FORUM-ASIA

Performance of National Human Rights Institutions in Asia 2006: Cooperation with NGOs and Relationship with Governments

India, Indonesia, Malaysia, the Maldives, Mongolia, Nepal, the Philippines, South Korea, Sri Lanka and Thailand

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

This publication covers the executive summary of 10 country-reports on the performance of national human rights institutions (NHRIs) in Asia, focusing on the status of their cooperation with NGOs, as well as relationship with governments.

The original reports were prepared in July 2006 to provide NGO input to the 11th Annual Meeting of the Asia Pacific Forum of NHRIs (APF) from 29 July to 3 August 2006 in Suva, Fiji. They were further revised and updated up to November 2006.

Each country report deals with various aspects of the NHRI's performance based on the Paris Principles, but seen from a human rights NGO perspective that takes into account the domestic context. It also addresses key challenges and issues facing each NHRI.

The reports were prepared by human rights defenders working in NGOs engaged with their respective NHRIs. They are members and partners of FORUM-ASIA, who help coordinate the project regionally. However, the content of the reports remain the views of the writers and their affiliated NGO(s).

It is hoped that this compilation will be a useful tool for more constructive cooperation between NHRIs and NGOs at the national and international level, with a view to enhancing the effectiveness of NHRIs for the promotion and protection of all human rights for all in Asia.

I would like to express my deepest appreciation to those who have contributed to the project, in particular, coordinator Mr Rashid Kang and all writers and participating organizations. Should you have any enquiries, please contact Mr Kang, Focal Point for this project at rashid@forum-asia.org

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South Asia

INDIA

'Policing' human rights

People's Watch – Tamilnadu (PW-TN)

1) KEY ADVOCACY ISSUES

a) Selection and appointment of Chairperson

The selection and appointment of the current National Human Rights Commission (NHRC) commissioner has undermined the credibility of the institution as a whole. The appointment of P.C Sharma, former Director-General of the Central Bureau of Investigation as well as the Supreme Court judgment (PUCL vs Union of India & Anr, 29 April 2004) sanctioning the appointment, constitute a step backwards in the understanding of human rights in India. Sharma's appointment clearly violates both the Paris Principles and the Protection of Human Rights Act (PHRA) of 1993[1] as he does not have either a judicial or a human rights background. The initial judgment of Justice Y.K Sabharwal had indeed challenged the legitimacy of appointing a former police officer to the NHRC exactly on the grounds that he did not have the pre-requisite "knowledge of, or practical experience in, human rights".

b) Doubts about impartiality

Considering the large number of cases reported to the NHRC that relate to acts of commission and omission by members of the police force, Sharma's appointment also raises serious questions about the impartiality of his work and the NHRC. His appointment hence violates one of the fundamental elements of the Paris Principles and the principles of natural justice. According to the principles of natural justice, the decision-maker in a judicial or disciplinary process must not hold, or be perceived to hold, any vested interest in the outcome and must be above both suspicion and real likelihood of bias.

c) Backlog of cases

As at 31 March 2004 (the latest available annual report of the NHRC which is available on its website), 60,808 cases were pending resolution. The total number of complaints received during the year was 72,990. The backlog is cause for concern as the NHRC was created to protect and promote human rights. Urgent measures are therefore required to ensure that cases are handled effectively and expeditiously.

d) Failure to obtain ratification of UN conventions

The NHRC has suffered from a number of deficiencies since being set up in 1993. The worst of these is its inability to push the government to accede to international legal measures that would reinforce the domestic protection of human rights. India has failed to ratify the UN Convention against Torture; Optional Protocol I & II to the ICCPR; and the Rome Statute creating the International Criminal Court. Furthermore, the NHRC has not been proactive in stating its position on the death penalty.

e) Silence over internally-displaced persons

In the aftermath of the tsunami that struck the Indian east coast in December 2004, the NHRC remained a silent spectator. It did not intervene in spite of petitions for action from the state of Tamilnadu and over 1.5 million complaints. This was in stark contrast to its efforts during the cyclone in Orissa (1999) and earthquake in Gujarat (2001) where – through direct intervention and persistent monitoring – it helped mobilise the state response and encouraged coordination by principal groups to ensure that aid reached all survivors.

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[1] Protection of Human Rights Act (PHRA) of 1993, 81 A.I.R. 1994 ACTS

Further evidence of the Commission's insensitivity was revealed by its absence of response to a complaint in relation to a 17-day fast observed by prominent human rights activist Medha Patkar, over the unsatisfactory rehabilitation of tribal populations displaced when the Narmada dam level was increased.

For the last nine months, the Commission has not acted on complaints of gross human rights violations suffered by over a thousand victims, as a result of alleged atrocities over the last 10 years by the Special Task Force in Karnataka and Tamilnadu.

f) Inability to expand jurisdiction

Sec 36 of the Protection of Human Rights Act 1993 denies the NHRC jurisdiction over important issues that are either fall under the purview under State Commissions or other National Commission (such as the National Commission for Women or the National Commission for Scheduled Castes) or one year has expired since the date on which the act constituting violation of human rights is alleged to have been committed.

The NHRC has also repeatedly asked the government to prescribe a three-month limit (from the date of submission) for NHRC and State Commission reports to be placed before the Parliament or State Legislature. It has further proposed that these reports be made public after three months even if not placed before the legislature. Yet, the 2004/05 Annual Report is still not in the public domain.

g) Administrative deficiencies

In the course of investigating complaints, the NHRC is often made to wait over a year for relevant state government responses. This significantly delays the process of resolving the case as well as a remedy for the complainant.

The NHRC does not have its own staff to ensure uninterrupted operations and create institutional memory. It relies on personnel who are transferred from various government departments.

Compulsory pre-employment training has yet to be prescribed for recruits. They are expected to understand the nature of their tasks through direct experience and carry out their duties accordingly. Much of this is in contradiction to the Paris Principles.

2) GOVERNMENT COOPERATION WITH NHRC

The greatest example of failure of government cooperation is its refusal to amend the Protection of Human Rights Act 1993, after the NHRC offered recommendations the same year. In 1998, the NHRC commissioned Justice A.M Ahmadi, former Chief Justice of India, to head a high-level Advisory Committee of human rights activists and legal experts to study the Act and suggest amendments.

The report was sent to the government in March 2002. Although a 2005 amendment Bill is before Parliament, it does not reflect a number of the most important changes proposed. These include reviewing the definition of 'armed forces', amending Sec 19 relating to the limitation of NHRC and State Human Rights Commissions' (SHRCs) jurisdiction on human rights violations by members of the armed forces, the inability of the NHRC to investigate complaints which are over a year old as well as the new provisions which allow for the transfer of cases from the NHRC to SHRCs.[2]

Nevertheless, it was reported in the New Delhi media on 1 September 2006 that the latest amendment to the Protection of Human Rights Act, 1993 has been passed by both the houses of Parliament and is now awaiting the assent of the President.

At the same time, it is learnt that the NHRC has called upon state governments, including that of Gujarat which is responsible for a series of serious human rights violations, to nominate candidates for the NHRC Special Rapporteur(s) on specific human rights violation incident or thematic issues. As an independent Commission, the NHRC should be able to appoint its own independent and competent expert, rather than relying on choices formulated from political compromise. There is no further information of these appointments at the time this article is being finalised.

3) NHRC COOPERATION WITH NGOs

The NHRC formed a National Core Group for NGOs, but this lay dormant for more than 18 months. Not a single meeting was conducted, while members were kept waiting to find out if their term would be extended. It was only a few days before the 2006 Asia Pacific Forum meeting began in July that the group was re-constituted with new members and, for the first time, a meeting was chaired by a sitting NHRC member.

The NHRC has also not acted proactively to ensure protection of human rights defenders. The worst comparison was when the NHRC failed to defend the work of a high profile human rights defender who is also a member of the NHRC Core Group for NGOs; there will be no guarantee that the NHRC will be committed to defend the rights of thousands other local activists facing threats in their daily works.

The following two cases involved complaints by human rights defenders to NHRC which were dismissed based only on the reports of the alleged perpetrators without giving the victims (complainants) the opportunity to respond, as should have been done per the NHRC procedure of sending a copy of the opposite party's response to the complainants in the case of complaints received from "reputed NGOs" before closure of a case.

Case study No. 802/22/2003-2004

PW-TN had filed a complaint with the NHRC after their premises were raided on the morning of 5 November 2003 at 7.30am based on a highly disputed search warrant issued on the same day, by police officers who did not wear their name tags and did not disclose their identity.

[2] The State Human Rights Commission (SHRC)s often lack the resources and skills to investigate complaints effectively and often function in an ad hoc manner

The NHRC had requested a report and comments from the Director-General of Police, Tamil Nadu on the petition made. The police in their report denied the violations mentioned in the complaint, and also made serious allegations against the Executive Director of PW-TN, Mr. Henri Tiphagne, calling him an "anti-national element", a "blackmailer" and allegedly "indulging in forceful religious conversions". In spite of this, no further investigations had been conducted by the NHRC and the complainants were not informed. The case was closed on 21 March 2005, more than 16 months after receipt of the complaint, without further investigation and without giving PW-TN any opportunity to comment on the police report

Case Study No. 730/22/2004-2005

In this case, PW-TN had filed a complaint with the NHRC on 11 October 2004, regarding the arbitrary arrest and detention of 16 human rights defenders by police just before the commencement of a training programme at Cuddalore on the same day. No custody memo was given to the arrested persons and despite repeated requests, they were never informed about the reasons for the arrest and detention.

Though the NHRC requested the police to submit a report on the incident, the follow-up was slow and the complainant was not kept informed, despite repeated requests. Finally, it was reported that the NHRC had closed the case on 21 September 2005, more than 11 months after the actual incident, on the grounds that the case was sub judice and no recommendations were made for actions to be taken against the arbitrary arrest and detention.

While several complaints have arisen nationwide relating to human rights defenders, the NHRC has not set up a special channel to handle such complaints. It is a matter of record that complaints referred by human rights defenders are not handled with care, resulting in these being summarily dismissed.

The NHRC has become extremely bureaucratic in its response. For example, NGO activists obtain appointments from the NHRC only after pressure from human rights defenders.

4) GENERAL PERFORMANCE

a) Uneven application of norms

Although the Protection of Human Rights Act calls for the formation of SHRCs, a uniform structure or hierarchy has not been developed for these bodies. The NHRC has repeatedly expressed concern about this in its annual reports. The understanding of human rights, complaints mechanism and issues of jurisdiction are all applied in a haphazard manner throughout India.

In a large country where each state has its own language, culture, social climate and thereby particular concerns, it is necessary for the SHRC to be effective and accessible. The NHRC should have powers of oversight and be able to hold SHRCs accountable for decisions. This would ensure that national standards for human rights are met and are in congruence with international norms.

b) Poor handling of complaints

The SHRC complaints mechanism does not reflect the spirit of the Protection of Human Rights Act in many ways. Many SHRCs summon complainants to every hearing, which has led to reluctance among the public to lodge complaints.

The NHRC has not handled complaints efficiently either, as revealed by analysis of cases filed by PW-TN. This involved 80 complaints filed between 2001 and 2005. A questionnaire was designed, while data was collected from PW-TN case files and supplemented with information from the NHRC website. A database was created and the information analyzed for, inter alia, how long the cases had been pending, initial response time, investigation, final order and public access to the information.

The findings were more damning than anticipated:

i. No response was received from the Commission in over one-third of the cases, while the average period for response was almost two years.
ii. On average, cases remained pending for more than two years – the longest wait was experienced by members of the Scheduled Castes, who are often the most vulnerable and poorest sectors of society and whose complaints should have been resolved speedily.
iii. The number of final directives issued was low and a favourable order had not been passed in a single case. In cases filed on behalf of members of the Scheduled Castes, the Commission's directives were even rarer. Numerous files were closed simply after placing the authorities' response on record, despite the known potential for bias in such reports.
iv. Complainants received a copy of the alleged perpetrator's response only in less than a fifth of the cases, thereby denying them an opportunity to comment on the response.
v. Information on the NHRC website rarely corresponded to that made available to the complainant.

A successful complaints-handling process is the ultimate measure of whether or not a national human rights institution is effective. It is this function which gives hope to those whose rights have been violated, many of whom are poor, vulnerable and unable to access other forms of legal recourse. The NHRC has done extremely poorly in regard to what is arguably its most important function. The implications of the PW-TN study findings are serious. Unless the Commission implements a number of urgently needed changes, it will soon become an empty shell that holds no substantive meaning for access to human rights.

In India, court cases are notoriously long and tedious and justice is often denied due to corruption; low levels of human rights awareness among the judiciary; and a frequent nexus between the lower ranks of the judiciary and law enforcement officials. The NHRC's role in handling complaints and seeking remedies for victims of human rights violations therefore takes on added significance. The prime value of its complaints mechanism lies in greater accessibility, particularly to the more vulnerable sections of society.

5) CAMPAIGN FOR CHANGE

c) Appointment of Chairperson and commissioners

Based on the structure stipulated in the Protection of Human Rights Act, 1993 the appointments process reflects a heavy political influence. In practice, nominations reveal a pro-government stance as representatives of the government form a two-thirds majority of members of the Appointment Committee.[3] The appointment committee's independence – a key plank of the Paris Principles as minimum acceptable criteria for the establishment and functioning of national human rights institutions – is not guaranteed by the Protection of Human Rights Act.

In addition, the composition of the Commission is generally decided at closed-door meetings, which does not allow for transparency or accountability.

d) Composition of NHRC

By limiting three of its five members to the judiciary, the NHRC clearly lacks the broad and representative composition recommended in the Paris Principles. These guidelines specifically point to representation of NGOs, trends in philosophical or religious thought, universities and qualified experts, Parliament and government departments. The aim of broad and pluralist representation is to ensure input from different sectors of society and thus give the institution the opportunity to detect possible human rights violations, obtain different perspectives and broaden its inventiveness in responding to violations.

[3] Asia-Pacific Human Rights Network, "A Case of Respectability", *Human Rights Features*, Nr. 112/05, 29 January 2005)

In India, three commissioners including the Chairperson must be members of the judiciary. However, they are not required to reflect any particular interest or experience in human rights.

The current membership fails the diversity test in that not one member represents women, Schedule Caste/Schedule Tribe or Other Backward Classes, Minorities, Muslims or any other disenfranchised groups. Given the multi-ethnic make up of India and the harsh reality that the vast majority of human rights violations are committed as discrimination against these groups, this failure undermines the credibility of the NHRC.

There have been only two women commissioners: Ms Justice Sujata Vasant Manohar, who served from February 2000 to August 2004; and Justice Fathima Beevi. Only one member of a Scheduled Caste has been appointed to date – Dr Justice K Ramaswamy served from 16 November 1998 to 12 July 2002. During the tenure of these commissioners, it was found that the NHRC performed to a higher level and demonstrated greater sensitivity to complex issues surrounding human rights.

FACT FILE

Country	India
Name of NHRI	National Human Rights Commission of India
Inception	12 October 1993
Enabling law	Protection of Human Rights Act 1993
Term of Office (Years)	5
Composition	Chairperson and 4 commissioners. In addition, the Chairpersons of the National Commission for Minorities, the National Commission for the Scheduled Castes and Scheduled Tribes and the National Commission for Women are deemed to be Members of the Commission for the discharge of specific functions. Does not define plurality. Not required to reflect any particular interest or experience in human rights.
Possibility of reappointment	Yes
Full-time/Part-time/Mixed (allows both full- and part-time)	Full-time. Commissioners are not allowed to engage in any other paid employment.
Funding	Government budget and other funding institutions
Legal Mandate	
Power to receive and investigate complaints	Yes
Power to conduct investigations on own initiative (suo motu)	Yes
Power to subpoena evidence and examine witnesses	Yes
Power to enter and inspect premises *** only detention facilities** **** must be announced or requested**	Yes. The Commission may enter any place and seize documents related to matter of inquiry. However, when related to detention and detention facilities, inspection can only take place after advance notice to the state government.
Power to resolve complaints by conciliation and/or mediation	***
Mandate to educate/conduct research on human rights	Yes
Power to advise/make recommendations to government and/or Parliament on laws, regulations, policies or programmes/ international treaties	Yes
Power to provide* or recommend compensation and/or seek it through a court of specialist tribunals*****	Yes ** Power to recommend only
Power to intervene or assist in court proceedings related to human rights (with court's permission)	Yes
Useful links	* http://www.nhrc.nic.in/ * www.pwtn.org/

*** Has an "incidentals" clause which follows the numeration of their specific powers and functions with a provision to the effect that the Commission can "do anything incidental or conducive to the performance of any of the preceding functions".

6) KEY ADVOCACY ISSUES

a) Government-led obstructions

Among other duties, the Human Rights Commission of Maldives (NHRC) is tasked with conducting independent and regular prison visits. However, it has been unable to carry out this crucial and mandatory activity "due to various reasons".

The NHRC says it is "at present unable to fulfil its responsibilities" as the government has not seen to making the enabling legislation compliant with the Paris Principles, the international standard applied to national human rights institutions.

b) Absence of media support

According to the Commission, the media – which is fully under the control of the state – does not cooperate with or assist its attempts to build public awareness of human rights. This has restricted the scope of the Commission's work. One unintended outcome is that is now popularly perceived to be a body that 'works to protect criminals'. There have been deliberate attempts to damage its reputation, so as to fuel public resentment.

c) Religious decree against human rights

The Supreme Council for Islamic Affairs announced on 5 July 2005 that the Commission's possession of the 'Universal Declaration of Human Rights' was illegal in the Maldives. This was a huge setback for the Commission, after all its work since its inception on 10 December 2003. However, the court decision drew international attention to the government's policy on human rights. In the face of a global outcry, the President's office intervened to revoke the decree.

7) GOVERNMENT COOPERATION WITH NHRC

In general, the NHRC has done its best to push for transparency and independent inquiries into allegations of violations of human rights. However, the government has consistently refused to cooperate.

The Commission was formed following the death of five prisoners at the Maafushi Ilsand jail on 20 September 2003. Nine commissioners were appointed by President Maumoon Abdul Gayoom. They refused to bow to government pressure and instead, tried to find some degree of independence for their work.

This saw the government retaliating by denying access to evidence and to the media respectively; limiting the commission's resources; blocking avenues for prosecution of officials; and withholding permission for annual reports to be published on time.

Seven commissioners, including the chairperson, have resigned for various reasons between 2004 and 2005. From 12 September 2005, only 2 members remained with the Commission.

Under intense pressure, the government tabled the Human Rights Commission Bill in Parliament to convert the NHRC into a statutory body. After much debate and with the opposition pushing for transparency and independence of the NHRC, the Bill was passed on 21 July 2005. However at the

eleventh hour, the government removed two important clauses, making the NHRC virtually powerless and rendering the bill useless vis-à-vis the Paris Principles.

The commission submitted 13 points of concerns as being against the principles of universality, non-discrimination and effective functioning of a human rights commission. For example, Article 6(a) states that only Muslims are eligible to become commissioners.

Yet, the president went on to ratify the bill in August. The chairperson submitted his resignation after the Bill was ratified saying that the Act was inadequate and "made it impossible [for the Commission] to protect human rights in Maldives".

Discussions however are now underway to amend the bill, which is before Parliament. This also allowed President Gayoom to delay nomination of new commissioners and avoid forming the NHRC on grounds that there is no legal basis for its existence.

Even if the revised bill is passed by Parliament, it will take approximately six months before the NHRC can start functioning. The president has effectively delayed the work of the NHRC by at least two years.

8) NHRC COOPERATION WITH NGOs

The government refused to register human rights NGOs up to April 2006. By then, a shortage of Commissioners and other resources had virtually blighted the NHRC. There has been no communication or attempts to forge a coherent working relationship between the NHRC and the two organisations that were eventually registered.

The government does not recognise human rights defenders either. Although a number of them are constantly detained or threatened with arrest and then abused by the police, the NHRC has not been able to raise its voice in their defence.

9) GENERAL PERFORMANCE

In general, the NHRC has not been able to carry out any effective programmes at the national level. There are no local chapters, except for one office which lacks resources to function adequately.

NGOs also note that the NHRC has failed to conduct regular prison visits and publicise the conditions at prisons and of the detainees. There is an alarming level of brutality, torture, cruel and ill-treatment by the police and detaining authorities. While there is no law to prevent the NHRC from acting against such violations, it appears to be powerless.

10) CAMPAIGN FOR CHANGE

The current NHRC team consists of the two remaining Commissioners appointed in 2003. New appointments need to be made to replace those who had resigned.

The current Human Rights Commission Bill need to be drastically overhauled to ensure its strict compliance with the Paris Principles. The 13 points of concerns voiced by the original team of the NHRC need to be reflected in the final Bill.

Parliament will also need to determine the need to dismiss Commissioners, under the draft amendments. The present selection process is extremely unfair as the president appoints and dismisses the Commissioners.

NEPAL

Under the King's Rule –Lessons Learned

Informal Sector Service Centre (INSEC)

1) KEY ADVOCACY ISSUES

a) End of Commission's autonomy

Different human rights organisations termed King Gyanendra's appointment of new NHRC members in May 2005 by as an attempt to institutionalise his authoritarian rule by neutralising the highly-effective human rights protection mechanism operational since 30 May 2000.

With no prime minister and the House of Representatives having been dissolved, he amended the NHRC Act by promulgating a new ordinance on 22 May 2005. This allowed the appointment of NHRC members to be recommended by the foreign affairs minister, Chief Justice and Speaker of the House[1]– all high-ranking officials in the King's government after he dismissed the elected government in February 2005 and assumed total and direct executive authority. Having put in place the Recommendation Committee of his choice, the King throttled the legitimacy and independence of a statutory body, in flagrant breach of the Paris Principles.

The ordinance allowed the King's direct intervention in an autonomous institution. The appointment procedure failed to meet the core minimum acceptable standards contained in the Paris Principles, thereby requiring a review and placing the system under probation by the Asia Pacific Forum (APF). This became the main argument of the NGO campaign for the 15 months of the King's rule.

b) Failure to uphold human rights standards

From February 2005, government military and security agencies summarily suspended or ignored civil and political rights, and continued to engage in the practice of 'disappearances', marking Nepal as the country with the highest number of cases reported to the United Nations.

The King and his hand-picked officials were responsible for serious human rights violations, including the arbitrary arrest and detention of thousands of critics, torture and ill-treatment of detainees, and severe restrictions on freedom of speech and assembly.

The then Royal Nepal Army[2] continued to violate international human rights and humanitarian law in its war against Maoist insurgents. Security forces arbitrarily arrested over 3,000 political activists, journalists and students. Over the last year, the armed forces have killed more than 1,000 people including civilians, while Maoists were responsible for at least 600 deaths. The king issued numerous decrees to bypass the constitution or any legislation that limited his authority.

It was general reading that the new NHRC lacked the political will to address impunity. Instead of bringing alleged human rights violators (mainly military commanders) to justice, it merely recommended compensation for the victims. Such decisions damaged its image. In protest, disappointed families of people who have 'disappeared' locked the NHRC office on 29 December 2005.

The NHRC tried organising some fact-finding missions, but ignored the principle of transparency as an integral element in defending human rights. The Commission claimed to have access to places where

[1] Post of Speaker and Deputy Speaker were in place even during the absence of Parliament.
[2] After April 24, 2006 the Parliament changed its name from Royal Nepal Army to Nepal Army.

detainees were being held. However, the question remains as to why it did not make recommendations after a visit to the army barracks used as places of interrogation and detention.

In May 2006, the UN Office of the High Commissioner for Human Rights (OHCHR) brought a Report of Investigation into Arbitrary Detention, Torture and Disappearance at Maharajgunj Republic of Nepal Army (RNA) barracks, Kathmandu, in 2003-2004. NHRC had kept mum on that case despite piles of complaints throughout 2005 and the second quarter of 2006. However, immediately after the Chairperson and other members resigned in July 2006, a NHRC member with a team to Sivapuri hill on 11 July 2006 "in course of investigation for making public the whereabouts of 49 disappeared people, who were said to have killed by the security forces". The exhumation of bodies without proper methodology was widely debated. The NHRC was alleged to have destroyed evidences at Kavre on 5 July 2006 and at Dhading on 10 January 2006. Such haphazard acts have led observers to believe that the authorities were trying to hide something. Activists insist that it was colluding with the army in this regard.

c) Defending an appalling record

NHRC commissioners and personnel actively lobbied the international community by understating the seriousness and magnitude of human rights violations at home. Denying the fact that the situation was deteriorating alongside the environment for human rights organisations and defenders, the NHRC Chairperson expressed his views as if there was peace and normalcy, rather than a state of emergency.

d) APF 'unprepared' to address compliance issues

A few NGOs had sent written interventions to the secretariat prior to the 10th annual meeting of the Asia Pacific Forum of National Human Rights Institutions (APF), expressing deep concern over Nepal NHRC's compliance with the Paris Principles since its controversial appointment. Consequently, an Expert from the OHCHR Mission was sent to Nepal between 29 June and 6 July 2005. This was followed by a visit by the APF secretariat in mid-July.

Despite continuous efforts by Nepal NGOs and international solidarity groups, APF was not ready to take up the case of non-compliance of the Nepal NHRC. As a result, APF was seen as being more concerned about maintaining good relationships among its peers, rather than taking up crucial issues such as adherence to the Paris Principles.

The NGOs' statement at the closing session of 10th annual meeting of the APF on 26 August 2005 in Ulaanbaatar "…note from the concluding statement that the closed session did not discuss the issue of the present status of the Nepal Human Rights Commission, nor any explanation as to why this has been overlooked. We do not call for the expulsion of the Nepal commission, but we are concerned and surprised that the Forum would act in such a dismissive manner".

In addition, APF endorsed the Nepal Commission's admission to the International Coordination Committee of the National Human Rights Institutions (NHRIs) of the Asia-Pacific region, along with three other original NHRI representatives of the APF: the Commissions of South Korea, the Philippines and Fiji respectively. The decision created a new crisis for the Nepal human rights community as the NHRC used the endorsement as a public relations exercise to boost its credibility. This was a big blow to human rights NGOs and international solidarity groups. The APF decision implied that the Nepal Commission had credibility, set a good example and had a leadership role in the international human rights community – even as its credibility was being disputed by NGOs at home.

As the only legitimate forum for 'defenders of human rights defenders', APF is accountable to the human rights community at national and at regional and international levels. It has a responsibility to uphold high standards and values.

e) King's appointees cling to office

The Chairperson and four remaining members of the NHRC refused to resign even after their patron, the King, stepped down on 24 April 2006. Huge public pressure was brought to bear, compelling them to resign.

The Commissioners announced their decision on 9 July 2006 at a press conference organised at the Commission's office. They stated that the resignation was tendered in the face of the changing political scenario. The Council of Ministers approved the resignation on 17 July 2006. The Office of the Prime Minister and Ministry of Council accepted the resignation.

Their resignation came as the ruling seven-party alliance was preparing to file an impeachment motion in the House of Representatives, accusing them of having failed to deliver their mandate responsibly.

2) GOVERNMENT COOPERATION WITH NHRC

The King ruled with an appointed government after he dismissed the elected government in February 2005. After recruiting NHRC members who are sympathetic to the King in May 2005 effectively relegating the NHRC to a puppet's role, the Royal Government created a new parallel nine-member Human Rights Committee under the council of ministers headed by the King himself.

This Committee was given the mandates identical to the original mandate of the NHRC. The move was seen by NGOs as a step to further sideline the NHRC's mandate and future possible efforts to intervene in human rights issues.

The turning point occurred when the King was forced to step down on 24 April 2006 by People Power and the eventual restoration of the Parliament. This led to the resignation of all five Commissioners on 17 July 2006.

The restored Nepal Parliament is currently debating new legislation to reform the NHRC. Among key proposals are an increase in the number of Commissioners from five to 11; as well as to strengthen the powers of the NHRC from an advisory role to one with enforcement power.

3) NHRC COOPERATION WITH NGOs

The appointment of new Commissioners in May 2005 had a severe impact on the NHRC's relationship with human rights organisations. Prior to the May 2005 ordinance, the NHRC had maintained a positive and mutually beneficial relationship with many civil society organisations, consulting with them and conducting joint awareness programmes. The new Commission was greeted with hostility from NGOs who were understandably sceptical about its autonomy. They called on international human rights bodies to de-recognise the Commission.

Twenty-five human rights organisations in Nepal issued a joint press release, which stated that the changes were illustrative of "the undemocratic and illegal nature of the regime" that seeks to "dismantle the structures of democracy".

Activists based in Kathmandu declared they would not work with the NHRC. Ian Martin, chief of the UN monitoring mission in Nepal, said: "In that context, there are understandable concerns about the independence of the new commission and the extent to which it will be able to develop the confidence of NGOs and victims which is essential to effective function [of the NHRC]." (6 Jun 2006 IRIN) He also noted the absence of public involvement in the selection of NHRC members.
Various international human rights organisations criticised the King for amending the NHRC Act. The Geneva-based International Commission of Jurists (ICJ), in a letter to the King on 25 June 2005, stated that the amendment "has placed in doubt the independence, representativeness and accountability of the

current NHRC"; that it is no longer in compliance with the Paris Principles; and that it has assumed an executive character as opposed to that of an independent body.[3]
The ICJ further questioned the independence of the NHRC since the appointment procedure "does not comply with the mandatory Paris Principles". It said the NHRC resembled an institution of the executive akin to human rights committees and cells set up by the government.

4) GENERAL PERFORMANCE

During the King's rule, the NHRC failed to monitor the state's violation of human rights. Instead, it isolated itself from the human rights community. During the final 19-day people's uprising from 16-24 April, 2006 – which eventually forced the King to step down and return executive power to the Parliament – the NHRC was nowhere in sight. At the time, human rights NGOs and solidarity groups, as well as OHCHR, repeatedly condemned the excessive use of force by the King's government against protestors. (See A Witness Account, published by INSEC)

In a nutshell, the watchdog role of the NHRC was called into question. The NHRC was confused about its accountability and was seen to be avoiding confrontation with the Royal establishment in its daily functioning. It failed to hear the cries of victims of human rights violations and to respond to their needs.

5) CAMPAIGN FOR CHANGE

The restored Nepal Parliament must ensure the current Bill tabled for adoption should contribute toward strengthening the existing NHRC with higher standards in line with the Paris Principle in its competence, mandate, enforcement power as well as its members' composition to ensure the plurality voices of its society including marginal groups and sectors.

As lesson learned from the NGOs campaign to hold the Nepal NHRC accountable at all levels (national, regional and international) during the 15 months of the King's rule, the international community plays a very significant role. There is a need for NGOs to lobby APF as well as the International Coordinating Committee of NHRIs (ICC) to have in place effective scrutiny and punishment mechanism to ensure the compliance of its own NHRI members to the Paris Principles from time to time. The current proposal by the ICC to introduce a mechanism of periodic review on the NHRIs' compliance is a welcome start. NGOs should be given a bigger role to play in this formulation process.

[3] Press statement issued by 25 human rights organisations

FACT FILE

Country	Nepal
Name of NHRI	National Human Rights Commission of Nepal
Inception	5 June 2000
Enabling law	Human Rights Commission Act 1997
Term of Office (Years)	5 years
Composition	Chairperson Parliament is now debating on the proposed new law to extend the number as many as 11.
Possibility of reappointment	Yes
Full-time/Part-time/Mixed (allows full- and part-time)	No reference in enabling law
Funding	From any source including foreign
Legal Mandate	Advisory body. The Bill currently before Parliament suggests that it should be constitutional and mandatory.
Power to receive and investigate complaints	Yes
Power to conduct investigations on own initiative (suo motu)	Yes
Power to subpoena evidence and examine witnesses	Yes
Power to enter and inspect premises *** only detention facilities** **** must be announced or requested**	Yes; advance notice/request not required as per Sec 9(2) of the 1997 Act
Power to resolve complaints by conciliation and/or mediation	Yes; however, no specific provision in the Act expressly empowers the Commission to do so. An 'incidentals' clause follows the enumeration of specific powers and functions, with a provision that the Commission can "do anything incidental or conducive to the performance of any of the preceding functions".
Mandate to educate/conduct research on human rights	Yes
Power to advise/make recommendations to government and/or Parliament on laws, regulations, policies or programmes/international treaties	Yes
Power to provide* or recommend compensation and/or seek it through a court of specialist tribunals*****	Power to recommend
Power to intervene or assist in court proceedings related to human rights (with court's permission)	Yes
Useful links	http://www.nhrcnepal.org/ http://www.inseconline.org/

SRI LANKA

One Step Forward, Two Steps Back

Law and Society Trust (LST)

1) KEY ADVOCACY ISSUES

a) Impact of unconstitutional appointments

Independence of human rights institutions is emphasised in the Paris Principles. The most urgent issue confronting Human Rights Commission (HRC) of Sri Lanka is its lack of independence due to the fact that the Executive President had bypassed the constitutionally-required intervening authority of the Constitutional Council (CC) in the nomination of the Commissioners.

An apolitical, 10-member Constitutional Council (CC) had been set up by the 17th Amendment to the Constitution in 2001 as an external check over earlier unrestrained presidential fiat, due to public outrage over highly politicised appointments to the public service. The CC was constituted through a process of consensual decision making by the constituent political parties in Parliament.

Five individuals of high integrity and standing in public life and with no political affiliations, (out of which, three members represented the minorities), had to be nominated jointly to the CC by the Prime Minister and the Leader of the Opposition. One member had to be nominated by the smaller parties in the House, which did not belong to either the party of the Prime Minister or the Leader of the Opposition. These six appointed members held office for three years. They could be removed only on strictly mandated grounds and any individual appointed to vacancies created held office for the un-expired portion of that term. In addition, the President had the authority to appoint a person of his or her own choice. The rest of the CC comprised the Leader of the Opposition, the Prime Minister and the Speaker of the House ex officio.

The CC had an important task in vetting and/or approving nominations of members to the country's key monitoring bodies on the police, the judiciary and the public service as well as to key posts in the public service. However, it was in existence only for a relatively short period. The first CC came into being in March 2002. The terms of office of its six appointed members expired in March 2005. But the vacancies arising therein were not filled which resulted in the lapsing of the CC.

Though names of five nominated members were agreed upon by the Prime Minister and the Leader of the Opposition and communicated to the President for appointment as constitutionally required in late 2005, these appointments were not made. The deliberate delay on the part of the smaller political parties in parliament to agree by majority vote on the one remaining member to the CC was cited as the ostensible reason for the CC not being brought into being.

The many representations made to the President by civil society groups that the one vacancy in the CC should not prevent the appointment of the members nominated already and that the consequent functioning of the body was essential to the good administration of the country, were to no avail.

Shortly thereafter, President Rajapakse proceeded to make his own appointments to the commissions, including the HRC. The appointees predominated with his supporters and personal friends with only some exceptions to the rule. Public uproar resulted on the basis that this was precisely the mischief that the 17th Amendment had set out to remedy.

Two former Commissioners, both senior law academics, declined re-appointment despite persuasion from government officials due to the unconstitutional nature of the appointments. Another nominee, reputed for his work as a human rights activist, also declined appointment. None of the current members had a track-record of sensitivity to rights protection and were virtually unknown to Sri Lanka's human rights community.

Immediately after the old Commissioners went out of office they had delegated their powers of investigation to a committee in the expectation that there would be a delay in appointments of the new Commissioners because of the non-functioning of the CC. During this period that the HRC was not in existence, this delegated committee commenced working but was not able to release official recommendations or reports due to the primary body not being in existence in the first place. This had a serious impact in the north-east of the country, where the HRC had been engaged in safeguarding citizens caught in the crossfire between government forces and the Liberation Tigers of Tamil Eelam (LTTE).

A further example of the impact on operations can be gauged by the decision of the new Commissioners to stop inquiring into the complaints of over 2,000 disappearances of persons. They advanced an extremely disturbing reason for stopping their inquiries "for the time being, unless special directions are received from the government". A verbatim citation from a note of the Secretary to the Human Rights Council dated 29 June 2006 attributed this to the fact that "the findings will result in payment of compensation, etc". The decision proved the worst fears of human rights activists that the Commissioners could not be regarded as functioning independently from the government.

Recommendations

i. Immediately implement Article 41A and 41B of the 17th Amendment to the Constitution bringing the CC into being and re-constitute the current NHRC with the new members being nominated by the CC as constitutionally required.
ii. Amend Sec 3(1) of the National Human Rights Commission Act, No 21 of 1996 (hereafter the Act) as existing requirements are vague and do not convey the necessity for Commissioners to apply rigorous standards for a high level of integrity and commitment to human rights.
iii. Appoint full time members.
iv. Increase the number of members from five to at least nine.
v. Amend Sec 3(3) of the Act to require not only an adequate ethnic representation in the HRC, but also adequate gender balance of its membership.
vi. Insufficient investigative powers

A central function of the HRC Sri Lanka is to investigate human rights violations. Monitoring bodies set up under Sri Lanka's obligations to international treaties have affirmed (in their Concluding Observations to periodic reports of the state, submitted under the reporting procedure) the need to strengthen "the capacity of the National Human Rights Commission to investigate and prosecute alleged human rights violations".

A good example of deficiency is seen in the way the HRC addresses torture even though it has adopted a specific policy against torture in its National Strategic Plan of Action (2003-2006). In the past, the HRC had failed to develop proper procedures for the conduct of investigations into cases of torture and its district coordinators had the practice of settling such cases for nominal monetary compensation. Responding to significant public concern, the HRC made a policy decision in 2004 not to mediate/conciliate complaints regarding Article 11 (freedom from torture). However, a prevailing problem is its limited capacity to conduct detailed investigations of a criminal nature into complaints of torture.

Another problem identified in respect of the Commission's investigative functions was that, even in cases where it investigates an allegation of torture and sends the matter to the Attorney General (AG), the AG

"again relies on police investigations". This duplicates and prolongs the investigative process and lends credence to criticism that the HRC Sri Lanka does not undertake serious and thorough investigations. Recent decisions by the police have resulted in HRC officers being hampered in their statutory task of monitoring places of detention to ensure that abuse of detainees does not occur.

Recommendations

i. Allow the HRC to inspect not only the cells of police stations, but the entire precinct including the toilets and kitchen, which are often the very places to which detainees are taken and tortured.
ii. Allow the HRC to develop closer links in the processes of torture investigations and prosecution, handled by the Special Investigations Unit (SIU) of the police and the AG's Department). Preliminary investigations by the HRC could help institute criminal inquiries into gross human rights abuses. However, it would require institutional capacity to collaborate in this and to skilfully monitor the process to ensure that the system functions properly.
iii. Enable the HRC to monitor the operation of the AG's Department, which is responsible for the prosecution of alleged torturers as it is now thought that it would be improper for the Commission to do so.
iv. Rectify other faults in the functioning of the HRC such as the failure to keep complainants informed of the progress of their cases; case files sometimes going missing from the head office; and complaints by victims that the 24-hour hotline is not always accessible.

2) GOVERNMENT COOPERATION WITH NHRC

a) Deficiencies in operational independence

It is problematic that the Executive can make regulations in regard to the operational aspects of the HRC and that Sec 31 of the Act confers powers on "the Minister" to make regulations regarding implementation, including conducting investigations. This provision violates the Paris Principles in that "[a]n effective national institution will have drafted its own rules of procedure and these rules should not be subject to external modification".

Recommendation

Repeal this clause

b) Financial independence at stake

According to the Paris Principles, an important aspect of independence is the financial autonomy of a national human rights institution and that "financial autonomy must be accompanied by adequate, continuing funding". The state has to provide adequate resources to enable the HRC to function effectively. The possibility of manipulating financial allocations to undermine the independence of such institutions is very real. Adequacy of financial resources is also linked to the issue of public accessibility to the HRC. It must have sufficient resources to have an adequate number of regional offices in order to widen access to the public.

Recommendation

Amend the Act to ensure that the HRC has its own budget and enjoys autonomy, manages its own finances subject to accountability by Parliament. Financial allocations to the HRC must be prioritised and must not be diminished.

3) NHRC COOPERATION WITH NGOs

Currently, there is minimal co-operation of the HRC with NGOs. As in the case of the Nepal National Human Rights Commission (NHRC) during the time that its Commissioners were appointed by the King

and civil society thereafter refused to recognise the NHRC as a properly constituted body, some Sri Lankan activists have also followed similar patterns of protest in regard to the present Commissioners.

Undoubtedly, the unconstitutional nature of the appointments must be rectified as pointed out above, consequent to which practices of consultation and co-operation with other human rights defenders may be observed by the HRC with the objective of fulfilling its duties under the Act.

4) CAMPAIGN FOR CHANGE

a) Revert Unconstitutional Appointments to Constitutional Appointments

HRC members must be appointed according to mandated constitutional procedures and after their nominations are approved by the Constitutional Council. Basic gap in the law under which the HRC is established need to be redressed if it is not to be relegated to yet another pitiable example of Sri Lanka's dysfunctional institutional process.

b) Enforcement of recommendations

Under the Act, if a party does not comply with a recommendation made by the HRC, all it can do is report to the President who shall then cause such report to be placed before Parliament under Sec 15(8). The success of this procedure inevitably depends on political will.

Recommendation

Adopt a more streamlined procedure if recommendations are to be enforced and the public is to have confidence in the efficacy of the HRC as a redress mechanism.

c) Need to expand mandate

As the HRC is designed to provide relief through informal procedures and perform other functions to promote and protect human rights, it should be mandated to adopt a broad view of human rights. Though past Commissioners had attempted to transform the HRC into an effective human rights monitor, their efforts were hampered by specific defects. Under the Act, the HRC can only investigate and inquire into violations of fundamental rights recognised by the Constitution. This recognises a limited category of rights which does not inter alia, include the right to life In recent years, the Supreme Court has recognised the right to life in a very limited context of death owing to torture or disappearances. However, a constitutionally enshrined right to life that is capable of expansion so as to mean safeguarding not only the fact of existence but also the quality of life is needed. The limited ambit of the rights chapter in the Constitution has significantly impacted on the capacity of the HRC as well.

Currently, the HRC functions are limited to human rights education, making recommendations on human rights treaty ratification and on bringing national laws and administrative practices in line with international human rights norms (Sec 10(d), (e) and (f). The interpretation clause of the Act (Sec 33) defines "human rights" as only those rights that are recognised by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. This is a very restrictive definition of the concept of "human rights" which does not include all universally-recognised human rights under treaty law and customary international law. Sri Lanka has ratified almost all of the major international human rights treaties and thereby has voluntarily assumed international legal obligations. In addition, Sri Lanka is bound by customary principles of international law relating to human rights protection. All organs of the state are, therefore, bound to respect and protect those international human rights standards.

Recommendations

i. Expand the HRC mandate to include investigation of human rights violations that the state is bound to respect and protect in international law.

ii. Amend Sec 10 to enable the HRC to advise the government, to ensure that executive policy-making, (not only legislation and administrative practices as currently stipulated), is brought in line with international human rights obligations.
iii. Amend Sec 14 further to expand the HRC mandate to investigate abuses by non-state actors. This would take into account decades-long conflict between the LTTE and the government, which has subjected ordinary people to extreme violations of life and liberty.

d) Standing to petition the HRC

The Act permits a person or persons to petition on behalf of aggrieved person/s. Sec 15(3) (b) of the Act states that in selected cases where, inter alia, conciliation or mediation has not been successful, the HRC may refer the matter "to any court having jurisdiction to hear and determine such matter in accordance with such rules of court as may be prescribed".

Recommendations

i. Broaden public standing to petition the HRC by permitting any person to bring to its attention an infringement or an imminent infringement of human rights rather than stipulating that it should be on behalf of an aggrieved party.
ii. Necessary rules should be prescribed by the Supreme Court to ensure that the HRC is not ridiculed for its lack of substantive power in cases where individuals or bodies cited before the HRC fail to heed its directions.

FACT FILE

Country	Sri Lanka
Name of NHRI	Human Rights Commission (HRC) of Sri Lanka
Inception	Operational from September 1997
Enabling law	Human Rights Commission of Sri Lanka Act, No. 21 (1996)
Term of Office in Years	3
Composition	Chairperson and 4 Commissioners
Possibility of reappointment	No
Full Time/ Part Time/ Mixed (allow for both full and part time)	Mixed
Funding	Funded by Parliament through the Presidential Office
Legal Mandate	
Power to receive and investigate complaints	Yes
Power to conduct investigations on their own initiative (Suo Motu)	Yes
Power to subpoena information and examine witnesses	Yes
Power to enter and inspect premises *** only detention facilities** **** must be announced or requested**	Yes * Only detention facilities
Power to resolve complaints by conciliation and/ or mediation	Yes
Mandate to educate and conduct research with regard to human rights	Yes
Power to advice/ make recommendations to governments and/ or parliament on laws, regulations, policies or programs/ international treaties	Yes
Power to provide* or recommend compensation and/ or seek it through a court of specialist tribunals*****	Yes ** To recommend compensation
Power to intervene or assist in Court proceedings related to human rights (with permission of the court)	Yes
Useful links	* HRC: http://www.hrcsl.org/ * LST: www.lawandsocietytrust.org/

Towards a more effective investigation process by the HRC Sri Lanka[1]

Movement for the Defence of Democratic Rights (MDDR)

Investigating and determining whether a violation of fundamental rights has occurred is a key function of the Human Rights Commission (HRC) of Sri Lanka, established by the human Rights Commission of Sri Lanka Act No 21 of 1996 (the 'the Act'). Although the Act is in need of change because of limitations, there are number of areas where the investigation process can be improved even within the current provisions.

The Table highlights irregularities and deficiencies, and offers recommendations to rectify the process of investigation.

Challenge	Recommendations
Undue delays in investigating fundamental rights violations due to a large number of complaints not falling under the existing mandate	Create a complaints desk to sort out reports made to the Commission daily This desk could identify complaints of an urgent nature and advise complainants where to take reports that the Commission can't currently investigate The Commission could also raise public awareness on its limitations in this respect.
Inadequate investigation procedures Sec 16 of the Act stipulates that, when the HRC refers a matter for mediation, it shall appoint one or more persons for this purpose. But such appointments are not duly regulated; in the past, persons without the capacity to carry out relevant duties have been appointed, such as those with no legal background, or who are retired. The other main weakness is the absence of a proper procedure to investigate complaints – it varies from officer to officer. A simple example is that some officers request details of the case in writing, while others ask for oral submissions.	Formulate a proper procedure to investigate the complaints. We recommend a procedure that will indicate minimum acceptable criteria in appointing investigating officers; cases should be presented through affidavits, together with relevant documents, within a stipulated time period. If additional evidence is needed, it could be obtained in either written or oral form in accordance with the provisions of the Act. This corresponds to the procedures of the Supreme Court in fundamental rights applications.
Reluctance of the HRC to determine the next date for the hearing of a case, when this is partly heard. It has led respondents to ignore the new dates. On other occasions, dates were only fixed after complainants sent reminders to the HRC.	Fix the next hearing dates when one hearing is concluded. In cases where HRC summonses are ignored, initiate action invoking relevant provisions of the Act.
Lack of a procedure to monitor implementation of HRC determinations that a violation of fundamental rights has occurred based on Sec 15 of the Act, although relevant measures are outlined in sub-sections 6, 7, 8. This has contributed to ignorance of HRC directions.	Make provisions in respect of the finality of the determination, and introduce a simple appellate procedure.
Acceptance of applications to re-open a case after the HRC has made determinations of violation(s) makes it difficult for the victims to obtain relief.	Applications should not be accepted to re-open a case where the HRC has made a determination.

[1] Adapted from the original paper prepared in July 2006 by Mr Pubudu Alwis and Mr Sampath Pushpakumara, Movement for the Defence of Democratic Rights (MDDR)

South East Asia

INDONESIA

Bogged down in Bureaucracy

ELSAM, HRWG, KONTRAS and PBHI[1]

1) KEY ADVOCACY ISSUES

a) Politicisation in KOMNAS HAM

The independence of KOMNAS HAM (the Bahasa Indonesia acronym for the National Human Rights Commission) is guaranteed by statute. In practice, though, the decision making process in the plenary forum – to decide whether or not a case of human rights violation constitutes gross violation – is highly politicised, predominated by the interests of powerful political groups represented by some commissioners.

The current Commissioners' team in the KOMNAS HAM is the combination of the first and second batch (elected in 2002). The first batch is consisted of retired military/police general and bureaucrats who are closely connected with political forces during Soeharto regime. Such a combination complicates the decision-making process in the plenary of KOMNAS HAM, which requires consensus; hence the Commission has been performing poorly in the field of human rights protection and promotion.

These procedural/institutional constraints have led to KOMNAS HAM being unable to effectively respond or bring about positive results in probing gross violations such as in the case of Abepura in 2000 and the Trisakti University and Semanggi student killings in 1998.

b) Failure to probe the Munir murder case

In September 2004, prominent Indonesia human rights defender Munir [2] died under suspicious circumstances. The president assigned an independent committee to probe this in collaboration with KOMNAS HAM. However, the latter did not contribute actively.

In July 2006, KOMNAS HAM took up the case only after a meeting between its Chairperson and Munir's wife, Suciwati. She was accompanied by Thai women's human rights defender Angkana whose husband, prominent human rights lawyer Somchai Neelaipaijit, has 'disappeared'.

While KOMNAS HAM was conducting preliminary investigations, the Indonesian High Court dismissed the appeal of the accused, Pollycarpus Priyanto. The court found him guilty of Munir's death, and sentenced him to 14 years in jail. However, other elements of injustice include the failure to investigate others implicated in the murder. The High Court judgment noted that the testimony proved that Pollycarpus did not act alone. The court therefore urged the police to conduct further investigations to uncover the identity of those also responsible for Munir's death.

c) Insufficient protection for the religious minority rights

KOMNAS HAM has not adequately protected religious minority rights, particularly of members of the Ahmadiyah. At the beginning of 2006, members of this group suffered attacks and persecution by violent religious groups in Lombok Island, Parung-West Java and South Sulawesi. There was strong evidence of negligence by local state agencies both in preventing and investigating the attacks. In Parung-West Java, a

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[1] The Institute for Policy Research and Advocacy (ELSAM), Human Rights Working Group of Indonesia (HRWG), Commission for Disappearance and Victims of Violence (KONTRAS) and Indonesian Legal Aid and Human Rights Association (PBHI)

[2] Munir was a prominent young Indonesian human rights defender with international recognition; he died of arsenic poison in an aircraft while on his way to The Netherlands on 7 September 2004. His death was attributed to a conspiracy implicating members of the state intelligence agency

local authority even issued a joint decree justifying the attack. KOMNAS HAM did not initiate adequate investigations to bring perpetrators to justice. This was allegedly due to bias among some Commissioners who are closely linked to the Indonesian Ulama Council, a religious organisation which had previously issued public announcements to ban the Ahmadiyah group.[3]

KOMNAS HAM derives its mandate under Law No. 39/1999 on human rights violations and under Law No. 26/2000 on quasi-judicial power to investigate crimes against humanity and genocide. However, weak provisions on the elements of such crimes and the absence of adequate procedures have hindered the legal framework from functioning effectively. Moreover, Commissioners have held to a loose interpretation of what constitutes such crimes, thereby leading to bureaucratisation of investigation procedures. For example, a procedure in KOMNAS HAM requires that investigations under Law No. 26/2000 can only be undertaken after preliminary investigations are carried out under Law No. 39/2999. This further requires a decision from the plenary of Commissioners. In many cases, the plenary does not give approval and investigations are therefore dropped. In the Ahmadiyah attacks, KOMNAS HAM concluded that there was not enough evidence of gross violation of human rights. As a result, there has been no follow-up by KOMNAS HAM.

2) GOVERNMENT COOPERATION WITH KOMNAS HAM

a) Recent interaction with government agencies

i) Memorandum of Understanding (MOU) with the police force

The MOU was initially meant to prevent misunderstanding that might occur between the police and KOMNAS HAM during investigations of human rights violations. However, in reality, the police have used the MOU to refer officers implicated in human rights abuses to an internal mechanism for resolution, instead of a criminal court. Examples are the case of Bulu Kumba (South Sulawesi) and the excessive use of force by police in dispersing student demonstrations in Makkassar, South Sulawesi.

ii) Conflict with Attorney-General's Office (AGO)

The disagreement between KOMNAS HAM and the AGO was due to procedural matters, but it clearly jeopardised the interests of the victims. The case involved killings in Wasior and Wamena in West Papua, allegedly linked to the police and armed forces. KOMNAS HAM argued that it had finalised a report on gross violation of human rights according to Law No. 26/2000. The AGO refused to accept the report on the basis that it was incomplete and not properly written.

iii) Court rejects application for subpoena

This was reflected in the case of enforced disappearances, when the Jakarta district Court rejected KONMAS HAM's application to summon alleged perpetrators from the military.

iv) Lack of cooperation over National Action Plan on Human Rights

Lack of cooperation between KOMNAS HAM and two ministries – Justice and Human Rights, and Foreign Affairs – has hampered implementation of the action plan.

b) KOMNAS HAM harassed in Aceh

In 2004, while martial law was enforced together with civil emergency laws in Aceh, KOMNAS HAM was subjected to harassment from the military authority. A meeting was forcefully dissolved. Some

[3] See written statement submitted by HRWG to 62nd session of UN CHR , March 2006

Commissioners, who were conducting training and investigation on serious allegations of human rights violations, were subjected to verbal harassment by people connected to the local security apparatus.

3) KOMNAS HAM COOPERATION WITH NGOs

In general, there is no institutionalised cooperation between KOMNAS HAM and human rights NGOs. This only happens on adhoc basis, particularly in conducting and dissemination information on human rights legislation, handling collective complaints, and in fact-finding missions on gross violation of human rights. In some cases, NGOs and victim organisations have had open confrontations with KOMNAS HAM over resolving cases that have been pending for years.[4] Peaceful demonstrations were organised in front of the KOMNAS HAM office demanding that firm action be taken.

There has never been prior consultation between KOMNAS HAM and NGOs with regard to the Commission's participation in various international human rights forums. The Human Rights Working Group, a national coalition of NGOs, did make attempts to initiate consultation prior to these meetings but did not succeed.

4) GENERAL PERFORMANCE

Indonesia's judiciary system on human rights litigation mandates KOMNAS HAM with the responsibility to conduct initial investigation on the admissibility of the claims of human rights violations, including gross human rights violations. When admissibility is established, the case will then be forwarded to the Attorney General Office (AGO) for further action, including follow-up investigations and the transmission of the complaint to the Human Rights Court for actual legal proceeding.

While dozens of high profiles and serious human rights violation cases were submitted by NGOs and victims to KOMNAS HAM from 2002-2006, there has not been a single successful case where final justice has been delivered to the victims.

All the defendants (mainly officials of state security apparatus) in high profile serious human rights violations' cases were acquitted by the Human Rights or Ad-hoc Human Rights Court, to the dismay of the NGOs and victims. Among the acquittals were those in the Tanjung Priok Massacre (1984), East Timor (1999) and Abepura (2001).

Cases forwarded by KOMNAS HAM for having sufficient evidence for persecution were delayed at AGO including: TSS/Trisakti Semanggi I & II (1998/1999), Jakarta May 1998 riot, and Wasior and Wamena (2002). The most recent case forwarded to the AGO in November this year was on enforced disappearances leading up to the fall of Soeharto in 1998.

KOMNAS HAM has taken a bureaucratic approach where its responsibility ended with the submission of the cases to the AGO. Thus, KOMNAS HAM did not monitor seriously the follow-up process at the AGO or Human Rights Court level. There were also instances where the AGO rejected cases referred by the KOMNAS HAM on grounds of inadequate evidence.

More complaints of serious human rights violations are now steadily piling up or are still under pending review by KOMNAS HAM including the 1965 Massacre, Poso riot (1998) and Martial Law in Aceh (2003-2004). There are cases which KOMNAS HAM has rejected but which NGOs view as important such as the Talangsari and Lampung Massacre (1989), Ambon riot (1999), ethnic riot in Sampit and Sambas (1999), and Bulukumba (2003).

[4] Cases of enforced 'disappearances' in 1998, student killings by police/military forces at Trisakti University and in Semanggi, Jakarta

KOMNAS HAM has yet to advocate changes in laws and regulations to protect human rights defenders. For example, current legislation on registration of NGOs is still based on the repressive Regulation No. 85/1995, a legacy of Soeharto's authoritarian regime.

The Commission did not play a prominent role in backing a law on witness protection, which was adopted by Parliament in July 2006.

The Commission has been non-commital in advocacy to repeal the provision for capital punishment in the Penal Code. As Indonesia has ratified the ICCPR, KOMNAS HAM should uphold the abolition of capital punishment.

Since 2004, the structure and responsibility of Commissioners has been divided into three main sub-commissions: Civil and Political rights, Economic, Social and cultural rights; and Specific/Vulnerable groups. This structure was initially meant to create a clear and transparent accountability of each Commissioner in performing designated task. Instead, based on the allocated budget and implemented programmes in previous years, 80% of the budget has been spent on various seminars and workshops instead of protection activities.

FACT FILE

Country	Indonesia
Name of NHRI	Indonesian National Commission on Human Rights (Komnas HAM)
Inception **Enabling law**	Initially established by Presidential Decree (Decree of the President of the Republic of Indonesia No 50/1993) during the Soeharto presidency in the wake of international and national pressure after the massacre in Dili, Timor Leste. In 1999 the foundation of the Commission was re-established through the passage of legislation by the Indonesian House of Representatives (Legislation Number 39 of 1999 Concerning Human Rights).
Term of Office (Years)	5
Composition	Currently a Chairperson and 20 Commissioners. According to the Article 83 Law No. 39/1999 members of KOMNAS HAM can be up to 35 Commissioners. The composition is drawn from former executives, religious groups, minorities (Chinese), and human rights as well developmental NGOs activists. Such composition does not adequately reflect plurality. Most of the elected members in 2002 were academicians and bureaucrats without a strong human rights background.
Possibility of reappointment	Yes. A number of the current Commissioners have reached the end of their tenure and the rest of the commissioner will have to be re-elected. There will be new election in mid-2007. Candidates will be recruited by an independent team and elected by members of Parliament. The commissioners will then be inaugurated by the President.
Full-time/Part-time/Mixed (allows full- and part-time)	Part-time
Funding	External funding is allowed as KOMNAS HAM works in the areas of study, mediation and socialisation; not on monitoring.
Legal Mandate	
Power to receive and investigate complaints	Yes
Power to conduct investigations on own initiative (suo motu)	Yes
Power to subpoena evidence and examine witnesses	Yes, but the subpoena can only be exercised through court's endorsement.
Power to enter and inspect premises *** only detention facilities** **** must be announced or requested**	Yes ** Must be announced or requested
Power to resolve complaints by conciliation and/or mediation	Yes
Mandate to educate/conduct research on human rights	Yes
Power to advise/make recommendations to government and/or Parliament on laws, regulations, policies or programmes/ international treaties	Yes
Power to provide* or recommend compensation and/or seek it through a court of specialist tribunals*****	No
Power to intervene or assist in court proceedings related to human rights (with court's permission)	Yes
Useful links	* http://portal.komnasham.go.id/ * http://www.elsam.or.id/ * http://www.kontras.org/ * http://www.pbhi.or.id/

MALAYSIA

Asia's Toothless Tiger

Suara Rakyat Malaysia (SUARAM)

1) KEY ADVOCACY ISSUES

a) Restrictive definition and mandate

The effectiveness of the Human Rights Commission of Malaysia (SUHAKAM) remains in question after six years in existence. According to the Paris Principles, a national human rights institution "shall be given as broad a mandate as possible". However, Sec 2 of the Human Rights Commission of Malaysia Act 1999 confines the definition of "human rights" to such fundamental liberties as are enshrined in Part II of the Federal Constitution.

This incredibly restrictive view has limited SUHAKAM's mandate. 'Human rights' should be defined broadly in accordance with the Universal Declaration of Human Rights 1948 and other international human rights laws. But Sec 4(4) of the Act merely states that "regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution".

Part II (Articles 5-13) is not the only section of the constitution that enshrines human rights. Many critical matters like right to citizenship, right to universal adult franchise, eligibility to contest a seat in the House of Representatives and protection for detainees under preventive detention laws are scattered in other parts. Yet, these rights have been deliberately excluded.

Allied with this is the issue of implied, un-enumerated and non-textual rights. According to constitutional law expert Professor Shad S Faruqi, some core human rights maybe rendered meaningless unless supported by other implied but un-enumerated rights. He cites as example the un-enumerated right to an expeditious trial, which is necessary to give meaning to the promise of personal liberty under Article 5.

Even the few fundamental liberties in Part II can be easily circumscribed. Unlike the US Constitution which provides an iron-clad guarantee of human rights, the Malaysian Constitution subordinates individual rights to the need for social stability, security and public order. It permits the Executive and Legislature to impose many restrictions on fundamental freedoms.

SUHAKAM has powers similar to those of a court of law in the matter of discovery of documents and attendance of witnesses, while its power to admit evidence is far larger. However, Sec 12(2) of the Act bars it from inquiring into any complaint relating into any allegation of the infringement of human rights which (a) is the subject matter of any proceedings pending in any court, including any appeal; or (b) has been finally determined by any court. This must be reviewed.[1] It is also necessary to allow SUHAKAM the discretion to conduct the inquiry after disposal of the matter in court. This is because the Commission is empowered to investigate a human rights violation without regard to the technical rules of procedure and evidence.

There is absence of a culture of respect for human rights, both in the political arena and in society at large. Without this, SUHAKAM has no room to operate effectively.

[1] According to prominent lawyer Ramdas Tikamdas and academician S Sothi Rachagan, an acceptable formulation is to provide that the inquiry be discontinued only if the complainant (the alleged victim) initiates an action in the courts, the subject matter of which is identical to the Commission's inquiry.

b) Recommendations and advisories ignored

SUHAKAM advisories are almost always ignored. For example, the police have clearly not paid attention to recommendations with regard to freedom of assembly and the dispersal of crowds. The Commission recommended in a report on the freedom of assembly in 2001 that water-cannon be used with restraint; that orders to disperse be given three times at 10-minute intervals; and that the crowd be given time to disperse. Yet, the police remain highhanded in handling peaceful demonstrations and gatherings. Instances of this in 2005 included the anti-war protest in March and several public political talks organised in Terengganu in July and August by PAS, the opposition Pan-Malaysia Islamic Party. In 2006, demonstrations against increases in petrol price were violently dispersed by the police, especially on May 28 when several people were severely injured.

Since 2000, SUHAKAM has recommended that the government should ratify the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, no progress has been made.

c) Non-competence and questionable composition

The Paris Principles unequivocally state that composition of a NHRI "must afford all guarantees to ensure the pluralist representation of the social forces involved in the protection and promotion of human rights…" In this regard, the criterion under Sec 5(3) of the Act suffers from both naivety and simplicity in that Commissioners "shall be appointed from amongst prominent personalities including those from various religious and racial backgrounds". The Act has to be made more specific as to their credentials. Questions abound as to the meaning of "prominent personalities" as this is not synonymous with integrity and competence. What is needed is the appointment of prominent Malaysians with a proven human rights track-record and competence.

Compounding matters, the law gives the prime minister unfettered discretion in appointing Commissioners. The selection process is shrouded in secrecy, without due consultation with and participation of civil society groups.[2]

d) Slow response to human rights violations

SUHAKAM is slow in responding to human rights violations and, in many cases, does not respond at all, particularly in complaints involving freedom of religion. A common excuse is that Commissioners need time to discuss the matter and that their meetings are convened only once a month. Yet, no proactive measures have been made to address the 'time-shortage' problem.

The presence of Commissioners at the SUHAKAM headquarters remains elusive, despite two of them being rostered for daily duty. Commissioners serve on a part-time basis and are not exclusively focused on human rights work.[3] Given that Commissioner are paid a handsome salary and allowances and are given numerous fringe benefits, it is expected that the public and human rights defenders should have access to them. They should be available when needed, and fulfil their responsibilities with competence and commitment.

Due to lack of human rights knowledge and proper training, the Commissioners and officers often fail to examine issues from a broader perspective. As a result, many complaints are dismissed myopically, as not

[2] In 2002, this perception was substantiated by a controversial change of personnel when former Attorney-General (AG) Abu Talib Othman was appointed Chairperson. It created a furore amongst civil society groups as he had served under Dr Mahathir Mohamad, whose 22-year tenure as premier had seen many laws being made more restrictive and oppressive. As AG, Abu Talib had also played a major role in the unprecedented sacking of Lord President Salleh Abas in 1988.

[3] In November 2004, while a hunger strike was underway at the Simpang Renggam detention centre in Johor, there was no access to Commissioners at the SUHAKAM headquarters for several days following a public holiday for the Hindu festival of Deepavali.

falling within a narrow purview of what constitutes human rights violations. Little wonder then that in 2005, only 721 of 1,342 complaints it received were deemed to involve rights violations.

e) No autonomy from government

A basic guarantee of independence lies in security of tenure. However, according to Sec 5(4) of the Act, Commissioners are to hold office for a period of two years and are eligible for re-appointment. This leads to the problem of insufficient time to effect substantial change.

As re-appointments are at the prerogative of the prime minister, there is a real danger that Commissioners will practise self-censorship and conduct themselves in such a way that they secure renewal of tenure. The few who do perform without fear or favour end up being marginalised and, when their term is up, face potential exit.

The trend persists in dropping those viewed as 'recalcitrant'. In May 2006, the government, after a two-week delay in appointing commissioners, axed the vocal head of SUHAKAM's investigations and complaints committee, Professor Mohd Hamdan Adnan. In 2002, the tenure of the highly competent Commissioners Anuar Zainal Abidin and Mehrun Siraj had not been renewed. Replacing them were ex-civil servants with little or no background in human rights advocacy. In an interview with online news portal Malaysiakini posted on 7 July 2006, Anuar revealed that his service was not extended following a disagreement with then premier Dr Mahathir Mohamad, who was vehemently against his decision to publicly announce the findings of the Kesas Highway Inquiry. The report was critical of the police for violating human rights at the aborted gathering of 100,000 people along the busy highway in November 2000.

Another controversial area is funding. According to the Paris Principles funding should be "independent of the government" and "not be subject to any financial control which might affect [its] independence". Sec 19 pays scant regard to this principle; the government is endowed with the sole responsibility of providing the Commission with "adequate funds", while foreign aid is prohibited by statute. State funding sets SUHAKAM apart from other NHRIs worldwide. There is a legitimate fear that 'he who pays the piper calls the tune'; thus, SUHAKAM's independence and transparency are gravely compromised.

In 2004, jurisdiction over SUHAKAM was transferred from the Ministry of Foreign Affairs to the Prime Minister's Department. The Commission is now under the direct supervision of Deputy Prime Minister Najib Abdul Razak. The close association with the premier's office has further eroded the veneer of independence and credibility.

f) Bureaucratic framework and mainstream view of human rights

SUHAKAM has been generally criticised for preferring to work within the government's bureaucratic framework rather than risk upsetting the authorities. The Commission's apprehension in not wanting to jeopardise its relationship with the authorities is evident in its work. It seems more at ease with educational aspects of human rights, by holding workshops, consultations, forums and conferences.

Little effort goes towards intervening in human rights violations. In the rare instances that it does take a position contrary to the government's interests, its recommendations are met with stony rejection. A common claim by ministries is that SUHAKAM is acting ultra vires its powers and mandate. This re-emphasises the need to broaden its mandate.

> **Case in point: Campus elections**
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> In response to complaints lodged by student groups in previous years, SUHAKAM In August 2005, held a meeting with the student affairs department of the universities. This generated lukewarm response – only 10 of the 17 universities sent representatives. Despite the setback, SUHAKAM announced that a majority of these universities had "no objection" in allowing the Commission to

monitor campus elections. In September, it submitted a formal request to monitor elections at public universities. This was hindered by the Ministry of Higher Education and campus authorities who only responded at the last minute – and rejected permission. Furthermore, the SUHAKAM officer who was tasked with monitoring the election at Universiti Kebangsaan Malaysia was turned away by the authorities.

One clause in the Act that has proved debilitating to the Commission's operations is a requirement that "[t]he members of the Commission shall use their best endeavours to arrive at all decisions of the meetings by consensus, failing which the decision by a two-third majority of the members present shall be required". Such a decision is not required of any body hitherto established – the Election Commission, the other constitutional commissions and even the Houses of Parliament in their ordinary function. A two-third majority is not even needed to amend many of the provisions of the constitution. This provision has the potential to root the Commission in stalemate and indecision, turning it into a helpless spectator of human rights violations. The provision should be amended to enhance SUHAKAM's effectiveness.

2) GOVERNMENT COOPERATION WITH SUHAKAM

Over the years, the Commission's efficiency and significance has been marred by lack of enforcement powers. Under the Act, the Commission is purely an advisory body and the government is free to accept or reject its recommendations.

Even though the Commission submits an annual report to Parliament, the government has steadfastly refused to facilitate debate on its contents. The SUHAKAM Annual Report 2005 was tabled in Parliament in March 2006 – as in previous years, the motion to debate it was initiated by opposition leader Lim Kit Siang, but was dismissed.

The Commission has repeatedly called for review of the enabling legislation and for more powers. Commissioner Professor Mohd Hamdan Adnan renewed the call in December 2005, saying that SUHAKAM would propose amendments for quasi-judicial powers to be accorded.

In May 2006, in response to a question in the House by an opposition Member of Parliament as to whether the Commission's power would be strengthened, Minister in the Prime Minister's Department Mohamed Nazri Abdul Aziz retorted, "I think you are dreaming, we have never planned to give any teeth to SUHAKAM. It does not have prosecuting powers because this can be done by other enforcement agencies. Thus, to give them teeth has never been a proposal."

Only two Commissioners responded to his comment – Professor Mohd Hamdan Adnan and N Siva Subramaniam, who pointed out that SUHAKAM was not established by the government of the day to which Nazri belongs, but by Parliament. Nazri's implied judgement that SUHAKAM was set up for mere window-dressing only reflected badly on the government. The SUHAKAM Chairperson stayed silent throughout this exchange.

3) SUHAKAM COOPERATION WITH NGOs

SUHAKAM's relationship with human rights NGOs has generally been a rocky one. It should be noted that the Commission only became a full member of Asia Pacific Forum of NHRIs (APF) in November 2002, a month before 32 Malaysian NGOs ended 100 days of disengagement with it in December. The boycott was to protest the appointment of former Attorney-General Abu Talib Othman as the new Chairperson in April that year, and the dropping of some progressive Commissioners who had served in the pioneer batch.

In 2005, SUHAKAM found its credibility further undermined through its decision to invite former premier Dr Mahathir Mohamad to address its conference commemorating Malaysian Human Rights Day on 9 September. The Commission refused to reverse its decision despite vehement protests from civil

society groups which highlighted numerous human rights violations during his tenure. Three human rights organisations boycotted the event.

The Commission has extensive powers of inquiry, but is frequently criticised for unwillingness to put this to the test, as revealed in the aftermath of an incident dubbed 'Bloody Sunday' on 28 May 2006:

> In essence, about 500 people had participated in a demonstration against hikes in the fuel price and electricity tariff rates, but were brutally handled by riot police who dispersed the gathering. In June, a request for a public inquiry was made by political parties and NGOs. To their dismay, SUHAKAM Chairperson Abu Talib Othman rejected the request, citing two equally-flawed reasons.
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> The first reason, according to a Malaysiakini report, was that "[w]e cannot hold a public inquiry if there is court action. That would be an exercise in futility." The 'court action' he erroneously referred to was an internal police investigation. His reasoning ran contrary to Sec 12 of the Act, which does not cover police investigations. The second reason was that the grievances expressed were merely "hearsay" and "emotional" rants, and that SUHAKAM requires credible evidence to initiate an inquiry. This was curious coming from a former AG. Hearsay is no bar to the Commission's inquiry which is unimpeded by the Evidence Act 1950. Furthermore, inquiries are conducted for the precise purpose of gathering evidence and looking into the credibility of allegations.
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> On 24 July 2006, SUHAKAM, acceding to mounting pressure by non-governmental organisations (many of which threatened disengagement with it), agreed to a public inquiry. Since the Commission's inception in 2000, only four public inquiries have been conducted; the Kesas Highway incident (2001); conditions faced by Internal Security Act detainees (2002); alleged mistreatment of native villagers in Kundasang, Sabah by the police (2004); and death of S Hendry while in police custody (2006).

4) GENERAL PERFORMANCE

SUHAKAM's rhetoric has failed the test of reality. The government's contention that the Commission is modelled upon the Paris Principles is precariously misleading. Many changes are required.

However, all benevolent measures will be rendered nugatory if the Commissioners, who are entrusted with advancing human rights, remain uninspired and lack the impetus to make a difference.

5) CAMPAIGN FOR CHANGE

a) Definition and mandate

Amend definition of 'human rights' so that SUHAKAM's jurisdiction can be widened to cover rights relating to life, liberty, equality and dignity of the individual as embodied by in the International Covenants

b) Composition of commissioners

Establish an independent search committee comprising members of Parliament from the ruling and opposition parties, civil society groups, trade unions and concerned social and professional groups. Provide SUHAKAM with staff of the right calibre, with the required knowledge, commitment and determination to enhance compliance with human rights

c) Security of tenure/autonomy

Extend the tenure of Commissioners and immediately dispense with the practice of re-appointment so as to ensure autonomy

d) Powers of inquiry

Clarify the Commission's powers to prevent Sec 12(2) from frustrating its work by the simple means of taking matters to court

FACT FILE

Country	Malaysia
Name of NHRI	Human Rights Commission of Malaysia (SUHAKAM)
Inception	24 April 2000
Enabling law	Human Rights Commission of Malaysia Act 1999 (Act 597) gazetted on 9 September 1999
Term of Office (Years)	2
Composition	Chairperson and 16 Commissioners
Possibility of reappointment	Yes
Full-time/Part-time/Mixed (allows both full- and part-time)	Does not require its Commissioners not to engage in any other paid employment
Funding	Government budget
Legal Mandate	Advice and recommendations to government on human rights issues; monitoring only, no power to arrest or enforce directions
Power to receive and investigate complaints	Yes
Power to conduct investigations on own initiative (suo motu)	Yes
Power to subpoena evidence and examine witnesses	Yes
Power to enter and inspect premises *** only detention facilities** **** must be announced or requested**	Yes; only detention facilities, with prior notice/request
Power to resolve complaints by conciliation and/or mediation	No
Mandate to educate/conduct research on human rights	Yes
Power to advise/make recommendations to government and/or Parliament on laws, regulations, policies or programmes/ international treaties	Yes
Power to provide* or recommend compensation and/or seek it through a court of specialist tribunals*****	No
Power to intervene or assist in court proceedings related to human rights (with court's permission)	No
Useful links	* http://www.suhakam.org * http://www.suaram.net

THAILAND

Win Some, Lose Some
FORUM-ASIA

1) KEY ADVOCACY ISSUES

a) Poor handling of Southern Thailand conflict

The NHRC worked closely with the now-defunct National Reconciliation Commission (NRC), an adhoc commission comprising representatives of the government, military, academia, NGOs and community-based organisations. The NRC, NHRC and the Lawyers Council of Thailand established the Nitidharma Centre to provide legal assistance and information to suspects/victims of the conflict in Southern Thailand.

NGOs see the NHRC as lacking political will due to its failure to monitor human rights abuses by security forces after the government imposed a state of emergency on the region in 2005. NHRC has not reacted as an institution whenever human rights defenders (HRDs) have come under threat, although individual commissioners have spoken out and then been singled out for being vocal.

The Commission has not pressured the government to uphold its obligations under the International Covenant on Civil and Political Rights. A NGO official stressed that it is Commission's responsibility to monitor the impact of the emergency decree and advise the government on its duties, rather than leave this to civil society groups.

b) Harassment of Commissioners

The NHRC has been found wanting in protecting its commissioners. One recent case involved Commissioner Vasant Panich, who heads the Sub-committee on Legislation and Administration of Justice. He has been actively working on complaints about human rights abuses in Southern Thailand, including the case of 300 unidentified bodies in Pattani Province. Attempts were made to intimidate and even abduct him, but the NHRC did not censure the perpetrators. Such callousness can only affect public confidence in the Commission, particularly among HRDs.

However, Commissioners interviewed pointed out that the worst harassment of the NHRC comes from society itself, over critical issues involving migrant workers and labour rights, among others. Commissioners face harassment by phone or through confrontation when they speak at seminars, for instance.

c) Protection of refugees and migrant workers

Thailand is not a party to the Convention on Refugees, while the constitution only protects the rights of citizens. As such, human rights abuses in refugee camps are not being addressed. Since Thailand is a party to the International Convention on the Elimination of All Forms of Racial Discrimination, the NHRC has used this as leverage in getting the judicial system to treat refugees and migrant workers without discrimination or prejudice. Government departments have since established complaints centres in refugee camps.

The Commission has further lobbied for ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment because many documented cases of human rights violations are related to torture.

2) GOVERNMENT COOPERATION WITH NHRC

The NHRC found it tough going under the government of Prime Minister Thaksin Shinnawatra [ousted in September 2006]. Government leaders and politicians held a negative view of the Commission, which was seen as allied to opposition parties, rather than a working partner of the government.

In general, the government did not take up recommendations for change in NHRC reports, as shown in by the lack of response to human rights abuses in Southern Thailand.

However, certain departments such as the Office of Natural Resources and Environmental Policy under the Ministry of Natural Resources and Environment; and Department of Fine Arts under the Ministry of Culture showed willingness to cooperate in managing threats to community resources or in protecting potential national artefacts when sites were converted for industrial development.

There were also barriers in collaboration between the NHRC and [since dissolved] Parliament, as seen when the latter refused to consider the Commission's findings on an incident involving the Thai-Malaysian Gas Pipeline project.

According to the Thai Constitution, the NHRC must send its reports and proposals on human rights to the relevant departments responsible for action. If these refuse or decline to act within 30 days, the report is sent to the prime minister. If within 60 days, the premier does not take the report into special consideration, it is forwarded to Parliament. However, Parliament often put such cases on hold and refused to consider action despite the NHRC's best efforts. As a result, there were delays in bringing about change in the government's actions or in amending laws.

3) NHRC COOPERATION WITH NGOs

NGOs hold contrasting views of the NHRC. Those that can easily access the Commission feel that it is aligned to their needs, while other groups feel that the NHRC is inactive and just a 'paper tiger' with no real power.

In general, the NHRC does not suffer negative perceptions for working in direct partnership with NGOs/people's organisations. Aside from information sharing, it has organised joint campaigns and issued joint statements with NGOs on numerous occasions, covering such issues as preservation of forests and local people's access to these resources; the right to assemble; and impact of dam construction on human rights.

As the NHRC does not have provincial or local chapters, it relies on national and local NGO networks for information. Victims of human rights abuses may relay information through NGOs if they prefer not to contact the NHRC directly.

The NHRC has focused on extending its network via informal partnerships. It has worked with academics, NGOs and lawyers in the Northeast region and set up various sub-committees comprising Sub-commissioners elected by Commissioners. Most sub-commissioners are from NGOs working on related issues, while others are academics. In Bangkok, the NHRC has facilitated consultation between regional NGOs and the government, especially with the Ministry of Foreign Affairs.

While the Commission has informed HRDs of its inability to protect them fully, it has established measures and standards that help contain threats. Such steps include confidentiality of name, identity and address. There are guidelines against travelling alone or meeting alone with perpetrators of human rights abuses. Whenever a human rights defender is harassed or threatened, the NHRC issues a letter to the Ministry of Interior, relevant governor, the police and other government agencies. Although this does not directly resolve the situation, it may limit possible harm.

Protection of HRDs remains a major concern. The NHRC has been lobbying for a bill on this, through meetings with the Department of Special Investigations (DSI) under the Ministry of Justice. There has been some progress, but the bill has yet to be approved. The Commission has proposed a mechanism for protecting HRDs and to organise financial aid for their families. The proposals, however, do not resolve challenges thrown up by weak judicial procedures. Although 21 HRDs have been killed to date, the majority of the alleged perpetrators have yet to be held accountable.

Some NGOs are of the view that the Commissioners should focus on implementation at policy level rather than concentrate on field-visits, which has led to their being burdened with work.

4) GENERAL PERFORMANCE

In an instance where legislative curbs were brought to bear on the NHRC's investigative function, it took a firm stand. It challenged Sec 22 of the Thai Constitution which bars it from investigating government officials or private companies for human rights abuses if a trial is pending. In late 2005, the NHRC won its case in the Constitutional Court which ruled that the Commission has jurisdiction in a case involving the Thai-Malaysian Gas Pipeline project. As a result alleged perpetrators now show up whenever called in by the NHRC.

Despite the victory, the Commission faces many other legal constraints. For example, it cannot make proposals to the Constitutional Court to amend Articles that contradict the constitution itself. While efforts have been made to enable the NHRC to submit direct proposals to the court, these have not succeeded. Ironically, the Ombudsman has been given this mandate – the NHRC must submit proposals via this channel, but this has only led to delays.

The Commission is further seen as only having powers over the government in relation to human rights violations, and not over private enterprises or agencies such as hospitals, factories or families, which often ignore the NHRC's requests.

The NHRC structure reflects that of the government. Although Commissioners and Sub-commissioners are truly independent, NHRC staff-members are government officials, many of whom are attached to the Office of the Prime Minister. As civil servants, they lack experience in handling human rights issues. This has affected the NHRC, which needs a flexible and proactive work culture, especially in dealing directly with NGOs and community-based organisations. At times, coordination and systematic working habits are lacking among the Commissioners themselves.

The Commission's organisational guidelines are rooted in bureaucracy, which affects decisions involving protection of HRDs. For example, funds cannot be allocated to NGOs for emergency cases or to victims of human rights abuses. The NHRC is bound by strict rules of the Bureau of Budget in the Prime Minister's Office. The cabinet decides the annual budget allocation, which could potentially be reduced.

5) CAMPAIGN FOR CHANGE

Following the coup d'etat on 19 September 2006, the NHRC has been lying low generally due to the fact that the Thailand Constitution (1997) which provided for its legal foundation has been abolished by the military council. It remains active in some public events as seen from its participation in the October Thai Social Forum. However, NGOs were critical of its Chairperson Professor Saneh Jamrik's remarks days after the coup which were perceived as concurring with the coup, "I do not think [the coup] is about progression or regression [of democracy], but about problem solving."

However, the Commission issued a statement on 29 September demanding that the military council guarantees the rights of expression and association under the Martial Law. It further demanded that the power be returned to the people in the shortest possible time. A general election is not expected until October 2007 at the earliest.

In light of these circumstances, there is a need for the NHRC to:

a) Play a vocal and pro-active role to respond to potential human rights violations resulting from the military coup d'etat; and under the Martial law. The Commission should engage hands-on to push for the lifting of the martial law as quickly as possible.
b) Protect those who have seen their human rights violated under the Martial law, regardless of their political affiliation, as human right is indivisible.
c) Prioritise campaigns to set up mechanisms to protect HRDs and victims; rather than focus mainly on human rights education.
d) Strengthen the working relationship with various civil society organisations on a institutional basis rather than rely on a personal-to-holder approach.
e) Respond to human rights abuses in united manner. Previously, the Commissioners have often acted individually when issuing statements to condemn human rights violations. Such an approach often allows Commissioner to be targeted, as in the case of Commissioner Vasant Panich. By acting in unison, NHRC could strengthen its advocacy on behalf of the public and pressure on the government.

FACT FILE

Country	Thailand
Name of NHRI	National Human Rights Commission of Thailand
Inception	July 2001
Enabling law	Established in the National Constitution; National Human Rights Commission Act B.E. 2542 (1999)
Term of Office (Years)	6 years
Composition	Chairperson and 10 Commissioners
Possibility of reappointment	No
Full-time/Part-time/Mixed (allows both full- and part-time)	Mixed. Article of 5(1) of the Act states "the Commission shall be comprised of 11 Commissioners for human rights…including one President and three full-time Commissioners."
Funding	From the government budget
Legal Mandate	The NHRC has the jurisdiction to summon witnesses or perpetrators of human rights abuses for a hearing or an interview. The Commission has a legal mandate to act if the person refuses to show up after being summoned. The Commission's mandate covers human rights abuses, not only of government departments, but also of the private corporations.
Power to receive and investigate complaints	Yes
Power to conduct investigations on own initiative (suo motu)	Yes
Power to subpoena evidence and examine witnesses	Yes
Power to enter and inspect premises *** only detention facilities** **** must be announced or requested**	Yes, must be announced or requested
Power to resolve complaints by conciliation and/or mediation	Yes
Mandate to educate/conduct research on human rights	Yes
Power to advise/make recommendations to government and/ or Parliament on laws, regulations, policies or programmes/international treaties	Yes
Power to provide* or recommend compensation and/ or seek it through a court of specialist tribunals*****	Yes. Although there are no provisions in the Act expressly stating that the Commission can provide/recommend compensation, Sec 28 empowers it to prepare and submit a report (to the person/agency involved a human rights violation) that may propose remedial measures which could include payment of compensation.
Power to intervene or assist in court proceedings related to human rights (with court's permission)	No
Useful links	* http://www.nhrc.go.th * http://www.forum-asia.org

THE PHILIPPINES

Coercive Environment, Culture of Impunity

Philippine Alliance of Human Rights Advocates (PAHRA)

1) KEY ADVOCACY ISSUES

a) Human rights crisis

The Commission on Human Rights of the Philippines (CHRP) currently operates in a coercive environment and within a culture of impunity. There is a state of repression within the context of the questioned legitimacy of Gloria Macapagal-Arroyo's presidency and her perceived moves to hold on to power. There is increasing militarisation in the rural areas up to the north and south entrances to Metro Manila with seemingly ubiquitous operations of death squads. Delineation of 'super regions' for development and investment heralds on-going and upcoming development aggression with its concomitant violations of economic, social and cultural rights.

The unabated, even increasing, extra-judicial executions, forced 'disappearances', torture and inhuman treatment, arrest, detention and harassment of political activists, journalists, leaders of people's organisations, church people, youth and ordinary citizens (Annex 1) are meant to sow fear. This also curtails, among others, the right to information, and the freedoms of expression, peaceful assembly and movement. A proactive response from the CHRP is long overdue.

b) Grassroots programme grossly neglected

The CHRP's most acclaimed model of grassroots empowerment – a programme that set up 7,270 Barangay Human Rights Action Centres (BHRAC)[1] nationwide over the last 12 years – was to be revitalised and strengthened by the current Commission together with the Department of the Interior and Local Government (DILG) through the Resolution of 15 March 2006. This was done without conducting a full assessment of the programme with all stakeholders, particularly non-governmental human rights organisations and institutions.

Despite many offers of collaboration by human rights NGOs to set up or strengthen BHRACs in their respective areas of service and activity, the CHRP has not called stakeholders together for a collective effort. This reveals that its priority is not the empowerment of the grassroots. The Resolution does not define a role for civil society groups, specifically those in the human rights community, much less mention them.[2]

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[1] BHRAC is the CHRP's "flagship outreach programme … in empowering the ordinary citizen to take the lead in the promotion and protection of human rights at the grassroots", particularly at the barangay (village) level. This was received with much enthusiasm by the non-governmental human rights community when launched in 1994. The potential of the programme is far reaching in terms of human rights education, para-legal training, documentation of human rights violations and monitoring of state obligations as well as non-state responsibilities over activities of logging and mining companies and armed opposition groups among others.

[2] Update: On 6 October 2006, a Joint Memorandum Circular No.1.s. 2006 by the Department of the Interior and Local Government (DILG) and CHRP enjoined "the *Punong* Barangays to conduct the Barangay Assembly Day" on 21 October 21 2006. One activity identified for the event "is the election of Barangay Human Rights Action Officer in every barangay nationwide". The earlier dissolution and the recent "revitalisation and strengthening" of, as well as the appropriation of funds (while laudable) for, the BHRACs on the eve of an election and in the midst of an "all-out war against insurgency", in view of what had earlier transpired during the collection of signatures for Charter Change, cannot escape suspicion of a possible re-cooptation of this human rights mechanism by the Macapagal-Arroyo Administration through the DILG. Without transparency and monitoring by the CHRP, HR-NGOs and civil society, fund allocation could go the way of another anomaly. In a Manila Standard Today report (24 October 2006), the issuance of Executive Order 546 directs local governments to finance the arming of

The gross neglect of the programme has had a bearing on one situation – the CHRP had no response regarding alleged manipulation and coercion at barangay level during a signature campaign for charter change, dubbed 'People's Initiative'. The BHRACs and Barangay Human Rights Action Officers (BHRAOs) could have been effective sources in verifying violations of the people's rights to information and to make an informed decision. But, by design or default, the CHRP's silence contributed to deceptive and coercive actions being carried out with impunity. In such an environment, the absence of a stand could easily be perceived as neglect of duty and/or as acquiescence with the violations.[3]

c) Failure to train human rights defenders

The Paris Principles indicate that a national human rights institution (NHRI) should assist in the formulation of a human rights education programme. Within the climate of fear in a coercive environment, the CHRP should play a proactive role in educating affected communities on their human rights, as well as provide para-legal training to human rights defenders so that they can protect and assert human rights. The CHRP has failed miserably to effectively address this situation. Take for example the military's public announcement in a Central Luzon province in its anti-insurgency campaign: Kapag hindi kayo nakiisa, mararanasan ninyo ang IDD: Imbibitahan muna kayo, tapos kapag matigas ang ulo ninyo, dadamputin kayo, at kapag tumuloy para rin kayo, dudukutin na kayo. Imbibitahin, Dadamputin, Dudukutin IDD. (If you do not cooperate, you will first be 'invited' [i.e. for interrogation in the military camp]; then if you are hard-headed, you will be arrested; if you still persist, then you will be abducted. Invited, Detained and Disappeared.) Enforced attendance at military-organised seminars on counter-insurgency, which culminates in "denouncement parades", is reminiscent of Cold War mentality and tactics, and anti-Communist propaganda.

Recommendations

The CHRP should adopt a policy direction that empowers the grassroots to assert their human rights, to help dispel the atmosphere of fear and to break down impunity. Positions stated and reiterated in timely fashion are imperative to this process. Human rights education and para-legal training should be pro-actively conducted primarily in conflict and militarised areas, even if the military puts off dialogues mediated by the CHRP. The CHRP could have given basic information and education on economic, social and cultural tights in communities affected by mining and logging and environmental pollution, such as oil spills. The institution's advocacy for a rights-based approach to development would have had more impact on the local governments and its constituencies.

2) GOVERNMENT COOPERATION WITH CHRP

The Paris Principles indicate that a NHRI should submit proposals and recommendations to the government in relation to legislative and administrative provisions for protection and promotion of human rights. In addition, the institution should ensure that national legislation, regulations and practices are in harmony with international human rights instruments to which the state is a party. The Philippine

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civilian volunteers to fight terrorism and insurgency, as well as 'teaching these volunteers human rights'. This move seems to augur a re-direction from the state's obligations to implement human rights to the focus on violations of non-state actors.

[3] Update: On 25 October 2006, the Supreme Court voted to dismiss the petition for a people's initiative to amend the constitution preparatory to a shift to the unicameral-parliamentary system. Among other points, the high court had "primarily assailed the supposed irregularities in the 6,327,952 signatures that Sigaw/Ulap claimed to have gathered" (*Philippine Daily Inquirer*, 26 October 2006, p.A6). This means that a large number of signatures were solicited deceptively from the barangay, the basic political unit. According to constitutional expert Fr Joaquin Bernas, SJ: "The people who signed could not have known that (1) the term limits on members of the legislature would be lifted and thus members of Parliament could be re-elected indefinitely; (2) The interim Parliament would continue to function indefinitely until its members, who are almost all the present members of Congress, should decide to call for new parliamentary elections, thus, the members of the interim Parliament would determine the expiration of their own term of office; (3) Within 45 days from the ratification of the proposed changes, the interim Parliament should convene to propose further amendments or revisions to the constitution." By neglect and omission, the CHRP leadership has been an accomplice to the 'gigantic fraud' perpetrated against the Filipino people.

Constitution requires the Commission to recommend to Congress effective measures to promote human rights. The Commission is also required to monitor the government's compliance with international treaty obligations on human rights.[4]

In September 2003, several human rights NGOs compiled a parallel report for presentation to the United Nations Human Rights Committee (UNHRC) on the occasion of the Philippine government's report on its implementation of the International Covenant on Civil and Political Rights. The UNHRC submitted its conclusions and recommendations to the Philippine government. Up to now, the CHRP has not taken the government to task over implementing the recommendations.
The CHRP has to make more effort in monitoring the government's compliance, now that the country is a member of the UNHRC formed on 25 April 2003. So far, the CHRP is on par with the Department of Foreign Affairs (DFA) in ignoring the request for discussion on the pledges made by the Philippine government during its candidacy for membership in the United Nations Human Rights Council (UNHRC).[5]

The CHRP has yet to maximise the Martus Programme[6] in gathering and sharing data so as to monitor compliance at different levels of governance. Even with the use of new technology over the past two years, it has yet to produce regular reports and analysis of the human rights situation. This has abetted non-compliance and impunity. Simply gathering and collating data without using it to pursue justice makes the CHRP a mere archive for human rights violations.

Recommendations

The CHRP should be more thorough in monitoring state obligations and should redirect data towards seeking justice and advancing human rights. With the phenomenon of development aggression, the CHRP must advocate for and articulate its stand against violations of economic, social and cultural rights, especially against hunger, the destruction of the environment and sources and means of subsistence due to big-scale mining and logging.[7]

3) CHRP COOPERATION WITH NGOs

a) Pursuit of justice through legal processes

The Paris Principles indicate that a NHRI should investigate and report on potential human rights violations at the request of government or an interested party. Also, the institution may investigate a potential violation on its own initiative, with no need for a referral. It is the latter characteristic of taking initiative that is demanded of the CHRP especially in areas where repression and militarisation are intense. It is imperative that the Commission plays an activist role.

The repressive actions of the Macapagal-Arroyo Administration implemented via political and military means have made people's struggle for democracy and human rights, both individually and/or collectively, very difficult yet poignant. Pursuing justice through legal processes even in the face of extra-judicial killings and various harassments deserves solidarity from the CHRP until the cases are resolved. It is hard

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[4] *Human Rights Features.* 'Philippines HRC: Yet to get off the mark'. Special Weekly Edition for the Duration of the 59th Session of the Commission on Human Rights (Geneva, 17 March 2003-25 April 2003) Volume 6, Issue 5, 14-20 April 2003

[5] The human rights movement called the Citizens Council for Human Rights (CCHR) submitted a position paper on 19 June 2006 to the DFA Secretary Alberto G Romulo with a cover letter regarding the pledges the Philippine government made during its candidacy for membership in the UNHRC. Despite the well-documented and published extra-judicial killings and other grave human rights violations perpetrated with impunity, the government has pledged "to campaign for the passing in Congress of an Anti-Terrorism Law which shall put in place measures to combat international terrorism in the perspective of respect for and protection of human rights". The Bill in both the Lower House and in the Senate has a vague definition of who is a "terrorist", among others which could legitimise human rights violations. The CHRP has been provided a copy of the position paper.

[6] *Mindanao Times*, Monday, 17 July 2006. 'Linkages needed in fight vs HRVs'

[7] The Philippines is State Party to the two International Covenants – the ICCPR and the ICESCR – which has a common article No. 1 which states, among others that "no people may be deprived of their own means of subsistence".

enough for poor, aggrieved parties to file charges against military or police personnel. Shortcomings of CHR officers and personnel would only erode the courage of the people and human rights defenders and encourage impunity.

The Task Force Detainees of the Philippines (TFDP)[8] has had frustrating experiences in working with the Commission on Human Rights (CHR) in Region XI, Davao City, in Mindanao.[9]

i) Abduction and torture of Abdul Rahman Camili

On 13 November 2004, Abdul Rahman Camili, a citizen, was abducted from barangay Datu Abdul, Panabo, Davao del Norte and later tortured. He was turned over to Davao City Jail (Bureau of Jail Management and Penology), Maa, Davao City in Mindanao on 3 December. On 16 December, TFDP and support groups conducted Paskuhan sa kampo (Christmas camp/prison visits) with Moro (Muslim) detainees. The staff met the victim who bore torture marks. On 17 December, TFDP staff contacted the CHR office with a request to facilitate a medical examination of Camili, as part of the campaign against torture. The next morning, TFDP staff interviewed Camili, while a CHR team visited him that afternoon.

TFDP also wrote to the Commission with documentation on the victim's account of torture. However, the Commission said it had not found torture marks on Camili despite asking him to remove his clothes. As such, they regarded him as not a credible witness According to the Commission, Camili confirmed telling the TFDP that he was tortured, but during its own investigation, no torture marks were found. On 22 December 22, TFDP staff visited Camili and asked what had happened during the CHR interview. He said that, when asked if his lawyer had visited him, he had replied 'No'. CHR personnel then did not push through with the investigation and left. Another detainee, later questioned by TFDP staff, verified this.

Dr Basas at the CHR National Office was later informed about the region's failure to act. He replied that the region's response was that, when the investigator visited Camili, it was late and that the torture marks were no longer visible. TFDP staff insisted that the regional CHR had conducted the visit on the afternoon of 17 December. Furthermore, the marks could still be seen during second TFDP visit on 22 December. TFDP asked for a copy of the CHR report on the interview, but has still not received it.

ii) Death of Bacar and Carmen Japalali

The couple was killed allegedly by members of the 404th Infantry Battalion Philippine Army on 8 September 2004 in Bincungan, Tagum City. On 4 October 2004, TFDP facilitated the filing of a complaint on behalf of the victims, addressed to Atty. Alberto Sipaco, Regional Director, but was not informed of any intervention. On 25 October 2004, Carmen's father Rodolfo Baluyo lodged a complaint and submitted an affidavit to the Commission, while Bacar's brother, Talib Japalali, submitted relevant documents. There has been no action. On 13 March 2006, TFDP wrote to Sipaco with copies of documents filed by the Office of the Ombudsman of the Military at the RTC branch 2, Tagum City, against the accused personnel. TFDP enquired about the status of investigations because the victims' families were eager to know about action taken. Up to the time of writing, the Commission had not replied.

[8] The Task Force Detainees of the Philippines was established by the Association of the Major Religious Superiors of the Philippines in 1974, two years after the dictator, President Ferdinand E Marcos, imposed martial law.

[9] Report submitted by TFDP personnel from the Davao office in Mindanao

b) Poor response to complaints

Human rights defenders in NGOs encourage torture victims to file charges, especially when they know the identity of perpetrators. However, they are sometimes let down by the CHRP's lukewarm response, as the following cases illustrate.

i) Omar Ramalan

Ramalan[10] from Maguindanao, a suspect in a bombing incident, was heavily tortured. This was immediately brought to the Commission's attention, but was dismissed for 'lack of merit'. Only when Ramalan filed a case against his perpetrators did the CHRP conduct an investigation. The court has yet to act. In the meantime, the police filed an appeal that was immediately granted. To fight his case, Omar will have to submit himself to the court and remain in prison during the course of the trial which, his counsel knows, will be dismissed. The thought of going back to jail after being tortured is not pleasant, so Omar has not yet presented himself. CHRP has made no move in relation to the complaint of torture.

ii) Bicutan Siege

In this high-profile case[11], the CHRP made an en banc resolution after a year. The case involved deaths in custody of suspected members of the kidnap-for-ransom group, the Abu Sayyaf. The CHRP findings confirmed the occurrence of a massacre, extra-judicial executions, excessive use of force, and inhuman treatment of the detainees. The CHRP "has transmitted copies of the records and other relevant documentary evidence to the Office of the Ombudsman, the National Police Commission, Department of Justice and Department of the Interior and Local Government for appropriate action". In the meantime, encouraged by the Moro Human Rights Centre, the aggrieved inmates are ready to file charges against the heads and members of the assault teams, based on the CHR findings. This is another chance to break impunity. But at the time of writing, four months after the transmission, there is not even a docket number from the Office of the Ombudsman. And the original case file cannot be found in any of the offices of the National CHR.

iii) DEMASKU

The Office for NGO Relations, among other government departments, appears to be accommodating by giving NGOs time to submit complaints and requests. This can be deceptive if one is not expecting thoroughness in investigation with justice obtained. One example was the case of DEMASKU, a grouping of farmers and indigenous peoples in Sultan Kudarat. On 21 June 2006, they were reportedly harassed and threatened with eviction by landlords and the military. The office accepted their report. However, nothing has been heard to date as to how the case is being followed up or of further investigation by the CHR.

c) Adverse to NGO criticism

After the Philippines was elected on 3 November 2006 as a member of the UN Economic and Social Council (ECOSOC), CHRP Chairperson Purificacion V Quisumbing lauded Ambassador Lauro Baja, Jr, the permanent representative of the Philippines to the UN for "engineering an exceptional win for the Philippines, despite criticism and negative reports from non-governmental organisations and the media".[12]

While seating the Philippines in the prestigious ECOSOC could be a diplomatic victory, it certainly does not in anyway vindicate the countru's human rights record, much less reduce the coercive environment and culture of impunity. And yet, the Chairperson has rendered reports from NGOs and media as "negative".

[10] Cfr TFDP Mindanao Files 2003. He filed a case against his perpetrators in the Regional Trial Court in Cotabato.
[11] Cfr Camp Bagong Diwa Case (CHR-NCR Case No. 2005-052), 15 March 2006
[12] Philippine Daily Inquirer, 4 November 2006

The distancing of the Chairperson from such reports is alarming to say the least. She implied that the Commission she chairs does not have similar "negative" records and does not agree with the "negative" NGO and media reports on documented human rights violations. She has also disassociated herself from the essence and leadership of an institution that is expected to assert human rights and hold the Philippine state accountable to its obligations.

d) Absence of witness protection

While the CHRP has no powers of prosecution, this should not be an obstacle in proactively assisting victims of human rights violations and human rights defenders in seeking redress. In fact, if the CHRP is serious, it should push the boundaries of its mandate to end impunity. It could, for example, set up a CHRP Task Force for Extra-judicial Executions that could sift through cases and concentrate on a few with a high possibility of prosecution and conviction of perpetrators.

In times of repression, another aspect has to be seriously and systematically considered – witness protection. On at least two occasions, people's organisations[13] lodged complaints about members who were threatened and who were killed extra-judicially. The CHRP's answer was an echo of the Macapagal-Arroyo Administration and the military: "Produce witnesses, or else we cannot do anything." The matter was left at that without deliberations on how to address a climate of fear that hinders witnesses from speaking up. The inability to reverse this situation would make the CHRP a mere witness to the perversion of justice.

In the words of Basil Fernando: "Without witness protection there can be no fight against impunity. Without witness protection, victims of human rights abuses who complain and seek justice must face serious threats leading to physical harm and possibly death of themselves or their loved ones. This violence is brought onto them by powerful people, whose power invariably comes from the uniforms they wear."[14]

Recommendations

The CHRP should be more determined and thorough in its investigations and in resolving cases. To break such a climate, there must be focused and thorough review of cases that have a high percentage of prosecution and conviction; and creation of a network with resources for witness protection. The CHRP's lukewarm response must radically be reversed as it could dangerously make this hard-won institution an unwitting accessory to impunity.

4) CAMPAIGN FOR CHANGE

a) Assert our common humanity and dignity in reclaiming human rights which have become a casualty under the Macapagal-Arroyo Administration, as it focuses on political and economic stability at all costs in the face of questioned legitimacy
b) Lobby the CHRP to immediately mobilise personnel and resources, knowledge and skills, courage and determination to converge with other human rights defenders and with civil society, and use all avenues to promote, protect and advance fundamental freedoms and human rights
c) Set priorities to eliminate the coercive environment and end impunity, so that there is increasing freedom in all spheres of life for both the individual and the country

[13] The organisations were Kilusan para sa Pambansang Demokrasya (Movement for National Democracy) and the Philippine Agrarian Reform and Rural Development and Services.
[14] Fernando, Basil. 'Foreword: The importance of protecting witnesses'. Article 2 of the International Covenant on Civil and Political Rights, Vol5, No.3, June 2006, p.2

FACT FILE

Country	Philippines
Name of NHRI	Commission on Human Rights Philippines
Inception	
Enabling law	Executive Order No. 163 1987 referring to the Philippines Constitution of 1987, Article XIII, Section 17, created the Commission on Human Rights as an independent office with a mandate to promote the protection, respect for and enhancement of human rights
Term of Office (Years)	7
Composition	Chairperson and 4 Commissioners
Possibility of reappointment	No
Full-time/Part-time/Mixed (allows both full- and part-time)	Full-time; Commissioners are not allowed to engage in any other paid employment
Funding	Government budget and other funding institutions
Legal Mandate	
Power to receive and investigate complaints	Yes
Power to conduct investigations on own initiative (*suo motu)*	Yes, only in cases involving violations of civil and political rights
Power to subpoena evidence and examine witnesses	Yes. However, there were cases where witnesses refused to oblige
Power to enter and inspect premises *** only detention facilities** **** must be announced or requested**	Yes, only detention facilities
Power to resolve complaints by conciliation and/or mediation	Yes. However, there is no specific provision in the Executive Order 163 that expressly empowers the Commission to do so.
Mandate to educate/conduct research on human rights	Yes
Power to advise/make recommendations to government and/or Parliament on laws, regulations, policies or programmes/ international treaties	Yes
Power to provide* or recommend compensation and/or seek it through a court of specialist tribunals*****	Yes *** Seek it through a court of specialist tribunals.
Power to intervene or assist in court proceedings related to human rights (with court's permission)	No
Useful links	* http://www.chr.gov.ph/ * http://www.philippinehumanrights.org/

CASES OF HUMAN RIGHTS VIOLATIONS

DURING THE ARROYO ADMINISTRATION

Documented By The Task

Force Detainees Of The Philippines

23 January 2001 – 30 September 2006

CASE	**# OF CASES**	**# OF VICTIMS**
Arrest and Detention	370	1,371
Torture	106	233
Harassment	103	5,002 individuals + 3,482 families + 9 barangays
Extra-Judicial Execution	54	62 individuals
Frustrated Extra-Judicial Execution	6	8 individuals
Massacre	13	107 individuals
Frustrated Massacre	9	43 individuals
Casualties due to Crossfire	7	14 individuals
Disappearance	22	54 individuals
Violent Dispersal of Protest	15	1,937 individuals
Forced/Faked Surrender	2	28 individuals + 1 community
Destruction of Property	5	691 individuals + 168 families
Forced Evacuation	26	10,561 individuals + 19,926 families
Illegal Demolition	62	34,048 individuals + 6,684 families
Violation of the Right to Housing	2	209 families

Northeast Asia

MONGOLIA

For Stronger Steps toward Human Rights

Centre for Human Rights and Development (CHRD)

1) KEY ADVOCACY ISSUES

a) Lack of preparedness for APF meeting

In 2005, the NHRC of Mongolia (NHRCM) had a key role to play in the protection and promotion of human rights regionally when it was appointed the chair of the 10th Asia Pacific Forum (APF) of National Human Rights Institutions (NHRIs). The meeting was hosted by the NHRCM in Ulaanbaatar in August 2005. Representatives of the Pre-Forum Consultation of NGOs, from different parts of Asia, concluded that the 10th Forum had "reached such a low point in NGO-NHRI relations", because the NGOs had not been provided with time and space to deliver their contributions and statements. As the venue of the annual meeting is rotated among members, the 10th Forum could have offered Mongolian NGOs the opportunity to be exposed to the regional process and learn to engage with this platform for their national advocacy. However, they received neither relevant information nor invitation prior to the Forum, and were therefore unprepared and unable to participate.

b) Shortcomings within NHRCM

Since its establishment in 2001, the NHRCM has made a significant contribution to improving the human rights situation particularly in promoting human rights education; freedom of movement of rural migrants in Ulaanbaatar; rights of arbitrarily detained victims; and rights of vulnerable groups like reindeer people living in remote areas. It has been reporting the annual human rights situation to Parliament as well. National human rights groups acknowledge these achievements, but point out weaknesses in the Law on the National Human Rights Commission of Mongolia 2000, as well as operational inadequacies, that impede the Commission's work.

c) Composition of NHRCM

National NGOs are greatly concerned that the NHRCM composition could have an effect on its autonomous status. The membership hardly meets the Paris Principles requirement of plural representation. As the current Commissioners are expected to conclude their term in 2007, it could be a strategic time for both sides to assess past experiences and make a united effort for change not only with respect to the Commission's organisational matters, but also in addressing crucial issues in human rights.

d) Lack of non-governmental representation

The enabling Law states that Commissioners should be nominated by the President, Parliament and Supreme Court. There is no provision to include representatives of groups working on human rights. NGOs see this as a potential risk to the independent functioning of the Commission as it fails to promote broad-based pluralism.

While the Commission claims that it works independently, NGOs are of the opinion that it does not have the option to be totally independent because Commissioners are appointed only from government institutions. Some NGOs cite the example of the Commission refraining from expressing its position on certain critical human rights issues on grounds that these should not be politicised. But the Commission should have the ability to see beyond the political process and warn of potential danger to human rights.

e) Absence of provision on gender balance

The Law does not contain any provision to ensure gender balance in the Commission, whose members are all male. The Commission is planning to introduce amendments to redress this deficiency. NGOs anticipate change before new Commissioners are appointed in 2007.

f) Weak criteria for nomination of Commissioners

Provision 4.1 of the Law states that "a candidate for Commissioner shall be a Mongolian citizen of high legal and political qualification, with appropriate knowledge and experience in human rights, with [no] criminal record and who has reached the age of 35". It appears that legal and political qualifications are more significant than human rights experience. Commissioners are senior lawyers who were practising law in the legal system including prosecution offices and the courts. If the criteria cannot be revised, an alternative would be to require nominees to have a high – not just 'appropriate' – level of knowledge, experience and commitment to human rights. Only people of such calibre will be able to contribute to improving the human rights situation, while being able to work independently.

Certain NGOs express the criticism that the Commissioners are not very sensitive to human rights and do not have enough initiative to tackle issues. Pressing matters that have not been addressed include violation of the rights of people living in areas affected by mining, as well as the rights of people attending public demonstrations. Other NGOs, though, are of the view that the Commission has adequate human resources and that that its performance is good enough because Commissioners have improved their capacity steadily.

g) Narrow scope of complaints

As part of its mandate, the Commission receives complaints that suggest a violation of rights and of freedoms guaranteed in the constitution, laws and international treaties ratified by Mongolia. It receives around 200-300 complaints annually, of which about 20% are deemed to fall outside its mandate. These cases are transferred to appropriate government agencies and organisations.

The enabling Law limits and weakens the powers of the Commission in accepting and acting on complaints. Commissioners have a right to refuse to accept complaints that do not meet certain legal stipulations. Specifically, Provision 11.2 states that "Commissioners shall not receive complaints about criminal and civil cases and/or disputes which are at the stage of registration/inquiry of cases, investigation and or on trial or have been already decided". There have been instances of complaints pending police investigation or trial being rejected. The Commission has to realise it has a responsibility to provide the best human rights judgment whenever this is required. It should not avoid examining urgent and important cases by leaving this to the courts and without highlighting the human rights implications. This is especially significant as judicial independence is still more of an ideal than a reality in Mongolia. The Commission is aware of the legislative gaps and restrictions and is planning to seek amendments.

2) NHRCM COOPERATION WITH NGOs

When the Commission was first established, NGOs had high expectations of cooperation. Five years on, the Commission assesses itself positively in this regard, but NGOs describe the status as limited and unsatisfactory. Generally, the Commission may invite NGO representatives to training programmes and workshops. NGOs invite the Commission to their events, but may not always obtain attendance of its representatives. NGOs sometimes submit requests to the Commission for small supplementary funding for publications and training programmes.

The Informal Committee of NGOs, comprising representatives of 40 groups, was set up at the Commission to act as a representative mechanism. This opened the Commission's door to human rights groups. The Committee is supposed to give suggestions and advice to the Commission and to conduct joint monitoring missions, training and research activities. Through this structure, NGOs can approach the

Commission and raise their concerns in more consistent manner and achieve some coordinated results. However, NGOs are of the opinion that the committee is not visible and has failed to work effectively. Its activities have been limited to several meetings to discuss and approve action plans or sometimes training for members. So the potential for it to serve as an avenue for real cooperation has not been fully realised.

On its part, the Commission complains that NGOs take their grouses directly to Parliament or the government and do not fully utilise the NHRCM as a core mechanism that is capable of influencing the government system. Also, the Commission feels that NGOs are more free and independent than it is to take up issues of human rights.

3) GENERAL PERFORMANCE

Thanks to financial support from the United Nations High Commissioner for Human Rights, the Commission has been improving its capacity and has been able to broaden its coverage of human rights issues. There has been uncertainty in terms of financial sustainability after the grant ended in 2005, because the Commission receives very limited funding from the government. It has to secure another funding source. While donor agencies may be an option, this brings with it the risk of an external agenda.

The Commission should have worked with the Parliament to obtain a larger budget as financial constraints prevent it from reaching out to every human rights issue. However, the Law states that it can submit a proposal to Parliament for a budget that meets needs in the independent conduct of its activities. It is within the Commission's ability to get an adequate budget from the state, but NGOs feel that it has not been effective in resolving this matter.

Perhaps because of its financial constraints, the Commission now tries to get involved in strategic projects that could bring about important change in particular human rights issues supported by major funders in Mongolia. One example is the UNIFEM project since 2005, to monitor implementation of the Convention on the Elimination of All Forms of Discrimination Against Women. This is part of a region-wide project coordinated by the UNIFEM regional office. Critics within NGOs question the Commission's ability to implement this project. They consider national women's NGOs to be more capable, having accumulated more expertise on women and gender issues over the last decade. NGOs are of the opinion that the Commission has taken on the project because it was attracted to the funding, without considering its competence and capability in addressing the issues. The results have not been very fruitful. The Commission tries to involve different parties including NGOs, but its coordination has not been effective either.

4) CAMPAIGN FOR CHANGE

a) Work towards change in the NHRCM composition to meet the principle of plural representation
b) Strengthen the Informal Committee of NGOs to enhance cooperation between NHRC and human rights NGOs through constructive and effective collaboration

Note: To include different views in this paper, CHRD conducted short interviews with main human rights national NGOs (Centre of Citizens Alliance, Globe International, Liberty Centre and Democracy Education Centre) and Chief Commissioner of NHRCM.

FACT FILE

Country	Mongolia
Name of NHRI	National Human Rights Commission of Mongolia
Inception	February 2001
Enabling law	Law on the National Human Rights Commission of Mongolia, adopted on 7 December 2000
Term of Office (Years)	Chief Commissioner (3 years); Commissioners (6 years)
Composition	Chief Commissioner and 2 Commissioners
Possibility of reappointment	Yes, only once
Full-time/Part-time/Mixed (allows full- and part-time)	Full-time; Commissioners not allowed to engage in any other paid employment
Funding	State budget and donor agencies
Legal Mandate	
Power to receive and investigate complaints	Yes
Power to conduct investigations on own initiative (suo motu)	Yes
Power to subpoena evidence and examine witnesses	Yes
Power to enter and inspect premises *** only detention facilities** **** must be announced or requested**	Yes
Power to resolve complaints by conciliation and/or mediation	Yes
Mandate to educate/conduct research on human rights	Yes
Power to advise/make recommendations to government and/or Parliament on laws, regulations, policies or programmes/ international treaties	Yes
Power to provide* or recommend compensation and/or seek it through a court of specialist tribunals*****	Yes; to recommend and seek it through court
Power to intervene or assist in court proceedings related to human rights (with court's permission)	No, but can make recommendation on human rights upon court's request; has power to access court materials for human rights research purposes
Useful links	* http://www.nhrc-mn.org/ * http://www.chrd.org.mn

SOUTH KOREA

Views from the Edge[1]

MINBYUN-Lawyers for a Democratic Society

1) KEY ADVOCACY ISSUES

a) High rate of rejection of cases

Based on government data, the National Human Rights Commission (NHRC) rejects up to 75% of cases without providing substantial judgment as to whether human rights violations or discrimination are involved. If transferred cases and those closed by mutual agreement are added, this goes up to 80%. Only about 1% of cases see recommendations for prosecution, investigation or disciplinary action. This is because the National Human Rights Act 2001 sets the range of reasons for dismissal too broadly, and the NHRC accepts these too passively. The Act stipulates 10 reasons for dismissal.[2] Among the most problematic is dismissal when, at the time of petition, the court or the Constitutional Court is trying the case; an enforcement agency is investigating it; or other procedures for redress based on the law are in process or completed.[3]

Such regulations have allowed the NHRC to dismiss a case involving a suspicious death in the army only because the military investigation agency had completed investigation. In addition, if the prosecutor decides not to pursue a case where the petitioner claims human rights have been violated, the case is dismissed. However, the prosecutor's decision not to prosecute a case involving a human rights violation could itself constitute a human rights violation that requires investigation and redress. Thus, broad dismissal is a main obstacle in efforts to protect human rights in South Korea.

b) Delays in investigation

In 2003, cases required an average of 180 days to be closed. This went down to 124 days in 2004 and 104 days by August 2005. However, the numbers only reflect the average time spent on investigating accepted cases, including those dismissed before substantial review. The actual time spent is longer. On occasion, urgent action is imperative. For example, on 15 February 2003, the NCHR recommended that the prosecutor investigates the case of a woman with 1st degree disability who allegedly had to be placed under restraint. Action was taken a week after the petition was accepted (i.e. a week after she was placed under restraint). She was confined and made to wear a diaper, as there was no access to a toilet designed for the disabled. She was forced to suffer pain on account of her disability and indignity as a person. In cases involving human rights violations in prisons or detention facilities, the longer the delay in handling petitions, the harder these are to investigate because prisoners and possible witnesses may have been transferred or released.

c) Insufficient investigative powers

The NHRC has the authority to visit and investigate only those detention facilities listed under the law and by presidential decree. It does not have the right to visit or investigate unlisted facilities, such as barracks and unofficial welfare facilities. Moreover, according to the Act, petitions can be investigated only when submitted in writing[4] and backed by documentary evidence. These systemic problems hinder the NHRC from obtaining relevant facts.

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[1] This paper was adapted from the South Korea NGOs' shadow report (October 2006) on ICCPR to the UN Human Rights Committee

[2] Article 32 of Act

[3] Article 32, paragraph 1.5 of Act

[4] Article 31, paragraph 4 of Act

d) NHRC composition

The current composition does not strictly reflect the Paris Principles requirement for a pluralist representation of social forces (of civil society). All 11 Commissioners were nominated by the National Assembly, President or Chief Justice of the Supreme Court.[5] While the Act states that nomination is restricted to those with expertise in the field of human rights, there is no procedural provision to either guarantee diverse representation, or enable effective cooperation with NGOs. Thus, there exists the danger of political influence in the composition of the Commission. Although the Act restricts nominees to "people with expertise in the field of human rights", questions arise as to whether the Commissioners truly embody the expertise and sensitivity necessary to promote human rights.

e) Inadequate public access to assistance

The Paris Principles require local or regional sections to be set up to assist a national human rights institution (NHRI) in discharging its functions. South Korea's NHRC was established in November 2001 but, it was not until October 2005 that two regional offices were opened. Even these cannot sufficiently protect human rights and provide remedies for victims of violations.

2) GOVERNMENT COOPERATION WITH NHRC

a) 'Administrative organ' tag

The Paris Principles stipulate that a NHRI should have an infrastructure suited to the smooth conduct of its activities, in particular adequate funding to sustain its own staff and premises. This is to enable it to be independent of administrative and financial controls that could affect its independence.

The Act states that the Commission must perform its operations independently. However, the government has a tendency to view the Commission as an organ within its administration because it allocates the funds. The NHRC is also structured like a government body.

Under the Budget and Accounting Act, organisations established by the Constitution, such as the National Assembly, Supreme Court, Constitutional Court, Board of Audit and Inspection, and National Election Commission, are defined as independent organisations. Accordingly, special procedures are needed to reduce their expenditure requests, while the head has power to appoint and dismiss holders of office. The NHRC is not a stipulated independent organisation under this law. Its office-bearers above a certain rank are appointed by the president in consultation with the Minister of Government Administration and Home Affairs, as is done for ordinary administrative personnel. For the NHRC to be independent, its structure and budget will have to be guaranteed by law.

b) Public discussion on the proposed National Action Plan (NAP)

In January 2006, the NHRC submitted its proposed National Action Plan for the Promotion and Protection of Human Rights to the government. Among other provisions, this backs the principle of gender change and recommends that sex-change operations should be covered by the National Health Insurance Corporation. NHRC's proposal on the National Action Plan has been studied by the government ministries and the Ministry of Justice is scheduled to organize a one-day public discussion on the NAP in December.

c) Immigration-related recommendations rejected

The Commission made recommendations on eight immigration cases from May-June 2005. It further proposed revision of Article 52 of the Immigration Control Act, which gives excessive authority to immigration officers, the Ministry of Justice and Korean Immigration Bureau. However, the ministry and the bureau openly refused to accept the recommendations in five cases and described the rest as merely under consideration.

[5] Article 5 of Act

d) Punishment of conscientious objectors

Conscientious objection to military service is currently one of the most contentious issues in South Korea. From 2000 to 30 April 2006, criminal action had been instituted against 3,537 objectors.[6] More than 500 people are sentenced each year. Since 1939, about 10,000 people, have been punished – the largest number worldwide.

The NHRC has recommended to the National Assembly Chairperson and the Defense Minister that alternative forms of service should be implemented alongside military service. However, the Minister has been noncommittal beyond saying he would announce his position after examining policies on alternative services together with the government and relevant NGOs. At the National Assembly session in 2004, two motions to implement alternative services were proposed by members. The law has yet to be enacted because the National Defence Committee has not enforced a resolution to place the bill before the Assembly plenary session for passage.

e) Concerns about CCTVs and right to privacy

Seven city police stations in Seoul operate a total of 1,178 security cameras.[7] Of these, 466 are CCTVs to monitor transportation flow and 712 are unmanned security cameras to check on traffic violations. The ward offices of Jongro, Kwanak and Gangnam operate another 107 security cameras. Of these, 67 are unmanned security cameras for traffic violations, 35 to check on illegal dumping of waste and 5 to deter crime. The total installation cost is an estimated 55 billion won (US$60 million). The pace of installing cameras is believed to be accelerating.

In May 2005, the NHRC advised that use of CCTVs could violate and restrict the right to control personal information, and the privacy and freedom of the individual. It therefore recommended laws to cover the operations and procedures among other aspects. If CCTVs have to be used in public areas, there should be a law to protect privacy, but none has been enacted.

f) Right to confidentiality

The real-name reporting system under the HIV/Aids control programme does not bar administrators from revealing information to private institutions such as blood banks. As such, the NHRC expressed its opinion through two Resolutions.[8] These confirmed that Article 10, paragraph 2.2 of the Law on Protection of Personal Information Regarding Public Institutions[9] should not be used as a ground to provide personal information to any other public institution. The provision should be construed in such a way that the institution that possesses personal information can only divulge this under narrowly defined criteria.

g) Harsh treatment of undocumented migrant workers

This is a common violation of human rights by the authorities. Immigration officers detain migrants without verifying their legal status, asking them to produce Foreigner ID cards. It is an illegitimate exercise of power for public officers to detain migrant workers in official vehicles and then check their

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[6] A report submitted to Im Jong-In to the Ministry of National Defence

[7] According to 2003 research by the Citizen's Action Network

[8] Recommendation of NHRC, 30 July 2002, on providing medical history information of a person with a mental disease for occasional aptitude tests of driver's license; Opinion of NHRC, 25 September 2002, on Insurance Business Amendment Bill

[9] Article 10, paragraph 1, stipulates that the head of the institution shall not, for a purpose other than established, use a personal information file or provide it to other institutions, except for using it within the institution or providing it to other institutions according to other laws. Paragraph 2 prescribes that despite the provision of paragraph 1, the head of the institution may use a personal information file or provide it to other institutions in the following cases.

- where there is a consent from the subject of information or it is to provide information to the subject of information;
- if there is a considerable reason to use information in order to carry out its mandate provided in other laws

However, this does not apply to the cases where the fear of unreasonable violation of the rights/interests of the subject of information or others is recognised. (Revised on 29 January 1999)

status. But the government has imposed controls on these workers without considering their rights. In many instances, the treatment meted out to them is harsher than that prescribed in criminal procedure provisions. Immigration officials have often entered workplaces without identifying themselves. In the process of inspection, many undocumented foreign workers have been injured or even killed.[10]

The NHRC has taken a visible stand by declaring that "a detention order or urgent detention order does not give immigration officials the authority to inspect or arrest by force". However, in practice the government or public officials have such broad and general powers that they are able to violate migrants' rights and apply discriminatory legal standards to them.

The NHRC has expressed the opinion that there are no grounds in the Immigration Control Law for officials to enter business or residential premises without the permission of a supervisor or owner. It pointed out that the Constitution has adopted the principle of issuing a warrant to protect freedom and the rights of individuals, while criminal procedures stipulate that the public prosecutor should ask a judge to issue a warrant in seizing or searching individuals. It said immigration officers also infringe basic human rights by acting to the contrary.

The NHRC has expressed concern about the government's decisions to restrict foreign workers from participating in labour unions or stopping them from becoming union leaders.[11] The Constitution and relevant laws do not contain any provisions to deny the three primary labour rights to undocumented migrant workers.

h) Discriminatory Industrial Trainee Programme

The NHRC has, in two Resolutions, advised the government to abolish the Industrial Trainee Programme[12] which is seen as discriminating against foreign workers. This does not guarantee their working hours or various kinds of bonuses and retirement benefits. It does not protect them against unfair dismissal and denies them the three basic labour rights.

The NHRC said "It was introduced primarily to cooperate on technology with developing countries. But in reality it is a deceptive and expedient policy used to secure low-wage alien labour. Since the alien trainees provide their labour not under the status of workers but under the status of trainees, they are not protected by the Labour Standards Act and they suffer from serious human rights infringements. Therefore, the Industrial Trainee Programme should be abolished in order to protect alien workers' rights."

The Ministry of Justice has since that the programme will be abolished on 1 January 2007 in order to protect the rights of foreign employees and satisfy employers' needs.[13] But it has not yet presented a plan or alternatives.[14]

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[10] Nocutnews, 23 April 2006, 'Continuous Occurrence of Undocumented Migrant Workers Death Due to Excessive Controls by the Government'

[11] Concluding Observation on Kuwait (2000), CCPR/CO/69/KWT, paras 40-41 Concluding Observation on Senegal (1998), CCPR/C/79/Add.82, para 16

[12] NHRC Opinion on the Measures for the Alien Worker Programme, 12 August 2002; Recommendation on the policy to improve human rights of alien workers residing in the ROK

[13] Ministry of Justice, 'Unity Plan of Alien Worker Programme and Measures Concerning Alien's Illegal Residence and Protection of their Rights'. 19 May 2005, pp.1, 5

[14] Ministry of Justice, 'Change Strategy Plan of Immigration Control', February 2005

3) NHRC COOPERATION WITH NGOs

a) Protection of migrant workers' rights

To curb violations of the human rights of foreign workers, the NHRC has reached out to various university research centres, the lawyers' association, international organisations and human right research centres. It has requested their help to look into cases of those being held at detention centres for foreigners.

The NHRC, in a report, said more than 80% of them were not notified of their right to counsel, to object their detention, or to petition for their human rights.[15] It said more than 50% complained that they were allowed only 10 minutes with visitors; 50% were denied the opportunity to exercise; 20% were verbally harassed by public officials; 10% said their letters were censored by inspectors; 5% alleged being held in solitary confinement.; and 5% claimed to have been tortured or assaulted.

b) Union rights for professors

In October 2005, the Korean Professors Union filed a petition with the Ministry of Labour stating that it is a discriminatory practice without reasonable grounds to deny them the right to form a labour union when primary, middle and high school teachers have a right to do so.

The NHRC expressed its opinion to the National Assembly Chairperson that "legislative measures are needed to guarantee professors' basic labour rights in conformity with the Constitution and International Human Rights Law. But the scope of the legal protection of professors' three labour rights is contingent upon the issues involving particular characteristics concerning their occupation and other legal matters such as students' right to education within the context of not violating professors' rights in essence as it is guaranteed on the Constitution".[16]

4) GENERAL PERFORMANCE

Not only did creation of the NHRC signal advancement in South Korea, but its prescribed activities[17] have contributed considerably to improving the level of human rights. Still, institutional problems hinder the Commission from fulfilling its role more effectively.

The NHRC performs two main functions. First, it investigates petitions received from victims and takes action to bring about remedies. Second, it researches and examines laws, policies and current circumstances in the field of human rights and acts to make appropriate corrections (e.g. through recommendations, expression of opinions, etc.).

According to the Act, the Commission may only request investigation, recommend disciplinary action, or express its opinion after its investigation of cases. It does not have any authority to act, but the relevant authorities are required to respect its directions by conducting investigations, recommending disciplinary action and reporting back on follow-up measures.[18] The NHRC may publicly announce recommendations that it has submitted to the authorities and action taken.[19] It may also express its opinion or make recommendations on the human rights perspective in national policy making.[20] However, these carry no legal force.

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[15] NHRC, 18 November 2005, 'Research on the Actual Conditions of Undocumented Migrant Workers Control and Protection Facilities'
[16] Press release, National Human Rights Commission, 27 March 2006
[17] CCPR/C/KOR/2005/3, paras 49-53
[18] Article 20 of Act
[19] Article 25, paragraph 4 of Act
[20] Article 25, paragraph 1 of Act

Even when the NHRC concludes that human rights violations or discrimination have occurred, the authorities are not legally obliged to act. It can do nothing if government policy goes against its recommendations or opinion. These restrictions, combined with the Commission's own passivity and lack of cooperation from government agencies, have impeded progress and left dissatisfaction over its effectiveness.

5) CAMPAIGN FOR ADVOCACY

In light of Ban Ki-Moon's confirmation as the new UN Secretary-General from January 2007:

a) Widen the leadership role and capacity of the NHRC, and its cooperation with Korean NGOs, to monitor the government's performance in all aspects of international relations that could have an impact on human rights at national, regional and international levels
b) Hold the government accountable for bridging its rhetoric at international level and implementation at home, for example in relation to conscientious objections to military service – a right recognised under the ICCPR[21], to which South Korea is party.

FACT FILE

Country	Republic of Korea
Name of NHRI	National Human Rights Commission of Korea
Inception	25 November 2001
Enabling law	National Human Rights Commission Act, passed on 24 May 2001
Term of Office (Years)	3
Composition	Chairperson and 10 Commissioners (3 standing, 7 non-standing)
Possibility of reappointment	Yes, only once
Full-time/Part-time/Mixed (allows full- and part-time)	Mixed
Funding	Governmental budget approved by Parliament
Legal Mandate	
Power to receive and investigate complaints	Yes
Power to conduct investigations on own initiative (suo motu)	Yes
Power to subpoena evidence and examine witnesses	Yes
Power to enter and inspect premises *** only detention facilities** **** must be announced or requested**	Yes
Power to resolve complaints by conciliation and/or mediation	Yes
Mandate to educate/conduct research on human rights	Yes
Power to advise/make recommendations to government and/or Parliament on laws, regulations, policies or programmes/international treaties	Yes
Power to provide* or recommend compensation and/or seek it through a court of specialist tribunals*****	Yes * To provide
Power to intervene or assist in court proceedings related to human rights (with court's permission)	Yes
Useful links	* NHRC: http://www.humanrights.go.kr/ * Minbyun: http://minbyun.jinbo.net/

[21] General Comment 22 (1998), para11. Deduced 'conscientious objection to military service' from A General Comment 22 (1998), para 11 Deduced "conscientious objection to military service" from Article 18 of the Covenant which stipulates moral, ethical, and religious freedoms, and that conscientious objectors should not be discriminated against on ground of their objection to military service

This publication covers the executive summary of 10 country-reports on the performance of national human rights institutions (NHRIs) in Asia, focusing on the status of their cooperation with NGOs, as well as relationship with governments.

Each country-report deals with various aspects of the NHRI's performance based on the Paris Principles, but seen from a human rights NGO perspective that takes into account the domestic context. It also addresses key challenges and issues facing each NHRI.

Asian Forum for Human Rights and Development (FORUM-ASIA) is a membership-based regional human rights organization committed to the promotion and protection of all human rights including right to development.

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