHRCM, an official response is delivered to the relevant legislators.

The NHRCM also submits recommendations on draft legislation on its own initiative. For example, in 2017, it submitted its recommendation on the draft of the newly amended Law on Labour. However, these recommendations are not publicly available.

In total, in 2017 the NHRCM analysed 12 draft laws, policy documents, and a set of draft regulations,<sup>5</sup> checking for their compliance with human rights principles and norms. As a

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<sup>5</sup> The full list of laws, draft laws, regulations, and policy documents that the NHRCM made recommendations to is as follows: ‘Internal procedure of custody for foreign nationals’ to be approved by the decree of the Minister for Justice and Home Affairs; Amendment to the Law on the Prosecutor; Draft Action Plan on Implementation of ‘National Program on Combating Human Trafficking’ to be approved by Cabinet resolution; amended draft law on Execution of Court Decision; 2017 draft on ‘Requirements for dormitory services’; Amendment to the Constitution of Mongolia; draft on ‘Regime and Procedure for Custody’ to be

result, 134 recommendations on how these documents could be amended to better comply with human rights standards were delivered to legislators.

The NHRCM has undertaken an analysis on the status of mandates and responsibilities, achievements, and challenges for government agencies with regard to implementation of the Law on Promotion of Gender Equality. This analysis reveals that government agencies have displayed a lack of attention to, or of initiative and action concerning, gender issues, in regard to their responsibilities required in the law. This was reflected in the NHRCM's 16th Status Report and four recommendations were submitted to the Great State Hural for decision.<sup>6</sup>

However, legislators never report back to the NHRCM on whether its opinions are taken into consideration in the discussions on the final draft. The NHRCM would like to receive at least a reason as to why their opinions are not incorporated into the laws. The NHRCM plans to push for a response as to whether its opinions are taken into consideration in those final discussions. To improve the quality of the recommendations it makes to legislators, the NHRCM also has a plan to include an expert who has deep knowledge and experience on relevant issues in its Working Group on recommendations on draft laws.

In 2017, the NHRCM received 502 complaints from individuals and private enterprises. Of these 463 have been resolved by taking necessary actions. The NHRCM receives complaints from people orally and in writing, through phone calls, emails, and a smart phone application, as stated in the NHRCM Act. The NHRCM has a close look at each individual complaint and contacts the complainant for further clarification, including regularly meeting with complainants in person. A Complaints and Inquiry Officer checks through the complaints every day and submits them to the NHRCM Commissioners. The Commissioners then go through those complaints to decide whether there is need for further examination. Within the reporting period, the NHRCM has provided 597 hours of legal advice in total to 2242 individuals and enterprises via email, phone calls, and meetings in person, and filed three human rights related cases to the courts in application for compensation.

Within its mandate for elimination of human rights violations and protection against human rights abuses, the NHRCM has full authority to deliver demands and recommendations to individuals and business entities, and to ensure their implementation. Within the reporting period, a total of 22 recommendations and 33 demands were submitted.

The Department of Complaints and Inquiry at the NHRCM monitors the implementation of these recommendations and demands. As of 2017, monitoring by the Department of Complaints and Inquiry found that only one demand was not responded to, and two demands received a response to the effect that it was impossible to take the recommended action, on the basis of lack of capacity and resources. According to the Department of Complaints and Inquiry, the rest of the recommendations and demands were implemented.

The NHRCM submits an annual Status Report to the Great State Hural. In 2018 it submitted the 17<sup>th</sup> Status Report covering topics such as the right to live in a healthy and safe environment, human rights issues in relation to Ulaanbaatar city planning, issues in relation

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approved to the Cabinet member in charge of justice; amendment to the law on witness and victim protection; report on 'current status on monitoring indicators for implementation of SDGs in Mongolia'; draft Cabinet resolution and draft programme on 'Legal Education for All'.

<sup>6</sup> '16<sup>th</sup> Status report on Human Rights and Freedoms in Mongolia', NHRCM, 2017, available at <http://www.mn-nhrc.gov.mn/eng/engine/download.php?id=102>.

to the right to remedy, issues in relation to the right to work for officers of Professional Inspection Organisations at the border zone and calls for implementation of recommendations from the United Nations Human Rights Council.

The Status Report is developed on the basis of NHRCM inquiries; research, complaints and demands from citizens; monitoring of implementation of recommendations; research and analysis from civil society organisations and researchers; and information provided by the Government, ministries, agencies and other organisations. Sixteen recommendations have been delivered for decision to the Great State Hural in the 17th Status Report.

One case considered in the Status Report concerns government projects and programmes focused on urban planning and ger<sup>7</sup> development areas. As part of these projects, land release and resettlement are being carried out by government agencies and project implementers. The NHRCM undertook human rights analyses of those programmes and projects, and made a number of recommendations discussed further in the ‘Case Studies’ section below.

One household reported that they had received a call from a representative of the Project Implementing Unit of the Asian Development Bank, together with the District Land Authority, and were then met in person by officials who took photos of the land and house without permission. The household reported being put under pressure to accept the land evaluation and to enter into a contract to vacate the land for use by the Selbe infrastructure project.<sup>8</sup>

The head of the household claims that his constitutional rights to own property and land have been violated in the name of the public well-being, and that they have been forced into accepting a land and property evaluation which has left them with insufficient money to buy another house and land. In addition, he claims that they are being made to move out, with nowhere to live, in the cold weather.<sup>9</sup>

In a separate and ongoing situation, in 2017 there were several cases in which child jockeys were injured or even died as a result of taking part in horse racing competitions in cold weather. During races held in March 2017 in different provinces of Mongolia, a total of 34 child jockeys fell off their horses, with one breaking his arm, another breaking his leg, and one 11-year-old child passing away after spending 16 days unconscious after a severe head injury.

The NHRCM has made frequent submissions on this issue, discussed in further detail in the ‘Case Studies’ section below.

In line with the Convention on the Rights of the Child, the Mongolian Law on the Rights of the Child, 2016, “serves to promote the rights of the child from the time of his/her birth until the age of 18”. Those under the age of 18 are considered to be children according to the law.

However, horse racing using child jockeys was organised again in March 2018. Sixteen

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<sup>7</sup> A ‘ger’ is a Mongolian house. Many gers use coal during the winter, as a result of which ger areas are one of the main contributors to air pollution. There are therefore activities to develop ger areas and reduce pollution levels.

<sup>8</sup> ‘17th Status Report on Human Rights and Freedoms in Mongolia’, NHRCM, 2018.

<sup>9</sup> Interview with J. – a citizen of 14th khoroo, Sukhbaatar district.

children fell off their horses out of which three suffered severe injuries.<sup>10</sup> Due to limited visibility, as the event was held in the late evening, two children collided with a car and were left unconscious. The child with the most severe injury is being treated at the Hospital of Injury and Trauma and has been identified as having the age of 11. He had been registered as 12 years old.<sup>11</sup>

### *Human Rights Promotion*

In 2017, the NHRCM conducted 553 training-sessions, on issues including child rights for lawyers and police officers, human rights and the environment, and a training on a human rights-based approach for government officers, for a total of 90,663 hours for 23,765 participants. The hope is that these trainings will reduce the human rights violations from government and state officials. A total of 27,509 copies of publications, such as human rights books, booklets, and handouts, were disseminated for training and public awareness purposes. The publications covered topics such as gender and human rights, human rights-based approaches, and a magazine on human rights. The Chief Commissioner, and Commissioners and staff of the secretariat, gave interviews, and provided clarification and information 112 times for television, 76 times for radio, 39 times for newspapers, and 18 times for websites.

### *Accountability and Publication of Findings and Reports*

The NHRCM produces its Status Report every year. The report must be submitted annually to Parliament. The Status Report is not discussed in the plenary session of Parliament, but in the Standing Committee on Legal Affairs. Civil society has called for the report to be discussed in the plenary session of the Parliament.

The annual reports are published on the NHRCM website where they are readily available for download.<sup>12</sup>

## **3.2 Autonomy from the Government and Independence Guaranteed by Statute or the Constitution**

### *Budgetary Autonomy and Financial Independence*

The NHRCM's budget is approved by the State Great Hural based on proposals on operational costs submitted by the NHRCM and is reflected in the State consolidated budget. Section 22.2 of the NHRCM Act, states that "The State Great Hural shall approve and reflect specifically the budget of the Commission in the State Consolidated Budget on the basis of a latter's proposal, and this budget shall fulfill the requirements for the independent conduct of its activities."

However, the budget is rechecked by the Ministry of Finance and can be amended to take account of the financial situation if needs be, thus undermining autonomy from the executive. In recent years, as discussed below, there has been a practice of the Ministry of Finance

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<sup>10</sup> 'During the "Dunjingzhav" horse race, 16 children, not nine, fell from the horse and two were injured', *Ikon*, 19 March 2018, available at <http://ikon.mn/n/18tr>.

<sup>11</sup> Interview with A. Enkhbaatar from the Legal and Cooperation Department of the Family, Child and Youth Agency.

<sup>12</sup> 'Status Report on Human Rights and Freedoms', NHRCM, available at <http://mn-nhrc.org/eng/main2/188/>.

reducing the budget during the amendment process.

### *Interaction with, and State Submissions to, the International Human Rights System*

The NHRCM made a submission for Mongolia's second review under the Universal Periodic Review process. It has also been active in advocating for the Government to sign and ratify UN human rights conventions such as the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, the Optional Protocols to the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities.

### *Selection and Appointment*

Names for candidates for the NHRCM's three Commissioners are submitted to the State Great Hural on the basis of respective proposals by the President, the Parliamentary Standing Committee on Legal Affairs, and the Supreme Court, and Commissioners are appointed by the State Great Hural for a six-year term with the possibility of getting re-appointed only once. A Chief Commissioner is appointed by the State Great Hural from amongst the three Commissioners for a term of three years, based on a proposal by the Speaker of the State Great Hural. Under the NHRCM Act all candidates for the post of Commissioner should be Mongolian citizens with high legal and political qualifications, with appropriate knowledge and experience in human rights, without a criminal record, and having reached the age of at least thirty-five.

In cases where any Commissioner has been released, resigned from his or her official position, or deceased before the expiry of the term of his or her office, the NHRCM Act provides that the Great State Hural should appoint a replacement for that Commissioner within sixty days.

There is a lack of transparency and inclusiveness in the nomination process for Commissioners. The process is not transparent, nor does it enable broad participation including from civil society, which is called for in the GANRHI-SCA's General Observation 1.8.<sup>13</sup> The nomination and appointment of the Commissioners is seen as a political matter, as a result of which the NHRCM has been criticised for not voicing an opinion on critical human rights matters in the country.

In addition, the limitation of its three nominees to those having 'appropriate' human rights knowledge and experience deemed sufficient as one of the requirements for the role of Commissioner, calls into question the quality of the Commissioners, as does the statement made once by a previous Chief Commissioner concerning a serious violation of human rights during the arrests of almost 800 people after the 1 July protests on the 2008 election results, as being "no breach of human rights".

### *Dismissal Procedures*

A Commissioner can be dismissed by the Great State Hural if he or she is nominated as candidate for President of Mongolia or as a member of the Great State Hural, if he or she is appointed to another official position, or if he or she cannot exercise his or her powers due to

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<sup>13</sup> General Observations of the SCA, 2013, Section 1.8, available at [https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC\\_SCA\\_General\\_Observations.pdf](https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC_SCA_General_Observations.pdf).

ill health or any other reason.<sup>14</sup> In practice no Commissioner has ever been dismissed.

Under the NHRCM Act, unless a Commissioner has been arrested for a criminal act or on the site of crime with all implicating evidence, it shall be prohibited to detain, imprison, or impose administrative sanctions by way of a judicial process on Commissioners, or to conduct the search of his or her home, office, or body.

### 3.3 Pluralism

#### *Pluralism of Commissioners*

There is no requirement for diversity in representation in the NHRCM Act, contrary to the Paris Principles and General Observation 1.7.<sup>15</sup>

Under the NHRCM Act, the NHRCM may establish an *ex officio* council, which consists of the representatives of active human rights non-governmental organisations, to assist it in conducting its activities. This *ex officio* council has an important role to provide diverse perspectives on the activities of the Commission. The composition of the council is renewed once in every three years and new members of the *ex officio* council were appointed on the 4 December 2017. The newly appointed council for 2018-2020, consisting of representatives of government, non-governmental, and international organisations, has 19 members.

#### *Pluralism of Staffing*

There are also no legal requirements to ensure diversity in staffing. The NHRCM has a secretariat. The staff of the secretariat are civil servants and their salaries are funded within the NHRCM budget approved by the State Great Hural. The NHRCM staff selection is carried out in accordance with the Law on Civil Service through open public announcement of vacancies. The candidate who earns the highest score among the short-listed candidates in the oral and written examination is selected.

#### *Collaboration with Civil Society and other Stakeholders*

The NHRCM has a legal mandate to cooperate with Government, the private sector, and international, regional, and national human rights organisations. It has continued the tradition of conducting joint activities with civil society organisations within the reporting period. The NHRCM meets formally twice a year with representatives from civil society. A ‘Human Rights Breakfast’ organised in conjunction with the Open Society Forum<sup>16</sup> and open to anyone interested, was organised ten times and approximately 400 people took part in it. On International Human Rights Day, the NHRCM, jointly with civil society organisations, organised public meetings at Sukhbaatar square in Ulaanbaatar, and in some aimags and soums<sup>17</sup> centres. The NHRCM’s Chief Commissioner took part in various workshops

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<sup>14</sup> National Human Rights Commission of Mongolia Act, 2000, available at <https://www.hurights.or.jp/archives/database/nhri-law-mongolia.html>.

<sup>15</sup> General Observations of the SCA, 2013, Section 1.7, available at [https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC\\_SCA\\_General\\_Observations.pdf](https://www.nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC_SCA_General_Observations.pdf).

<sup>16</sup> The Open Society Forum is an independent non-governmental organisation established in 2004 with the mission to serve as a platform for informed citizens’ participation in policy formulation and implementation by supporting quality research, information, and stakeholder dialogue.

<sup>17</sup> Every aimag (province) has around 15-25 soums (sub-provinces).



organised by Asian civil society organisations across the region, such as in Busan, South Korea, organised by the Busan Democracy Forum, and has participated as an invited speaker in plenary and panel sessions. He has also initiated and cooperated with civil society on a draft law on human rights defenders.

The NHRCM consults with human rights NGOs in regard to nominees for the *ex officio* council mentioned above, and engages actively in consultative meetings with human rights defenders, in which the National Human Rights NGO Forum, an umbrella of some 40 human rights NGOs, presents a report. In the last such meeting this report was on the 2018 work plan of the NHRCM, with civil society input solicited. In addition, policy dialogues conducted by NGOs have been organised, for example by CHRD with the support of FORUM-ASIA, with the attendance of the director of the NHRCM secretariat, policy staff, or the Chief Commissioner himself. The content and form of the partnership with civil society organisations has been strengthened over the last two or three years, largely due to a change in strategy by civil society in which it has tried to engage more constructively to support the NHRCM for example by inviting the NHRCM to their workshops, consultations, and other events, so that the NHRCM can learn more about the issues involved.

In December 2017, in support of the NHRCM's activities, the member organisations of the National Human Rights NGO Forum sent an official request to all members of the State Great Hural. Two of the key requests in relation to the NHRCM were: a call for the organisation of a hearing on the NHRCM's Status Report at the Plenary Session of the State Great Hural and for a decree to be issued by the Standing Committee on Legal Affairs for implementation of the recommendations of that report; and a call for adequate funds for the NHRCM's operations, and the abolition of the practice of approved budget reduction, in which the Ministry of Finance rechecks the state budget to assess whether there is any need for amendment due to the financial situation or other reason.<sup>18</sup>

As a result of these calls on one hand and the efforts of the NHRCM and its Chief Commissioner on other hand, the NHRCM budget was increased by 40 percent. Furthermore, while the Status Report was not discussed in the plenary session of Parliament, it was discussed in the Standing Committee on Legal Affairs, following which a State Great Hural working group on domestic violence and children's rights was formed.<sup>19</sup> The Working Group consists of seven members of Parliament, representatives from other government organisations, and the NHRCM, and has the purpose of making inquiries into the enforcement of the Law on Combating Domestic Violence, the Law on Crime Prevention, the Law on Child Rights, and the Law on Child Protection; and to issue conclusions and recommendations for the improvement of the implementation of these laws.

### **3.4 Adequate Resources**

Although there is a legal environment to maintain the financial independence of the NHRCM, there could be cases where planned activities cannot be carried out due to inadequate funds depending on the country's economic situation. For example, between 2015-2016, the NHRCM budget was reduced two years in a row by Parliament, following an amendment by the Ministry of Finance, from 885 million to 831 million tugrik, and from 831 million to 731 million tugrik. In 2017, it was slightly increased and a total budget of 814

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<sup>18</sup> Official letter is attached in Annexe 1.

<sup>19</sup> This information was given by Mr. Batbyamba, officer of the Standing Committee on Legal Affairs of the Great State Hural, in response to the calls from NGOs.

million was approved, but it remained below the 885 million of 2014.

However, in 2018, following the push by NGOs and the NHRCM outlined above, a budget of 1,140,000,000 tugrik was approved, an increase of 326 million over last year. The Director of the NHRCM secretariat said, “The Chief Commissioner played a significant role for approval of additional funds. Thanks to an increased budget for 2018, particularly for increased operational costs, we are able to expand our activities focused on training and public awareness programmes. There has been a case of budget reduction during amendment to the budget. We will pay regular attention either not to decrease the budget from 2018, or to increase the budget to the required level”. Now there is need to take concrete action to abolish the practice of budget cuts by the Ministry of Finance during the process of budget amendment.<sup>20</sup>

The source of these cuts to the NHRCM’s budget has been financial constraints, rather than it being a direct attempt to limit the human rights work of the NHRCM.

### **3.5 Adequate Powers of Investigation**

#### *Powers of Investigation*

The NHRCM has the power to conduct an inquiry with regard to individual complaints on violations of human rights and freedoms or at the request of business entities, organisations, or officials. During the course of an inquiry into complaints, the NHRCM has the right to take explanations in writing from the complainant and relevant business entities, organisations, officials, or individual persons; to summon the complainant and relevant persons; to have unrestricted access to any business entity or organisation, to participate in their meetings and conferences, and to meet in person with relevant officials; to obtain without any charge the necessary evidence, official documents, and information from organisations and/or officials, and to get acquainted with them on the spot; and to appoint experts from the appropriate organisations in a case of necessity for specialised knowledge, and to get their expert opinions.

In the NHRCM Act, there is no provision in relation to the NHRCM’s power to protect complainants and witnesses who submit complaints and provide evidence.

The NHRCM carried out 99 planned inquiries as well as inquiries on its own initiative. These include inquiries into prisons, police custody, detention centres, a preventive inquiry in regard to safety of child jockeys, as well as implementation of the right to education of disabled children of pre-school age.

#### *Court Cases*

The NHRCM has the power to submit claims to the courts with regard to issues of violations of human rights and freedoms, to participate in person or through a representative in judicial proceedings in accordance with the procedure established by the law, to put forward requests

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<sup>20</sup> In December 2017, by decision of participants of a national consultation of human rights defenders, the National Human Rights NGO Forum sent a request to all members of the State Great Hural to allocate and approve adequate funds to the NHRCM and abolish the practice of budget reduction by the Ministry of Finance. The request influenced matters to a certain extent because there was a call from the officer for the Standing Committee on Legal Affairs in January 2018 on this issue.

to the competent authorities or officials with regard to imposing administrative sanctions on officials who have violated human rights and freedoms, and to demand organisations or officials to stop activities that violate human rights and freedoms or that create conditions for such violations.

In the reporting period, the NHRCM submitted three claims to the courts in regard to the restoration of violated human rights, and their remedies. To date, two of these cases have been resolved by the court.

### *Inspection of Prisons, Jails, Detention Centres, and Places of Confinement*

The NHRCM has a mandate to visit prisons and detention centres under the NHRCM Act. The purpose is to protect the human rights of prisoners and to prevent human rights violations such as torture. The NHRCM visited 41 prisons in the period under discussion, and sent recommendations to the prison heads for how the violations found could be addressed.

### *Case Studies*

- a) *Child jockeys* - The NHRCM has investigated cases in which child jockeys have died or been severely injured, including the death of an 11-year old child, making frequent submissions on this issue, with recommendations to the Prime Minister, the Government, and aimag governors. However, Government Resolution 19, dated 19 January 2018, which sets out the decision to again hold horse-racing during the winter and spring seasons, only went so far as to state that “children aged under 12 are prohibited to ride a horse for the period from early spring till 1 May”.<sup>21</sup> In response the NHRCM issued its most recent recommendation, dated 22 January 2018, sent to the Prime Minister and 21 aimag governors, calling for horse-racing not to be organised in the spring, during the cold season, demanding that children be prevented from riding as jockeys in the races, and calling for children to be protected from being made to drop out of school to take part in the horse-racing. As mentioned in the 17th Status Report, the NHRCM regrets that in the Government Resolution 19 mentioned above, only “...children under the age of 12 are prohibited from riding in horse-racing competitions” which effectively means that children above the age of 12 are permitted to ride.<sup>22</sup>

Despite the recommendations of the NHRCM, the ‘Dunjingarav 2018’ horse-racing competition was organised on 18 March 2018 in Bayantal soum, Gobisumber aimag, with much the same results as the previous year. The State Inspector on Child Rights has said that charges will be brought under the Law of Mongolia on Violations,<sup>23</sup> on the grounds of “allowing children to be part of games that might cause danger to life and health”.<sup>24</sup>

- b) *Citizen D.M* - The NHRCM submitted a claim to the courts on behalf of D.M - a citizen of 8<sup>th</sup> bag, Murun soum, Huvsgul, for compensation in relation to false charges. The

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<sup>21</sup> Resolution of the Government of Mongolia 19, 19 January 2018, available at <http://www.legalinfo.mn/law/details/13178>.

<sup>22</sup> ‘17<sup>th</sup> Status Report on Human Rights and Freedoms in Mongolia’, NHRCM, 2018.

<sup>23</sup> An overview of this law is available at <http://gtsadvocates.mn/brief-overview-of-law-of-mongolia-on-violations/>.

<sup>24</sup> ‘17<sup>th</sup> Status Report on Human Rights and Freedoms in Mongolia’, NHRCM, 2018.

claim was submitted on 3 November 2016 to the inter-soum civil court of first instance for compensation of 238,227,592 tugriks. By decree of the Civil Court of Supervisory Instance of the Supreme Court dated 8 June 2017, compensation of 9,636,700 tugriks was granted and the claim for the outstanding 228,590,892 tugriks was dismissed, on the basis that the damages calculated by the claimant included psychological damage, which is not recognised as grounds for compensation in Mongolian law.<sup>25</sup>

- c) *Urban planning programmes* - The NHRCM undertook human rights analyses of these programmes and projects, revealing a number of violations of human rights, such as failing to provide housing for those who have left the land, failing to pay rental or compensation in a timely manner, assessing the value of property at a lower level than its market value, and demanding that citizens leave their land and move out of their homes during the cold season. The NHRCM has recommended that the Government take urgent measures for compensating those citizens who have vacated the land and who as a result have lost their property. In addition, it has called for the legal environment for urban development to be improved, in particular that demands for land to be freed up be restricted until such time as the residents have managed to find alternative accommodation. Furthermore, accountability mechanisms should be put in place for the Government and other organisations or business entities to monitor whether, and ensure that, housing is arranged within the agreed period of time.

#### **4. Conclusion**

During the reporting period, the NHRCM has gone some way towards meeting its responsibility to monitor the implementation of human rights standards and freedoms, and to protect and promote human rights under its mandate as specified by law and according to its current financial capacity.

Government agencies, authorities, and business entities have also taken some steps to implement the NHRCM's demands and recommendations, according to monitoring undertaken by the NHRCM's Department of Complaints and Inquiry.

However, that has not been the case at the Government level. For example, there was no response to the NHRCM's recommendation to end the organisation of horse-racing competitions during the cold seasons of winter and spring, and to prohibit children from riding in these competitions.

The creation of a working group on domestic violence and the rights of children following on from the recommendations made in the Status Report of 2017, is a notable achievement. However, rather than having the Status Report and its recommendations discussed in the Standing Committee on Legal Affairs of the State Great Hural, it should be introduced in the plenary session of the State Great Hural and discussed by all members of Parliament. The NHRCM submitted its 17th Status Report in 2018, but it remains doubtful whether this report will be discussed in the plenary of the State Great Hural.

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<sup>25</sup> '17th Status Report on Human Rights and Freedoms in Mongolia', NHRCM, 2018.

## **5. Recommendations**

### **To the National Human Rights Commission of Mongolia:**

- Ensure discussion of the annual Status Report at the Parliamentary plenary session;
- Be vigilant on human rights violations and act in a timely and comprehensive manner aligned with international human rights conventions;
- Closely cooperate with relevant NGOs and civil society organisations;
- Ensure effective implementation of the recommendations in the Status Report and in the enforcement resolution of the Parliamentary Standing Committee on Legal Affairs.

### **To the State Great Hural and the Standing Committee on Legal Affairs:**

- Discuss the Status Report at the Plenary session of the Great State Hural, so that it is brought to the attention of all parliamentary members;
- Approve the draft law on protection of human rights defenders initiated by the NHRCM;
- Issue resolutions for the implementation of the recommendations from the Status Report and monitor their implementation;
- Approve adequate funding for the NHRCM to perform its responsibilities and do not decrease the approved budget during the budget amendment process;
- Amend relevant laws and regulations in particular the NHRCM Act to strengthen the NHRCM's independence in accordance with the Paris Principles.

### **To the Government of Mongolia:**

- Accept and implement recommendations made by the NHRCM and take action to protect, fulfil, and promote human rights according to the state's responsibilities under international human rights treaties to which Mongolia is a State Party;
- Place a moratorium on budget cuts irrespective of economic circumstances, for the sake of the NHRCM's ability to perform independently;
- Ensure implementation of the resolutions by the State Great Hural and Standing Committee on Legal Affairs in relation to the NHRCM recommendations, including by imposing sanctions on those officials who have not implemented them.

## **TO THE OFFICE OF THE STATE GREAT HURAL**

As a member of the United Nations, Mongolia receives UN decisions and recommendations for protection and promotion of human rights, ratifies human rights declarations and conventions, takes responsibility to ensure compliance of national laws, regulations and their implementation with international human rights norms, and aims to improve the status of human rights. We do believe that these are significant steps towards protection and promotion of human rights, and improving political, economic and social development policies.

As of today, the Government of Mongolia has successfully participated in the Universal Periodic Review meeting of the UN Human Rights Council and is implementing relevant recommendations as well as planning to submit the mid-term review report. In this regard, we kindly ask your commitment and contribution for implementation of the following recommendations on setting up a national mechanism for protection of human rights as recommended by the UN Human Rights Council, UN treaty bodies, and other organisations:

1. Considering the fact that there exists no legal environment for the protection and promotion of activities of human rights defenders, by the initiative of the NHRCM, jointly with the members of Human Rights NGO Forum, the draft law on Human Rights Defenders was developed and submitted to the Human Rights Sub-Committee in April 2017. Support was granted for approval of the draft law;
2. Considering recommendations by the UN Human Rights Council, UN treaty bodies, and global associations of national human rights institutions, amendments must be made to ensure that the NHRCM acts in accordance with the Paris Principles, and to ensure independence of national human rights institutions as the key to the effectiveness of national human rights mechanisms;
3. Read through the annual report on the status of human rights and freedoms prepared and submitted to the State Great Hural annually, habituate practice on discussion of proposals and recommendations of the report at the Plenary Session of the Parliament, cooperate with the NHRCM for adopting resolutions, and make decisions in regard to implementation of the report's conclusions and recommendations, and take the initiative with regard to the relationship between national human rights institutions and Parliament in accordance with the Belgrade Principles;
4. There have been NHRCM budget reductions in successive years between 2015-2017, with the effect that insufficient effort goes into performing duties to raise public awareness on human rights in local provinces. The Government must ensure approval for adequate funds and abolish the practice of budget reductions by the Ministry of Finance upon budget approval by the State Great Hural.

This request is issued on the basis of decisions by the Human Rights NGO Forum on behalf of 150 human rights defenders representing from Ulanbaatar and seventeen aimags, who took part in National Consultations on Human Rights Defenders in 2015, 2016, and 2017 respectively.

# REPUBLIC OF KOREA: NHRCK STANDS IN FRONT OF A NEW STARTING LINE

*Korean House for International Solidarity (KHIS)*

## 1. Introduction

The National Human Rights Commission of Korea (NHRCK) was launched in 2001 on the basis of the National Human Rights Commission of Korea Act (NHRCK Act), with high expectations from the international community, and became one of the foremost National Human Rights Institutions in Asia. However, in 2008, with the emergence of the Lee Myung-bak administration that was unfriendly toward human rights, the NHRCK regressed dramatically. In particular, due to the Chairperson and the members being loyal to the Government, the NHRCK was in danger of losing full membership status of the Global Alliance of National Human Rights Institutions (GANHRI). However, in 2016, as the candlelight protests pulled down the Park Geun-hye administration that had suppressed human rights, the NHRCK found itself in a context in which it had the possibility of rebuilding itself as an organisation that complies with the Paris Principles. This country chapter covers the major activities of the NHRCK in 2017 and the first half of 2018, years which potentially mark an important turning point for the NHRCK from regression to progression.<sup>1</sup> The report is based on the NHRCK's 2017 annual report, the activity report from the Reform Committee of the NHRCK, and analysis of news reports.

## 2. Overview

In 2016, Koreans rose against a president who denied human rights and democracy. More than 10 million Koreans participated in the candlelight protests from October 2016 to 10 March 2017. Park Geun-hye was impeached following these protests on 9 May 2017 and the Moon Jae-in administration took over the helm. Koreans believed that unlike the Park administration, the Moon administration would not use state power to suppress the human rights of the people. In addition, there was a growing expectation that the time had come to solve various human rights problems in Korean society on which no progress had been made over the past years.

The minimum wage has been increased, regularisation of the public sector's non-regular workers is in progress, and entrepreneurs and others who have oppressed the labour unions are being investigated. Further, the Constitutional Court decision, on 28 June 2018, that an alternative service system for conscientious objectors be introduced, was a major event symbolising the change in Korean society since the new administration came into force. However, the Moon administration has consistently shown its reservations and passive attitudes toward the human rights issues of sexual minorities, represented by the continuing failure to pass the Anti-Discrimination Law. In addition, they have not made any progress on the issue of migrants and refugees. The human rights policies of the Moon administration have failed to meet the expectations of human rights activists on the issue of discrimination against Korean minorities including sexual minorities and migrants, and other minorities.

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<sup>1</sup> This report is written by the TF team led by Na, Hyun Pil and was reviewed by NHRCK WATCH. It also collected the opinions of the NHRCK. In the TF team, interns of Korea House for International Solidarity (KHIS) Kim, Gahee and Kim, Ryo Won participated in the research, and Yang, Hye Min translated the report.



Since the former government, which negated the independence of the NHRCK and undermined its effectiveness, collapsed, the NHRCK has had an opportunity to escape from its dark history. This opportunity looked even greater when, right after the Moon administration began work, it committed itself to strengthening the NHRCK's status.<sup>2</sup>

However, NHRCK staff and civil society strongly voiced the opinion that the NHRCK should not be strengthened without a prior process of reflection. As a result, from October 2017, civil society took the lead in forming a Reform Committee of the NHRCK (hereafter 'Reform Committee'), consisting of human rights activists and experts. The diagnosis of the NHRCK's problems and proposal of solutions was therefore outsourced to this Committee.

The Reform Committee commented, "because the NHRCK lost its credibility with civil society...it was necessary for experts outside the NHRCK to participate".<sup>3</sup> In spite of the limitations faced by the Reform Committee, such as that they were only authorised to access research materials submitted by NHRCK staff, along with drawing on recollections of the staff; the short duration given for the task of three months; and the lack of a full-time workforce; the Reform Committee has identified the areas and issues that need to be changed in order for the NHRCK to serve as the premier national human rights advocacy organisation. The Reform Committee evaluated its own achievements stating that "the Reform Committee provided an opportunity for restoration of governance with civil society".<sup>4</sup> Civil society also positively assesses the activities and recommendations of the Reform Committee. However, what is more important now is that monitoring by civil society be continuous in order for the recommendations of the Reform Committee to be properly implemented.

In May 2016, the Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation (GANHRI-SCA) granted the NHRCK 'A' status after deferring its reaccreditation three times in a row. However, it called in particular for improvement to the selection process of Commissioners, including by advertising vacancies and by creating a single independent selection committee.<sup>5</sup>

It is imperative that the next NHRCK Chairperson be appointed through an open process involving civil society scrutiny, to ensure his or her independence. Fortunately, the Presidential Office (Blue House) accepted the core recommendation of the Reform Committee and the long-standing demands of the international community and civil society that civil society participate in the Candidate Recommendation Committee, which is a committee created in response to recommendations from GANHRI-SCA that the appointment process be reformed. At present the Candidate Recommendation Committee has not been officially incorporated into law. However, it is in operation, and the next Chairperson of the NHRCK will be appointed for the first time through the Candidate Recommendation Committee. This person, who will begin his or her duties from August

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<sup>2</sup> On 25 May 2017 Senior Presidential Secretary for Civil Affairs Cho, Kuk gave a briefing saying, "there was a strong desire by the President to act in a manner that would regulate human rights violations in the country and promote human rights and that Moon instructed all institutions to increase their rate of accepting recommendations of the NHRCK".

<sup>3</sup> 'Activity Report', Reform Committee of NHRCK, 2018, 2018, p.10.

<sup>4</sup> Ibid, pp.10-11.

<sup>5</sup> 'Report and Recommendations of the Session of the Sub-Committee on Accreditation', GANHRI, May 2016, p.41, available at

<http://www.nihr.org.bh/EN/MediaHandler/GenericHandler/PDF/HR/01.%20SCA%20FINAL%20REPORT%20-%20MAY%202016-English.pdf>.

2018,<sup>6</sup> must defeat the bureaucratic attitude<sup>7</sup> of the NHRCK, which has long cooperated with an administration hostile to human rights. In addition, through a process of public reflection and innovation he or she must carry out the crucial task of properly re-establishing the NHRCK in accordance with the Paris Principles, and take responsibility for the results.

### **3. The National Human Rights Commission of Korea and the Paris Principles**

#### **3.1 Functions, Mandate, and Structure**

The NHRCK consists of the Chairperson of ministerial calibre, three standing full-time Commissioners of vice-ministerial calibre, and seven non-standing Commissioners. As of 2017, the NHRCK has a total of 195 employees.<sup>8</sup> The budget for 2017 is 29.289 billion won (about US \$25.91 million)<sup>9</sup>

The Chairperson can attend the National Assembly and express his or her opinions. Also, when the National Assembly requests the Chairperson to be present and report or answer queries, he or she must comply. He or she can also speak at the State Council meeting.

Under Article 19 of the NHRCK Act, the mandate of the NHRCK is as follows:

- 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;
- investigation and remedy with respect to human rights violations;
- investigation and remedy with respect to discriminatory acts;
- investigation on actual conditions of human rights;
- education and promotion of human rights;
- presentation and recommendation of guidelines as to categories of and determination of standards for human rights violations, and preventive measures therefor;
- 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;
- cooperation with organisations and individuals engaged in activities to protect and improve human rights;
- exchanges and cooperation with human rights related international organisations or foreign organisations for human rights;
- other matters deemed necessary to guarantee and improve human rights.

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<sup>6</sup> At the time of publication of this report, the appointment of the new Chairperson, made through the Candidate Recommendation Committee, was in the process of being finalised.

<sup>7</sup> The Reform Committee points out in its report that “The negative side of bureaucratisation” shows itself in the ‘lining up’ of employees loyal to the former Chairperson Hyun, Byung-chul, who have gained control of the NHRCK, as a result of Hyun’s policy of appointing and promoting employees loyal to himself. The Reform Committee reports that this is “one of the fundamental causes of the continuing mismanagement of the NHRCK”. ‘Activity Report’, Reform Committee of NHRCK, 2018, p.2.

<sup>8</sup> ‘Annual Report’ (English version), National Human Rights Commission of Korea, 2017, p.12.

<sup>9</sup> ‘Annual Report’ (Korean version), National Human Rights Commission of Korea, 2017, p.16.

## *Human Rights Protection*

### Conscientious objection and capital punishment

On 7 December 2017, the NHRCK delivered a special report<sup>10</sup> to President Moon. The last time a special report was submitted was five years and nine months ago. In the report the Chairperson Lee Sung-ho reported the following as essential:

- constitutional amendments to strengthen basic rights such as social rights and promote decentralisation of power;
- enactment of basic human rights related laws, including the Basic Law on Human Rights, the Human Rights Education Support Act, and the Anti-Discrimination Act;
- strengthening of individual laws and ordinances for the protection of the human rights of the socially vulnerable, and for outlawing discrimination, exclusion, and hate;
- establishing institutional guarantees for the autonomy and independence of the NHRCK.

In response, President Moon expressed his sympathy for the need for a new system of human rights protection, called for the NHRCK to assume a role in the protection of human rights of people in the military, and requested the NHRCK to give concrete alternatives to military service for conscientious objectors, and to propose appropriate sentences as an alternative of the death penalty. The President emphasised the issues of conscientious objection to military service and the death penalty, rather than the Anti-Discrimination Act as had been requested by the NHRCK.

The NHRCK said that it would select conscientious objection to military service and the abolition of the death penalty among its eight research tasks for 2018, looking into the current situation and proposing plans for improvement.<sup>11</sup> On 28 June 2018, the Constitutional Court ruled that the current law punishing conscientious objectors was incompatible with the Constitution.

### Enactment of Anti-Discrimination Act and protection of sexual minorities

Chairperson Lee, Sung-ho issued a statement on October 13, 2017, saying that the UN Committee on Economic, Social and Cultural Rights had highlighted the Korean Government's priority tasks as business and human rights, enactment of the Anti-Discrimination Act, and guarantee of the right to strike,<sup>12</sup> and calling for the Government to implement the recommendations of the UN Committee on Economic, Social and Cultural Rights. The NHRCK has urged the Government to enact the Anti-Discrimination Act that prohibits discrimination against the socially vulnerable, including minorities, as it is the UN's ongoing recommendation to the Korean Government.

Non-standing Commissioners Choi, E-woo and Lee, Eun-kyung have continued to publicly

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<sup>10</sup> NHRCK Act, Article 29, available at [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=37724&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=37724&lang=ENG).

<sup>11</sup> 'NHRCK launch investigations of actual condition of conscientious objection to military service and death penalty', *Money Today*, 8 March 2018, available at <http://news.mt.co.kr/mtview.php?no=2018030809353286113>.

<sup>12</sup> 'Concluding observations on the fourth periodic report of the Republic of Korea', UN Committee on Economic, Social and Cultural Rights, 19 October 2017, available at [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fKOR%2fCO%2f4&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fKOR%2fCO%2f4&Lang=en).

incite hostile attitudes regarding LGBTI issues even in the midst of the NHRCK's effort to change its attitude in relation to sexual minorities, such as by officially participating in the Queer Festival on 15 July 2016.<sup>13</sup> Thus, the NHRCK has been criticised for failing to adequately protect the rights of sexual minorities. Currently, Choi, E-woo is retired from the NHRCK due to the ending of his term and Lee Eun-kyung will follow. However, it is concerning that the conservative party, the Liberty Korea Party, will continue to nominate as Commissioner a person who incites discrimination against and hate of sexual minorities. This is the reason why it is urgent that the law revising the procedure for appointing the Commissioners be passed.

### Opposition to special schools for children with disabilities

Chairperson Lee pointed out on 19 April 2017 that human rights violations against people with disabilities are continuing, such as “the anti-establishment movement for special schools in Gangseo-gu, Seoul”.<sup>14</sup> As residents opposed the establishment of a special school for children with disabilities in Gangseo-gu, Seoul, the parents of the children kneeled and appealed for the establishment of a school. As this scene was reported in the press, the issue of discrimination against people with disabilities in Korean society came to the fore. As the opposition movement continued, the NHRCK declared on 18 September 2017 that, “the act of opposing the establishment of a special school in Gangseo-gu is a violation of Article 11 of the Constitution”.<sup>15</sup>

### 'Me Too' movement

On 29 January 2018, South Korea's 'Me Too' movement, which was initiated by prosecutor Seo Ji-hyun's revelations about sexual harassment she had experienced, provided a chance to raise the issue of power-based sexual violence that was concealed in Korean society. The sexual violence of famous politicians and entertainers was exposed, as was the dark side of Korean society, which forced women to be silent. From 14 March 2018 the NHRCK has been organising and running a special team to “investigate sexual harassment and sexual assault and find systemic improvements” in order to respond to the 'Me Too' movement.<sup>16</sup> Although the NHRCK is responding to the movement by holding special forums and so on, the NHRCK itself has the task of implementing the recommendations of the Reform Committee. The Committee recommended that a gender impact analysis be conducted throughout the organisation's work and that gender training be conducted to enhance the gender sensitivity of all members of the organisation.<sup>17</sup>

### Business and human rights

The NHRCK has been making efforts to spread the word on 'human rights management' in

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<sup>13</sup> 'Republic of Korea: New Hope for Reforms', *ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, 2017, pp.183-185, available at, <https://www.forum-asia.org/uploads/wp/2017/12/ANNI-Report-Final.pdf>.

<sup>14</sup> 'The Chairperson of NHRCK says, "need interest in guaranteeing the rights of the disabled"', *Money Today*, 19 April 2017, available at <http://news.mt.co.kr/mtview.php?no=2018041909484440239>.

<sup>15</sup> 'The act of opposing special school in Gangseo-gu is a violation of equality of the Constitution', *Yonhapnews*, 18 September 2017, available at <http://www.yonhapnews.co.kr/bulletin/2017/09/18/0200000000AKR20170918074600004.HTML?input=1195m>.

<sup>16</sup> Hankyoreh, 'NHRCK organizes a special team to investigate "Me Too Movement"', 23 March 2018, available at [http://www.hani.co.kr/arti/society/society\\_general/837406.html#csidx8af4b03af65328b968b10e2c3395d21](http://www.hani.co.kr/arti/society/society_general/837406.html#csidx8af4b03af65328b968b10e2c3395d21).

<sup>17</sup> 'Activity Report', Reform Committee of NHRCK, 2018, pp.154-155.

terms of business and human rights issues. In particular, the NHRCK recommended the Government to establish a National Action Plan (NAP) on Business and Human Rights in September 2016, and requested notification as to the development of such a plan in January and April 2017 respectively. On 23 July 2017, when no reply had been received to this recommendation, the NHRCK again urged the Prime Minister to establish a NAP on Business and Human Rights as soon as possible. In October 2017, Chairperson Lee once again made this call to the Korean Government noting that in September 2017 the UN Committee on Economic, Social and Cultural Rights had recommended that Korea establish a NAP on Business and Human Rights. Taking all these instances into account, the NHRCK has urged the Moon administration three times to establish a NAP on Business and Human Rights.

In March 2018, the NHRCK issued a recommendation to the Ministry of Trade, Industry and Energy, which is in charge of the Korean National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises,<sup>18</sup> calling for improvements to the system of the Korean NCP. This recommendation was a repeated call for implementation of a 2011 recommendation from the NHRCK for participation of labour and civil society in the Korean NCP.<sup>19</sup>

### Third National Action Plan and the NHRCK

The Korean Government has created a NAP since 2007 with a five-year implementation cycle. The third phase of the NAP had to be in place by 2017 since the first phase was carried out from 2007 to 2011 and the second phase from 2012 to 2016. However, due to the candlelight protests and the change of regime at the end of 2016, so far there is only a draft of the third NAP.

The period from 2007 to 2016, when the first two NAPs were created and implemented in Korea, was under the regime that was hostile to human rights. Both the first and the second NAP were created and implemented without serious discussion with civil society, and civil society for its part did not have much interest in the NAP. The NHRCK also failed to play its role in the establishment and implementation process of the NAP.

The Reform Committee indicated that although the NHRCK played a role in the first NAP drafting process, during the process of drafting the second and third NAP it only “1) arranged to lay the foundations for the content through external researchers, 2) wrote its own proposals and notified the Government of them, and 3) held a one-off implementation evaluation debate”. The Reform Committee criticised the NHRCK for communicating its opinions to the Government without full consultation with civil society, and further criticised it for not taking responsibility for the NAP implementation process.<sup>20</sup>

The NAP on Business and Human Rights, which the NHRCK has recommended the creation of several times, will not be created as a separate NAP but will be included in the third NAP. The draft of the Government's third NAP, released on 20 April 2018, greatly disappointed civil society. It satisfied almost none of the proposals made by civil society and the NHRCK,

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<sup>18</sup> These are guidelines on multinational corporations that the OECD established in 1976. For more information see <http://mneguidelines.oecd.org/>.

<sup>19</sup> ‘A Restart of Korea NCP Reform?’, *Naeil*, 16 March 2018, available at [http://www.naeil.com/news\\_view/?id\\_art=269536](http://www.naeil.com/news_view/?id_art=269536).

<sup>20</sup> ‘Activity Report’, Reform Committee of NHRCK, 2018, p.119.

such as in the areas of sexual minorities, prohibition of discrimination, business and human rights, migrants and refugees, labour rights, and human rights related to access to information. Civil society requested the Government to improve the quality of the third NAP by at least reflecting on the recommendations of the international community and including means to implement them in the final draft, but it is anticipated that the final draft of the third NAP expected in early August will eventually fall short of the expectations of civil society and the international community.

The NHRCK should not only discuss the content of the third NAP, but also actively reflect on what role it will play in the process of drafting and subsequent implementation.

### *Human Rights Promotion*

The NHRCK undertook human rights education in schools, and public and private sectors based on Article 26<sup>21</sup> of the NHRCK Act, fostering and commissioning human rights education instructors, and establishing a domestic and international cooperation system on human rights education as its main outcome in 2017.<sup>22</sup> The NHRCK has established the Cyber Human Rights Education Center and in 2017 the NHRCK organised 3,910 human rights sessions for 221,171 persons.<sup>23</sup> In addition to education courses for civil servants, soldiers, and police, the NHRCK operated courses in the areas of mental health, developmental disabilities, homelessness, business and human rights, and human rights in the elderly. In 2017, a total of 79,799 civil servants, teachers, and citizens completed a course.<sup>24</sup> Furthermore, the NHRCK developed and distributed catalogues and books on human rights education and also produced films to promote human rights. The NHRCK used various other mediums and techniques to promote human rights issues, such as carrying out dissertation, advertisement, and essay contests.<sup>25</sup> It also operates a human rights library<sup>26</sup> and publishes a ‘Human Rights’ magazine on a bi-monthly basis.<sup>27</sup>

### *Accountability and Publication of Findings and Reports*

The NHRCK publishes reports in booklet forms annually in both Korean and English versions. Everyone can access the report through the website of the NHRCK. The NHRCK has an obligation to report its activities to the National Assembly and the President every year.

## **3.2 Autonomy from the Government and Independence Guaranteed by Statute or the Constitution**

The NHRCK is guaranteed by the NHRCK Act to be an independent body that is not part of the legislative, executive, or judicial branches, however the organisation and budget are in practice controlled by the administration.<sup>28</sup> Therefore, the opinion has been expressed that if the constitution is amended, that the opportunity be taken to elevate the NHRCK to a

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<sup>21</sup> NHRCK Act, Article 26, available at [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=37724&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=37724&lang=ENG).

<sup>22</sup> ‘Annual Report’ (Korean version), National Human Rights Commission of Korea, 2017, pp.189-193.

<sup>23</sup> ‘Annual Report’ (English version), National Human Rights Commission of Korea, 2017, p.116.

<sup>24</sup> Ibid. pp.116-117.

<sup>25</sup> Ibid. pp.124-125.

<sup>26</sup> Ibid. p.121.

<sup>27</sup> Ibid. pp.126-127.

<sup>28</sup> According to Article 6(5) of the NHRCK Act, “When the chairperson of the Commission performs duties related to the budget of the Commission, he/she shall be deemed the head of a central administrative agency under Article 6 (3) of the National Finance Act”.

constitutional institution, so as to more easily guarantee its independence. However, before its elevation to a constitutional institution, it has been argued that the NHRCK should first play its role as an independent body in accordance with the Paris Principles.

#### *Budgetary Autonomy and Financial Independence*

The budget of the Commission is determined in consultation with the Ministry of Strategy and Finance. The budget is submitted to the National Assembly and decided by the House Steering Committee of the National Assembly.

#### *Interaction with, and State Submissions to, the International Human Rights System*

The NHRCK's Chairperson is also the Chairperson of the GANHRI Working Group on Ageing. The NHRCK attended the Asia Pacific Forum on NHRIs meeting, participated in the country report review by the United Nations Committee on Economic, Social and Cultural Rights, and in the 3<sup>rd</sup> Universal Periodic Review (UPR) of Korea.<sup>29</sup> The NHRCK also organised the 2017 Partnership Program for Human Rights Defenders from 29 May to 2 June, inviting nine NHRI staff from Colombia, Costa Rica, Croatia, Denmark, India, Jordan, Malaysia, Mongolia, and Nigeria respectively.<sup>30</sup>

#### *Selection and Appointment*

According to Article 5 of the NHRCK Act on composition of the NHRCK:

- the Commission shall be comprised of 11 Commissioners for human rights, including one Chairperson and three full-time Commissioners;
- the President of the Republic of Korea shall appoint to be 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;
- the President of the Republic of Korea shall appoint the Chairperson of the Commission from among the Commissioners. In such cases, the Chairperson shall undergo a confirmation hearing held by the National Assembly. The term of Commissioners including the Chairperson shall be three years and may be renewed up to one time.

As GANHRI-SCA has pointed out, 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.

In January 2016, the NHRCK Act was amended to require each selecting organisation to announce when the selection of the Commissioners was going to take place and to listen to various opinions and recommendations in the process of appointing the Commissioners. However, the NHRCK Act lacked any means of enforcement and so in practice it was not adhered to by these institutions.

Even after the Moon administration began work, the Presidential Office appointed the activist

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<sup>29</sup> 'Annual Report' (English version), National Human Rights Commission of Korea, 2017, p.134.

<sup>30</sup> Ibid. p.136.



Bae, Bokju as a non-standing Commissioner on 15 December 2017 without any recommendation process or participation from civil society. However, although the Candidate Recommendation Committee had not been formed at this time and hence civil society could not participate in the process, the selection of Commissioner Bae is of great significance.

First of all, Commissioner Bae is a human rights activist who has been working in the human rights field. Considering that eight out of eleven Commissioners are from the legal profession, this fact is significant. Above all, she is an activist who worked for persons with disability, women, and victims of sexual violence, and she has been active in advocating for the enactment of the Anti-Discrimination Act. She was appointed to succeed Commissioner Choi, E-woo, who opposed the enactment of the Anti-Discrimination Act and provoked discrimination against sexual minorities even after becoming a Commissioner. It is a point to note that the President has deviated from the practice of appointing a Protestant Minister as a Commissioner and instead appointed a human rights activist as the successor of Pastor Choi, E-Woo who acted in an anti-humanitarian manner. This symbolises the change in the NHRCK.<sup>31</sup>

Another person who symbolises the change in the NHRCK is the Secretary-General<sup>32</sup> Cho, Youngsun. On 20 July 2017 NHRCK Watch<sup>33</sup> and Lee, Sung-ho, the Chairperson of the NHRCK, held a meeting. NHRCK Watch urged the NHRCK to actively reform and emphasised that an outside specialist should be appointed as the Secretary-General. As a result, on 14 August 2017, the NHRCK decided to appoint attorney Cho, Youngsun as the Secretary-General. The NHRCK Act stipulates that the President appoints the Secretary-General on the Chairperson's recommendation after a process of deliberation by the Plenary Committee. Cho is a lawyer who is trusted by civil society. He has been the Secretary-General of MINBYUN-Lawyers for a Democratic Society,<sup>34</sup> one of Korea's representative human rights organisations, and has worked in human rights-related activities.

Above all, in order to comply with the Paris Principles, it is essential that the Commissioners are appointed through an independent selection committee as recommended by GANHRI-SCA. This is the purpose of the Candidate Recommendation Committee, previously mentioned. On 11 April 2018, NHRCK Watch held a forum with the Democratic Party's Hong, Ihkpyo and Lee, Jaejung, members of the National Assembly, to consider how to revise the NHRCK Act in particular to include a provision stipulating the composition of the Candidate Recommendation Committee. As a result of this forum an amendment was proposed, which is now being considered by the National Assembly. The amendment has not yet been passed by the National Assembly, but on 14 May 2018, President Moon Jae-in

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<sup>31</sup> 'Comment on the nomination of a non-standing commissioner of NHRCK, Bae Bokju', NHRCK Watch, 15 December 2017, available at [http://www.khis.or.kr/spaceBBS/bbs.asp?act=read&bbs=notice1&no=496&ncount=472&s\\_text=&s\\_title=&page=1&basic\\_url=](http://www.khis.or.kr/spaceBBS/bbs.asp?act=read&bbs=notice1&no=496&ncount=472&s_text=&s_title=&page=1&basic_url=).

<sup>32</sup> NHRCK Act, Article 16(4), available at [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=37724&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=37724&lang=ENG).

<sup>33</sup> NHRCK Watch is a network of Korean civil society established in 2009 to respond to the Korean Government's violation of the independence of the NHRCK. As of 2018, it is composed of 32 organisations, and seven of them form the executive committee. KHIS is also participating in the executive committee.

<sup>34</sup> 'Minbyun' is the abbreviation of "Minjusahoereul wihan Byeonhosamoim" translated as 'Lawyers for a Democratic Society' in English.

ordered that “the next Chairperson should be appointed transparently and democratically.”<sup>35</sup> This means that he is willing to organise the Candidate Recommendation Committee for the purposes of selecting the Chairperson with the participation of civil society regardless of whether or not the amendment is passed.

Although the Presidential Office ordered the next Chairperson to be appointed through the Candidate Recommendation Committee, it is up to the National Assembly and the Supreme Court to accept the authority of the Candidate Recommendation Committee, which is not yet stipulated by law. But what is even more important than putting in place a system such as the Candidate Recommendation Committee is that the next Chairperson should take responsibility for meeting the expectations of the people by operating the NHRCK in accordance with the Paris Principles.

### *Dismissal Procedures*

Regarding the dismissal procedures, the articles of the NHRCK Act describe the requirements for dismissal and safeguards. Ever since the NHRCK was established, there have been no cases in which members were dismissed, except for voluntary resignation.

No Commissioner shall be removed from his or her office against his or her will unless he or she is sentenced to imprisonment without labour or a heavier punishment. However, in case it is very impracticable or impossible for him or her to perform his or her duties due to prolonged physical or mental weakness, he or she may retire from office provided a resolution of consent is passed by 2/3 or more of all Commissioners.<sup>36</sup>

No Commissioner shall be held criminally or civilly responsible for any remarks or decisions made in the course of performing his or her duties, unless such remarks are made willfully or negligently.<sup>37</sup>

## **3.3 Pluralism**

### *Pluralism of Commissioners*

According to Article 5 of the NHRCK Act, 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:

- a person who has served for at least ten years at a university or an authorised research institute as an associate professor or higher or in an equivalent position;
- a person who has served as a judge, prosecutor, or attorney-at-law for at least ten years;
- a person who has been engaged in activities for human rights for at least ten years, such as working for a non-profit, non-governmental organisation, corporation, or international organisation in the field of human rights;

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<sup>35</sup> ‘President Moon says “Closed-door appointment” of the chairperson of NHRCK should be completely eradicated’, *OhmyNews*, 14 May 2017, available at [http://www.ohmynews.com/NWS\\_Web/View/at\\_pg.aspx?CNTN\\_CD=A0002434114](http://www.ohmynews.com/NWS_Web/View/at_pg.aspx?CNTN_CD=A0002434114).

<sup>36</sup> NHRCK Act, Article 8, available at [https://www.elaw.klri.re.kr/eng\\_service/lawView.do?hseq=37724&lang=ENG](https://www.elaw.klri.re.kr/eng_service/lawView.do?hseq=37724&lang=ENG).

<sup>37</sup> NHRCM Act, Article 8-2, available at [https://www.elaw.klri.re.kr/eng\\_service/lawView.do?hseq=37724&lang=ENG](https://www.elaw.klri.re.kr/eng_service/lawView.do?hseq=37724&lang=ENG).

- 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 six out of the total number of ten Commissioners.

Currently, there are no provisions in the NHRCK Act that specify that representative members of a minority, such as people with disabilities or sexual minorities, should be selected as Commissioners. Criticisms have been made that the NHRCK has too many lawyers.

### *Pluralism of Staffing*

Regarding the composition of staff, the NHRCK Act has no provisions. After Chairperson Hyun, Byung-chul took office, the diversity of the NHRCK was also harmed. The Reform Committee has pointed out that “because the NHRCK has reduced the number of open positions, external human rights experts’ opportunities to work at the NHRCK are blocked from the beginning, and because, compared to the proportion of outsiders being recruited, the proportion of the civil servants’ being transferred to the NHRCK has increased, there are criticisms that the current NHRCK lacks plurality and diversity in the composition of Commissioners and staff”.

The Reform Committee has recommended full-scale innovation to secure independence in the NHRCK's personnel management policy and in assigning, promoting, and evaluating based on fairness and gender equality.<sup>38</sup>

### *Collaboration with Civil Society and other Stakeholders*

Korean civil society, in particular NHRCK Watch, has focused on criticising the NHRCK. After the Government announced its intention to strengthen the status of the NHRCK with the inauguration of the Moon administration, civil society has expressed the opinion that NHRCK reform is a priority and has called for strong innovation in the NHRCK.

As a result of these calls, lawyer Cho was appointed as the Secretary-General and human rights activists and experts participated in the Reform Committee. And finally, a Candidate Recommendation Committee which has the participation of civil society, a long-time demand of human rights organisations, was formed to select the next Chairperson of the NHRCK. In this process, the relationship between the NHRCK and civil society is transforming to be more cooperative than it was in the past.

In particular, civil society and the NHRCK are responding jointly to the issues of discrimination and hatred against minorities. A typical case is the repeal of the Chungnam Province Human Rights Ordinance. The provincial council of Chungcheongnam-do passed a resolution to repeal the human rights ordinance, on 3 April 2018. They presented a proposal to the effect that an ordinance prohibiting discrimination based on sexual orientation will encourage homosexuality. It is the first time that local governments have shown hostility to

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<sup>38</sup> ‘Activity Report’, Reform Committee of NHRCK, 2018, pp.145-150.

human rights and repealed a human rights ordinance. Human rights organisations have strongly protested against the Chungcheongnam-do Parliament and the repeal of the ordinance. On 25 January, the NHRCK also expressed its opposition to the repeal of the human rights ordinance and issued a Chairperson's statement on 6 April saying, "the promotion and protection of human rights for local residents is a basic responsibility of local governments based on the Constitution. We are deeply regretful that the system and foundation for the protection of human rights of residents has broken down."<sup>39</sup>

The forces inciting hatred and discrimination against sexual minorities have mobilised all means to prevent inclusion of the phrase 'sexual orientation' in the NHRCK Act. They argue that expanding the authority and role of the NHRCK means permitting human rights on the basis of sexual orientation, and thus promoting homosexuality. And the conservative parties who listen to these people not only have a passive attitude toward the amendment of the NHRCK Act to include reference to sexual orientation, but also continue to appoint Commissioners who are supported by groups hostile to rights on the basis of sexual orientation.

The NHRCK must continue to innovate, but both the NHRCK and civil society should actively and jointly respond to the growing hatred and discrimination against immigrants, refugees, North Korean defectors, as well as sexual minorities. In particular, in the process of establishing the third NAP, the role of the NHRCK was shown to be more important as it was confirmed that the Government lacks the will to establish active protection measures for political reasons.

In accordance with the recommendation of the Reform Committee, civil society members will be recruited and employed in various positions of the NHRCK, and exchanges between NHRCK employees and human rights activists will also increase. Through the implementation process of the Reform Committee's recommendation, a constructive relationship could be built that will build deeper mutual trust and perform the role of constant monitoring of the NHRCK.

### *Degree of Trust*

The Moon administration has raised the public's expectations for the NHRCK. In order to live up to these high expectations, the NHRCK should show that it is fulfilling its given role. Currently civil society is watching on with hope.

### **3.4 Adequate Resources**

As of 2017, the NHRCK has a total of 195 employees. The budget for 2017 is 20,290 billion won (about US \$26,17 million).

The Reform Committee has questioned whether the NHRCK is capable of effectively performing its role. First, they pointed out that education and training should be continued to strengthen competencies so that the employees with human rights qualifications will be able to maintain their human rights approach and retain their identity as human rights defenders

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<sup>39</sup> Hankyoreh, 'The Chairperson Lee Sung-ho says, "abolition of the Chungnam Province Human Rights Ordinance is an elimination of the basis of human rights protection of local residents"', *Hani*, 6 April 2018, available at [http://www.hani.co.kr/arti/society/society\\_general/839432.html#csidxac46495e3127eeab7e0673fe514f73b](http://www.hani.co.kr/arti/society/society_general/839432.html#csidxac46495e3127eeab7e0673fe514f73b).

even after they are recruited.<sup>40</sup> The Reform Committee has recommended that a large number of employees with experience in the human rights field (human rights activists or experts) be recruited. They also raised the need to strengthen the organisation and increase the number of staff.

### **3.5 Adequate Powers of Investigation**

#### *Powers of Investigation*

The NHRCK may investigate and relieve human rights violations and discriminatory acts. Under Article 30 of the NHRCK Act,<sup>41</sup> the Commission may investigate any cases where a person has suffered a violation of human rights, when that person or someone acting on their behalf, files a complaint to the Commission. The cases that the Commission may investigate include cases where human rights have been violated or a discriminatory act has been committed in connection with the performance of duties, such as by a state agency, local government, state school, confinement, or caring facility; or where a discriminatory act has been committed by a private individual, a juristic person, or an organisation. In all such cases the Commission may investigate even when a complaint has not been filed, if it has reasonable grounds to suspect a serious violation or discriminatory act.

The Commission must reject a complaint if it is before a court, or under investigation by a criminal investigation agency, except in cases where an investigation agency has recognised and is investigating abuse of authority by a public person, unlawful arrest and unlawful confinement by someone acting in his or her public role, or violence or cruelty by a public official such as police or prosecutor. However, all cases that have been decided by a court, or where the investigation has terminated, may not be investigated by the Commission.<sup>42</sup>

According to the NHRCK's annual report, the number of complaints, counselling,<sup>43</sup> and civil petitions brought to the NHRCK has increased since the establishment of the Moon administration. A total of 11,252 cases were filed to the NHRCK in 2017, an increase of 1,680 cases (15 percent) from 16,415 cases in 2016.<sup>44</sup> The following are statistics of complaints, counselling, civil petitions, and inquiries received and processed by the NHRCK in the last five years.

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<sup>40</sup> 'Activity Report', Reform Committee of NHRCK, 2018, p.114.

<sup>41</sup> NHRCK Act, Article 30, available at [https://www.elaw.klri.re.kr/eng\\_service/lawView.do?hseq=37724&lang=ENG](https://www.elaw.klri.re.kr/eng_service/lawView.do?hseq=37724&lang=ENG).

<sup>42</sup> NHRCK Act, Article 32, available at [https://www.elaw.klri.re.kr/eng\\_service/lawView.do?hseq=37724&lang=ENG](https://www.elaw.klri.re.kr/eng_service/lawView.do?hseq=37724&lang=ENG).

<sup>43</sup> Counselling means providing advice and giving consultation on human rights violations and its relief.

<sup>44</sup> 'Annual Report' (Korean version), National Human Rights Commission of Korea, 2018, p.115.

Classification	Total	Total number of complaints		Human rights infringement		Discrimination		Others	
		Registered	Processed	Registered	Processed	Registered	Processed	Registered	Processed
Cumulative	885,064	122,899	118,908	94,194	91,643	26,439	25,001	2,266	2,264
2017	91,632	12,325	10,999	9,263	8,576	3,029	2,371	33	52
2016	80,281	10,645	10,868	8,160	8,424	2,431	2,410	54	34
2015	80,686	10,695	10,894	8,499	8,795	2,188	2,016	8	83
2014	82,093	10,923	10,331	8,708	8,093	2,197	2,223	18	15
2013	82,234	10,056	10,427	7,457	7,450	2,496	2,858	103	119

*Complaints, counselling, civil petitions, and inquiries in the last five years<sup>45</sup>*

\*The cumulative figures total the numbers from the time the Commission was established (November 25, 2001) to December 31, 2017.

However, in 2017, the recommendations issued by the NHRCK declined by eight cases from 2016. The statistics of the NHRCK policy recommendations and opinions for the past five years are as follows:

Classification	Total	Recommendation	Opinion expressed	Opinion submitted
Cumulative	710	334	352	24
2017	64	30	33	1
2016	72	44	26	2
2015	36	12	23	1
2014	46	27	18	1
2013	43	27	16	-

*Statistics of recommendations and opinions on related statutes and policies<sup>46</sup>*

\*The cumulative figures total the numbers from the time the Commission was established (November 25, 2001) to December 31, 2017.

According to the statistics above, the NHRCK has been handling more than 10,000 cases annually since 2014, and by 2017, the number of complaints had risen markedly to 12,000. It is also worth noting that the NHRCK's recommendations have been actively implemented since the candlelight protests in 2016, and the NHRCK has expressed more opinions<sup>47</sup> than it has issued policy recommendations since the Moon administration began work.

### *Court Cases*

Under the NHRCK Act the NHRCK may present its opinions on *de jure* matters if those

<sup>45</sup> Ibid, p.117

<sup>46</sup> 'Annual Report' (English version), National Human Rights Commission of Korea, 2018, p.47.

<sup>47</sup> NHRCK Act, Article 28, available at [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=37724&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=37724&lang=ENG).

proceedings are liable to affect the protection and improvement of human rights. The Commission may also present its opinions on *de facto* and *de jure* matters, when matters it has investigated come before a court.

### *Inspection of Prisons, Jails, Detention Centres, and Places of Confinement*

Under the NHRCK Act the Commission may undertake visits to places of confinement, and must be assisted in such a visit by the administration of that facility. In the course of the visit Commissioners may interview staff or internees; however, a member of staff may be present when internees are interviewed.<sup>48</sup>

In 2017, the Commission carried out a total of nine on-scene investigations of this manner, of an installation confinement facility (which holds pretrial detainees and short-term post-trial prisoners), a police custody jail, a correctional facility for women and girls, a shelter specifically for foreigners, a welfare facility for the homeless, a senior care facility, two mental health care facilities, and a child welfare facility. It made preventative relief efforts in areas particularly vulnerable to human rights violations by recommending improvements to the relevant institutions and notifying the investigation result to the facilities in question.<sup>49</sup>

### *Cases Studies*

The NHRCK conducts *ex officio* investigations<sup>50</sup> even if there are no complaints submitted. By examining the areas in which *ex officio* investigations have been undertaken by the NHRCK in the course of its monitoring of serious human rights violations, the most serious human rights problems in Korean society are revealed.

In 2017, the Commission initiated *ex officio* investigations on ten serious human rights violations, including sexual violence in the military; overcrowding of a detention facility; assault against a resident at University Hospital X; sexual harassment of a female employee by a senior employee of Public Corporation X; coercion to complete humanistic education at a college; violence and other infringements at a facility for severely handicapped persons; violence and human rights infringement by the staff of a facility for people with disabilities; staff violence and negligence at a facility for people with disabilities; forced labour at a facility for people with disabilities; and rights infringement against people with disabilities at a mental health rehabilitation centre.<sup>51</sup>

## **4. Conclusion**

Starting from the second half of 2018, the selection process for the Chairperson through the Candidate Recommendation Committee, in which civil society will participate, will be inaugurated. This seems to be a chance for the NHRCK to be regenerated after its dark past. Although it will not be easy to overcome the bureaucracy that the NHRCK has shown in the past, the next Chairperson will have an important obligation and responsibility to reinstate the NHRCK as a genuine national human rights commission that faithfully fulfills the Paris

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<sup>48</sup> NHRCK Act, Article 24, available at [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=37724&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=37724&lang=ENG).

<sup>49</sup> 'Annual Report' (English version), National Human Rights Commission of Korea, 2018, p.70.

<sup>50</sup> NHRCK Act, Article 30(3), available at [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=37724&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=37724&lang=ENG).

<sup>51</sup> 'Annual Report' (English version), National Human Rights Commission of Korea, 2018, pp.69-70.



Principles. Since the launch of the NHRCK in 2001, Korean civil society has witnessed both the development of the NHRCK and its failure. Through this process, the NHRCK recognised the need for its independence and status to be guaranteed in order to play its role as a national human rights commission. Although there are discussions ongoing on constitutional amendment at the National Assembly, in order to be an organisation that complies with the Paris Principles even if the NHRCK does not get promoted to a constitutional institution, it is essential to revise the law to secure the diversity of human rights commissioners, the participation of civil society in the selection process, and the independence of the NHRCK. Therefore, civil society, along with the NHRCK, will continue to advocate for and promote the necessity of revising the NHRCK Act.

Above all, it is important for a social consensus to be reached that Korean society, as a member of the international community, will fulfil the international community's demands for the promotion and protection of human rights. Korean society should recognise and respect that the NHRCK is an internationally recognised organisation, and that the NHRCK is based on international human rights standards. At the very least those who are selected as Commissioners of the NHRCK should agree on the significance and role of the NHRCK. In particular, the Government, the NHRCK, and civil society should join together and work to create a social consensus that those who discriminate against and incite hatred against sexual minorities and refugees are not qualified to be a Commissioner.

The year 2018 marks the 70th anniversary of the Universal Declaration of Human Rights. It is a year in which the NHRCK stands on the start line of a new beginning. The role that the NHRCK plays is still needed in Korean society and human rights policies are still considered to be the work of the NHRCK even by the Government. In particular, the NHRCK and civil society should play an active role in the revision, implementation, and monitoring process of the third NAP so that the Korean Government, the National Assembly, and the judiciary can actualise the value of human rights into policies.

Although it seems that the Anti-Discrimination Act will not be dealt with in the third NAP, the next Chairperson of the NHRCK should make clear to civil society their support for enactment of the Anti-Discrimination Act within his or her term. The next Chairperson is responsible for creating a society in which people with disabilities, sexual minorities, migrants, refugees, and other socially vulnerable people can live safely, free from hatred and discrimination, the biggest human rights issues in Korean society. Enactment of the Anti-Discrimination Act is the cornerstone to achieving this.

## **5. Recommendations**

### **To the Government of Korea:**

- Codify an independent Candidate Recommendation Committee for selection of Commissioners in compliance with the recommendations of GANHRI-SCA, the NHRCK, and civil society. To do so, the Government should actively cooperate with the National Assembly and civil society to amend the NHRCK Act;
- Faithfully carry out the recommendations of the NHRCK;
- Establish laws and systems to ensure the independence of the organisation, personnel, and finances of the NHRCK, and secure the budget.

**To the National Assembly:**

- Pass amendments to the NHRCK Act to establish an independent Candidate Recommendation Committee for selection of Commissioners, in which the participation of civil society is ensured, as recommended by GANHRI-SCA;
- Establish laws and systems to ensure the independence of the organisation, personnel, and finances of the NHRCK, and secure the budget.

**To the National Human Rights Commission of Korea:**

- Strive to ensure an amendment to the NHRCK Act is passed to establish an independent Candidate Recommendation Committee for the selection of Commissioners;
- Accept the criticisms of civil society and actively implement reforms;
- Introduce and advocate for international human rights standards to the Government, the National Assembly, and the general public, with the aim of promoting the implementation of recommendations from the international community, including the UN.

# TAIWAN: TURBULENCE BENEATH THE STILL WATER - CAN THE CONTROL YUAN DELIVER A MAJOR REFORMATION?

*Covenants Watch (CW) and Taiwan Association for Human Rights (TAHR)<sup>1</sup>*

## 1. Introduction

Human rights NGOs have advocated for the establishment of an NHRI in Taiwan since 1999. Although the Government seemed to take some actions in 2002 and again in 2014, it has not announced to the public a concrete plan or a timeline for the setup of an NHRI. The authors collected material for this report through the following sources: (1) frequent exchange of information with other human rights NGOs and activists, (2) in-person consultations with legislators and high-level governmental officials, (3) direct participation in the President's Office Human Rights Consultative Committee by Song-Lih Huang, the current Convener of Covenants Watch (CW), (4) news reports.

## 2. Overview

One of the key roles of an NHRI is to monitor compliance with the international human rights system and make recommendations for how a country can better meet its obligations under that system. Taiwan's political situation means that it is not in a position to participate directly in the international human rights system. However, despite these difficulties, the Taiwanese government is willing to adopt the international human rights instruments unilaterally and to integrate them into the domestic legal system. In addition, the country has created a system of review of compliance with these instruments, based on the system used by the UN treaty bodies. Since President Tsai Ing-wen took office in May 2016, the Taiwanese Government has conducted five reviews based on reports submitted by the Government to an international review panel that is constituted in Taipei for this purpose. The Government undertook its second reviews under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in January 2017, and its first review under the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Rights of the Child (CRC) in November of the same year. In July 2018, the Government also undertook its third review under the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

This commitment to integrating international norms into the domestic legal system has been recognised by many of the international review panellists. However, despite this demonstrated commitment, and even after these reviews in their 'Concluding Observations and Recommendations'<sup>2</sup> have identified many laws and policies as not compatible with the international human rights treaties, the Executive Yuan and Legislative Yuan are slow in

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<sup>1</sup> *Writers: Song-Lih Huang, Convener, Covenants Watch, Yibee Huang, Chief Executive Officer, Covenants Watch, Eeling Chiu, Secretary General, Taiwan Association for Human Rights and Yi-Hsiang Shi, Deputy Secretary General, Taiwan Association for Human Rights*

<sup>2</sup> For information on the reviews of ICCPR and ICESCR see <http://www.humanrights.moj.gov.tw/mp-200.html>; for the information on the review under CEDAW see <http://www.cedaw.org.tw/tw/en-global/home>; for information on the review under the CRPD see <https://crpd.sfaa.gov.tw/>; for information on the review under the CRC see [https://crc.sfaa.gov.tw/crc\\_front/index.php](https://crc.sfaa.gov.tw/crc_front/index.php).

revising such laws, and governmental agencies continue to implement the current laws and norms. For instance, the delay in the passage of the refugee law has led many asylum seekers with nowhere to turn to; revision of problematic laws related to cases of eviction of residents in informal settlements on state-owned lands has seen little progress; the amendments proposed by the ruling Democratic Progressive Party (DPP) to the *Assembly and Parade Act* have still not abandoned provisions including the prohibition zone, which forbids protests around the Presidential Office, courts, and areas surrounding the airports, and the dismissal order, which allows a parade or demonstration to be halted by a competent authority if it does not have a permit, if regulations are violated, or if laws are held to be broken;<sup>3</sup> medical services in prisons are still inadequate, leading to fatal delays in medical treatment; the *Personal Information Protection Act* does not include a provision creating an independent specialised institution dedicated to handling personal data; and the Mental Health Act which violates Article 14 of the CRPD has just begun to be amended.

The Tsai Administration has made several significant achievements in 2017 including the passage of the *Promotion of Transitional Justice Act* by the Legislative Yuan on 5 December 2017 and the establishment of the Transitional Justice Commission<sup>4</sup> on 31 May 2018 following the enactment of the new law. As for human rights in judicial matters, after collecting public opinions and holding 40 high-profile conferences in breakout sessions spanning over two months, on 12 August 2017 the National Conference on Judicial Reform finally announced dozens of recommendations for judicial reform. At present, this reform has entered the implementation phase, closely monitored by a coalition of NGOs, and a taskforce on Judicial Reform is scheduled to periodically report on a semi-annual basis.<sup>5</sup> Finally, President Tsai nominated eleven Control Yuan members to fill the 29 positions (18 were nominated by the previous President) and some of these new members had experience working in the non-governmental sector. Since the new members took office in January 2018, they have undertaken several investigations on the rights of children and the youth, rights of parade and assembly, the rights of overseas fishermen, judicial human rights, rights of persons with disabilities, rights of indigenous peoples, and gender equality. Their reports, when compared with those issued in the past, are regarded as more in line with international human rights standards. However, although there had been discussions around setting up an NHRI within the Control Yuan, and although this process of nominating new members would have been the ideal time to clarify the different and separate roles that the Control Yuan and an NHRI could play, President Tsai did not mention anything about an NHRI during the nomination process.

On the other hand, the Tsai Administration has also done harm to people's basic rights as a result of many of its acts and omissions. The regressive reform of the Labor Standards Act led by the DDP legislators aroused widespread dissatisfaction among grassroots workers. The reform has made it possible for employers to enjoy flexibility in asking workers to work overtime and arrange their shifts, thereby increasing the risk of overwork and health hazards. Although the working conditions are supposed to be negotiated through collective bargaining between the employer and employees, the level of functioning of labour unions in Taiwan is barely enough to provide protection. When workers, unions, and civil society organisations rallied against the reform on 23 December 2017, the police abused their power to restrict

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<sup>3</sup> Assembly and Parade Act, 2002, Article 6 and Article 25, available at <http://glrs.moi.gov.tw/EngLawContent.aspx?Type=E&id=271>.

<sup>4</sup> Further information about the Transitional Justice Commission is available at <https://www.tjc.gov.tw/>.

<sup>5</sup> For more information, please go to the 'Judicial Reform Progress Checking (司法改革進度追蹤資訊平台)' website maintained by the Judicial Yuan and the Executive Yuan, available at <https://judicialreform.gov.tw/>.

personal freedom and violated the *Assembly and Parade Act*.<sup>6</sup> The Control Yuan has conducted an investigation and asked the Ministry of the Interior and the Taipei City Police Department to improve their practices.

Another example of failure to protect human rights was on gender equality and sexual orientation. Despite the fact that the Justices of the Constitutional Court, the Judicial Yuan, issued Interpretation No. 748 on the Constitution in May 2017, declaring unconstitutional part of Taiwan's Civil Code which in essence prohibits same-sex marriage, the DPP Government continues using "the lack of consensus in society" as an excuse to fail to take legislative actions to guarantee the rights of same-sex couples. Meanwhile, the anti-same-sex marriage conservatives have initiated two referendum proposals against same-sex marriage and gender equality in education, and those two proposals are very likely to reach the threshold of formal filing.

In addition, the threat to human rights from China has escalated. The biggest event in 2017 was the arbitrary detention and criminalisation of a Taiwanese citizen Ming-che Li, who was later sentenced by the Chinese authorities to serve five years in prison, for his online speeches.<sup>7</sup> To date, the UN Human Rights Council's Working Group on Enforced or Involuntary Disappearances has been monitoring Li's case, and Taiwanese civil society organisations continue to try all possible measures to rescue Li. Li is currently detained in Chishan Prison in China. Furthermore, Chinese influence also poses a threat to Taiwanese people on the basis of international cooperation against crime. If a Taiwanese citizen is arrested because of a breach of law in a foreign country, it is possible that this Taiwanese person will be deported to and tried in China. In this way the Taiwanese people are exposed to the risks of unfair trials, torture, and cruel and inhuman treatment or punishment.<sup>8</sup> On a different front, China forced 44 foreign airlines to change the name of their destination from Taiwan to 'Taiwan, Province of China'.

Lacking an NHRI, the current human rights protection system in the Taiwanese Government is patchy and scattered. There are several unstaffed human rights committees or task forces, such as the President's Office Human Rights Consultative Committee, the Executive Yuan Human Rights Protection Promotion Group, the Committee for the Promotion of the Benefits and Interests of the Child and Youth, and the Committee for the Promotion of the Rights of Persons with Disabilities. The above-mentioned human rights committees usually only have one meeting every three to six months, the selection of members is not open and transparent, and the agenda is often decided by governmental agencies which serve as the secretariat for these groups.

The judiciary and the Control Yuan are the last resort to seek remedy when human rights are violated. The Control Yuan can receive complaints from individuals and receives more than 5,000 such complaints a year. However, not all judges and Control Yuan members are familiar with or skilled in application of human rights instruments. In particular, the judges usually do not refer to or cite international human rights laws in their judgement. As far as

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<sup>6</sup> See the statement related issued by the Taiwan Association for Human Rights (TAHR), available at <https://www.tahr.org.tw/news/2157>.

<sup>7</sup> Further information about the Facebook page 'Lee Ming-Che Rescuer (李明哲救援大隊)', available at <https://www.facebook.com/whereislee.org/>.

<sup>8</sup> See the protest statement and joint letter issued by the Taiwan Association for Human Rights (TAHR), available at <https://www.tahr.org.tw/news/2292>.

the Control Yuan is concerned, it is not always aware of its human rights duties,<sup>9</sup> and some cases of human rights violations originated ironically from the correctional actions proposed by the members of the Control Yuan, such as the evictions of residents in informal settlements on state-owned lands, and the Xiang'an project which mobilised national security units to pursue and capture undocumented foreign workers. With examples like these two cases, the function and capability of the Control Yuan in protecting human rights is questionable.

### 3. Establishment of an NHRI

NGOs in Taiwan have been advocating for the establishment of a National Human Rights Institution (NHRI) since 1999. The NGO Covenants Watch (CW) has since its establishment in 2009 taken this as one of its mandates: to strengthen Taiwan's institutional competency in the protection and promotion of human rights.

The momentum to establish an NHRI was rejuvenated by the review of the state's human rights reports under the international human rights treaties. Through the acts to implement international human rights instruments, Taiwan brought into its legal system the following core UN human rights conventions: ICCPR and ICESCR (2009), CEDAW (2011), CRC (2014), and CRPD (2014). The implementation legislation required the Government "to set up a human rights report system in accordance with the Covenants/Conventions". The establishment of an NHRI has been urged by each and every international review committee in their Concluding Observations and Recommendations following the review on ICCPR and ICESCR (2013 and 2017), CEDAW (2014 and 2018), CRPD (2017), and CRC (2017).

The current Convener of CW, Song-Lih Huang, was appointed in May 2016 as a member of the President's Office Human Rights Consultative Committee (POHRCC), which is chaired by Vice President Chen and meets once every three months. This gives CW, representing the position of its member organisations, an opportunity to bring issues to high-level officials, as the vice presidents of the Executive Yuan, Judicial Yuan, and Control Yuan are also members of the POHRCC.

Mr. Huang has made several proposals for establishing an NHRI to the POHRCC in an attempt to move forward the discussion on the establishment of the NHRI. However, the progress seemed to be stalled at considerations over where in the system to set up the NHRI, with three options laid out by a working group of five members of the POHRCC in 2014: (1) an NHRI under the President's Office, (2) an NHRI set up in the Control Yuan, and (3) a structurally independent NHRI. The high officials have not been able to make an executive decision on this point.

It is to be noted that the Control Yuan is a constitutional organ with 29 members who are *de facto* ombudsmen. The Control Yuan is aimed primarily at monitoring the misconduct of civil servants. "The Control Yuan shall be the highest control organ of the State and shall exercise the powers of consent, impeachment, censure and auditing" (Constitution, Article 90). While the Control Yuan does not have the mandate under the Constitution or the Control

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<sup>9</sup> Although the Control Yuan does not have a specific protection role with regard to human rights under the Constitution it has always claimed that it has a strong role in protecting human rights and in 2000 a 'special (as opposed to standing) committee on human rights' was established.

Act<sup>10</sup> (which sets out the functions and powers of the Control Yuan) to protect and promote human rights, the Control Act leaves room for members to take the initiative to investigate on the issues it deems relevant, and it has always claimed that it has a strong role in protecting human rights. In 2000 a ‘special (as opposed to standing) committee on human rights’ was established. However, a Control Yuan investigation is still focused on the person who did wrong, rather than reviewing the law or policy.

In the past, the Control Yuan has from time to time claimed that it is the equivalent of an NHRI, as other ombudsman institutions have been accredited with ‘A’ status by the Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation (GANHRI-SCA). The Control Yuan therefore expressed the idea that there is no need to establish an NHRI. However, the Control Yuan has not performed a comprehensive evaluation on its own compliance with the Paris Principles.

In view of this impasse, CW decided to borrow from international expertise. CW invited Rosslyn Noonan<sup>11</sup> to lead an assessment mission to Taiwan. The mission, with Ms. Noonan joined by Agantaranansa Juanda<sup>12</sup> and Sushil Pyakurel,<sup>13</sup> was sponsored by the Asia Pacific Forum of National Human Rights Institutions and the Asian Forum for Human Rights and Development (FORUM-ASIA) and it conducted a weeklong survey in July 2017.

The mission conducted consultations with two dozen civil society representatives and scholars, met with two political parties in the Parliament, and paid visits to officials including the Presidents of the Judicial and Control Yuans, the Secretary-General of the Legislative Yuan, the Minister of the Interior, the Secretary-General of the Ministry of Education, and the Chief Officer of the Department of Gender Equality of the Executive Yuan. In particular, the Control Yuan set aside half a day to enable the mission to have wide-ranging discussions and to explore in-depth the raft of complexities involved in the establishment of an NHRI in Taiwan. The mission visited the Vice President of Taiwan and presented its preliminary observations and suggestions.

The final report was published in October 2017, and Mr. Huang presented the report to the POHRCC meeting on 13 October.<sup>14</sup> The report concluded, in part, that of the options to establish the NHRI, two of them – an NHRI based in the President’s office or an NHRI as part of the Executive – would have difficulty meeting the fundamental independence requirements for an NHRI under the Paris Principles. On the other hand, establishing a stand-alone NHRI structure outside of Taiwan’s five powers structure<sup>15</sup> presents insurmountable constitutional challenges, including in relation to its status relative to the five Yuans and government agencies more generally. As far as the option to designate the Control Yuan as an NHRI goes, the report concluded that while the Control Yuan currently has some of the

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<sup>10</sup> Control Act of the Republic of China, available at

<https://www.cy.gov.tw/ct.asp?xItem=3158&mp=21&CtNode=1734&returnctNode=1734&returnxItem=3139>.

<sup>11</sup> Rosslyn Noonan is former Chief Commissioner of the New Zealand Human Rights Commission and Asia Pacific Forum Expert NHRI Consultant.

<sup>12</sup> Agantaranansa Juanda is ANNI coordinator.

<sup>13</sup> Sushil Pyakure is a former Commissioner of the Nepal Human Rights Commission and current human rights adviser to the President of Nepal.

<sup>14</sup> The final report of the assessment mission, ‘Taiwan NHRI Assessment Report 2017’ published jointly by the APF, FORUM-ASIA, and ANNI, can be found on Covenants Watch’s webpage, available at <https://covenantwatch.org.tw/english/>.

<sup>15</sup> Taiwan’s political system comprises the President and five major branches or Yuans, including the Control Yuan, Legislative Yuan, and Judicial Yuan.



elements required by the Paris Principles, substantial changes would be required to its legislation to make it fully compliant with them.

Nevertheless, the task force concluded unanimously that the best option for establishing an NHRI in a timely manner would be to make it part of the Control Yuan and to provide for a fully compliant Paris Principles institution by amendments to the Organic Law of the Control Yuan and to the Control Act.

The Control Yuan is a constitutional agency having ombudsman functions and can (theoretically) independently monitor the Government. However, the current Control Yuan does not meet the Paris Principles in the following aspects, for example, the Paris Principles ask that the appointment of NHRI members goes through an open process; currently there is almost no participation by civil society in the nomination and selection of Control Yuan members. The Paris Principles also ask that the composition of NHRI members reflects the plurality of the society; currently the Organic Law of the Control Yuan limits its members to senior civil servants and professionals.

The Paris Principles ask that an NHRI has a broad mandate, including the promotion and protection of human rights; the Control Yuan is aimed at monitoring the misconduct of civil servants. In particular, (a) the Control Yuan currently plays a minimal role in promoting human rights, and (b) the Control Yuan ensures that civil servants conform to domestic laws (even when the laws are not compatible with human rights standards) and does not refer to international human rights laws in its consideration of impeachment. The Control Yuan also cannot monitor the private sector, except indirectly through pressuring the corresponding governmental agencies in their regulatory activities.

The Control Yuan has almost no interaction with civil society and has no discernible mechanism of accountability.

After Mr. Huang presented the report of the international experts to the POHRCC in October 2017, the conclusions reached by the POHRCC were (1) it is desirable to have a powerful and (structurally) independent NHRI, and (2) taking the Constitution into consideration, it seems that setting up the NHRI in the Control Yuan is an acceptable, but not the optimal option.

One major concern by some members in relation to setting up the NHRI in the Control Yuan was that the DPP had advocated in the past for constitutional reform including the abolition of the Control Yuan. However, despite these concerns the two options - a structurally independent NHRI or setting up an NHRI in the Control Yuan - were subsequently presented to the President for her decision. The President is the party leader of the DPP so her decision has substantial influence on the legislature, and furthermore, the Control Yuan has always said that the setup of an NHRI should be within the power of the President (although in practice it must pass through the Legislative Yuan).

Keeping in mind the need for wait for the President to express a preference between the two main options, the POHRCC did not proceed to discuss CW's proposal (detailed below).

After the October meeting of the POHRCC, the Government has yet to announce to the public its intention and the format of how it would plan to establish an NHRI. However, in the meantime the Control Yuan is moving forward with the proposal to establish an NHRI in

the Control Yuan. According to some new Control Yuan members,<sup>16</sup> a six-member committee (including 3 new members) was formed in the Control Yuan in March 2018 to draft a new proposal. The previous proposal of the Control Yuan stated basically that the current Control Yuan can play the role of NHRI, and proposed conferring the title of Human Rights Commissioner to all 29 Control Yuan members. The two proposals from the Control Yuan have to go through a meeting of the Control Yuan before either one would be sent to the Presidential Office or (more appropriately) the Legislative Yuan. It remains to be seen whether a major structural reform of the Control Yuan is possible and whether it is an approach acceptable to Control Yuan members. To avoid a standoff between the Legislative Yuan and the Control Yuan, the Control Yuan must be on board with any proposal to establish an NHRI in the Control Yuan, prior to discussion in the Legislative Yuan.

Meanwhile, CW is working with DPP Parliamentarian, Yu Mei-Nu to draft new organic and functional acts to set up an NHRI in the Control Yuan. The CW proposed NHRI would comprise 11 pre-designated Commissioners at the nomination stage with the other 18 members of the Control Yuan remaining as Ombudsmen. All NHRI Commissioners would enjoy the status of Control Yuan members in terms of their investigative and impeachment powers. The 11-member NHRI would function independently of the Control Yuan, although the Chief Commissioner would be the president of the Control Yuan, to prevent potential conflicts in the human rights and ombudsman functions of the Control Yuan. The NHRI's budget and personnel would be specifically allocated.

In CW's proposal, the structure, functions, and mandate of the NHRI were cross-examined with the Paris Principles for compatibility.

CW proposed an additional clause in the Organic Law of the Control Yuan, to include representatives in the NHRI who had working experience on human right issues and who do not meet the current eligibility criteria for nomination (senior civil servants and some professionals). The mandate of the NHRI will include both human rights promotion and protection, and it will have powers of investigation in both public and private sectors. The NHRI Commissioners would enjoy the same investigative powers as Control Yuan members, but the nature of the power would be administrative, rather than judicial. If, upon investigation, criminal activities are revealed, the case would be referred to the judiciary.

The NHRI would also be required to turn in an annual report to the Parliament. It would enjoy independence from other governmental powers and from the Control Yuan.

#### **4. Advocacy Strategies**

The current situation relies on (1) the submission of a proposal from the Control Yuan as to how an NHRI could be set up within the Control Yuan (which is now being delayed), and after that, (2) the struggle of possibly more than one proposal (any legislator may submit a proposal) to gain approval in the Legislative Yuan. The political will of the President may hasten both processes, but it seems that President Tsai is not ready to take the lead on this issue.

It is currently unlikely that advocacy from NGOs would produce enough pressure for the

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<sup>16</sup> Of the 29 Control Yuan members, 18 were nominated by the KMT and 11 new members were nominated by the DPP earlier this year; their term ends in July 2020.

Government to take action. Understanding of and support for an NHRI is probably limited to active citizens who have a clear idea of the scope of human rights. The CW has been publishing a series of short articles on a weekly basis to introduce the actions and achievements of NHRIs in other countries such as Germany, South Korea, Afghanistan, Poland, and Malaysia, in an attempt to raise awareness of the need for, and support for, an NHRI.

From what CW has learned from legislators, the proposal to set up an NHRI has not attracted significant attention. In fact, some DPP legislators hold deep-rooted animosity against the Control Yuan, which was regarded as a device to control public officials invented by the Kuomintang (KMT). The DPP has long desired a new Constitution to get rid of any remnants of Chinese influence on Taiwan, and the idea is that the Control Yuan will be absent in that new Constitution. The Control Yuan's constant re-iteration that there is a two-thousand-year history of an ombudsman in China has not helped to remove this antagonism towards the body. The performance of the newly appointed Control Yuan members brought some attention to the Control Yuan, but in itself that attention did not give impetus to the discussion about the establishment of an NHRI.

Up to now the Government has not made any public comment on the expected values and functions of an NHRI. In fact, it is quite low-key (almost silent) on any human rights issue.

To clear the misconceptions and rebuild trust (and interest) in this area, the Government needs to set these things straight:

- To introduce the modern functions of ombudsmen to the people. Ombudsmen and the ombudsman institution are prevalent in modern governments. The Government should depict the positive side of competent ombudsmen and set out which areas would benefit the most from an ombudsman. It should also examine whether there should be specialisation in an ombudsman, such as having the body serve as the National Preventive Mechanism to prevent torture, cruel and other inhuman or degrading treatment or punishment.
- To explain clearly the rationale behind 'abolishing the Control Yuan'. Does it mean that there is no place for an ombudsman, or that there should be an ombudsman institution other than in the form of a Yuan? What other forms are possible? What functions are expected with each design?
- To explain the difference in functions and achievements expected of an NHRI and the institution of an Ombudsman.

CW and other NGOs are trying to engage the political parties and the public in the above discussion, but the effect has not been encouraging.

## **5. Conclusion**

The assessment mission led by Ms. Noonan has brought the issue of establishing an NHRI back to the attention of high officials in Taiwan. Currently the Government seems to be inclined to establish the NHRI in the Control Yuan. However, given that the Control Yuan is an independent constitutional body, it has a rather high level of autonomy, which means that a proposal regarding an NHRI cannot be imposed upon it. Progress depends on whether, and to what extent, the Control Yuan is able to put forward a proposal on an NHRI that is compliant with the Paris Principles in terms of its mandate, structure, and functions. The final

stage will then consist of a probable competition between more than one proposal in the Legislative Yuan. The aim should be to complete the whole process in 2019, so that the new institutions (both the newly founded NHRI and a reformed Control Yuan) can begin to function when the term of the current Control Yuan members end in July 2020.

## **6. Recommendations**

- The Control Yuan should proceed with forming the new proposal on an NHRI, and the process should be both open to participation and ensure full consultation with experts on the Paris Principles;
- The Government should put in proper effort to promote awareness regarding an NHRI, particularly about the human rights promoting and protective roles an NHRI can play, and the distinction between an NHRI and an ombudsman institution;
- The ruling party should elaborate on the idea of abolishing the Control Yuan, and along that line, how it views the ideal governmental structure in the new Constitution;
- The APF and FORUM-ASIA should plan to have a follow-up assessment in Taiwan;
- Local NGOs should continue to advocate strongly for the establishment of an NHRI.

The Asian NGOs Network on NHRIs (ANNI) is a network of human rights organisations 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 (B4A) – 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;  
Covenants 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;  
Peoples' Empowerment Foundation (PEF) – Thailand;  
Philippine Alliance of Human Rights Advocates (PAHRA) – Philippines;  
Potohar Organization for Development Advocacy (PODA) – Pakistan;  
Progressive Voice (PV) – Myanmar  
Suara Rakyat Malaysia (SUARAM) – Malaysia;  
Taiwan Association for Human Rights (TAHR) – Taiwan;  
Universal Periodical Review - Human Rights Forum (UPRHRF) – Bangladesh;

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