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

2008 Report on the Performance and Establishment of National Human Rights Institutions in Asia

The Asian NGOs Network on National Institutions (ANNI)

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Foreword

The idea of establishing a network of Asian non-governmental organisations and human rights defenders engaged with national human rights institutions (NHRIs) initially came about during the *1st Regional Consultation and Cooperation between NHRIs and NGOs in Asia*, which was organised by the Asian Forum for Human Rights and Development (FORUM-ASIA) and held in Bangkok, Thailand, from 30 November to 01 December 2006. After three days of rich discussions on experiences on this issue from all over Asia, the participants of the consultation made the collective decision to form the Asian NGOs Network on National Human Rights Institutions (ANNI). It was also decided during the consultation that FORUM-ASIA would serve as the convener of the ANNI.

The ANNI covers the sub-regions of South Asia, Southeast Asia, and Northeast Asia. The goal of ANNI is to help establish and develop accountable, independent, effective, and transparent national human rights institutions in Asia. National human rights institutions hold an important role in the promotion and protection of human rights in the region, considering the fact that Asia has yet to set up a human rights mechanism that would cover the region. National human rights institutions are the primary protection mechanisms for human rights defenders working on the ground. They also hold the potential of developing a regional jurisprudence on human rights that would conform to international human rights principles.

It is in this light that the ANNI pursues its advocacy work at the national, regional, and international levels, on issues regarding NHRIs. Major advocacy activities of the ANNI include lobby missions during the annual meetings of the Asia Pacific Forum on National Human Rights Institutions (APF), as well as engagement with the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights.

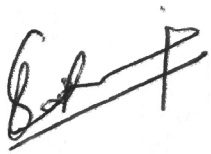
The ANNI also undertakes every year a collaborative research project on assessing the independence and effectiveness of NHRIs in Asia. It released its first publication in 2007, which was entitled *The Performance of National Human Rights Institutions in Asia 2006: Cooperation with NGOs and Relationship with Governments.* This report covered ten (10) countries in Asia: India, Indonesia, Malaysia, the Maldives, Mongolia, Nepal, the Philippines, South Korea, Sri Lanka, and Thailand.

This book, *The 2008 ANNI Report: An Assessment of the Performance and Development of National Human Rights Institutions in Asia*, is the network's second installment and we are happy to note that this now covers fourteen (14) countries: Bangladesh, Hong Kong, India, Indonesia, Malaysia, Maldives, Mongolia, Nepal, Philippines, South Korea, Sri Lanka, Taiwan, Thailand, and Japan.

Four of the reports examine the current efforts being undertaken in the establishment of NHRIs in four countries in Asia, while the rest of the reports critically assess the performance of existing NHRIs in the region. The period of coverage of this report is from January to December 2007, with some additions of critical developments which occurred during the first quarter of 2008.

I would like extend our appreciation to all ANNI members, writers, and editors, who have worked hard to produce the reports. I would also like to thank the NHRIs in Asia, and all the other friends and partners of ANNI, who made this report possible through their cooperation, and sharing with their information, comments, and guidance. Finally, I would also like to thank the staff of the Human Rights Defenders Programme of FORUM-ASIA for the excellent job in this book.

With this report, the ANNI hopes to develop a stronger and more constructive relationship with NHRIs in the region. This report also underlines the deep and sincere commitment of ANNI to work with NHRIs in building a regional community devoted to the promotion and protection of human rights.



Subodh Pyakurel
Chairperson

The State of National Human Rights Institutions in Asia: A Regional Analysis

Human Rights Defenders Programme, FORUM-ASIA[1]

I. Introduction

In 2007, the members of the Asian NGOs Network for National Human Rights Institutions (ANNI) undertook a project to assess the performance and effectiveness of National Human Rights Institutions (NHRIs) in Asia. The outputs of this project are reports written by members and partners of the ANNI who have practical expertise in engaging with their respective NHRIs. Reports were also written by ANNI members and partners from countries that are still in the process of creating NHRIs. All of these reports have been compiled by the Asian Forum for Human Rights and Development (FORUM-ASIA) as the coordinator of the ANNI.

This regional analysis of all the reports for 2007 is meant to help members and partners of the ANNI to build a regional perspective of the situation of NHRIs in Asia. From the reports, main trends and issues were identified, all of which are common to many NHRIs in the region.

There are three main issues that are prevalent among national human rights institutions (NHRIs) in Asia. The first issue is with respect to the independence of these NHRIs from government interference and control. There are several aspects to the issue of independence, but a large number of the reports point to the NHRIs' lack of structural and fiscal autonomy and the arbitrary and non-transparent appointment process of members of the commission as major areas of concern.

The second prevalent issue common among most of the NHRIs in the region is their ineffectiveness. Again, many reasons were given for this, including the lack of resources, political will, advocacy strategies, and a focus on the promotion aspect of their mandate, thereby almost forgetting the protection side of their work.

Finally, the third most common issue is the lack of a good and constructive relationships between NHRIs and non-governmental organisations (NGOs) at the national level. It appears however, that this issue is closely related to the first two. The lack of independence and ineffectiveness of NHRIs make NGOs hesitant

[1] EmerlynneGil, Emma Germanos, and Erdenechimeg Dashdorg.

to engage with them. Moreover, because of the NHRIs' lack of structural and fiscal autonomy from their governments, the NHRIs often identify themselves as another government institution. This type of attitude leads the NHRIs to take on the defensive stance of the governments when it comes to criticisms received from NGOs.

II. Independence

The lack of independence is a burning issue for many national human rights institutions (NHRIs) in Asia. An examination of this year's reports would reveal that many NHRIs do not have autonomy from certain branches of government.

There are three reasons for this lack of autonomy. First, it may be that the enabling law of the national institution has created a structure that it is either wholly or partially dependent on one of the branches of government. Second, the appointment process of commissioners allows governments to exercise some influence on the choice of commissioners. Third, many of these national institutions do not have fiscal autonomy and more often than not, would have to rely on the governments for their budgets.

1. Structural Autonomy

Based on the reports, there are four constitutionally-created NHRIs in Asia: Thailand, Philippines, Maldives, and Nepal. In theory, these NHRIs should enjoy the most structural independence and autonomy, as compared to other NHRIs in Asia which are created by virtue of a legislative act. However, other factors undermine the independence of these constitutionally-created national institutions, making them as susceptible to government interference and influence as the others.

In Nepal, the National Human Rights Commission of Nepal (NHRC) used to be a strong and independent body with broad powers. However, after the coup d' etat in 2005 led by King Gyanendra, the NHRC was placed under the control of the executive branch, thus losing its impartiality, independence, and effectiveness. The government also amended its enabling law, making changes in the appointment process of the commission and appointed pro-coup commissioners. After 2005, the NHRC became the appointed mouthpiece of the government of Nepal. On 18 November 2007, however, the government appointed a new set of commissioners, which now includes human rights activists and a former Supreme Court justice. It still remains to be seen whether this new set of commissioners would prove to steer the NHRC towards being a more independent body, less influenced by the government.

The Human Rights Commission of Maldives (HRCM) and the National Human Rights Commission of Thailand (NHRC) are reported to have strong constitutional

backing and a broad mandate based on universal human rights standards. However, Maldives' HRCM has been criticized of being biased in favor of the ruling political party, the Dhivehi Raiyyithunge Party. The country report of Maldives, though, gives no basis for this allegation. Meanwhile, Thailand's commissioners are widely perceived to be independent, but as the report pointed out, all permanent members of the staff are classified as civil servants. Because of this, the staff of Thailand's NHRC would have to follow civil service rules as prescribed by parliament, which may pose as a potential point where the government may exert its influence. Other institutions created under Thailand's constitution have their own set of rules and regulations for the permanent members of their staff.

There are two NHRIs in Asia that enjoy a fair amount of independence and autonomy from government interference, although they are not constitutionally-created bodies. These are the Komnas HAM of Indonesia and the National Human Rights Commission of Korea (NHRCK). In fact, the Komnas HAM has gained a reputation of being too independent, that it has somewhat been viewed by human rights organisations in the country as not having a constructive relationship with the Indonesian government. Thus, the report from Indonesia recommended that Komnas HAM exert more efforts to create a better relationship with the various branches of government in the country so that it may effectively lobby the government for the implementation of its recommendations. For the NHRCK, on the other hand, it has foreseen that the structural independence it enjoys now may be compromised by amendments in its enabling law. Thus, the NHRCK has undertaken steps towards making the NHRCK a constitutional body, but these efforts did not prosper.

At the other end of the spectrum, the Human Rights Commission of Malaysia (SUHAKAM) suffers from not having structural autonomy at all from the government. It was created under the Human Rights Commission of Malaysia Act of 1999 and was, at the very beginning, placed under the jurisdiction of the Ministry of Foreign Affairs. In 2004, the Prime Minister's Department took over the direct supervision of the SUHAKAM, further undermining the independence of the commission.

2. Appointment Process of Members of the Commission

Another issue raised with respect to the independence of NHRIs in Asia is the extremely politicized and arbitrary manner by which the commissioners are chosen. A concern was also raised with respect to the transparency of the selection process, with many reports focusing on civil society not having a voice in the appointment process of the commissioners.

One particular example of politicization and arbitrariness is the appointment of the current commissioners of the Human Rights Commission of Sri Lanka (HRC).

Under Sri Lanka's constitution, the Constitutional Council shall nominate persons to be appointed by the president as members of the HRC. However, in 2006, the president ignored this provision and went on to nominate members of the HRC on his own. The unconstitutionality and arbitrariness of such a move caused a general outcry of concern nationally and internationally.

Another example is the case in Maldives. The president forwards names of nominees to the parliament, which then evaluates the choices and sends its suggestions and recommendations back to the president. It is the president who makes the final decision in appointing the members of the HRCM. This process, according to the report, is highly politicized because the president is the elected leader of the ruling political party. The sub-committee within the parliament which evaluates the choices of the president and sends back to him its suggestions and recommendations somehow balances out the highly politicized manner of the selection since the members of this sub-committee are selected from different political parties.

In Mongolia, it is the parliament or the State Great Khural (SGK) which appoints the commissioners of the National Human Rights Commission of Mongolia (NHRCM). The report alleges that non-governmental organisations were neither able to observe the process of selection, nor to participate in it. They did not know who were being nominated as commissioners and when the list of nominees was discussed at the SGK. The NGOs in Mongolia have been demanding for more civil society participation in the process, but their demands have been largely ignored by the government. Other countries where civil society does not have a voice in the selection and appointment process of members of the national institution are Malaysia and the Philippines.

3. Fiscal Autonomy

Most NHRIs, in theory, are accorded independence under the law to formulate its own budgets and disburse funds. However, in practice, most NHRIs would need to have their budgets approved by a branch of government, i.e. the parliament. The disbursement of funds of many NHRIs is also regulated by a department or ministry under the executive branch. One example is Thailand's National Human Rights Commission (NHRC). Under Thailand's constitution, the NHRC is accorded financial independence, but in reality, it does not have the power to determine how to disburse its own funds. The report notes that the expenditure procedures the NHRC must follow are very bureaucratic and time consuming. Similarly, the budget of the National Human Rights Commission of Korea (NHRCK) is regulated by the Ministry of Planning and Budget, the Ministry of Governmental and Home Affairs, and the Civil Service Commission.

Many of the NHRIs in Asia suffer from having very limited budgets. All of them rely on the national government for their funds to operate. So far, it is only the

Commission on Human Rights of the Philippines (CHRP) that has been successful in significantly augmenting its budget with grants from private institutions and donors. The CHRP's fundraising activities also raises some concern from NGOs in the country since there may be a danger that its activities may later on be characterized as being donor-driven.

The very limited budgets of NHRIs in Asia reflect the indifferent attitude of governments in Asia towards the promotion and protection of human rights, as well as the governments' desire to keep close control of NHRIs.

III. Effectiveness

Three issues have been raised in most of the reports with respect to the effectiveness of NHRIs. First, the reports revealed that most of the NHRIs in the region focus more on the promotion aspect of their mandate and more often than not, are weak on the protection of human rights. Second, most NHRIs have not been very effective in handling complaints submitted to them. Third, many of the NHRIs have also not been very effective in influencing their governments' human rights policies.

1. Strong on Promotion and Weak on Protection

There is common trend that NHRIs in Asia have more activities geared towards human rights education and promotion functions. While enhancing awareness is important, NHRIs need to balance their activities so that they will implement more the protection aspect of their mandate. Because of this imbalance, it thus appears that NHRIs are ineffective and inefficient in the protection of human rights in their countries.

One clear indication of the inefficiency of NHRIs on human rights protection is their slow response to alleged violations of human rights; particularly, the violations of human rights committed by government authorities and armed groups. Many of these violations include torture, enforced disappearances, arbitrary arrest and detention, extrajudicial killings, and excessive use of power. Various reasons have been identified for the slow response. First, some NHRIs' mandates have been severely restricted to cover only certain rights. For instance, the mandate of Malaysia's SUHAKAM is only limited to the rights under Part II of the Federal Constitution. This portion of the constitution, however, leaves out many rights which are included in the Universal Declaration on Human Rights (UDHR). It is worthy to note that SUHAKAM is not very proactive in lobbying the legislative branch for the broadening of its mandate.

Some NHRIs, on the other hand, may have mandates that cover all the rights under the UDHR. However, they cannot act upon certain violations of human rights. The NHRCM of Nepal does not have the power to investigate violations

committed by the army, while Indonesia's Komnas HAM and Mongolia's NHRCM cannot act upon violations which are already the subject of cases before the courts.

Second, NHRIs may also lack the resources to conduct detailed inquiry and investigation of violations committed by the police, army, and other security forces. The lack of resources was the reason cited by Sri Lanka's HRC for issuing an administrative order in June 2006 to stop inquiring into the complaints of over 2000 enforced disappearances. The HRC only revoked the decision after an overwhelming protest from media and human rights defenders in the country.

2. Complaints Handling Process

According to the Paris Principles, the investigation of human rights violations on the basis of complaints or petitions is the main responsibility of NHRIs in protecting and promoting human rights and fundamental freedoms. However, many of the reports revealed that NHRIs in Asia have not been very efficient in handling complaints submitted to them, despite the fact that the number of complaints have risen during the past year.

The reports do not elaborate on how many complaints were submitted to NHRIs and how many of these complaints have been rejected. The reports do reveal though that there is a lack of public awareness regarding the complaints procedures of NHRIs. Some even adopt policies to discourage the lodging of complaints before them. For instance, the HRC of Sri Lanka issued an administrative order setting a 3-month limitation for the filing of a complaint. After 3 months from the date of the occurrence of the alleged violation, the victim is therefore barred from filing a complaint before the HRC. Many of the NHRIs have also been reported to be referring cases of violations to certain government offices. However, there is no clear follow-up by these NHRIs on the referrals.

Some NHRIs wait until an actual complaint is lodged before conducting an investigation on a particular violation. Most have the power to refer cases and complaints to courts and police authorities. One example is the NHRC of Maldives, which has the power to bring cases to the courts. It is for this reason that the NHRC of Maldives is currently hiring a legal staff in order to take advantage of this capacity.

Finally, some investigative reports from NHRIs in Thailand, South Korea, Malaysia, Philippines, Mongolia, and India, have been well received by the courts and police authorities. Also, the National Human Rights Commission of India has been holding meetings with relevant state officials of 4 states to expedite the disposition of pending complaints. These meetings also serve as a venue for sensitizing state functionaries on the human rights.

3. Lack of impact of recommendations on government policies on human rights

Most NHRIs have been issuing recommendations to governments, urging the latter to change certain policies to conform to basic human rights principles and to undertake necessary measures to protect human rights. However, there is not much impact of these recommendations on the policies and practices of many governments in the region. The government of Nepal, for example, has only taken action and implemented a mere 10% of the recommendations transmitted to it by the NHRC of Nepal. Meanwhile, the recommendations of Malaysia's SUHAKAM for its government to sign several core international human rights instruments have been largely ignored.

One of the reasons pointed out for the very weak impact of NHRIs' recommendations on government policies is that many of NHRIs do not have the power to take sanctions if their recommendations and proposals are ignored. Nevertheless, in some countries, NHRIs have the power to take actions to follow up their recommendations. For instance in Mongolia, business entities, organisations or any other body who has received recommendations from the National Human Rights Commission of Mongolia (NHRCM), shall inform in writing within 30 days of their receipt of the recommendations as to the measures undertaken to implement the same. Also the court may impose administrative sanctions on persons who have not complied with this rule.

There are several positive developments though on the reception by governments in Asia of recommendations from the NHRIs. One very good example is that of the National Human Rights Commission of Korea (NHRCK). It appears that the government of Korea seriously considers the recommendations transmitted to it by the NHRCK. As mentioned in the report, there are certain reasons why the NHRCK's recommendations are respected. Some of these reasons are the strong advocacy by the NHRCK and the encouragement of civil society and media to promote and protect human rights. The NHRCK example is also proof that strong cooperation between the NHRI and civil society would result to a louder and more persistent voice to the government to implement basic principles of human rights.

4. Other Reasons for Ineffectiveness

The other reasons cited for the ineffectiveness of NHRIs in Asia are the lack of political will to implement their mandates, conflict among commissioners, and the absenteeism of commissioners who only work part-time for the NHRIs.

It is unfortunate that the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) does not measure effectiveness during its accreditation review of NHRIs. Because of the

overwhelming dissatisfaction of civil society on the ineffectiveness of NHRIs, it is important for the ICC to consider including this criteria during its accreditation review. It is also important for the Asia Pacific Forum of National Human Rights Institutions (APF) to consider this in accepting and maintaining its membership.

IV. The Rocky Relationship between NHRIs and NGOs in Asia

As human rights defenders, it is vital that NHRIs and NGOs cooperate with each other in the promotion and protection of human rights. Since NGOs have more flexibility and links on the ground, they are valuable because they can provide information and necessary resources for NHRIs to expand in their work. This importance is expressed in the Paris Principles, emphasized in Principles C 6 and 7, which states that NHRIs must maintain positive relationship and consultations with other bodies responsible for promoting and protecting human rights. A consultation mechanism is needed for NHRIs to facilitate any cooperation with NGOs at the national level regularly.

In many Asian countries, the relationship between NHRIs and NGOs are - as some ANNI reports have stated - "rocky". In other words, the relationship between NHRIs and NGOs are best described as confrontational and adversarial. Both groups often do not cooperate with each other in activities or initiatives. Consultation mechanisms between NHRIs and NGOs are virtually nonexistent in many Asian countries.

In Malaysia for example, the SUHAKAM and human rights NGOs do not have the best relationship with each other. On June 2006, after only five minutes of consultation, NGO representatives walked out of a meeting where a plans for a public investigation on the "Bloody Sunday" incident was being discussed. Malaysian NGOs have also initiated annual consultations with SUHAKAM, but the sessions were never attended by the Chairman and less than 10 % of the commissioners attended, despite invitation letters having been sent to all. The SUHAKAM does, however, conduct consultations with NGOs, particularly on the issue of trafficking of persons. However, for other issues, consultations have been pro-forma and limited to "friendlier" NGOs. For instance, when SUHAKAM held a meeting on the ASEAN National Human Rights Institutions' Consultative Mechanism, it was held in an "exclusive manner" that only a limited number of NGOs were able to engage in the meeting. Many NGOs were also not included in ensuing meetings and roundtable discussions regarding the matter. This kind of relationship and method of consultation is also evident in Nepal. The NHRC of Nepal only invites the NGOs to its programmes to discuss on specific issues such as internally displaced persons, transitional justice mechanisms, and issues of

impunity. There are no consultative mechanisms that could facilitate regular discussions and communications with NGOs on issues at the national level.

In Maldives, the Human Rights Commission of Maldives (HRCM) and the NGOs in the country make little effort to cooperate with each other. The NGOs in Maldives do not contact the HRCM to cooperate with NGO projects because they think that their projects have no connection at all with each other. The report, however, clearly states that cooperation between the two groups is valuable especially on monitoring the conditions in prisons and detention centers.

The reasons why there is a lack of cooperation among NHRIs and NGOs in many Asian countries are related to whether or not NGOs view the NHRIs as independent from government interference and influence. In many countries like Malaysia, Philippines, or Mongolia, many NGOs feel that their NHRIs are not independent and thus feel that it is not worthwhile to cooperate with them. In Mongolia, 13 NGOs took part in a survey to assess the National Human Rights Commission of Mongolia (NHRCM), they question its independence because the Commissioners rely on state funding and are appointed from government agencies.

Moreover, Commissioners are usually not trained to cooperate with NGOs. Most are former judges and because of the nature of the work in the judiciary, these judges do not have the capacity and understanding to work with NGOs. This is seen in Sri Lanka, India, and Maldives. In Sri Lanka, most of the commissioners are former members of the judiciary. The relationship between the HRC of Sri Lanka and the NGOs have become so antagonistic that in one instance, when one staff member from the NGO Law and Society Trust (LST) met with the commissioners on 6 August 2007 to interview them for the ANNI report, the commissioners refused to discuss the matter and began a tirade of general criticism of NGOs instead. In a few instances, however, the HRC of Sri Lanka does cooperate with the NGOs and one example is its using the statistical information shared with it by the People's Action for Free and Fair elections (PAFREL). It is believed though that the HRC of Sri Lanka accedes to the information of PAFREL because the latter named the LTTTE, the Karuna Faction, and the Underworld as the three main perpetrators of violence, while it downplayed the government's involvement in extrajudicial executions and enforce disappearances.

Only very few NHRIs have established a good and constructive working relationship with the NGOs in their countries. The National Human Rights Commission of Korea is an example. The NHRCK has involved NGOs in the NHRCK's planning, investigation and evaluation processes. It has also involved various NGOs in its annual policy meetings to determine activities for the year. It also conducts human rights trainings and carries out regular visits to the organizations. However, the report noted that the current positive relationship is

based on the pressure from the upper management of the Commission, while various departments and committees of the NHRCK are actually reluctant to cooperate with human rights organizations.

V. Conclusion

It is clear from the reports that the issues of lack of independence, ineffectiveness, and lack of cooperation between NHRIs and NGOs are all closely intertwined with each other. The lack of independence of NHRIs leads towards their ineffectiveness, which in turn, results to the lack of trust and cooperation from the NGOs. There is also a lack of cooperation between the NGOs and NHRIs because of the fact that the latter perceive themselves as government entities. This perception is borne out by the fact that they do not have structural and fiscal autonomy from the government. Thus, more often than not, NHRIs view criticisms against the government as criticisms against them as national institutions as well. Moreover, because of this, NHRIs take on the confrontational and adversarial stance of the government when it comes to dealing with NGOs.

These three issues must therefore be addressed together. Asia is the only region in the world that does not have a regional human rights protection mechanism, and thus, NHRIs remain to be the key bodies for the promotion and protection of human rights in the region. Thus, these three issues must be given serious consideration by the NHRIs themselves, the APF, and the ICC. It is hoped that by addressing these issues, a stronger human rights regime will be established in the region.

Bangladesh: Further Amendments Needed for the Human Rights Commission Ordinance 2007

Ain o Salish Kendra (ASK)[2]

I. Introduction and Background

The Government of Bangladesh started the initiative to establish a national human rights commission, first in 1995. In April 1995, the government started a project called the Institutional Development of Human Rights in Bangladesh (IDHRB), with the aim to mainly draft a law for the establishment of a National Human Rights Commission. There was hardly any development on this project for a year until it was revived in March 1996 through the signing of an agreement between the Bangladesh Government and the United Nations Development Programme (UNDP). An Action Research Study was thereafter done with the financial support of UNDP. Under this project, the first bill pertaining to the establishment of the human rights commission called the Bangladesh National Human Rights Commission Act of 1999 was prepared and a Cabinet Committee approved it on 12 April 1999.

On 10 December 2001, the government of Bangladesh formed a committee headed by the Ministry of Law, Justice, and Parliamentary Affairs to examine the prospect of setting up of the National Human Rights Commission. This committee finalized a draft recommending the enactment of a comprehensive law on the protection of human rights, instead of instituting a National Human Rights Commission. On 23 January 2003, this draft was sent to the Cabinet, but was never put on the agenda of its meetings.

Finally, on 19 March 2007, the present caretaker government agreed in principle to establish a National Human Rights Commission. Again, another committee was formed which then drafted an ordinance which was presented to and approved by the Council of Advisers on 9 December 2007. On 23 December 2007, the President promulgated the National Human Rights Commission Ordinance, thereby establishing the National Human Rights Commission of Bangladesh.

II. Independence

It is difficult to assess the independence of the commission, as it is yet to start its work. However, based on the wording of the ordinance, there are some issues

[2] Contact Person: Sayeed Ahmed, Coordinator on Media and International Advocacy

that might raise some concerns regarding the independence of the commission. One major issue of concern is the major role the President plays in the appointment and removal processes of members of the commission. Another issue of concern is that under the Ordinance, the Parliament does not play a role in any way with respect to the commission. One reason for this may be that the Ordinance was drafted and issued in the absence of the Parliament in Bangladesh. The Parliament was dissolved on 28 October 2006. Nevertheless, the Ordinance should still provide for measures towards the commission's engagement with a parliament, which is a basic institution of democracy in every country.

1. Selection process of commissioners

Under the Ordinance, the Selection Committee has the mandate of preparing a list of recommended names from which the President will select the members of the commission. The Selection Committee shall be composed of the following:

a) A justice of the Appellate Division of the Supreme Court, nominated by the Chief Justice;
b) Cabinet Secretary of the Cabinet Ministry;
c) Attorney General of Bangladesh;
d) General Controller of Audits and Accounts of Bangladesh;
e) Chairman of the Government Works Commission;
f) Secretary, Ministry for Law, Justice, and Parliamentary Affairs.[3]

One primary concern of non-governmental organisations with respect to the Selection Committee is that all of its members, except the justice from the Appellate Division of the Supreme Court, come from the executive branch of government. Therefore, most of the members of the committee are under the direct supervision and control of the executive.

The President also plays a major role in the removal from office of the members of the commission. Generally, the members of the commission may be removed from their post using the same grounds as that for the removal of justices of the Supreme Court. However, the President also has the power to remove a member of the commission from office if the latter

a) Is adjudged an insolvent by a competent court;
b) Engages in any gainful employment outside the duties of his office;
c) Is declared by a competent court to be of unsound mind;
d) Is convicted and sentenced to imprisonment for an offense which in the opinion of the President involved moral turpitude.[4]

[3] Ordinance No. 40 of 2007 [hereinafter called the National Human Rights Commission Ordinance of 2007] art. 6, par. 1.

[4] National Human Rights Commission Ordinance of 2007, art. 7, par. 2.

2. Financial independence

Under the Ordinance, there appears to be two sources of funding for the commission. First, there is the Human Rights Commission Fund,[5] from which salaries of the commission's members, officers, and employees will be paid. This fund shall come from an annual donation provided by the government and from the "local authorities". Human rights organisations have expressed their concern on the ambiguity of the term "local authorities". It is also worthy to note though that the Ordinance does not mention any prohibition on the commission receiving funds from sources other than those mentioned therein.

Aside from the Human Rights Commission Fund, the commission will also receive funds from the government through an annual allocation from the national budget.[6] The Ordinance provides for financial independence of the commission by stating that it does not need prior approval from the government on spending the amount allocated to it.

III. Effectiveness

The commission's mandate as provided under the Ordinance includes responsibilities laid out in the Paris Principles. These responsibilities are meant to make a national institution a credible and effective body. The Ordinance appears to grant the commission a broad mandate, but it still remains to be seen whether this mandate would enable it to effectively promote and protect human rights in the country. There are some areas of concern, however, which human rights organisations in the country have pointed out which may prevent the commission from effectively dispensing with its mandate. Some of these concerns are the following:

- The Ordinance grants the commission the power to investigate on its own, or upon the petition of a victim or any person on the victim's behalf, complaints of human rights violations.[7] Negligence in the prevention of human rights violations by a public servant is likewise included in the mandate of the commission.[8] However, negligence by the government agency or institution is not included in the commission's mandate. Many human rights organisations view this as restricting or narrowing down the mandate of the commission.
- The power to investigate or conduct inquiries, in order to be effectively carried out, must be accompanied with the power to gather information and evidence needed. The Ordinance does state that the commission may

[5] National Human Rights Commission Ordinance of 2007, art. 21.

[6] National Human Rights Commission Ordinance of 2007, art. 22.

[7] National Human Rights Commission Ordinance of 2007, art. 11, par. 1(a).

[8] National Human Rights Commission Ordinance of 2007, art. 11, par. 1(b).

"summon and enforce the attendance of witnesses", "call for any written or oral evidence on oath", and "call for the attendance of any person residing in Bangladesh to a meeting with the Commission for the purpose of giving evidence, or to call for the presentation of any document in the possession of any such person."[9] The Ordinance also explicitly says that it has the power to issue summons.[10] This implies that it has the power to issue subpoena and subpoena duces tecum. However, the Ordinance does not expressly state that the commission has power to cite a person or body in contempt if the subpoena or subpoena duces tecum is ignored. It does not have power to impose sanctions on persons or entities who refuses to obey its summons.

- The commission may also not intervene in any matter pending before the courts.[11] This provision prevents the commission from playing a valuable role as a national institution for the promotion and protection of human rights in the country. Ideally, the commission should be at least allowed to present its views before the courts perhaps through an amicus curiae brief on the interpretation of the law and how it should be applied considering the circumstances of the case.

1. Mediation and Conciliation

In cases where there are reports of violations of human rights, the commission, under the Ordinance, is supposed to take steps "to resolve the issue through mediation and conciliation".[12] Mediation and conciliation are two terms used interchangeably to describe a type of alternative dispute resolution where two conflicting parties agree to bring in a neutral third party which would help in resolving their differences. The purpose of mediation and conciliation is to bring about a settlement between the two parties.

Human rights organisations in Bangladesh are concerned that violations to the right to life, freedom from torture, freedom of expression, and other similar rights cannot be solved through mediation and conciliation. Addressing violations to the abovementioned rights through mediation and conciliation may merely further foster a culture of impunity in the country. More often than not, the end result of mediation and conciliation is a settlement between the two parties. On the other hand, in order to combat impunity, the State must be able to fulfill the victim's right to justice, which would include prosecution of perpetrators. Combating impunity also includes ensuring that victims should be granted reparations for the abuse they have suffered. It would indeed be quite incongruous for a victim of

[9] National Human Rights Commission Ordinance of 2007, art. 15, paragraphs (a), (b), and (c).

[10] National Human Rights Commission Ordinance of 2007, art. 18.

[11] National Human Rights Commission Ordinance of 2007, art. 11, par. 2(a).

[12] National Human Rights Commission Ordinance of 2007, art. 13.

torture to sit with his torturer and enter into negotiations with the latter as to how much he should receive as reparations for the torture he was made to suffer.

Moreover, mediation and conciliation may also be more effective if accompanied with subpoena powers and the power to cite a person or entity in contempt if the subpoena is ignored. Again, the Ordinance does not expressly give this power to the commission under the section on mediation and conciliation and it is thereby questionable whether the commission can actually enforce the attendance of perpetrators during mediation and conciliation sessions.

2. Promotion

Spreading out education on human rights and creating awareness among the public is a necessary task of the commission and is laid out as well in the Ordinance. The commission must "raise awareness of human rights issues through research, seminars, symposiums, workshops, and through any other means and publish the results of such research."[13] This is a welcome provision since there is a need to conduct education and training programmes for officers and workers of the government including the law, justice, and police departments, to make them aware and sensitive about human rights needs. There is also a need to teach persons in government their responsibilities in protecting the citizens' human rights.

IV. Possible involvement of the Human Rights Defenders and NGOs

Under the Ordinance, the commission has the power "to encourage efforts regarding human rights by non-government agencies or organisations and coordinate the activities of such agencies or organisations".[14] The wording of this provision is quite weak and does not particularly encourage the commission to cooperate and collaborate with NGOs. Moreover, many human rights organisations view that the part regarding coordination of activities of non-government organisations is unnecessary. The suggested terminology of human rights organisations in place of the abovementioned provision is "to take up programs on the basis of coordinated plans with non-government organisations".

V. Process of Drafting the Ordinance:

For the last fifteen years, national human rights defenders have campaigned for a Human Rights Commission with independent powers of investigation, taking deterrent or punitive action against violators, and providing protection for victims of human rights violations.

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[13] National Human Rights Commission Ordinance of 2007, art. 11, par. (o).

[14] National Human Rights Commission Ordinance of 2007, art. 11, par. (k).

The draft of the Ordinance was distributed by the government in 2007 and on 26 August 2007, a workshop was called. However, the workshop was postponed and no further consultation has taken place. Civil society groups nevertheless prepared their detailed recommendations and sent these to the relevant authorities. They also actively campaigned on this issue through a series of articles in the media.

The draft ordinance was sent to the President for promulgation, after the approval of the Advisory Council (de facto Cabinet) on 9 December 2007. Civil society was not consulted at any stage during the drafting of this ordinance. Still, civil society groups came out again with their recommendations through press statements.

On 30th December 2007, human rights organizations organized a press conference to demand an effective and efficient NHRC. Another press conference by several human rights organizations was held on 26 February 2008. In a sense, the campaign undertaken by civil society groups fostered a wide discussion among people and media in Bangladesh.

VI. Recommendations

- It is needed to adopt open and broad definition of human rights in the Ordinance that will incorporate all necessary rights, including the civic, political, social, economic and cultural rights, for the sake of complete development as human beings.
- The Selection Committee of the commission must ensure presence of representation from the civil society. It is proposed that this committee includes persons who have worked substantially in upholding the bar, media, academics and human rights. It is also hoped that the election committee represents different sectors of society so that the formation of the commission reflects opinions of all people irrespective of caste, religion, gender and race.
- Gender equality is absent from the proposed draft for forming the commission. Subsequent laws must ensure that there is at least one woman in the three-member commission.
- Subsequent laws must be enacted to ensure publication of reports on all the activities of the commission.
- In sum, it is hoped that the laws will include all elements to ensure that the credibility and independence of the commission be ensured so that it can take action against a human rights violations These necessary amendments to the Ordinance must be enacted within at the soonest possible time to ensure an independent, credible, and effective National Human Rights Commission.

Hong Kong Mulls Its Options

HONG KONG HUMAN RIGHTS MONITOR[15]

I. Introduction

The debate on the establishment of a human rights commission first appeared during the enactment of the Hong Kong Bill of Rights Ordinance, Cap. 383 (BORO) in June 1991. The BORO is a domesticated local replica of most of the provisions of the International Covenant on Civil and Political Rights (ICCPR) with the reservations entered into on behalf of Hong Kong by the British Government in the colonial days.

Over the following decade, some legislators and various NGOs have repeatedly demanded the establishment of a HRC but to no avail. Various UN committees have called at least nine times for the establishment of the commission (Appendix I). This would have satisfied HK's obligation to implement the applicable international human rights instruments. Instead, the Government created the Equal Opportunities Commission (EOC) to mediate discrimination cases but on limited grounds (Appendix II). To date, the HKSAR Government has not agreed to set up a commission.

In February 2007, the Deputy Chairman of the Home Affairs Panel of the Legislative Council (LegCo) opined during a meeting that 'the existing arrangements and mechanism for protection of human rights in Hong Kong with the following shortcomings were far from adequate - (a) there was no central mechanism in compliance with the Paris Principles to examine the overall human rights situation in Hong Kong, coordinate policies which might have human rights implications under the purview of various bureaux, monitor the implementation of the United Nations (UN) human rights treaties applicable to Hong Kong, and examine any inconsistency between local legislation/administrative decisions and treaty obligations; (b) under the existing institutional arrangement, the Home Affairs Bureau only played the role of coordinating with relevant bureaux the reporting work required under the respective human rights treaties and the attendance of their representatives at meetings of this Panel for discussion on reports submitted under various UN treaties; and (c) the power of the existing human rights statutory bodies was limited in scope.'[16]

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[15] Contact persons: Chong yiu kwong, chairperson, Law yuk kai, director, Kwok hiu chung, education officer, Hong kong human rights monitor, 17 march 2008

[16] Paragraph 24, Minute of the LegCo Home Affairs Penal meeting on 9 Feb 2007 (LC Paper No. CB(2)1501/06-07). Visited the web-page of the Home Affairs Penal of the LegCo on 20 July at http://www.legco.gov.hk/english/index.htm

The same month, the Home Affairs Panel decided to set up a Subcommittee on Human Rights Protection Mechanisms under its jurisdiction.[17]

II. Current Human Rights Protection Mechanisms in Hong Kong

The Hong Kong Special Administrative Region (HKSAR) Government's response to the UN Human Rights Committee's recommendation of setting up a human rights commission is as follows: '[…] our position remains that Hong Kong's current human rights framework, underpinned as it is by the rule of law, an independent judiciary, a comprehensive legal aid system, our three human rights institutions - namely the Equal Opportunities Commission (EOC), the Ombudsman, and the Office of the Privacy Commission, and a free and vigilant media corps, provides sufficient protection and support for human rights in the SAR. We therefore see no obvious need for another human rights institution and have no plans or timetable for the establishment of such an institution in the immediate future.'[18]

To what extent does the HKSAR justify that there is no obvious need for such a commission? We examine the limitations of various human rights protection mechanism as follows.

1. The Legislative Actions

a. The LegCo conducts an examination of the compatibility of a bill on table with the BORO and the ICCPR during the first and second debates of the bill. But this examination is dictated by political considerations, and human rights have not been given the weight they deserve.

b. Responding to the continuous calls for enhancing human rights protection, the Panel of Home Affairs of the Legislative Council once discussed whether a working group mandated to regularly assess the Government's progress in implementing recommendations of the UN committees should be set up. This suggestion was rejected in the Panel's meeting in May 2003[19] but a Sub-Committee on Human Rights Protection

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[17] The term of reference of the Sub-committee is to ' (a) to monitor and examine the operation and effectiveness of existing institutional framework for promotion and protection of human rights in Hong Kong; (b) to examine possible means for enhancement of the effectiveness of the institutional framework of human rights promotion and protection in Hong Kong, including the setting up of a statutory Hong Kong Human Rights Commission; and (c) to monitor and examine the implementation of the Concluding Observations or Concluding Comments in respect of Hong Kong issued by United Nations human rights treaty bodies.' Paragraph 37, ibid. The Subcommittee on Human Rights Protection Mechanisms has held four meetings since its first meeting on 23 March 2007. Its minutes and papers can be found at http://www.legco.gov.hk/english/index.htm

[18] Paragraph 5, 'Initial response to the Concluding Observations of the United Nations Human Rights Committee on the Second Report of the Hong Kong Special Administrative Region (HKSAR) in the light of the International Covenant on Civil and Political Rights' in May 2006 (Paper No. 5/2006, Human Rights Forum). Visited the web-page of the Human Rights Forum on 20 July 2007 at http://www.cmab.gov.hk/en/issues/human_forum.htm See also Legislative Council (LegCo), "Implementation of International Human Rights Treaties: Monitoring Mechanisms," LegCo paper No. CB(2)1957/02-03(03)

[19] Background brief prepared by Legislative Council Secretariat" at 5.

Mechanism was set up in early 2007 to study the matter.[20]

2. The Judiciary System

a. The independence of judiciary has been undermined. *Ng Ka Ling v. Director of Immigration* [21] is the first case that referred to the Standing Committee of the National People's Congress for re-interpretation of the Basic Law after the Court of Final Appeal had handed down its judgment.[22] The HKSAR Government's assertion that the Standing Committee has the power to interpret the Basic Law without, before, during or after a court case severely threatens the rule of law in Hong Kong.

b. Litigation involves substantial amount of legal cost and delay which is unaffordable to ordinary citizens. As such, most victims of human rights violations will leave their complaints private.

c. Recently, there were many judicial review challenging the decisions of public bodies. Many of them alleged violations of human rights. A human rights commission would not duplicate the function of the judiciary. An independent judiciary and national human rights institution (NHRI) would supplement and strengthen the roles of each other without unwarranted duplication. The cost and delay of litigation can effectively deter the victims from filing a case to the court. NHRIs, though can provide easy, friendly and inexpensive access to justice for victims of human rights violations.

3. The Array of Specialized Bodies

a. According to the Paris Principles, NHRIs shall be independent[23] and given "as broad a mandate as possible."[24]

b. The specialized bodies currently in force in Hong Kong with narrow mandate cannot provide effective protection of human rights. [25]

c. On 8 June, the LegCo passed a motion that "urges the Government to set

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[20] See notes 16 and 17.

[21] Ng Ka Ling v. Director of Immigration [1999] 1 HKLRD 577.

[22] In the Concluding Observations of the Human Rights Committee on the First HK report in 1999, '[t]he Committee is seriously concerned at the implications for the independence of the judiciary of the request by the Chief Executive of HKSAR for a reinterpretation of article 24 (2)(3) of the Basic Law by the Standing Committee of the National People's Congress (NPC) (under article 158 of the Basic Law) following upon the decision of the Court of Final Appeal (CFA) in the Ng Ka Ling and Chan Kam Nga cases, which placed a particular interpretation on article 24 (2)(3). The Committee has noted the statement of the HKSAR that it would not seek another such interpretation except in highly exceptional circumstances. Nevertheless, the Committee remains concerned that a request by the executive branch of government for an interpretation under article 158 (1) of the Basic Law could be used in circumstances that undermine the right to a fair trial under article 14.' See Paragraph 10, Paragraph 9 in CCPR/C/79/Add.117 dated 15 November 1999

[23] Id, Article C.

[24] The Paris Principles, Article A(2).

[25] Moreover, the independence and pluralism of these government watchdogs have been called into question. The existing institutional framework cannot satisfy the requirements of the Paris Principles. The jurisdictional restrictions and defects in the appointment system have severely hampered the effectiveness of the specialized bodies in the promotion and protection in human rights.

up a Commission on children to fulfill the obligations under the Convention on the Rights of the Child (CRC).[26] The United Nations Committee on the Rights of the Child also recommends the HKSAR to set up a HRI to monitor children's rights and implement the CRC[27]

d. HKSAR also lacks a high-level mechanism with appropriate powers to implement the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Women's Commission is just an advisory body with little power.[28]

4. The Equal Opportunities Commission (EOC):

a. Limited jurisdiction: The EOC can only enforce the Sex Discrimination Ordinance (Cap 480), the Disability Discrimination Ordinance (Cap 487), the Family Status Discrimination Ordinance (Cap 527), and the forthcoming Racial Discrimination Ordinance[29]. Indeed, it enjoys certain independence as the law expressly stated that '[t]he Commission shall not be regarded as a servant or agent of the Government or as enjoying any status, immunity or privilege of the Government."[30]

b. Under the Sex Discrimination Ordinance, the EOC Chair and members are appointed by the Chief Executive. Actually, the only restriction is that every appointment shall be notified in the Gazette.[31] The appointment process has long been criticized for not open, not transparent, and

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26 The motion is without legislative effect: "urges the Government to set up a Commission on children to fulfill the obligations under the Convention on the Rights of the Child (CRC) to safeguard the well-being of children, and ensure that children's perspectives are fully taken into account in the progress of formulating government policies."

27 On 30 September 2005, paragraph 17 of the Concluding Observations by the United Nations Committee on the Rights of the Child on China's report states that: "[t]he Committee recommends that the State party establish, in the mainland, Hong Kong and Macau SARs respectively, a national human rights institution which includes a clear mandate for the monitoring of children's rights and the implementation of the Convention at national, regional and local levels and in accordance with the Principles relating to the Status of National Institutions (The Paris Principles) contained in General Assembly resolution 48/134 of 20 December 1993. While drawing the State party's attention to the Committee's General Comment No. 2 (2002) on the role of independent national human rights institutions, the Committee notes that such institutions should have a mandate to receive, investigate and address complaints from the public, including individual children, and be provided with adequate financial, human and material resources. In the case of Hong Kong SAR, such an institution could be a specialized branch of the existing Ombudsman's office."

28 In Feb 1999, paragraph 318 of the Concluding comments of the UN Committee on the Elimination of Discrimination against Women on the initial report of HKSAR under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provided that the Committee recommended the HKSAR Government to "establish a high level central mechanism with appropriate powers and resources to develop and co-ordinate a women-focused policy and long-term strategy to ensure effective implementation of the Convention." In January 2001, the HKSAR set up a Women's Commission as an advisory body under a bureau. On 11 May 2001, paragraph 33 of the Concluding Observations of the UN Committee on Economic, Social and Cultural Rights on HK report states that "[t]he Committee urges the HKSAR to provide the Women's Commission with sufficient powers and resources to improve the status of women in Hong Kong and to integrate gender in its policy-making and to ensure wider participation of women in all spheres of public life."

29 The Race Discrimination Bill was introduced to the LegCo in December 2006 and is expected to be passed in July 2008.

30 Section 63(7) of the Sex Discrimination Ordinance, visited the website on 20 July 2007 at http://www.legislation.gov.hk/eng/home.htm Indeed, The funding of EOC was proposed by the Executive and then passed by the Legislature. Different from the former municipal Council, it enjoyed its financial independence by having a proportion of rates (a form of land tax). After the economic crisis in 1997, the Government had to reduce the salary of civil servants and all the related organization like EOC in early 2000s. Indeed, the judiciary is able to maintain its salary without any salary cut greatly due to its financial independence. In 2005, the Government claimed that the expenditure of overseas visit of EOC should be approved by the relevant Government Bureau, EOC opposed as it clearly undermined its independence. In about March 2006, EOC gave back $13,000,000 to the Government as EOC had surplus. It was because the Government treated EOC as an ordinary body receiving government funding so it has to refund a proportion among its surplus. This also undermines the financial independence of EOC.

31 Section 63(3)(9) of the Sex Discrimination Ordinance

excluding civil society participation. [32]

c. Appointment scandals: Whether the degree of independence of specialized commissions in Hong Kong complies with the Paris Principles is questionable. The government's refusal to re-appoint Ms. Anna Wu, perceived as an assertive figure in promoting equality, for a second three-year term, in 2003 has been widely regarded as an attempt to play down the activism of the EOC.[33] It was suspected that the relationship between the government and Ms Wu went on a downhill turn as a result of the EOC's remarkable success in litigations against the government, including the Education Department, over whether the allocation system of secondary school was discriminatory to girls.[34] Instead of re-appointing Ms. Wu, the Government appointed Mr. Michael Wong, a retired judge from the Court of Appeal, despite his lack of experience in the equality issues.[35]

d. Subsequent scandals have attracted widespread criticism of deliberate undermining of EOC's independence by the government and of the policy of appointing persons who are closely linked to the Government.[36]

e. In handling complaints, the EOC does not have adjudicative power, so it may mediate; if mediation fails, the matter may be resolved by going to court. [37]

5. The Office of the Ombudsman

a. Limited jurisdiction: The Ombudsman in Hong Kong is primarily mandated to handle cases of poor or improper administration in the bureaus, department, and non-departmental public bodies, as specified in Schedule 1 of the Ombudsman Ordinance (Cap 397).[38] Conventionally, purely government policies *per se* are outside the Ombudsman's

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[32] The appointments were often criticized as appointed those who do not have track records on human rights and equal opportunities. The NGOs fought for the participation in the selection process by nominating candidates for EOC in 2004 and 2007 but received no response from the Government.

[33] Carole. J. Petersen, "The Paris Principles and Human Rights Institutions: Is Hong Kong Slipping Further Away from the Mark?" (2003) 33 Hong Kong Law Journal 513 at 516-7.

[34] Equal Opportunities Commission v Director of Education [2001] 3 HKLRD 690.

[35] Since Anna Wu left EOC in July 2003, the HKSAR appointed three persons in order, namely Mr. Michael Wong, Ms Patricia Chu and Mr. Raymond Tang within 18 months. The EOC becomes very unstable and faces difficulties in tackling discrimination.

[36] Ravina Shamdasani, "Watchdog faces pressure to resign: Firing breached human rights treaties, says academic", South China Morning Post (24 Oct 2003), C3.

[37] The discrimination laws are complicated and involved substantial legal costs so EOC proposed to set up a tribunal in order to deal with the dispute in a quick, cheap and efficient manner since about 2003. The latest development is that the Administration declined to set up an equal opportunities tribunal but EOC continue studying and promoting its establishment. According to Article 80 of the Basic Law, '[t]he courts of the HKSAR at all levels shall be the judiciary of the Region, exercising the judicial power of the Region.' Hence, only the judiciary has the power to adjudicate under the framework of separation of powers. EOC cannot set up its own tribunal and may only persuade the Executive, the Legislature and the judiciary such proposal. If all of them agree to establish a new tribunal, it is the Executive which drafts the law and then pass by the Legislature. The tribunal must be under the judiciary. The latest development was told by Raymond Tang to us on 12 July 2007 during a meeting between EOC and an alliance of NGOs: Civil Human Rights Front.

[38] Ombudsman Ordinance, Section 7(1)(a).

jurisdiction. However, it is claimed that in certain instances, the Ombudsmen make comments and offer suggestions if the policies under investigation are considered to be outdated or inequitable.[39] There is also no law which will ensure that Ombudsmen take into account international human rights treaties when considering cases within their mandate. Thus, it is left to the discretion of individual Ombudsmen whether or not to indeed take into cognizance international human rights law.

b. The protection of the independence of Ombudsmen was called into question after Mr. Andrew So was not re-appointed in 1998. Mr. So, who had actively pursued a human rights perspective and had publicly expressed his wish to remain in office, was not renewed as Ombudsman despite considerable public support for this. It was widely reported that the Government was unhappy with Mr. So's vigorous investigation into maladministration and his attempts to expand the Ombudsman into a broad-based human rights body.[40]

c. The Office of the Ombudsman is currently reviewing its functions and performance and no report on this has been published yet.

6. The Office of the Privacy Commissioner for Personal Data (PCO)

a. Limited jurisdiction: The mandate of the PCO is severely limited by the Personal Data (Privacy) Ordinance (Cap 486).[41] It does not provide for any conciliation measures, legal advice or legal aid, and does not have powers to bring legal proceedings.

b. In January 2006, Commissioner Raymond Tang left the office and joined the EOC as Chairperson. It set a poor example when the Commissioner left a human rights body within the term of office. This affected the stability and independence of the human rights body.

c. The recent leakage of the complainants' personal information via the internet from the Independent Police Complaints Council (IPCC) showed that the PCO is not effective in improving the data protection function of the Government, public bodies, or the civil services in cyber space.

d. Budgetary constraint since 2003: The net cash flow for the operating activities of the PCO has gradually been reduced from HK$3,231,478 in 2003, $3,170,642 in 2004 to $2,602,341 in 2005.[42] This amounts to a

[39] Alice Tai Yuen Ying, "Letter to Hong Kong Human Rights Monitor" (OMB/CR/31_V, 9 January 2007), at 1.

[40] Gren Manuel, "A New Watchdog in the Jungle," South China Morning Post (27 December 1998).

[41] The PDPO has a limited remit cannot effectively protect the right to privacy enshrined under the Basic Law and ICCPR.

[42] The Office of Privacy Commissioner for Personal Data, Hong Kong, "Annual Report 2002-2003," available at

24.2% decrease in the operational budget, thereby suggesting that the Commission was unable to pursue certain strategies and areas of concern. As to the Government recurrent subvention for PCO, it has been reduced from $ 35,096,287 in 2003, $33,276,000 in 2004, $31,439,000 in 2005 to $31,439,000 in 2006. This amounts to a 10% decrease in the Government subvention.[43]

7. The Police Complaints Mechanism

a. The Complaints Against Police Office (CAPO) is not independent from the Police Force.[44]

b. The IPCC is not a statutory body. It has no power to investigate complaints against the police or to impose penalty.

c. In response to such comments, the HKSAR proposed to make some improvements by incorporating the IPCC.[45]

8. The Commissioner for Covert Surveillance

a. The Commissioner has insufficient power to punish unlawful covert surveillance. He can only "submit reports to the Chief Executive and make recommendations to the Secretary for Security and heads of departments in case of non-compliance."[46]

b. There is criticism that the first commissioner, Justice Woo Kwok-hing, is not as independent as he appears to be, given his long-term appointment as the head of the Electoral Affairs Commission.[47] At this stage, it remains to be seen whether Justice Woo will protect the right to privacy in a just and pro-active manner.

Overall, there *is no public body with overall responsibility for the strategic*

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http://www.pcpd.org.hk/english/publications/annualreport2002.html at 68; The Office of Privacy Commissioner for Personal Data, Hong Kong, "Annual Report 2003-2004," available at
http://www.pcpd.org.hk/english/publications/annualreport2004.html at 63; The Office of Privacy Commissioner for Personal Data, Hong Kong, "Annual Report 2004-2005," available at
http://www.pcpd.org.hk/english/publications/annualreport2005.html at 79.

43 The letter of PCO dated 20 Aug 2007 responded to our draft report on NHRI dated 10 Aug 2007. In the letter, PCO suggested the above paragraph 12c be amended as: "[t]he recent incident on leakage of the complainants' personal information via the internet by the IPCC showed that the Privacy Commissioner for Personal Data took prompt and proactive measures to investigate with a view to ensuring strict compliance of privacy law by the Government and public bodies."

44 In the Concluding Observations of the Human Rights Committee on the First HK report in 1999, '[t]he Committee takes the view that the Independent Police Complaints Council has not the power to ensure proper and effective investigation of complaints against the police. The Committee remains concerned that investigations of police misconduct are still in the hands of the police themselves, which undermines the credibility of these investigations. The HKSAR should reconsider its approach on this issue and should provide for independent investigation of complaints against the police.' See Paragraph 11, see note 22

45 The Executive published the IPCC Bill in Gazette on 29 June 2007 as Legal Supplement No. 3. The main object of this Bill is to incorporate the existing IPCC and to provide for the Council's functions of observing and monitoring the handling and investigation of reportable complaint by Commissioner of Police and its power as such statutory body. See Explanatory Memorandum of the Bill, visited the gazette wit-site on 20 July 2007 at http://www.gld.gov.hk/cgi-bin/gld/egazette/gazettefiles.cgi?lang=e&year=2007&month=6&day=29&vol=11&no=26&header=0&acurrentpage=2&df=0&agree=1&gaz_type=

46 Id, Section 40(b)(iv).

47 Stephen Vines, "Watching the Watchers," The Standard (11 August 2006), available at http://hk-imail.singtao.com/news_detail.asp?we_cat=5&art_id=24805&sid=9264402&con_type=1&d_str=20060811

enforcement of human rights law in Hong Kong.

In the words of Ms. Wu: "None of these bodies, however, focuses on all the related aspects of human rights. The current approach, instead, splits up the human rights problem and distributes it across a variety of organizations, none of which is dedicated to human rights issues as its principal concern. Thus, complaints handling is served from education about human rights. Continuing this fragmented approach would also slow down the development of standards, policy, and solutions. Protection of human rights should not be a peripheral or a fragmented exercise."[48]

NHRIs contribute to the development of good governance, foster a culture of human rights[49], and promote the values of transparency and government accountability. Publicizing human rights abuses can generate public pressure on the government and private individuals to comply with international human rights norms. Human rights education programmes have a far-reaching impact on human rights protection in the long run.

The establishment of NHRIs would satisfy HK's obligation to implement the international human rights instruments which are applicable in HK. Various UN committees have been calling for at least 9 times for the establishment of the HKHRC.

III. Latest developments

1. Human rights portfolio suffered due to governmental restructuring

Mr. Donald Tsang took up his second term as Chief Executive of Hong Kong on 1 July 2007. On the same date, there was a re-shuffling of portfolios among different government policy bureaus. The policy portfolio on human rights was transferred from the Home Affairs Bureau (HAB) to the Constitutional and Mainland Affairs Bureau (CMAB). Despite the assurances from the government, it now currently appears that the human rights work of the Government had been adversely affected. The human rights education working group under the Committee on the Promotion of Civic Education (CPCE) was disbanded in December 2007 and a survey on public perception on human rights proposed by the working group and commissioned by HAB was abruptly terminated by the Government without reasonable justification.

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[48] Anna Wu (1995) "Why Hong Kong Should Have an Equal Opportunities Legislation and a Human Rights Commission," Human Rights and Chinese Values-- Legal, Philosophical and Political Perspectives, Michael C. Davis (ed.) at 198. Anna Wu is the second EOC Chair (1999-2003).

[49] The United Nations Economic and Social Commission for Asia and the Pacific identified eight major characteristics of good governance: participation, rule of law, transparency, responsiveness, consensus-oriented, equity and inclusiveness, effectiveness and efficiency, and accountability.

2. The legislation of Race Discrimination Bill

The Race Discrimination Bill was introduced to the LegCo by the Government in late 2006. It contains many serious problems. Among them, it departs from the existing equal opportunities legislation in that a substantial part of Government acts will not be covered and that there is no provision to bring the exercise of government functions and powers under the regulation of the Bill. The Equal Opportunities Commission will therefore be denied jurisdiction over all these government acts and exercise of government functions and powers not covered by the Bill because it will have no jurisdiction over acts not covered by the Bill.

In the Concluding Observations of the UN Committee on the Elimination of Racial Discrimination (CERD) after its consideration of the report by China in 2001, CERD 'recommended that the Government of the State party and the local authorities of the HKSAR review the existing unsatisfactory situation thoroughly and that appropriate legislation be adopted to provide appropriate legal remedies and prohibit discrimination based on race, colour, descent, or national or ethnic origin, as has been done with regard to discrimination on the grounds of gender and disability.'

In a letter to China dated 24 August 2007, CERD expressed its concern that the Race Discrimination Bill does not appear to be in conformity with the Committee's recommendation. It requested the State Party to submit information on the Bill under its Follow-up Procedure. Unfortunately, China has failed to submit the information required within the deadline.[50]

Immediately before CERD's 72nd Session, the HKSAR announced its readiness to introduce amendments to the Bills but only in respect of the application of the law to bind the government and the definition of indirect discrimination. Furthermore, no detailed amendments were publicized, making it totally uncertain whether the amendments would be cosmetic or not.

On 7 March 2008, CERD issued a letter to the Chinese Government under its Early Warning Procedure, criticizing the Race Discrimination Bill on its narrow definition of racial discrimination, limited applicability to actions of public authorities and institutions, and the omission of racial discrimination on the basis of language, nationality and residency status. It set 19 July 2008 as the deadline for the HKSAR to amend the Bill to bring it in line with Hong Kong's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination. A government paper to LegCo published subsequently makes it clear that the HKSAR Government, while claiming to intend to amend the Bill to bind the

[50] It is not clear whether the Hong Kong Special Administrative Region Government has failed to prepare the requested information, or that China, as the State Party, has refused to transmit the information prepared by the HKSAR Government.

Government, maintains "to expand the scope of the Bill to cover all government functions would cause uncertain and potentially far-reaching adverse implications on the Government's ability to make and implement policies: any policy or practice could be challenged in the courts" and the Government refused to let the Bill bind government exercise of functions and powers.

3. The establishment of Family Council: rights of women and children being sidelined

In May 2001 the UN Committee on Economic, Social and Cultural Rights, while welcoming the establishment of the Women's Commission that January, also urged the HKSAR government to provide sufficient power and resources to the Council (Appendix I).

In September 2005, the UN Committee on the Rights of the Child called on the establishment of a Commission for Children in Hong Kong (Appendix I). On 8 June 2007, a non-binding motion was passed in the Legislative Council to urge the HKSAR government to set up a Commission on Children (Appendix II).

In the 2007 Policy Address, the Chief Executive Donald Tsang stated that, 'I announced in my last Policy Address the establishment of a Family Council. The Council will be set up this year and will be chaired by the Chief Secretary for Administration. It will implement policies and initiatives relating to family support in the next two years.'

Following the Policy Address, Tsang Tak-shing, the Secretary for Home Affairs Bureau, announced that the Government would consult the Family Council and the Elderly Commission, the Women's Commission and the Commission on Youth on how to fully integrate them into the structure of the Family Council by 31 March 2009.'[51] In other words, the Government will dismantle the Women's Commission in March 2009, a move that has been criticized as a regression on the implementation of the CEDAW, and to undervalue the importance of women's affairs.

On the other hand, various NGOs have submitted a joint-statement to the Welfare Services Panel of the Legislative Council, expressing their disappointment because 'there is no mention of children throughout the Terms of Reference of the Family Council, while elderly, youth and women have been included.'[52]

These recent developments indicate that the HKSAR Government has given low priority to the promotion and protection of human rights. It does not bode well

[51] Speech of Tsang Tak-shing, the Secretary of Home Affairs Bureau on 25 October 2007. (Chinese only)

[52] Submission to Welfare Services Panel of the Legislative Council: Our views on the Family Council by the Alliance for Children's Commission on 6 February 2008.

for the prospect of it agreeing to the establishment of a human rights institution in the foreseeable future.

IV. Proposals for HKHRC

1. Mandate

"Human rights" should be defined with reference to the following six UN human rights treaties which currently apply to the HKSAR[53] and includes other domestic legislations. [54]

The institutional framework for promotion and protection of human rights in Hong Kong ("the institutional framework") should be capable of investigating complaints against both public authorities and private individuals[55]; and handling complaints and conducting investigations against all the law enforcement agencies in the absence of other independent commissions monitoring them.

2. The Functions of the HKHRC:

a. Promoting awareness and educating about human rights
   i. To undertake research;
   ii. To work with the media and identify areas of concerns which would benefit from media involvement;
   iii. To actively organize promotional events and encourage community initiatives;
   iv. To advocate for education programmes at primary, secondary and tertiary levels;
   v. To press all governmental departments to introduce human rights training for staff and provide human rights training courses for government officials;

b. Advising and assisting the Government
   i. To comment on (a) legislation proposals with respect to their compliance with international and domestic human rights obligations and their

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53 They include (a) The International Covenant on Economic, Social and Cultural Rights; (b) The International Covenant on Civil and Political Rights; (c) The International Convention on the Elimination of All Forms of Racial Discrimination; (d) The Convention on the Elimination of All Forms of Discrimination against Women; (e) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and (f) The Convention on the Rights of the Child.

54 They include The Hong Kong Bills of Rights Ordinance (BORO); The anti-discrimination Ordinances (Including the Sex Discrimination Ordinance, the Disability Discrimination Ordinance, and the Family Status Discrimination Ordinance and potentially the forthcoming Race Discrimination Ordinance) and Any other legislation having incorporated any of the above international human rights treaties. ** Such jurisdiction should be applicable to the functions in relation to promotion and education of human rights and advising and assisting the Government.

55 International Council on Human Rights Policy and the Office of the United Nations High Commissioner for Human Rights, "Assessing the Effectiveness of National Human Rights Institutions," (Switzerland: 2005) ISBN 2-940259-67-4 at 19 (the "Assessing the Effectiveness of NHRIs"); Commonwealth Secretariat, "National Human Rights Institutions: Best Practice," (London: 2001) at 18 (the "Best Practice").

implications for human rights,[56] (b) the inadequacies and defects of existing legislation and to report to the relevant government agencies or the legislature[57] and assist in the drafting of new legislation[58];

ii. To provide advice on national policies[59], administrative regulations and practices[60,] national policies to international human rights issues[61] and judicial processes[62] with potential human rights implications;

iii. To call for acceptance and application of international treaties[63] and incorporation of international treaties to which Hong Kong is a party into domestic laws and practices;[64]

iv. To comment on human rights violations in the private sectors[65] and the development of a national action plan on human rights[66];

v. To assist the HKSAR Government in the course of preparing scheduled reports to the UN and to comment on the report in public.

c. Investigating human rights violation and handling complaints

Handle complaints where the alleged violation falls within the remit of the six major applicable international treaties, the BORO, the anti-discrimination Ordinances and any other legislation with reference to the Basic Law. The complaints-handling function of the institutional framework for protecting human rights in Hong Kong should not be restricted to discrimination cases.

3. The Powers of the HKHRC:

a. The power to visit and to inspect places;

b. The power of inquiry (the power of the NHRIs to compel any person or any organization to answer questions regarding compliance with domestic or international human rights requirements either in writing or in person);

c. The power to conduct investigation upon receipt of complaints and investigations suo moto (power to pursue the subject of inquiry on its own initiative);

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56 Office of the High Commissioner for Human Rights, "National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights, Professional Training Series No. 4 (Geneva: United Nations, 1995), paragraph 195 (the Handbook).

57 Id, paragraph 196.

58 Id, paragraph 197.

59 Id, paragraph 200.

60 Id, paragraph 204.

61 Id, paragraph 206.

62 Id, paragraph 205.

63 Id, paragraph 209.

64 Id, paragraph 210.

65 Id, paragraph 203.

66 Id, paragraph 215.

d. The power to compel evidence;
e. The power to impose financial administration sanctions for failure to co-operate;
f. The power to protect witnesses;
g. The power to make determinations and enforce order (for human rights violations of the Basic Law, ICCPR, the BORO, anti-discrimination ordinances and other kinds of legislation with reference to the ICCPR or the ICESCR);
h. The power to provide direct legal advice and assistance in strategic cases;
i. The power to bring cases in its own name;
j. The power to intervene in legal proceedings as amicus curiae (a "friend of the court").

4. Working Mechanisms

The two most important features for an NHRI to function effectively are high-quality members and staff and independence.[67] Independence is the most important effectiveness factor of NHRIs.[68] Effective NHRIs should act independently of the Government, party politics, and all other similar factors that may compromise the NHRI's independence.

Independence can be achieved through legal and operational autonomy; financial autonomy, appointment and dismissal procedures, accountability and relationships with other institutions; and composition of personnel.[69]

5. Legal and operational autonomy

a. Established by a statute,
b. Directly report to the Chief Executive or the LegCo, and
c. Enjoy full-fledge operational autonomy - Executives cannot issue any directives or administrative orders to the HKHRC.

6. Financial autonomy

a. No direct control of funding from the Executive[70];
b. A body of the LegCo, for example a standing panel[71], should be

[67] Commonwealth Secretariat, "National Human Rights Institutions: Best Practice," (London: 2001) at 18 (the "Best Practice") at 14. It also stated that "Individual members should possess the requisite expertise, integrity, experience and sensitivity to adequately protect and promote human rights. NHRI must be free to perform their mandates and functions without outside restraint or improper influence."

[68] Best Practice at 5.

[69] Handbook, paragraphs 6-8.

[70] HKSAR is now considering the mechanism of funding to the judiciary from the executive that may ensure judicial independence. HRI should enjoy the financial autonomy equivalent to or no less than those enjoyed by our judiciary.

responsible for overseeing the formulation of the budget of the HKHRC; and

c. Sufficient funding.

7. Appointment and dismissal procedures

a. To handle the selection procedure of the Chief Commissioner of the HKHRC, a steering committee comprising of Secretaries of the relevant Bureaus, members of the LegCo, officials of the relevant government departments, NGOs, judges, human rights experts and professionals should be established.[72]

b. Commissioners should be selected on the basis of "proven" expertise, knowledge and experience in the promotion and protection of human rights.

c. Commissioners should be accorded a rank and salary comparable to that of senior judicial officials.[73]

d. The terms of office of Commissioners should be a fixed term of 5-7 years, with the chance of reappointment of an additional term of the same duration.

e. Commissioners should enjoy immunity from civil and criminal proceedings for actions performed in their official capacity,[74] subject only to laws related to judicial review.[75]

f. The power of dismissal and the circumstances under which a member can be dismissed should be of a serious nature and specified in the legislation.[76]

g. To enable NHRI members to undertake their duties as independent professionals, they should be appointed to full-time positions. It should consist of at least three leading members who serve on a full-time basis. The salaries of members of HRI should be linked to, and reviewed in line with, the salaries of members of the judiciary.[77]

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[71] Before 1 July 2007, HKSAR Home Affairs Bureau was responsible for human rights matters. After that, the newly arranged bureau called Mainland and Constitutional Affairs Bureau takes care of human rights matters. We are worried that those government officials deal with mainland affairs may be easier to be influenced by the Central Authorities on human rights issues.

[72] Best Practice at 9.

[73] Best Practice at 13.

[74] Handbook paragraph 81; Best Practice at 17.

[75] Best Practice at 17.

[76] Handbook, paragraph 80.

[77] Best Practice at 13, 14.

8. Accountability and relationships with other institutions[78]

a. The NHRI should actively evaluate its effectiveness and incorporate its results together with its strategic plan in its annual report.

b. The Legislature should hold in-depth discussion on the NHRI annual report.

c. The NHRI should hold public hearings and for a to discuss its annual report.

d. The Executive should respond in a timely manner to recommendations made by the NHRI.[79]

e. The NHRI should play a role complementary to that of the courts.

f. The decisions of NHRI should be subject to judicial review.

9. The composition of the members of the HRI

a. The Paris Principles require that the composition of commissioners reflects a degree of sociological and political pluralism, representing the views of NGOs, trade unions, professional organizations and trends in philosophical and religious thought[80]. Additionally, the composition should reflect "gender balance, the ethnic diversity of the society and the range of vulnerable groups" in the society.[81]

b. A pluralistic composition, bearing a broad range of expertise and experience on human rights issues, should also "ensure that each Commissioner would have the benefit of drawing on the expertise of other Commissioners."[82]

V. Recommendations

There are three main categories of institutional framework of human rights promotion and protection: (i) the single and integrated commission model, (ii) the dual-commission model consisting of a HRC and an equal opportunities commission; and (iii) the multiple-commission model.

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[78] We basically accept the proposals set out in Chapter IV of the Best Practice is a good reference on this issue. We highlight some important points in the above only.

[79] There is a very obvious example that the HKSAR executive does not act timely to the recommendations of the HRI. In Feb 1999, the EOC recommended various amendment proposals (they are mainly obvious loopholes and some technical irregularities) to the Sex and Disability Discrimination Ordinances. In Oct 2000, the HKSAR agreed in principle on many proposals. Indeed, up to now, HKSAR refuses to have any plan to amend the law. She even refuses to draft the Race Discrimination Bill on the basis of the EOC proposal. HKSAR only agrees to make one amendment to Sex Discrimination Ordinance: render hostile learning environment unlawful (in sexual harassment) and also proposes hostile learning environment in racial harassment in unlawful.

[80] Handbook paragraph 82; See also the Paris Principles, Section 4.

[81] Best Practice at 15.

[82] Eric Metcalfe, "A Human Rights Commission: Structure, Functions and Powers—Joint Committee on Human Rights," (8 May 2003), JUSTICE's website, available at http://www.justice.org.uk/images/pdfs/hrcommission.pdf, paragraph 18.

1. The dual-commission model

a. This establishes a general HRC and an equal opportunities commission that is responsible for general human rights and equality rights respectively. These two commissions could also divert some of their functions to other independent institutions.

b. The model guarantees particular focus and resources to the equality agenda irrespective of political, social and economic atmosphere. It can prevent the possible loss of focus on the equality agenda in favour of broader and often more political human rights issues.

c. As a result of the 1998 Good Friday Agreement, the Northern Ireland and the Republic of Ireland have established their respective Equality Commission as well as their HRC.[83] Because of the deeply-rooted racism and the political disputes between the Republic of Ireland and the United Kingdom, the adaptation of the dual-commission model in the two places has been widely supported.

d. The major objection is the considerable overlap of jurisdiction between the HRC and the equality commission, particularly in areas such as domestic abuse, forced marriages, and children's rights. The interconnected nature of human rights and equality rights may lead to confusion in the mind of the public and possibly to conflicting decisions from the two commissions.

e. However, a clear division of labour and a co-operative working relationship between the two commissions is achievable. To do so, the relationship and allocation of functions between the two commissions must be clearly set out and delineated in writing.[84]

2. International trend

a. Many Commonwealth countries including New Zealand, Australia, Canada and the United Kingdom have moved away from the multiple-commission model in the last decade to the single and integrated commission model.

b. However, the single human rights commission granted with too wide a scope of power and functions, may perpetuate internal tension across strands and lose focus on the equality rights. As a result, some major jurisdictions adopting the single commission model have established several specialized independent commissions.

c. In Australia and New Zealand, the Privacy Commissioner and Children's

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83 The Good Friday Agreement was signed on 10 April 1998, at Belfast, Northern Ireland, and was agreed upon by representatives of the two governments and eight of the ten parties entitled to take part in the negotiations. Agreement Reached in the Multi-Party Negotiations, (10 April 1998), Rights, Safeguards and Equality of Opportunity, Human Rights, New Institutions in Northern Ireland at 5 [hereinafter Good Friday Agreement].

84 UCL Survey at 47.

Commissioner which are independent from the central HRC, were established in the late 1990s.

d. In New Zealand, when the Human Rights Commission Act 1977 was introduced, the Ombudsman was made a member of the HRC. The Human Rights Act in 1993 revoked the right of the Ombudsman to act as a Commissioner.

e. In 2002, the Ministry of Justice in New Zealand reconsidered whether or not the Privacy, Children's and Health and Disability Commissioners should be merged within the Commission. In the end, it opined that it would be more effective for these separate offices to operate outside the commission structure.[85]

It is more cost effective for Hong Kong to follow the single commission model, whereby the HKHRC would take up almost all the functions of the institutional framework. The best practice suggests that: "In small and developing states or states with very limited resources, it may be more practical to confer the mandates of both a NHRI and an Ombudsman upon a single institution."[86]

If a single and integrated commission is to be established, the HKSAR government should consider the extent of decentralization (the areas of concern to be diverted to other independent institutions) and the issue of whether the existing specialized commissions should be absorbed.

Given the potential difficulties faced by the single commission model and the recent trend of decentralization in New Zealand and Australia, a dual-commission model is perhaps, a more suitable and feasible institutional framework for Hong Kong.

The dual-commission model strikes a balance between the multiple-commission and the single commission models. It allocates special focus to both equality rights and freestanding human rights, while providing the two commissions with a manageable remit and a reasonable expectation of co-operation between the two commissions. In other words, the dual-commission aims to benefit from the advantages of the single commission model and to minimize the drawbacks at the same time.

The dual-commission model also provides a two-tier protection for human rights. In the dual-commission model, the equality agenda is less likely to be compromised by the concurrent political climate and emergency of political human rights issues.

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85 Ministry of Justice, New Zealand, "Re-Evaluation of the Human Rights Protections in New Zealand," (October 2000), available at http://www.justice.govt.nz/pubs/reports/2000/hr_reevaluation/index.html at 14.

86 Best Practice at 4. It is obvious that Hong Kong is not a place with limited resources. Economically, Hong Kong is a developed region. Hence, we prefer the dual commission model.

Firstly, under the notion of "one country, two systems", plenty of constitutional issues wait to be resolved. Freestanding human rights issues, particularly those related to the relationship between the Chinese Central Authorities and the HKSAR Government, can be very politically sensitive and may subsequently attract intervention from the Chinese Central Government. The caseload of freestanding human rights issues will likely be very heavy.[87]

Secondly, given the track record of human rights actions of the HKSAR Government in the scandals relating to appointments to the EOC, the Privacy Commissioner and Ombudsmen, the HKSAR Government may attempt to control the HKHRC and other HRIs. Even if the Government does not exercise visible control over the HKHRC, the single commission could suffer from self-restraint and pursue less politically sensitive issues like discrimination cases against the private sector, rather than areas involving civil and political rights.

Thus, the dual-commission model would be more capable of addressing both equality rights and freestanding human rights than the single-commission model. Though we prefer the dual-commission model, we will not insist on a particular model and oppose other options. Most important of all, the HKSAR should move forward and admit that there is a genuine need for such an independent human rights commission.

3. Short-term Alternatives to setting up of the HKHRC

This section discusses alternatives to the establishment of the HKHRC and the effectiveness of each. It may serve as a road map leading to establishment of HKHRC or as a measure to improve the human rights protection mechanism when the HRC can be realized within a short period of time.

4. An activated Office of Ombudsman

a. In the absence of an explicit human rights mandate, a classic Ombudsman can involve international human rights norms by actively interpreting the mandate to take into consideration the human rights laws in processing investigations.

b. Without explicit human rights mandate in the enabling legislation, the extent to which the activated Ombudsman effectively promotes and protects human rights is highly dependent on the holder's knowledge of human rights and political orientation. There lacks institutional guarantee that the Ombudsman will pursue promotion and protection in pure human rights cases in the absence of an explicit human rights mandate.

[87] Patrick Yu, the former Commissioner of RDC in Northern Ireland is fully in support of the dual-commissions model.

c. Activating the Office of the Ombudsman is the most conservative alternative because it involves no institutional improvement. As such, it is not very desirable alternative for Hong Kong given the frequent appointment scandals, whereby the government has been suspected to control the orientation of the independent statutory committees by appointing pro-government, conservative and rights-unfriendly commissioners and members.

5. Enlarging the jurisdiction of the current Office of Ombudsman

a. For long, the Council of Europe and various academics have encouraged entrusting the Ombudsmen with human rights matters.

b. A human rights Ombudsman enhanced by amendment of laws to cover human rights matters provides a structural guarantee to the protection of human rights. This alternative is more secure than simple activation of the existing Office of Ombudsman without enlarging its scope of work.

c. However, an Ombudsman as a substitute for a human rights commission may have several limitations. First, it is unclear whether the human rights Ombudsman can deal with free-standing human rights violations committed by the public authorities.

d. Second, the core business of the Office of Ombudsman is the pursuit of administrative justice and to provide people with an opportunity to complain about "maladministration" by public officials. As a result, the human rights performance of the private sector does not receive the attention that it deserves.

e. To make matters worse, the impact of privatisation has significantly affected the work of the Ombudsman in the sense that an increasing amount of government work is and will continue to be out of the scope of the Ombudsmen.[88] That means an increasing area of public administration will not be covered by the Ombudsman.

f. The existing Office of Ombudsman, as a body dealing with the complaints against public authorities, is familiar with the culture and standard operation procedure of the government. To overcome difficulties, transforming the existing Ombudsman into the HKHRC could result in transfer of knowledge and the skills. This means that the HKHRC should be able to take up the role as an effective NHRI within a shorter period of time.

[88] John Hatchard at 12.

6. Creating a research-based local human rights center

a. National human rights centers have been widely developed in Northern Europe where strong Ombudsmen are also present to deal with individual complaints against public authorities. For examples, these centers exist in Denmark, Germany and Norway.

b. The Danish Institute for Human Rights, the NHRI in Denmark, is part of the Danish Centre for International Studies and Human Rights. The work of the Danish Institute for Human Rights includes research, analysis, information distribution, education, documentation, and complaints handling, as well as a large number of national and international programmes.

c. The weakness of research-based human rights centers is that they lack complaints-handling power and enforcement power. These centers do not possess the legal power to ensure that the government and private entities comply with either domestic or international human rights laws. Nevertheless, in the long run, research-based human rights centers can have an impact on public policy by arousing public concern through publication of in-depth studies.

d. Whether the recommendation to form a research-based human rights center will be adopted and implemented depends heavily on the commitment to human rights protection on the part of the government. Although the culture of respect for human rights is a new concept to the entire community in Hong Kong and hence remains weak, enforcement powers are essential to spark the awareness of protection for human rights. As such, this alternative is less desirable than that of the human rights Ombudsman.

7. Setting up an advisory panel/committee under the Legislature/Chief Executive

a. As an interim arrangement to the establishment of the HKHRC, an advisory working group could be set up under the Legislature or its standing Panel,[89] or alternatively, directly under the Chief Executive.[90]

b. Between an advisory working group set up under the Legislature and one set up under the Chief Executive, the advisory former is preferable. A working group will usually have a higher level of transparency. As a result, civil society can more easily access it to express opinion. Its open

[89] Since 1 July 2007, the Mainland and Constitutional Affairs is established to be responsible for human rights affairs. Home Affairs Bureau is no longer responsible for human rights affairs after that date. In 2007-2008, the LegCo may have corresponding change in the terms of reference of the Penal.

[90] An example of a high level body chaired by the Chief Executive is the Commission on Strategic Development.

meetings would also allow information to be released, hence arousing public interest and educating the community on the issues.

8. Weighing the options

Activation of the Office of Ombudsman without amending its mandate is the most conservative alternative because it involves no legal or institutional guarantee on human rights protection. As such, this alternative is not desirable in Hong Kong where the commitment to human rights protection remains limited in scope and weak in magnitude.

The expansion of the jurisdiction of the Office of Ombudsman alone is not satisfactory in light of trend of privatization of public services. Research-based human rights centers are not desirable either because they lack powers to handle complaint and to make any order.

Nevertheless, the expansion of the jurisdiction of the Office of Ombudsman to cover human rights violations, alongside a new researched-based human rights institute, is a desirable alternative. A human rights Ombudsman and a research-based human rights center can supplement each other and hence promote and may protect human rights in a similar way as the dual-commission model.

If this proposal is also rejected, then the expansion of the jurisdiction of the Office of Ombudsman to encompass human rights violations, accompanied by establishment of an advisory working group under the LegCo or Home Affairs Panel, could facilitate a culture of respect for human rights.

In 2007-08, the most important matter for civil society to address will be to push the government to move its position on the NHRI through the newly established Sub-committee on Human Rights Protection Mechanism under the Legislature. Next is the need to fight for universal suffrage of the Chief Executive and the Legislature in the spirit of public consultation.[91]

VI. Acknowledgement

We want to show our gratitude to those In academia, NGOs and HRC who commented on our draft report, in particular, Professor Michael Davis, Professor Raj Kumar, Amnesty International (HK Section), the Association for the Advancement of Feminism in HK, Civil Human Rights Front, FORUM-ASIA, HK Women Coalition on Equal Opportunities, and the Office of the Privacy Commissioner for Personal Data.

[91] In July 2007, the Green Paper on the Constitutional Development was published on 11 July 2007 (available at http://www.cmab-gpcd.gov.hk/en/consultation/index.htm) for public consultation up to 10 October 2007. It sets out many options for Hong Kong people top express their views on the electoral arrangements of Chief Executive and the LegCo.

Appendix I: UN Recommendations on the setting up of HRI

1. In the Concluding Observations of the Human Rights Committee on the First HK report on the implementation of the International Covenant on Civil and Political Rights in 1999 (the first report after the establishment of the HKSAR in 1997), '[t]he Committee remains concerned that there is no independent body established by law to investigate and monitor human rights violations in HKSAR and the implementation of Covenant rights.'[92]

2. In the Concluding Observations of the Committee on the Elimination of Discrimination against Women on the Report by China in 1999, the Committee recommended that the HKSAR Government 'establish a high-level central mechanism with appropriate powers and resources to develop and coordinate a women-focused policy and long-term strategy to ensure effective implementation of the Convention.'[93]

3. In the Concluding Observations of the Committee on Economic, Social and Cultural Rights considering the First HKSAR Report in 2001, '[t]he Committee regrets that the HKSAR has not implemented a number of the recommendations in its concluding observations of 1996, despite the delegation's assurance that these must be given effect. The Committee wishes to reiterate in particular its concern on the following issues: …d) The failure of the HKSAR to establish a national human rights institution with a broad mandate and its failure to establish adequate alternative arrangements for the promotion of economic, social and cultural rights;' 'The Committee urges the HKSAR to establish a national human rights institution consistent with the Paris principles (1991)[94] and the Committee's General Comment No. 10. Until such an institution is established, the Committee urges the HKSAR to enhance its measures for the promotion of economic, social and cultural rights.'[95] 'The Committee urges the HKSAR to provide the Women's Commission with sufficient powers and resources to improve the status of women in Hong Kong and to integrate gender in

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92 Paragraph 9 in CCPR/C/79/Add.117 dated 15 November 1999. All the Concluding Observations on HKSAR reports can be found over the website at http://www.cmab.gov.hk/en/press/reports_human.htm

93 Paragraph 318 in A/54/38 dated 5 February 1999.

94 "The Principles relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights" (1991), General Assembly resolution 48/134, Annex, available at http://www.ohchr.org/english/law/parisprinciples.htm (the Paris Principles). The Paris Principles, released by the Geneva Centre for Human Rights in 1991, and subsequently endorsed by the 1992 Commission on Human Rights and the 1993 Vienna Conference, set forth the basic standards of competence, responsibility, composition, and mode of operation for NHRIs.

95 Paragraphs 15 and 32 in E/C.12/1/Add.58 dated 11 May 2001

its policy-making and to ensure wider participation of women in all spheres of public life.'[96]

4. In the Concluding Observations of the Committee on Economic, Social and Cultural Rights considering the Report by China in 2005, '[t]he Committee regrets that HKSAR has not implemented a number of the recommendations contained in its concluding observations of 2001. The Committee wishes to reiterate in particular its concern on the following issue:...(b) the absence of a human rights institution with a broad mandate, while noting HKSAR's position that the Equal Opportunities Commission has comparable functions'. 'The Committee once again urges HKSAR to implement the Committee's relevant suggestions and recommendations contained in its concluding observations of 2001 (E/C.12/1/Add.58), as well as the current ones, and to undertake whatever relevant concrete measures may be necessary towards their implementation.'[97]

5. In the Concluding Observations of the Committee on the Rights of Child on the Report by China in 2005, "[t]he Committee notes the information that various ministries on the mainland may receive complaints from the public, but it is concerned at the lack of an independent national human rights institution with a clear mandate to monitor the implementation of the Convention. It similarly regrets the absence of an independent national human rights institution with a specific mandate for child rights on the mainland and the Hong Kong and Macau SARs.'**[98]** 'The Committee recommends that the State party establish, on the mainland and the Hong Kong and Macau SARs, national human rights institutions with a clear mandate to monitor children's rights and implement the Convention at national, regional and local levels in accordance with the Principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles) annexed to General Assembly resolution 48/134 of 20 December 1993. Drawing the State party's attention to the Committee's general comment No. 2 (2002) on the role of independent national human rights institutions, the Committee notes that such institutions should have a mandate to receive, investigate and address complaints from the public, including individual children, and be provided with adequate financial, human and material

[96] Paragraph 17 in E/C.12/1/Add.58 dated 11 May 2001.

[97] Paragraphs 78 and 90 in E/C.12/1/Add.107 dated 13 May 2005

[98] Paragraph 16 in CRC/C/CHN/CO/2 dated 24 November 2005.

resources. In the case of the Hong Kong SAR, such an institution could be a specialized branch of the existing Ombudsman's Office."[99]

6. In March 2006, in the Concluding Observations of the Human Rights Committee on the HK report, '[i]t (the Human Rights Committee) remains concerned regarding the limited mandate and powers of the Ombudsman, including its lack of oversight function of the police, and the Equal Opportunities Commission (article 2). The HKSAR should consider the establishment of an independent human rights institution compliant with the Paris Principles.'[100]

Appendix II: Events in the debate on the establishment of a human rights commission and its substitute body, the EOC

June 1990	The ad hoc group concerning the legislation of the BORO urged the Government to study the feasibility of a Human Rights Commission in Hong Kong.[101]
June 1991	During the second reading of the BORO, the ac hoc group was divided on the functions and terms of the Human Rights Commission. Nevertheless, the group believed that speedy legislation of the BORO should be accorded with the highest priority and such disagreement should not delay the passage of the BORO. Hence, the ac hoc group abandoned the proposal to establish the Human Rights Commission and urged the Government to fulfill its promise to study the matter and come up with a conclusion "*soon*" after the enactment of the BORO.[102]
July 1993	Former legislator Ms. Anna Wu (LegCo Member 1992-95) initiated a Legislative Council motion debate on the enactment of antidiscrimination legislation and the establishment of a Human Rights and Equal Opportunities Commission.[103] The motion gained the support from the Legislative Council at that time.[104]
March 1994	Ms. Anna Wu introduced two private member bills, namely the Equal Opportunities Bill, which would have prohibited discrimination in private

[99] Paragraph 17 in CRC/C/CHN/CO/2 dated 24 November 2005.

[100] Paragraph 8 in CCPR/C/HKG/CO/2 dated 30 March 2006

[101] LegCo's meeting, "Official Record of Proceedings," (5 June 1991) at 52.

[102] Id at 29.

[103] LegCo's meeting, "Official Record of Proceedings," (14 July 1993) at 4591-5.

[104] Id at 4633.

	sector on several different grounds including race, sex, disability, age, and sexuality[105], and the Human Rights and Equal Opportunities Commission Bill which called for the establishment of a general human rights commission.
April 1994	Empowered by Clause XXIV of the Royal Instructions to oppose a private member bill on which incurred public expenditure, the former Governor Chris Patten declined to give permission to the Human Rights and Equal Opportunities Commission Bill. During his address to the LegCo on the United Kingdom House of Commons Foreign Affairs Committee's "*Report on Relations between the United Kingdom and China in the period up to and beyond 1997",* Patten rejected the need to establish a human rights commission by arguing that human rights can be effectively protected in Hong Kong without establishing a Human Rights and Equal Opportunities Commission and some NHRIs in other jurisdictions had remained toothless.[106]
October 1994	Instead of supporting the Equal Opportunities Bill drafted by Anna Wu, the Government opposed it by introducing the Sex Discrimination Bill and the Disability Discrimination Bill.
1995	The Sex Discrimination Ordinance (Cap 480) and the Disability Discrimination Ordinance (Cap 487) were enacted.
1996	The Equal Opportunities Commission was established to enforce the Sex Discrimination Ordinance and the Disability Discrimination Ordinance.
1997	The Family Status Discrimination Ordinance (Cap 527) was enacted and the jurisdiction of the EOC is enlarged to include family status discrimination.
1997-2005	HKSAR Government rejected the need to establish a general human rights institution by continuously pointing to the independent judiciary, the legal aid system, the vigilant media, and various specialist institutions, including the Ombudsman, the Privacy Commission, and the Equal Opportunities Commission.[107]
November 1999	The former High Commissioner of Human Rights, Ms. Mary Robinson, visited Hong Kong and called for the establishment of a NHRI in accordance with the Paris Principles in Hong Kong.

[105] Anna Wu, "Equal Opportunities Legislation and a Human Rights Commission for Hong Kong, A Proposal," March 1994. See also Anna Wu, Human Rights and Equal Opportunities Commission Bill 1994.

[106] Legislative Council, "Official Record of Proceedings," (21 April 1994) at 3299.

[107] Legislative Council, Panel on Home Affairs, "Background brief prepared by Legislative Council Secretariat Monitoring mechanism for the implementation of United Nations human rights treaties in the Hong Kong Special Administrative Region," (7 May 2003), LC Paper No. CB(2)1999/02-03(02) Ref: CB2/PL/HA, at 3-5. See also Legislative Council Panel on Home Affairs, (May 2006), LC Paper No. CB(2)2219/05-06(01) at 2.

May 2004	The Chairman of the Panel of Home Affairs of the Legislative Council concluded that Panel's Meeting by requesting the Administration to take note of the suggestion of conducting a public consultation on the establishment of a human rights commission in Hong Kong.[108]
September 2004	"Legislating Against Racial Discrimination: a Consultation Paper" was released.[109] This provided an opportunity for a review on the implementation mechanism of the anti-discrimination laws.
April 2005	In response to a question posed by the UN Committee on Economic, Social and Cultural Rights during the consideration of the initial report of China, the delegation of the HKSAR Government, Mr. Stephen Fisher, noted that the Government was "currently considering the establishment of a human rights commission."[110]
March 2006	The Secretary for Home Affairs, Dr Patrick Ho, in the motion debate on "Implementing the recommendations of the United Nations Human Rights Committee" at the Legislative Council said:- "We have acted on past recommendations of the Human Rights Committee and will act on any future ones to the extent that we judge feasible and desirable…An example of a long-standing recommendation that has yet to be put into effect is the establishment of a human rights commission. We have not, as some have asserted, ignored the Committee. *We have kept the matter in view, testing its implications against the criteria I have rehearsed and ready to move forward when the conditions are met.* Tentative steps have already been taken in that direction with the establishment of new public forums for regular and formal exchange of views between Government and non-governmental organizations. *Options for further development are under exploration, though we are not – as yet ready to commit to a timetable*."[111]
March 2006	In the hearing before the UN Human Rights Committee, the HKSAR Government promised to review the institutional framework for human rights promotion and protection in Hong Kong. Yet, no public consultation of such a review has been conducted and no report has been published.

[108] Legislative Council, Panel on Home Affairs, "Minutes of meeting," (14 May 2004), LC Paper No.CB(2)2663/03-04 Ref: CB2/PL/HA.

[109] Home Affairs Bureau, the Hong Kong Special Administrative Region Government, "Legislating Against Racial Discrimination: A Consultation Paper," (September 2004).

[110] Committee on Economic, Social and Cultural Rights, "Press Release: Committee on Economic, Social and Cultural Rights Reviews Initial Report of China," (29 April 2005), available at http://193.194.138.190/huricane/huricane.nsf/0/EF0EBFFDB1BD26EFC1256FF5002B3FBE?opendocument

[111] Press Release of the HKSAR Government, "LC: SHA's speech in the motion debate on "Implementing the recommendations of the United Nations Human Rights Committee," (1 March 2006).

May 2006	The HKSAR Government have apparently returned to the conservative position and stated that the establishment of a general human rights commission is unnecessary.[112]
Oct 2006	The HKSAR announced that a Family Council would be established.
Dec 2006	The HKSAR Government introduced the Race Discrimination Bill into the Legislative Council.
Feb 2007	The Home Affairs Penal of the Legislative Council decided to set up a Subcommittee on Human Rights Protection Mechanisms under it.
Jun 2007	A motion "That this Council urges the Government to set up a Commission on Children to fulfill the obligations under the United Nations Convention on the Rights of the Child, safeguard the well-bring of children, and ensure that children's perspectives are fully taken into account in the process of formulating government policies" was passed by the Legislative Council with unanimous votes from all the attending legislators.
Jul 2007	The policy area of human rights was transferred from the Home Affairs Bureau to the Constitutional and Mainland Affairs Bureau (CMAB). Human rights education remains the responsibility of the HAB, but the human rights education working group was disbanded. The HKSAR Government decided to terminate, without any proper justifications, the work on the perception survey on human rights after the transfer of the policy portfolio on human rights.
Aug 2007	The UN Committee on the Elimination of All Forms of Racial Discrimination expressed that the Race Discrimination Bill does not appear to be in conformity with the Committee's recommendation. The Committee requested the state party to provide information and to explain the Race Discrimination Bill.[113]
Oct 2007	The HKSAR Government announced that the Family Council would be set up this year, and to it would study how to integrate the Elderly Commission, the Women's Commission and the Commission on Youth into the structure of Family Council by 31 March 2009.'[114]
Jan 2008	Over 60 individuals and organizations co-signed a joint statement, requesting the HKSAR Government to make substantive improvements to

[112] Legislative Council, Panel on Home Affairs, (May 2006) LC Paper No. CB(2)2219/05-06(01) at 2.

[113] Letter dated 24 August 2007 from CERD to the Permanent Representative of the Permanent Mission of China to the UN at Geneva.

[114] Speech of Tsang Tak-shing, the Secretary of Home Affairs Bureau on 25 October 2007. (Chinese only)

	the proposed Race Discrimination Bill, and urged the Legislative Council Bills Committee to consider rejecting the Bill should there be no substantive improvements.
Mar 2008	The UN Committee on the Elimination of All Forms of Racial Discrimination discussed the problematic Hong Kong Race Discrimination Bill as scheduled in spite of China's failure to provide the information on the Bill within the prescribed period. In the light of the pending UN CERD meeting, the HKSAR Government indicated to NGOs without details its intention to amend the Bill regarding its application to the government and the definition of indirect discrimination.
Mar 2008	On 7 March 2008, CERD issued a letter to the Chinese Government, criticizing the Hong Kong Race Discrimination Bill on its narrow definition of racial discrimination, limited applicability to actions of public authorities and institutions, and the omission of racial discrimination on the basis of language, nationality and residency status.

Appendix III: Consultative Exercises

By August 2007 we have conducted the consultation in many ways. We have sent emails to over 100 NGOs, all the Legislative Council members, various specialized institutions including the Equal Opportunities Commission, The Office of Ombudsman, The Office of the Privacy Commissioner for Personal Data and the The Commissioner for Covert Surveillance, and the HKSAR Government for comment. The draft report had been uploaded to our website (http://www.hkhrm.org.hk) for public consultation. Various meetings were held within the NGO community, and with Professor Michael Davis and Professor Raj Kumar, to discuss the draft report. Our chairperson, Chong Yiu Kwong attended a television programme (RTHK) on 17 August 2007 to explain this draft report.

India – Time to Raise the Benchmark

I. Introduction

Despite its shortcomings, the National Human Rights Commission (NHRC) has remained indispensable for the protection and promotion of human rights in India. It has been actively involved in many positive measures.

1. Sittings in different states

Pursuant to a decision of the NHRC of 21 November 2006, the Commission has been holding sittings in State capitals to expedite disposal of complaints, furnish the status of complaints, receive complaints and sensitize State functionaries to issues of human rights.

The first sitting was held in Lucknow, Uttar Pradesh, from 18-20 January 2007. The NHRC drew the attention of the authorities to a range of issues including failure to file First Information Reports (FIRs); delays in compliance with its recommendations; delays in sending requisite details or reports in cases of custodial death; failure to set up an adequate number of Juvenile Justice Boards, Child Welfare Homes, Observation Homes and Special Homes; the lack of hygiene and education in current Juvenile Observation Homes; and the situation of bonded and child labour, among other matters. The Commission disposed of 32 cases of Full Commission and 150 cases of Single Members during the sitting.

The Commission held a special meeting with the Home Secretary, Health Secretary, Additional Director-General of Police (Human Rights) and Director-General of Prisons. It asked the officials to expedite submission of reports such as magisterial inquiries and post-mortem reports of those who die in custody.

The Commission directed the State government to complete all pending magisterial inquiries within three months and future inquiries within three months, and in exceptional cases, within six months. It discussed the State government's plan of action to prevent and end trafficking of women and children; and recommended revival of the system of a Board of Visitors to inspect jails.[115]

The second NHRC sitting was held in Patna, Bihar, from 17-19 May 2007. It disposed of 30 cases of Full Commission and 125 cases of Single Members. Based on the NHRC's recommendations, the State government paid compensation of Rs. 7,60,000 (around US$17,727) to victims of human rights violations in six cases,

[115] 'NHRC camp at Lucknow – draws authorities' attention to failure in filing FIRs and delay in compliance; directs State Government to complete all pending magisterial inquiries within three months', NHRC Press release, 21 January 2007, available at http://www.nhrc.nic.in/disparchive.asp?fno=1367

including two cases of custodial death. The NHRC also recommended interim relief of Rs. 14,25,000 (around US$33,239.73) in 10 cases, including eight involving custodial death, and called for additional information in 50 other cases.

On 20 May 2007 the Commission held a regional review meeting with the Chief Secretaries and Director General of Police (DGP) from the States of Bihar, West Bengal, Orissa and Jharkhand. It took up issues involving juvenile justice, prisons, trafficking of women and children, manual scavenging, and the rights to health and education, among others.

The Commission urged these States to appoint special officers to sensitize police personnel to human rights, and to work out a systematic programme for rehabilitation of victims of trafficking; to carry out a new survey of manual scavengers with the help of an independent agency and adopt an effective rehabilitation and reintegration programme to bring manual scavengers into the mainstream; and to ensure that the rights to health and education reach every one.

The NHRC further expressed concern about poor compliance with its recommendations in West Bengal and Orissa. It stressed the need for micro-level monitoring of Kalahandi, Bolangir and Koraput districts in Orissa.[116]

2. Reconstitution of NGO core group

Under Section 12(i) of the Protection of Human Rights Act 1993 ('the Act', amended 2006), the NHRC has the responsibility to "encourage the efforts of non-governmental organizations and institutions working in the field of human rights". In 2001, the NHRC had constituted a Core Group for NGOs to serve as a monitoring mechanism for its consultations with NGOs engaged in the field of human rights.[117] The Core Group of NGOs was re-constituted in 2006.

The Core Group was convened only once after 2006 and this was before the 12th Annual Meeting of the Asia Pacific Forum in September 2007. The Core Group has not been re-convened thereafter. It was not even convened prior to the submission by the NHRC of its report to the UN Human Rights Council's Universal Periodic Review (UPR) process.

116 'Protection of Human Rights is our mission' says NHRC Chairperson, Justice Shri S Rajendra Babu, NHRC Press release, 22 May 2007, available at http://nhrc.nic.in/disparchive.asp?fno=1416

117 'NHRC constitutes Core Group for NGOs', NHRC Press release, 26 July 2001, available at http://www.nhrc.nic.in/disparchive.asp?fno=182

II. Independence

1. Self-imposed limits to statutory powers

The NHRC has not fully utilized its powers and functions as bestowed upon it by the enabling Act. Rather, it has sought to satisfy the lowest common denominator when dealing with complaints.

For example, the NHRC has seldom invoked its power as stipulated in Section 17(i)(a), which provides that "if the information or report is not received (from the Central or State government) within the time stipulated by the Commission, it may proceed to inquire into the complaint on its own". In most cases, what the Commission did was to limit its powers by closing the complaint on receipt of information or report from the authorities as provided in Section 17(b). This states that the Commission "may not proceed with the complaint and inform the complainant accordingly" if it is "satisfied either that no further inquiry is required or that the required action has been initiated or taken by the concerned Government or authority".

From 2004-2005, the NHRC disposed of 85,661 cases, of which 38,448 (44.8%) were dismissed in limini, 21,465 (25%) were disposed of with directions and 25,748 (30%) were concluded after receipt of reports from the relevant authorities.[118]

As per the NHRC's Practice Direction No. 10, when a case is disposed of with directions for the authorities, such cases shall be categorized as "compliance cases" and shall be pursued by the Registrar of NHRC. In cases where the relevant authorities fail to comply within the stipulated time, "compliance cases" shall be again put up before the Commission for further directions. In reality, however, the NHRC does not follow-up on such cases.

Amendments to the Act in 2006 enlarged the powers of the Commission. Under Section 18(b), the Commission can approach the Supreme Court or the High Court concerned for such directions, orders or writs as the Court may deem necessary. But the Commission seems happy to "not proceed with the complaint" as provided under Section 17(b).

2. Absence of strategic planning

Apart from statutory limitations, the other main reason for the ineffectiveness of the NHRC is its lack of strategic planning. The NHRC should create a mechanism to measure its performance, as well as draw up a strategy with clear goals and objectives to be achieved within a given period of time.

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118. NHRC Annual Report 2004-2005

The Central and the State governments do not take the recommendations of the NHRC seriously. Yet, the NHRC has failed to develop any strategy as to how to make its recommendations work. At very least, it should ensure that the Central and State governments table its Annual Report or special reports, together with details of action taken in Parliament or the State Legislature, as required under Section 20 of the Act.

There is no follow-up mechanism within the NHRC. Once directions are issued, it merely expresses helplessness if the State does not comply with its directives. The Act empowers the NHRC to approach the Supreme Court or the High Court for enforcement of its directions. But, due to absence of strategic planning, the NHRC has not taken the cases further.

III. Mandate

1. Failure to fulfil mandate on international treaties

Section 12(f) of the Act assigns the NHRC the responsibility to "study treaties and other international instruments on human rights and make recommendations for their effective implementation" by the government of India.

However, the NHRC has not fulfilled this mandate. It has neither provided input nor participated in deliberations while preparing India's periodic reports to various United Nations Treaty Bodies.

In its 15th to 19th periodic report (CERD/C/IND/19) to the UN Committee on International Convention on the Elimination of All Forms of Racial Discrimination (CERD), India denied the existence of racial discrimination even though its society is divided along caste lines and racial discrimination is glaring in all aspects. The NHRC, which has strongly condemned discrimination against the Scheduled Caste and Scheduled Tribes, has remained silent on domestic implementation of CERD.

2. No response to ACJ references

The NHRC has not responded to the references of the Advisory Council of Jurists (ACJ) of the Asia Pacific Forum of NHRIs on issues like death penalty and torture.

The ACJ in its final report on the Reference on the Death Penalty of December 2000 recommended that India should ratify the Second Optional Protocol to the ICCPR and Convention Against Torture (CAT); and take "progressive steps towards de facto abolition of the death penalty and ultimately, its de jure abolition".[119] But the death penalty has yet to be abolished.

[119] Final Report of Reference on the Death Penalty, December 2000, The Advisory Council of Jurists, Asia Pacific Forum of National Human Rights Institutions, available at http://apf.mooball.net/acj/references/death-penalty/related-files/reference-on-the-death-penalty/final.pdf

On the Reference on Torture, the ACJ recommended that the NHRC should urge the government to:

sign and/or ratify the First Optional Protocol, CAT, OPCAT, the Refugee Convention, the Protocols to the Geneva Conventions and the Rome Statute;

amend Section 376(B) of the Indian Penal Code which "seems on its face to apply only in the case of public servants who are male and who have sexual intercourse with a woman in custody but not in the case of female public servants who have sexual intercourse with a male in custody";

continue to provide human rights training for the police, the paramilitary, armed forces and public servants;

strengthen the role of human rights cells in State police headquarters; and

ensure compliance with Supreme Court's guidelines on arrest and detention.[120]

Again, the NHRC has failed to register a response.

3. When alleged violators turn investigators

It has been the standard practice of the NHRC to close cases after receiving reports from the relevant authorities without giving the complainants/victims any opportunity to submit comments on these reports. The NHRC is satisfied with the reports even if the investigations were conducted by the very police officials accused of violations in those cases.

In a complaint on 23 September 2002, the Asian Indigenous and Tribal Peoples Network (AITPN) sought NHRC intervention over police atrocities including torching of houses in Hojaipur village, under Diphu police station, Karbi Anglong, Assam. According to information provided by the Dimaraji Mohila Samaj (Damaraji Women's Organization), Hojaipur branch, a combined team comprising the Central Reserve Police Force, Black Panthers and Assam police – under the command of KK Sarma, Superintendent of Police of Karbi Anglong – attacked the village on 25 August 2002. The team allegedly dragged the villagers out of their houses and torched the buildings without any provocation. Many were rendered homeless and destitute. The police force surrounded the village and did not allow the villagers to recover their belongings from the burning houses.

The NHRC registered a complaint (No.100/3/2002-2003) and directed the Assam government to submit a reply. The State government merely attached the field report by Supt Sarma against whom AITPN had filed its complaint in the first

[120] Final Report on Reference on Torture, December 2005, The Advisory Council of Jurists, Asia Pacific Forum of National Human Rights Institutions, available at http://apf.mooball.net/acj/references/acj-references-torture/downloads/reference-on-torture/acj-torture-report.pdf

place. Supt Sarma reported that "the so-called victims […] have burnt their own houses […] for reason[s] known to them".[121]

The NHRC accepted the report and closed the case on 3 April, 2005, stating: "The Commission has gone through the record. The Commission feels that a detailed inquiry has already been conducted. There is no improbability in the inquiry report. Thus, the Commission feels that no further action is called for in this regard and the case is closed."[122]

Such decisions allow the accused to act as both judge and jury, thereby denying justice to the victims. The NHRC must evolve a workable strategy to gain the confidence of the people. For example, under Section 14(1) of its enabling legislation, the NHRC can utilize the services of any officer or investigation agency of the Central or State Government for the purpose of conducting an investigation into a complaint of human rights violation.

Under Section 14(5), the NHRC can "make such inquiry (including the examination of the person or persons who conducted or assisted in the investigation)" to satisfy itself about "the correctness of the facts stated and the conclusion, if any, arrived at in the report submitted" to the NHRC. The NHRC must adopt the same strategy and inquire into the correctness of the facts stated in the report submitted by the relevant authorities, including the person who investigated the allegations before closing any case.

4. Hazards faced by victims, human rights defenders

The NHRC usually forwards a copy of complaints to the relevant authorities – such as State governments, the Ministry of Home Affairs, and Ministry of Defence – seeking a response to the allegations. This exposes the identity of complainants to the authorities who are in a position to retaliate.

In a recent case, officials of a State Human Rights Commission (SHRC) also placed a human rights defender in danger by engineering his arrest from its premises. On 17 July 2007 Mr Subash Mahapatra, Director of the Forum for Fact Finding, Documentation and Advocacy (FFDA) of Chhattisgarh, was arrested by the police pursuant to a complaint filed by Mr Dilip Kumar Bhat, Joint Secretary, Chhattisgarh SHRC in Raipur.

Mr Mahapatra had gone to the SHRC to follow up on complaints of human rights violations filed by the FFDA. When he asked to see the files, his request was rejected. A junior official allegedly sought illegal inducements from him. This led

[121] Commissions and Conflicts: Briefing papers on the role of National Human Rights Institutions in Conflict Situations, Asian Centre for Human Rights, September 2004

[122] NHRC Case Details of File No: 100/3/2002-2003

to an exchange of words, during which Mr Bhat and others caught hold Mr Mahapatra by the collar and then called the police.

Mr Mahapatra was detained under Section 151 of the Criminal Procedure Code, relating to arrest for prevention of a cognizable offence.[123] Although he was released when the Asian Centre for Human Rights (ACHR) intervened, there has been no response from the NHRC about the ACHR's demand for "immediate establishment of a two-member commission of inquiry consisting of one Honourable Member of the NHRC and one Honourable member of the NGO Core Committee of the NHRC" to inquire into the arrest and detention of Mr Mahapatra. Neither has Mr Bhat been suspended from the Commission.[124]

If SHRC officials are allowed to act with impunity, how can the public have faith in either the NHRC or SHRCs? It is essential for the NHRC to ensure that those who seek justice do not become victims of further harassment and human rights violations by staff-members of the NHRC or SHRC.

5. Lack of transparency

The NHRC works in secrecy in handing complaints. Most complaints are dismissed or closed without informing the complainants. Many cases are not registered, and the NHRC does not explain its reasons to complainants.

It does not make its investigation reports public. Section 18(f) of the Act provides that "the Commission shall publish its inquiry report together with the comments of the concerned Government or authority, if any, and the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the Commission".

The NHRC seems to be one of the greatest violators of the Right to Information Act 2000. It has continuously refused to provide information about its operations, citing frivolous reasons.

6. Vacancies and non-utilization of funds

Due to lack of transparency, it is difficult to determine the current staff strength of the NHRC. It does not provide this information on its website. However, according to its Annual Report 2004-2005, the total sanctioned strength of the Commission was 341 posts. As at 31 March 2005, however, it had only 326 officers and staff, leaving 15 posts vacant.

The Commission's workload has increased manifold. This is evident from the increase in the number of complaints – from 496 in 1993-1994 to 74,444 in 2005-

[123] Complaint of Asian Centre for Human Rights to NHRC dated 17 July 2007

[124] Complaint of Asian Centre for Human Rights to NHRC dated 20 July 2007

2006. As a result of shortage of manpower, a large number of cases have been pending resolution[125] - 49,548 as at 31 March 2005.[126] Another 74,444 complaints were received in 2005-2006[127], bringing the total to 123,992 as at 31 March 2006. But the NHRC disposed of only 80,923 complaints in 2005-2006, including complaints carried forward from the previous year.[128] Some 43,069 cases are now pending.

Under Section 32 of the Act, the NHRC receives financial assistance by way of grants from the Central government after due appropriation made in this behalf by the Parliament. In 2004-2005, the Commission received Rs.1,070 lakh under Non-plan funding and Rs.188 lakh under Plan funding from the Central government. But the NHRC spent only Rs.1,063.51 lakh of the Non-plan funding.[129] A sum of Rs 6.49 lakh has not been utilized.

IV. Interaction with Stakeholders

1. Consultation with NGOs

In its Annual Report 2004-2005, the NHRC stated: "The promotion and protection of human rights cannot gather momentum without the fullest co-operation between the Commission and the NGOs". It described NGOs as the "the eyes and ears of the Commission in the remotest corners of the country".

On 28-29 April 2007, the NHRC organized a two-day conference on the 'Role of NGOs in support of NHRC for better promotion and protection of human rights' in Bangalore, Karnataka. Representatives attended from NGOs that work on the frontline to defend human rights.

Several recommendations and undertakings were framed at the end of the conference:

- NGOs should be responsible in representing victims of human rights violations and ensure the credibility and accuracy of their reports on such cases.
- The NHRC should make sure that victims get justice in the shortest possible period.

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125 Human Rights Day Address By Dr. Justice Shivaraj V Patil, Acting Chairperson, National Human Rights Commission at Human Rights Day Celebration function at Stein Auditorium, India Habitat Centre, New Delhi, on 10 December 2006

126 NHRC Annual Report 2004-2005

127 Human Rights Day Address By Dr Justice Shivaraj V Patil, Acting Chairperson, National Human Rights Commission at Human Rights Day Celebration function at Stein Auditorium, India Habitat Centre, New Delhi, on 10 December 2006

128 Human Rights Day address by Dr Justice Shivaraj V Patil, Acting Chairperson, NHRC at the Human Rights Day celebration at Stein Auditorium, India Habitat Centre, New Delhi, on 10 December 2006

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- The NHRC will conduct continuous sensitization programmes for its officers as well as those in government, to highlight the plight of victims.
- Women's issues shall be an important part of all sensitization and training programmes of judicial officers, police and other government officials.
- The Commission will provide co-ordination for NGOs monitoring of human rights violations.
- The public should be educated on human rights, and taught to monitor violation of their rights and to lodge complaints with the authorities.
- The NHRC could work with the media to disseminate human rights information.
- A task force of NHRC-NGO could be constituted to address the problem of exclusion of Scheduled Castes and Scheduled Tribes.

The NGOs further suggested that the Commission should install Special Rapporteurs in every part of the country, to serve as its eyes and ears. Another proposal was the NHRC should target specific districts and work with NGOs to make these free of torture. The NGOs urged the NHRC to take pro-active steps to ensure strict compliance with its guidelines in cases involving post-mortems and death resulting from starvation.[130]

2. Guidelines on handling child sexual abuse

To address issues involved in media coverage of child sexual abuse cases, the NHRC issued detailed guidelines:

- The identity of the child victim should not be revealed under any circumstances.
- Coverage should be "sensitive and a meaningful projection".
- The media should "ascertain the facts, context and circumstances" of the incident and not "sensationalize or exaggerate" a particular incident.
- It should also report "subsequently on actions taken by concerned authorities and continue to report till action is taken to punish the abusers".
- The media should enlighten the public on how to prevent incidents of sexual abuse of children and what must be done if such an unfortunate incident has taken place.

[130] Conference on Role of NGOs in support of NHRC for promotion and protection of human rights, available at http://www.nhrc.nic.in/disparchive.asp?fno=1446

- The media must be guided by the principle of best interest of the child as required in the Convention on the Rights of the Child, among others.[131]

On 16 July 2007, the NHRC issued 'Draft guidelines for speedy disposal of child rape cases'. These provide for such complaints to be recorded promptly and accurately. A police officer not below the rank of Sub-Inspector, preferably a female, should record the complainant's statement. A medical examination should be done within 24 hours, and the clothes of both the complainant and the accused, if arrested, should be sent for forensic analysis within 10 days. The investigation should be completed within 90 days of registration of the case.

The draft guidelines make it mandatory for the identity of complainants and their families to be kept secret. The NHRC also recommended in camera trial proceedings by fast-track courts, preferably presided over by a female judge. Noting that the trial environment must be "child friendly", the guidelines provide for "recordings be done in video conferencing/in conducive manner so that victim is not subjected to close proximity of the accused". The magistrate should commit such cases to session within 15 days after the filing of the charge sheet.[132]

V. State Human Rights Commissions

Subsequent to the establishment of the NHRC, 17 State Human Rights Commissions (SHRCs) have come into existence. These are in Andhra Pradesh, Assam, Chhatisgarh, Himachal Pradesh, Jammu & Kashmir, Kerala, Madhya Pradesh, Manipur, Maharashtra, Orissa, Punjab, Rajasthan, Tamil Nadu, Uttar Pradesh and West Bengal, Karnataka, Gujarat.

While the mechanisms at both central and state levels are touted to be the vanguard for protection and promotion of human rights, closer examination reveals a different – and far from satisfactory – picture.

Under the 1993 Act, the NHRC has no supervisory authority over the SHRCs. At best, it invites the SHRCs' Chairpersons once or twice a year for national co-ordination meetings.

Although the NHRC has issued several important instructions or guidelines on custodial deaths, rapes, cases of extrajudicial killings, polygraph tests and arrests, SHRCs have not made any genuine effort to implement, popularize or translate the guidelines or monitor their effectiveness.

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[131] NHRC Guidelines for the media in addressing the issue of child sexual abuse, available at http://nhrc.nic.in/Documents/Guidelinesforthemedia.pdf

[132] NHRC Draft Guidelines For Speedy Disposal Of Child Rape Cases, available at http://nhrc.nic.in/child%20rape%20cases%20(New%20Guidlines).doc

Both bodies are mandated to perform similar functions. Instead of seeking to co-ordinate their work, they function on parallel tracks. The NHRC also monopolises opportunities for participation in national and international meetings, conferences and capacity-building programmes. SHRCs, without adequate training, cannot be effective.

Recent meetings of the National Core Group of NGOs have briefly discussed the NHRC's intention to transfer cases to SHRCs, based on place of origin of complaints. From 2004-2005, for example, there were 2,369 complaints from Rajasthan, 2,217 from Madhya Pradesh and 1,191 from Tamil Nadu.

One reason why complainants turn to the NHRC – despite its inherent weaknesses – is that they do not have faith in the SHRCs because of their operational shortcomings. Also, the appointment of members is said to be extremely 'political' in most states and many former members of the judiciary would attest to this.

Generally, common grievances are that:

- Complaints procedures are peculiar to each SHRC and not entirely effectual.
- There is no effective investigation mechanism. Hence, SHRCs depend on the police, even when alleged to be perpetrators in cases of custodial violence.
- There is no transparency in the complaints-handling procedure as most matters are kept beyond the reach of the public; at times, complainants are not informed about the progress of their case.
- Websites are not fully functional and do not reveal important information regarding the status of cases or action taken.
- Most of the SHRCs do not put out publications to build awareness of their functions and procedures, or of citizens' rights.
- Complainants have minimal access to the SHRCs, which often emphasise formalities; this is contrary to the basic principle of the 1993 Act.
- SHRCS tend to safeguard the interests of civil servants through tacit means, for example by ignoring serious complaints or causing undue delay in registering cases.

These shortcomings are further substantiated in the following analysis of eight SHRCs in India:

1. West Bengal

The SHRC was established in 1995. As the Left Front has been in power for the last 30 years, it has tightened its grip over all government agencies as well as

autonomous bodies and institutions. The SHRC is no exception and has become another executive agency.

It has malfunctioned in many ways. In many cases, it has merely asked for reports without taking action. There is no 'independent' wing to investigate certain types of human rights violations. For example, when a complaint is lodged against a police officer, the Commission seeks a report from the Superintendent of Police of the district where the officer is stationed; this allows a superior officer to clear the errant officer.

The SHRC's operations reveal a lack of seriousness. In the case of false implication of the District Human Rights Defender, Mr Gopen Sharma, the Commission asked the District Magistrate of Murshidabad for a report; more than a year later, nothing has been done about either the absence of a report or the complaint itself.

In the death of Babai Biswas who was allegedly tortured while in police custody, the Commission reacted by directing the Criminal Investigations Department to register a criminal case against the police officers and government officials said to be involved. But at the time of the trial in the Sessions Court of Alipore, Kolkata, the Commission backed out without a good reason and in breach of its mandate.

MASUM, a human rights organization, has sent several serious complaints about custodial deaths and extrajudicial killings, but the Commission has barely responded despite reminders. Yet, it has taken cognizance of allegations of police inaction and negligence, which are less serious in nature.

There is no transparency in the Commission's dealings. It has not published an annual report for the last three years. Its website displays no useful information apart from contact details. Interestingly, the Chairperson, Justice Shyamal Sen, receives more than Rs 100,000 per month in salary and allowances. However, he and other Commissioners took leave for a month in connection with the Durga puja festival in 2007, leaving the SHRC unable to make any decisions during this period.

2. Kerala

The SHRC was constituted on 11 December 1998. It doesn't seem to have a standard procedure for its proceedings. Instead of using the services of its investigation wing, it has insisted on eyewitness testimony even in the cases of custodial torture, which is carried out in secrecy. The Commission's sittings are often postponed or cancelled without prior notice.

Its personnel mainly comprise staff absorbed from various departments of the State government. They have no education, experience or orientation in human rights or in matters related to law. Collecting information on cases, locating files

or even making a general inquiry can be difficult because of inadequate record keeping.

The Commission's mandate on handling of cases is not widely publicized; neither is there a hand book for the public. As a result, many petitions that flow into the Commission have no relation to human rights and only add to its workload. The SHRC has not attempted to solicit the help of voluntary organizations to solve its problems.

Its existence has not had much impact on deterring human rights violations, especially in lock-ups and in jail. In schools, incidents of corporal punishment are on the rise.

One case illustrates the Commission's lax approach. Unnikrishnan (Case No: HRMC 3337/05) of Palakkad district claimed he was a victim of police torture and filed a complaint. During the inquiry, the Sub-Inspector (SI) did not turn up until the fourth hearing – even then he claimed he had only received the summons the day before and so, was not prepared to testify. The Commission was told he was lying. Eight sittings were held, the last in August 2006, but the SI did not show up again.

In June 2007, the victim asked the Commission for a status report. On 21 July 2007, he received a letter stating that the file had been closed because the SI had not participated in the inquiry. The victim's full statement is available at: http://voiceofvictims.blogspot.com/ In addition to being denied justice, he had to spend about Rs 100 to attend each hearing and was also in poor health.

3. Karnataka

The Commission was only set up in July 2007 and so, it may not be appropriate to assess its functioning. However, it is pertinent to look at certain events that led to its establishment and its initial responses.

Various human rights institutions had initiated a vigorous campaign for the SHRC to be set up since the 1993 Act came into force. The response was negative, with the Home Minister claiming that there was no need for a SHRC since the incidence of human rights violations in the state was negligible.

In 1998, a public interest litigation was filed in the High Court of Karnataka to which the South India Cell for Human Rights Education and Monitoring (SICHREM) and People's Union for Civil Liberties (PUCL) were parties. It asked the court to direct the State to set up the Commission. In reply, the government submitted that it would do so. The court then disposed of the case without issuing a clear order on the matter.

It was only in December 2006 that the High Court of Karnataka, while passing an order on a case of custodial death, directed the government to set up the SHRC

within six months. As a result, the government was forced to set it up without any representation from civil society groups.

Already, problems are apparent. For instance, Mr Prakash, a staff-member of SICHREM, went to the Commission over an issue of the police using electric shocks in police stations with an instrument manufactured by a Bangalore-based company. On 23 October 2007, he was called into the chambers of Mr MN Reddy – the Commission's Inspector General for investigation – and told there is nothing wrong with the police resorting to a little torture, without which investigations would be impossible. SICHREM has filed seven complaints to date with the SHRC through National Project on Preventing Torture (NPPT). In the two responses received, the directive was to the same IG who will be investigating the case.

4. Andhra Pradesh

The SHRC was formed on an ad-hoc basis in 2002 and reconstituted in 2005. It currently consists of the Chairperson, Justice B Subhashan Reddy, and only one Commissioner. For reasons not known, the State government has not bothered to appoint the other two non-judicial members.

The SHRC is unpopular because of the Chairperson's populist tactics. He has initiated several cases on suo moto basis, accompanied by arrangements for wide publicity. However, all the cases relate to matters other than alleged human rights violations by the police. He is also more interested in enforcing a dress code for advocates and creating the ambience of a High Court. This puts off victims from approaching the Commission directly for help.

The Commission operates for less than two hours daily. Most of the time, it grants adjournments, with the gap between each hearing being at least two months. On occasion, the duration has been longer, without the reasons being recorded.

There is a severe staff shortage as most of the personnel are absorbed on an ad-hoc basis, while the infrastructure is also very poor. The absence of stenographers has compelled the Commission to reserve its orders in several cases.

Three years on, rules have yet to be framed. As a result, there is confusion among administrative staff and great difficulty for complainants. The Commission adopts summary procedures which does not include calling for records from public officers.

Most cases result in a negative outcome for complainants. Even where allegations are proven against public servants, the State government does not comply with the Commission's recommendations and deadlines. The Commission does not show any interest in pursuing such matters consistently. It has yet to approach

either the Supreme Court or High Court to get orders against those public servants found to have violated fundamental human rights.

5. Uttar Pradesh

There was distinct lack of political will in setting up the SHRC, with successive State governments taking an unduly long time to announce its establishment. On many occasions, the pledges were made on the floor of the Vidhan Sabha, but none of these were honoured.

The NHRC was moved to intervene with strong advice in light of numerous accusations that the government machinery was responsible for custodial deaths and blatant human rights violations. Ironically, the senior officer heading the human rights cell of the police force said the complaints were due to western Uttar Pradesh's proximity to Delhi, where the NHRC is located.

Human rights groups like the People's Vigilance Committee for Human Rights (PVCHR) persevered in lobbying for the SHRC, while PUCL filed a PIL in the High Court of Uttar Pradesh. This saw the SHRC being established on 8 October 2002. Even then, opposition leaders from both Houses of the State legislature boycotted the meeting held to discuss modalities for its formation.

One case highlights how the SHRC operates. Mr Santhosh Patel, a staff-member of PVCHR, was arrested twice by local police on the instructions of the District Magistrate of Varanasi on 10 May 2006. This was for presenting cases of corruption related to the public distribution system in Belwa village.

Upon receipt of a complaint from the Asian Centre for Human Rights (AHRC), the SHRC appointed an inquiry officer. However, the complainant only found out about this when the officer asked if he would settle the matter by compromise. Although this was brought to the notice of the Chairperson, no action was initiated.

As for the case itself, the only communication AHRC has received is the Commission’s final order dismissing the complaint. The complainant was not told the details of the inquiry and the report was not made public. This shows that the SHRC has no clear procedures. It is a public body but it suffers from lack of both transparency and fairness.

6. Orissa

The SHRC was established on 11 July 2003, but its operations have been riddled with problems from the start. The Commission was never constituted fully, and does not have any member with a background in human rights activism. The structure acts as a judicial forum; there is currently no Chairperson and the system is run by the Secretary with two members.

To date, the Commission has not published materials about its functions, including an annual report. Even the status of the Public Information Officer to be appointed under the Right to Information Act is dubious. The web portal of the State government mentions the SHRC, but takes the visitor to the NHRC site instead.

There is no investigation team, which leaves the Commission reliant on the police for all kinds of inquiries. Most of the complaints are against the police, so, naturally, they make no decisions. The People's Watch office in Bhubaneshwar sent nine complaints of torture in 2006-2007 to the SHRC. Only the case of Soneper was considered. The Commission asked for a report from the local Superintendent of Police and marked a copy to the victim, Mr Narendra Kumar Maharana. The case has not gone a step further. In 2006, two complainants from Cuttack district, Basenti Bhoi and Bir Bhoi, wrote to the SHRC but received an acknowledgement only 10 months later.

The Commission's apathy was also seen in another case. In 2006, then Chairperson, Justice DP Mohapatra, attended a human rights awareness programme for lawyers in Cuttack, organized by People's Watch. At the event, a complainant named Bijoy Ku Subuhi narrated how his son was not allowed to sit with high-caste students in school and was later told to leave the school. People's Watch sent a letter to the SHRC Chairperson, but received neither a reply nor direction from the Commission.

7. Rajasthan

The SHRC became functional in March 2000, but appears to have done little about complaints, based on the experience of People's Watch. One complaint was sent, but there has been no response.

However, the SHRC did help People's Watch to organize a seminar for law enforcement officers in Ajmer, by obtaining an order from the Director General of Police (DGP) directing participation of the officers.

But the DGP refused to co-operate when approached for help with the next two seminars in Kota and Jodhpur. He said the Commission was not in favour of supporting just one NGO. Several trips to the SHRC proved futile as the Chairperson, Justice NK Jain, declined to meet People's Watch, which only succeeded after it contacted the NHRC.

A look at the SHRC website is revealing – its so-called achievements have only been to organize seminars, meetings and awareness programmes and to observe important events. Information on the complaints received up to 31 July 2007 show that only 44% were 'prima facie decided cases'.

NGOs in Rajasthan, including PUCL, are not happy with the Chairperson and Commissioners, as they do not respond to human rights violations. Such is the extent of the NGOs' frustration, that PUCL has started a campaign to get the Chairperson out of office.

The SHRC is known to have investigated NGOs about their right to conduct public hearings on human rights issues. This was reported at the annual conference of the NHRC and SHRCs, organized by People's Watch, ACHR and Pairvi in January 2007.

8. Tamil Nadu

The SHRC was created in 1996 but its performance has not been encouraging. People's Watch has worked with the Commission since its inception. An analysis of the complaints lodged by People's Watch exposes the Commission's lack of efficiency in handling cases.

From 2000-2006, the Commission received 144 complaints, but only 10 were disposed of with orders. Shockingly, 35.42 % of the cases were closed on the basis that the relevant authority had provided its report upon referral of the complaint. However, a copy of such reports was not sent to the complainants.

Another 27.78% of the cases remain 'unnumbered'. One was filed as early as 5 August 2002; to date People's Watch has not been informed of the case number assigned by the Commission.

There is no transparency or standard in operational procedures. The Commission has not produced any publications or posted information on its website as to the number of complaints handled each year or its recommendations on important cases.

Complainants have to travel to Chennai, paying their own expenses, to attend every hearing at the Commission; alternatively, they can appoint a lawyer. Such practices are a burden on complainants. In one case, a complainant – who had been attending every hearing – was fined Rs 2,000 when he did not attend a session after the SHRC office was relocated. He had to pay up in order to get the case reinstated.

Indifference was particularly clear in relation to 150 complaints filed by human rights groups, including People's Watch, about the excesses of the Special Task Force (STF) during the Veerappan operation.[133] The SHRC remained silent even when a NHRC-appointed fact-finding panel headed by Justice A.D. Sadashiva,

[133] The Veerappan operation was conducted in response to the crimes being committed rampantly by the brigand called Veerappan. It was extensive police operation which gave rise to allegations of police excesses and gross violations of human rights of the residents around the area where the operation was conducted.

former judge of the High Court of Karnataka, asked for the complaints to be produced. The SHRC's response was that all the records had been destroyed.

Indonesia – Legacy and Challenges

Indriaswati Dyah S, Indria Fernida, and Donny Ardianto, [134]

I. Introduction

A change of guard at the National Commission on Human Rights (Komnas HAM) in September 2007 saw 11 new Commissioners being appointed up to 2012. They face substantial challenges, some of which are a legacy of the past. A key challenge is restoring public trust in the Commission's commitment to human rights in light of many unresolved cases, such as that of the Wasior Wamena case.[135]

1. Poor organizational structure and legal framework

Komnas HAM has come under public scrutiny over the critical issue of its impartiality, especially since there are questions as to whether or not it is influenced by the government and interest groups. Its other problems are rooted in both the administrative and legal framework, which have an impact on the handling of human rights cases.

Management problems relate to the power and organizational structures – the pace of work is affected by bureaucracy; there are State controls over the budget**;** and there are constraints in the staff-recruitment process and decision-making structure.

The Commission is also restricted by the legal framework involving Law No. 39/1999, which covers monitoring of human rights, and Law No. 26/2000, which creates the human rights court.

Law No. 26/2000 vests in the Commission the responsibility to conduct an independent inquiry into cases of gross violation of human rights, of which there are two types: genocide and crimes against humanity. The Commission conducts a pro-justitia inquiry as a legal proceeding to gather evidence, prior to submitting a case to the human rights court.

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[134] With support from the Indonesian Human Rights Working Group and Forum Asia

[135] Wasior and Wamena case consists of two incidents, one took place in Wamena in 2003 where the military personnel tortured 48 people, killed seven others and forcibly around 7000 people during the raid shortly after some alleged member of the Free Papua Movement (OPM) broke the military arsenal in Wamena, the other took place in Wasior, regency in 2001, where the police paramilitary forces, the mobile Brigade (BRIMOB) launched a raid after some of their personnel guarding a logging company were killed. 16 people were torture, three were killed and dozens houses were burnt down during the raid. The recommendation to investigate the case in order to be heard before the human rights court was submitted to the Attorney General Office in 2004, but it refused to undertake further investigation arguing that the commission's inquiry failed to comply with the standard set out by the Act on Human rights court as the commissioners conducted the inquiry had not been sworn in. On the other side, the commission insisted that this Act did not state such requirement, and therefore refused to respond to this request. The case remains unresolved up to the present.

However, an inquiry under Law No. 39/1999 is not necessarily pro-justitia in nature. The problem originates from a gap between two functions that are governed by separate laws. In particular, it stems from the absence of a provision to ensure that any inquiry undertaken under Law No. 39/1999 can be further investigated as a gross violation of human rights.

Instead, this requires a decision at a plenary hearing of Commission. Each member may have a different interest in the case, however, sometimes reflecting political preferences.[136] As a result, the plenary sometimes fails to reach a consensus on whether to continue the investigation. For example, in 2004, Komnas HAM had conducted an analysis of human rights violations that occurred during the Soeharto era and proposed channelling incidents related to the forced transfer and arbitrary detention to Buru Island of those suspected to be PKI (communist party) members, the extra judicial killing of recidivists in 1986 known as mysterious shooting or "Petrus", the riot on 27 July 1996, and the Aceh and Papua Military Operations. It then decided to conduct a legal analysis of each case to see if it can be taken to an ad-hoc human rights court[137] but as they ended their service in 2007, only the legal analysis on the Buru Island case was completed. Therefore, no parliament support could be attained, and the case was left unresolved when newly appointed commissioners began their service.

The commission also lost the opportunity to submit the result of this inquiry to the Truth and Reconciliation Commission (*Komisi Kebenaran dan Rekonsilitasi*, KKR) after the Constitutional Court scrapped the act on the TRC (Act no 27/2004) in 2006 after a number of victims' organisations and NGOs filed their petitions in 2005.

Public disappointment has mounted as fewer complaints about gross human rights violations make it to the human rights court. When cases cannot be pursued, the door is closed to victims seeking remedies.

2. Loss of public confidence

Weak performance has led to deteriorating public confidence in the Commission. Many cases remain unresolved and victims' grievances are not granted any redress. Komnas HAM has also failed to take urgent action over certain serious human rights cases such as the eruption of the natural gas drilling site of PT Lapindo Brantas, a firm controlled by the family of Aburizal Bakrie, a cabinet member of Susilo Bambang Yudoyono. The ongoing eruption of this mudflow has

[136] Komnas HAM Annual Report 2006, Appendix 5, p 170

[137] Interview with Enny Suprapto, 18 April 2007

covered more than 360 hectares, buried four villages, 25 factories, and displaced over 11,000 people.[138]

It was also clear that some members of the 2002-2007 Commission lacked expertise in human rights. Several openly supported the death penalty, contrary to their function to protect the fundamental right to life. In the case of Ahmadiah, some saw the sect as a religious splinter-group and therefore deemed that the violence instigated against it by the Front for Islam Defenders was justified. Although this was not the Commission's official stance, the fact that some members held such views was enough to raise concern about their level of knowledge in human rights and skills in handling human rights issues.

Public confidence has been further eroded because most Commissioners do not work full-time for Komnas HAM. Some attend only the plenary sessions. Zumrotin K Susilo, a former commissioner, pointed out that some Commissioners dedicate only 10% of the agreed time each month to Komnas HAM. It implies that they consider their contributions as merely a 'side job' and is further indicative of a poor work ethic.

3. Lack of political support

Since 1998, there have been fundamental changes in Indonesia. Human rights have been widely incorporated into State policies and in the institutional framework of most government institutions. More human rights legislation have been formulated, with the process being kicked off by ratification of the Convention Against Torture in 1998 and, more recently, ratification of the ICESCR and ICCPR. A Ministry of Law and Human Rights has also been established. Such policies presumably lead to improved observance of human rights principles.

In reality, however, a strong legal framework is not always easy to implement. The lack of political support has been exacerbated because the Commission has not worked at developing good relationships with the main branches of government. The Paris Principles stipulate that a national human rights institution should collaborate with other institutions, both government and non-government. The 2002-2007 Komnas HAM did not do so.

a. Obstacles at Executive level

Human rights remain marginalized in the government's agenda, taking a back seat to economic recovery and eradication of corruption. Regulations that are enacted still contradict human rights principles at both national and local levels, while relevant institutions have not shown commitment to human rights.

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[138] See, Sidoardjo Mudflow, can be accessed at http://sidoarjo-mud-flow.blogspot.com/ . The commission has finished its preliminary inquiry over this case, but the plenary failed to reach a decision as to whether or not proceeding the case under the Act no 26/2000 on human rights court. Yet no other attempt has been undertaken to follow up the finding, including responding the dire need of the victims for reparation.

b. Judicial perspectives

The human rights court has acquitted most of those accused of gross violations of human rights. In addition, the Attorney-General's Office, as chief investigator, has refused to follow up on Komnas HAM's independent inquiries into the Trisakti-Semanggi case, the 1998 May riot and cases of involuntary disappearances from 1997-1998.[139]

The refusal is due to the failure of both institutions to achieve understanding and interpretation of legal provisions applied to the inquiries. They have been locked in a bitter dispute over interpretation of the Criminal Procedure Code, particularly over requirements in recording statements for submission as evidence.

In most cases, with exception of three cases, namely the East Timorese case, the Tanjung Priok case, and the Abepura case, the Attorney-General concluded that Komnas HAM's inquiries were unlawful and incomplete as they were carried out by investigators who have not been sworn in. In response to this, the Commission thus argued that Law No. 26/2000 does not require investigators to be sworn in and that its inquiry was complete. It cited the 1999 East Timor investigations, which were conducted in a similar fashion and had succeeded in being placed before the court.

c. Blockages in Parliament

As a political body, the House of Representatives' (the DPR) attitude to human rights cases has, more often than not, been influenced by the leanings of its members. Therefore, its decisions have often been highly politicized ones. One prime example can be seen from its response on the Trisakti Semanggi case. In 2000, when the DPR first submitted its recommendation on this case, it refused to back Komnas HAM's recommendation to establish an ad-hoc human rights court to hear the case. Instead, it concluded that no human rights violations had occurred. However, in 2007 the DPR substantially amended its decision, and supported the commission's recommendation for establishing the court.[140] Komnas HAM, however, failed to urge the Attorney General's office set conduct further investigation on the case.

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[139] The trisakti and Semanggi case dossiers consists of two incidents, namely the killing of students staged demonstration in 1998 and in 1999, following the political turmoil demanding Soeharto to resign in 1998. The Komnas HAM conducted an inquiry over the cases, and concluded that there was adequate evidence proofing that gross violation of human rights were committed. This recommendation finally got political support from the house of representative (DPR) in 2007, which then urged the Attorney General to conduct investigation over the case. However, the attorney general office has continued to neglect the recommendation and hold back legal process of the case from moving forward, detail chronology of the legal process, see http://www.reformasihukum.org/konten.php?nama=KejahatanHam&op=detail_korupsi&id=4 . Similarly, the inquiry of the involuntary disappearance case was conducted following the earlier inquiry over the disappearance of activists; most of them were students and human rights activists during the political turmoil leading to Soeharto resignation in 1998. The commission found substantial evidence to bring the case before the human rights court and urged the Attorney General Office (AGO) to investigate the case. The AGO refused to conduct further investigation over the cases, arguing that they were past abuses, and would only be investigated unless the DPR decided the establishment of human rights court. These cases remain unresolve up to the present; further information on this case, see, http://ikohi.blogspot.com/2007/06/disappearance-case-in-indonesia-in.html

[140] for detail information on this case, see " Komisi III ambil Alih Kasus Penghilangan Paksa Aktivis 1997-1998, can be accessed at http://hukumonline.com/detail.asp?id=16186&cl=Berita

Similarly, Komnas HAM also failed to convince the DPR to set up an ad hoc human rights court to investigate the May 1998 riot and cases of involuntary disappearances.

4. Barriers to implementation of powers

Provisions in the law have prevented Komnas HAM from functioning effectively. In other countries, regulations on the national commission on human rights are separated from regulations on human rights in general. In Indonesia, clauses relating to Komnas HAM are incorporated into Law No. 39/1999, which covers human rights. This has weakened the Commission's position, in effect turning it into a 'committee' to monitors matters stipulated in Law No. 39/1999.[141]

a. Power to investigate

Law No. 39/1999 defines human rights violations without providing rules for the accountability or redress mechanisms. The provision for a human rights court, as set out in Law No. 26/2000, originates from Article 104 of Law No. 39/1999. This is the only avenue available currently, although its role is limited to hearing cases of gross violation.

b. Power to subpoena

Under Law No. 39/1999, Komnas HAM is empowered to subpoena witnesses, including high-ranking government authorities, to assist its inquiries with written information and original documents. However, a court is required to first validate such requests. So far, the Komnas HAM has been unable to exercise this power due to the fact that its requests to issue subpoenas have never been approved by any court.

Many inquiries have been halted as necessary information and documents, particularly those held by military institutions and the national intelligence service, could not be obtained. In the inquiry into involuntary disappearances cases, the court refused to issue a warrant to summon high-ranking military officials to testify before the commission.[142]

The Commission also could not obtain validation for the inquiry into the May 1998 riot. The Central Jakarta High Court stated that such power was not applicable because the inquiry had been invoked under Law No. 26/2000.

c. Power to make recommendations

The findings of an inquiry cannot be directly used in a proceeding before a human rights court. Instead, the report is followed by recommendations to the

141 Enny Suprapto, supra note 4

142 Executive summary of the ad-hoc inquiry team on disappearance cases, 2006

government or institutions concerned. However, very few recommendations have been taken up and implemented by government institutions.

Law No. 39/1999 authorizes Komnas HAM to make recommendations to the government or other State institutions in relation to human rights violations, but there are no sanctions if its proposals are ignored.[143] It is therefore difficult for Komnas HAM to pressure the government to respect and protect human rights. In the process, the Commission is left in a difficult position, because victims have sought its assistance and have high expectations of action.

d. Lack of legal standing

Komnas HAM does not have legal status to initiate 'class action' suits on human rights violations. It can only put forward recommendations and mediate in cases involving land, labour and eviction, among other matters.

The Commission has taken action to circumvent such problems, namely by establishing teams to amend both laws. The 2002-2007 Komnas HAM decided to amend Law No. 39/1999 by removing the Commission from its ambit and developing a separate law. An obligation was inserted for the government to follow up on recommendations submitted, while procedural and substance clauses were added. A separate court was mooted for human rights violations. Komnas HAM also sought legal standing and immunity in carrying out its task, to avoid defamation charges as what happened in 2006 with a commission set up by the House of Representatives.[144]

A team led by a new commissioner is preparing the academic draft necessary for amendment of Law No. 26/2000 and a draft bill. However, changes are a long way off as both the draft bills are not on the priority list for legislative debate in 2008.

5. Low public awareness

Komnas HAM is often criticized by victims and human rights activists who engage in demonstrations outside its office. This is to pressure the Commission to expedite resolution of complaints and problems, since they see it as the sole institution for dealing with human rights issues. However, Zumrotin K Susilo, the Commission's deputy chairman, admitted that victims and some activists are now recognizing that the Commission is only one of the components in the system. The earlier misunderstanding shows, though, that the Commission had not sufficiently spread awareness of its role and functions.

[143] Interview with Enny Suprapto, 18 April 2007

[144] Interview with Enny Suprapto, 18 April 2007

II. Independence

The Commission is managed under the State system. Bureaucracy, organizational shortcomings and a poor decision-making process often hinder the Commission's attempt to uphold human rights.

1. Administrative procedures

State intervention in Komnas HAM's human resources has undermined its independence and autonomy. Law No. 39/1999 states that Komnas HAM is a state institution; as such its personnel are deemed to be civil servants. A civil servant, rather than a Commissioner as in the previous term, has been appointed to serve as secretary-general. This implies that the Komnas HAM secretariat is governed under civil service procedures and standards. Its administration sadly reflects the typically slow pace of government machinery. Worse, this has intensified the tension between the commissioners and the secretary-general over the staff recruitment and promotion which substantially hindered the work of the commission.[145]

Staff recruitment and promotion are processed by the Ministry of Administrative Reform. Unfortunately, recruits often do not have adequate skills to support the Commission's work.[146] Promotions do not necessarily relate to the level of knowledge and experience required in the field of human rights promotion. Instead, the system is based on those standards that are applied in any government institution by which promotions are determined based on his/her structural position. This also prevents capable individuals from serving in administrative posts as, in most cases; they do not hold the right rank to be eligible for promotion. This hampers Komnas HAM's effectiveness.

2. Financial management

The Commission's budget comes from the National Budget which compels only civil servants to handle financial management.[147] This arrangement puts Komnas HAM under State financial monitoring standards in terms of both budget proposals and financial reporting.

The monitoring standards hinder Komnas HAM from managing its budget in a way that responds to human rights needs. Fund disbursement is slowed down, which

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[145] Recently, the tension has evolved into open conflict between the secretary General and the newly appointed commissioners, when the Secretary General arbitrarily moved some staffs from their positions without prior notice, and without prior consent from the commission. One among them has appealed against this decision before the administrative court, and the court is now hearing the case. The commission has nominated other civil servant to replace the Secretary general's position, but the President rejected the candidates; so, the commission would have to wait for until new Secretary General is appointed by the government.

[146] Interview with Roichatul Aswidah, 3 May 2007

[147] See: Asmara Nababan, in Ida Ruwaida ean Adi Jebatu (editor), Komnas HAM: di Persimpangan Jalan (Komnas HAM: At the Crossroads) (catatan hasil diskusi public; a public discussion note), Labsosio-UI, 2004, p 8

delays implementation of programmes. As part of good governance and transparency, procurement of supplies must comply with procedures, but these restrict Komnas HAM activities especially at local levels.

The scheme offers less flexibility, particularly with regard to the obligation to conduct inquiries into gross violation of human rights. The Commission has to adjust the number of inquiries in line with available allocations, even though the number of cases received may vary from time to time.

Such obstacles are in contradiction to the Paris Principles, which specify that a national human rights institution should have a financial arrangement that is free from State intervention or any restraining control.

3. Sources of funds

In 2006, the Commission received around 49 billion rupiahs (US$5.3 million) from the State coffers. The sum increased to 59 billion rupiahs (US$6.3 million) in 2007.[148] Of this, less than 10% was allocated for inquiries into cases of human rights violation, thereby affecting the Commission's capacity and flexibility in responding to complaints.

However, the Commission is allowed to accept funds from other sources including international funding agencies. In 2006, it received about 1.3 billion rupiahs (US$139,000) from Indonesia Australia Legal Development Fund (IALDF**),**[149] which supported education programmes by way of training, workshops and translation of human rights instruments and books into the Indonesian language.

III. Mandate

1. Complaints handling

In implementing its mandate to monitor human rights, the Commission received 1,351 written complaints in 2006. Of these, 345 related to alleged violations of economic, social and cultural rights; 825 were on civil and political rights; and 181 on the protection of the rights of particular groups.[150] However, the Annual Report did not give details on the number of cases resolved, to be followed up, or rejected. It only stated that these were handled through mechanisms under Law No. 39/1999 [151] and Law No. 26/2000.[152]

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148 Monetary Department of the Republic of Indonesia, 2006

149 Komnas HAM Annual Report 2006, p 171

150 Komnas HAM National Human Rights Annual Report 2006

151 Supra note 13

152 Based on Article 19(1) Law No. 26/2000; the Commission is empowered (1) to conduct inquiry and investigations into incidents which by their nature or scope provide a reasonable doubt that gross violatons of human rights has been committed; (2) to receive complaints from individuals or groups about the commission of gross human rights violations, and to collect information and evidence; (3) to summon the complainants and suspects to testify; (4) to summon witnesses to testify; (5) to review and collect information at the crime scene and other places deemed necessary;

Under Law No. 39/1999, the Commission dealt with 10 cases, of which three were followed up through mediation; one case was followed by a pro-justitia inquiry; and 6 were followed up with field monitoring, communication with institutions concerned, and sending letters of recommendation.[153]

Under Law No 26/2000, an independent pro-justitia inquiry was held for one case, while three cases submitted to the Attorney-General's Office were monitored, as proceedings for these had yet to start. Monitoring was also conducted on three cases that had already been decided by the human rights court.[154] The Commission completed its inquiry into involuntary disappearance of student activists from 1997-1998, and continued a pro-justitia inquiry into the Talangsari case.[155]

However, no initiative was taken to monitor cases submitted to the human rights court or to comprehensively review the outcome of cases. Most of the decisions were to acquit the alleged perpetrators, as in the East Timor, Abepura and Tanjung Priok cases.[156] Up to now, though, there has not been a single recommendation by the Commission to respond to the acquittals or to the fact that victims have not obtained the redress they demanded.[157]

2. Co-operation with other State institutions

The Commission lacks effective co-operation with other institutions[158] as evidenced by absence of support from the three branches of government, which neglect or defeat the Commission's work.

It has been public knowledge that the Commission's relationship with the Attorney-General's Office has been riddled with disagreement over the handling

(6) to summon related parties to testify in writing or to submit documents necessary in accordance to the original documents; (7) With the prosecutor's order, the Commission is allowed to undertake action as follows: examination of letters, seizure and confiscation, on site visit which includes houses, yards, buildings and other places which are occupied or owned by certain entities; and to invite experts to support the inquiry.

153 However, based on Kontras' report, of the 38 cases on civil and political rights submitted to the Commission, only 11 were followed up by sending letters of clarification, as well as by establishing communication with the institutions concerned. Two other cases were followed up by setting up a field monitoring team; see Komnas HAM Annual Report 2006, pp 62-82

154 KOMNAS HAM Annual Report 2006, pp 83-97

155 Evaluation of the Performance of Komnas HAM, Kontras 2006

156 The first ad hoc court was established in 2000 for gross violations of human rights committed before and after public consultation in East Timor 1999. Out of 18 defendants who were indicted in 12 case dossiers, only six were charged at the first instance, and finally only one, that of Eurico Gutteres who was sentenced for 10 years imprisonment. The case of Abepura was brought before the human right court in 2004, indicted 2 high ranking police officials. They were indicted for committed torture and judicial killings over students and civilians, following the attack of Abepura Police station (resort police station located about 20 kilos from Jayapura, provincial capital of Papua) in 2001. the The court acquitted all the defendants and they were promoted for higher position at the Indonesia National Police. While, in the case of Tanjung Priok, the human rights court indicted 14 defendants in 4 different case dossiers. They were indicted for committed For further details on the human rights court see http://www.elsam.or.id ; also on the struggle for accountability mechanism through human rights court, see, Linton, Suzannah, "Accounting For Atrocities in Indonesia," in 2006 Singapore Year Book of International Laws and Contributors, can be accessed at http://law.nus.edu.sg/sybil/downloads/current/Linton_SYBIL_2006.pdf.

157 Such recommendations are mandated under Article 89(1) of Law No. 39/1999. The Commission is: (1) to carry out study and research on various international human rights instruments; (2) to study and research various regulations as to be able to draw recommendations for amendment, annulment, stipulation, of regulations related to human rights; (3) Publish its study and research reports; (4) To conduct literature review, field study, and comparative study to other countries regarding human rights; (5) To analyze various problems related to the protection, enforcement and promotion of human rights; (6) to develop co-operation of study and research on human rights with other organizations, institutions or other parties at the national, regional, and international levels.

158 Although the Komnas HAM report stated that there was co-operation between the Commission and the DPR, it did not provide details.

of cases. For example, in conducting a pro-justitia inquiry into the involuntary disappearance of student activists from 1997-1998, the Attorney-General refused to issue the Commission a permit to visit a detention facility where torture had allegedly occurred.[159] Similarly, a court rejected an application for a warrant that would have allowed the Commission to subpoena the military personnel who had refused to co-operate or testify.[160]

The Commission established official co-operation with the National Police in 2005 through a memorandum of understanding (MoU). This allows the Commission to monitor legal procedures for incidents of violence against criminals or suspects by police personnel on duty.[161] Initially, this was aimed at ensuring that alleged perpetrators could be held accountable. However, it has been difficult to enforce because the police typically deal with such cases through an internal disciplinary mechanism, which itself is inadequate in holding perpetrators accountable. The MoU has failed to stop the practice of torture because it has no deterrent effect.[162]

The Commission does not have any official co-operation with other institutions under the Executive branch of government, such as the Ministry of Foreign Affairs and the Department of Law and Human Rights which has a similar mandate with regard to dissemination of information,[163] promotion of human rights and human rights education.[164] The Commission has yet to be involved in the government's decision-making process to ratify several human rights instruments, or in preparing government reports to the UN treaty bodies.

IV. Interaction with NGOs

Komnas HAM has co-operated with human rights defenders and NGOs only with regard to complaints. It does not have a regular consultative mechanism involving NGOs, on general thematic issues at the national or local/regional levels. Collaboration with NGOs has only materialized through various studies, for example with ELSAM.[165]

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159 Kompas, 21/5/ 2006, see also executive summary of ad-hoc inquiry team on enforced disappearance cases, 2006

160 Executive summary of the ad-hoc inquiry team on enforced disappearance cases, 2006

161 No. 11/Komnas HAM/VI/2005 and No. Pol: B/1572/VI/2005

162 See Kontras' Evaluation of Komnas HAM's Performance 2006

163 The function to disseminate information on human rights is further explained in the article 89 (2), which includes among others; (1) dissemination of information on human rights the Indonesian public; b. taking steps to raise public awareness about human rights through formal and non-formal education institutes and other bodies; c. to cooperate with organizations, institutions or other parties at national, regional and international level with regard human rights;

164 Based on the Presidential decree no 4/2004 regarding the National Plan of Action of Human Rights 2004-2009 (RANHAM), organising comittee on the implementation of RANHAM at the provincial level is established by the Ministry of Law, Justice and Human Rights, who is acting as the Chair of National comittee. This committee consists of among others, all provincial governors.

165 Interview with Enny Suprapto, 18 April 2007

Its relations with civil society groups seem to rely on the personal ties of each Commissioner. Komnas HAM has failed to collaborate effectively with civil society, according to Enny Suprapto, one of the commissioners of Komnas HAM, who also said it has not engaged the media. It has not conducted visits to print media offices and there appears to be no regular communication with the media, which should be communicating the Commission's work to the public.

V. Recommendations

As explained earlier, the commission has been significantly hindered from effectively dispensing its functions by the numerous major problems it is facing. Because of this, there is broad public distrust in its impartiality and capacity to act as an effective commission.

The opportunity to undertake changes came when the election of the new members took place in 2007. Despite its weak performance, the commission pursued a different mechanism for the recruitment of a set of new commissioners who will be serving until 2012. Unlike the previous selection process, the commission appointed popular figures to sit in the selection committee. Moreover, the general public, this time, had more space to be involved in the process, making it more transparent. Particularly, the selection committee conducted two public hearings where the general public, as well as victims' groups, were able to express their concerns to the candidates. During these hearings, the general public was given the chance to assess the candidates' commitment to uphold human rights. Also, the selection committee guaranteed that the results from the public hearings will be submitted to the House of Representatives. From this process, 11 new commissioners were selected to serve for another five-year period, ending in 2012.

Having observed the performance of the commission in 2007, and in light of the reforms that are expected to be brought by the newly appointed commissioners, the following are some recommendations for the improvement of the work of the commission:

(1) In order to restore public trust and support, the commission needs to demonstrate its commitment on human rights issues by particularly dealing with the legacy of former commissioners who left numerous unresolved cases of gross violation on human rights;
(2) The newly appointed commissioners should develop a new strategy to gain political support from the other branches of government, particularly the executive. This would include proactively approaching the Attorney General's Office to develop an MoU in order to achieve a common understanding or framework on the implementation of Act No 26/2000 on human rights. This common framework is believed to improve the

commission's work to support the victims of gross violations on human rights in getting adequate reparations.

(3) Bearing in mind the lack of political support for the commission from other government institutions, it is strongly recommended that NGOs and other civil society organisations continue to engage with the commission's work, either in the monitoring of human rights cases or in the promotion and dissemination of human rights issues. Such engagement would help to ensure that the commission's work is moving towards the right direction. This will include ensuring the commission's response to various issues, such as the investigation of human rights abuses committed in the past, the amendment of Act No 26/2000 on the human rights court, and the amendment of Act No 39/1999 on human rights, to restore its power in human rights monitoring.

(4) Internal conflict within the commission has also clearly hindered it to work effectively. In some cases, these conflicts cost the commission the opportunity to uphold the rights of the victims of gross violations of human rights. It is therefore strongly recommended that the commission resolve its internal problems so that it may function more effectively. This will include taking necessary steps in dealing with the ongoing conflict with the Secretary General to prevent it from hampering the commission's work.

Situation of Japan: Working Towards the Establishment of an Independent NI

Mikiko Otani[166]

I. Background

The movement toward the establishment of a national human rights institution started during the late 1990s in Japan. The driving force underlying this movement was the combination of international and domestic factors. In 1998, the Human Rights Committee in its concluding observations of the examination of the fourth periodic report of the Japanese government, specifically expressed concern for the lack of an independent body for investigating complaints of violations of human rights and recommended that the government set up such a body without delay.[167] Although the Human Rights Committee was aware of the existing systems for human rights remedies in Japan, such as the Human Rights Bureau and human rights volunteers under the Ministry of Justice, the Committee found these existing mechanisms neither independent nor effective.[168]

The domestic situation also called for an effective human rights institution. The Council for the Promotion of Human Rights Protection was set up in 1997 by the Law for the Promotion of Measures for Human Rights Protection. Its primary mandate was to study and make policy recommendations to the government on human rights education and the human rights remedy system. This was the initiative to follow up the end of the special measures for 'Buraku' minority people.[169] Recognizing that discrimination against these people continues to exist in the society, an effective human rights remedy system was deemed necessary, together with human rights education.

In 2001, the Council on the Promotion and Protection of Human Rights issued the final report on the framework of the human rights remedy system. In the report,

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166 Member of Committee on International Human Rights, Japan Federation of Bar Associations. This article is based on the author's individual view and does not represent the organizational view or position of the Japan Federation of Bar Associations.

167 "The Committee is concerned about the lack of institutional mechanisms available for investigating violations of human rights and for providing redress to the complainants. Effective institutional mechanisms are required to ensure that the authorities do not abuse their power and that they respect the rights of individuals in practice. The Committee is of the view that the Civil Liberties Commission is not such a mechanism, since it is supervised by the Ministry of Justice and its powers are strictly limited to issuing recommendations. The Committee strongly recommends to the State party to set up an independent mechanism for investigating complaints of violations of human rights. " (para.9) "More particularly, the Committee is concerned that there is no independent authority to which complaints of ill-treatment by the police and immigration officials can be addressed for investigation and redress. The Committee recommends that such an independent body or authority be set up by the State party without delay. " (para. 10) Other UN treaty bodies have also requested the government of Japan to establish an independent national human rights institution in accordance with the Paris Principle.

168 Human rights volunteers are approximately 14,000 private citizens appointed by the Minister of Justice in all the municipalities such as cities, towns and villages across the country.

169 'Buraku' minority people are the descendants of the caste class created during the feudal period and they have been suffering discrimination even after the formal abolition of the class system. Special financial measures to remedy discrimination against them were cut off in 2002.

the Council advised the government to reform the existing human rights volunteer system and to set up a new human rights institution given the powers for investigation and remedies. Based on the recommendation by the Council, the Human Rights Protection Bill (hereinafter referred as "Draft Bill") to create a national human rights commission (hereinafter referred to as "Human Rights Commission" or "Commission") was drafted and submitted to the Diet in March 2002. However, it failed to pass as a result of the concerted extensive objection of NGOs and media groups that continued until the dissolution of the House of Representatives in October 2003.

The Draft Bill had two major problems among a number of issues. The most serious concern for many human rights NGOs was its insufficient independence from the government. Under the Draft Bill, the Human Rights Commission was an affiliated agency of the Ministry of Justice. This means that the Commission would be substantially placed under the jurisdiction of the Ministry of Justice, which governs the Immigration Bureau, prisons and detention facilities, the agencies persistently involved in human rights violations. Being attached under the Ministry thus was seen as a critical flaw detrimental to the independence from the government.

Another concern, which was raised by media, as well as human rights groups, was with respect to the power given to the proposed human rights commission to investigate and regulate media activities. If such power is exercised arbitrarily or excessively, it may serve to limit or even censor media activities. This may also give rise to situations where the rights to freedom of expression and information are violated, thereby threatening the very foundations of any democratic society.

It is true that the activities of media, like other private entities, may be the basis of human rights violations, in particular, violations to the right to privacy of victims of crimes and their family members. It was argued, however, that it is appropriate to leave these issues to self-regulation by the media and not to allow the Human Rights Commission, a powerful but not fully independent body, to intervene into the media activities.

While human rights NGOs called for the establishment of a national human rights institution, their general view was that it was better not create one with such fatal flaws mentioned above. Particularly, human rights NGOs believe that independence from the governmental is a critical element that must be possessed by national human rights institutions in accordance with the Paris Principles. It would be very difficult to address the problem of independence of the national human rights institution after it has already been established.

In 2005, there was another proposal to revise and submit the draft Human Rights Protection Bill. However, as the most serious flaw of lack of independence from the government was not addressed, NGOs did not support the submission of the

bill. Even worse, the proposed revised bill was reported to introduce a citizenship requirement for human rights volunteers who will be serving under the Human Rights Commission. This citizenship requirement was viewed by human rights NGOs to be regressive and discriminatory. The revised bill was eventually not submitted to the Diet. There has been no progress since then toward the establishment of a national human rights institution in Japan.

II. Basic Information

Below is an overview of the structure and functions of a national human rights institution proposed to be established by the draft Human Rights Protection Bill.

Full Name	Human Rights Commission
Founding Year	N/A (Not yet established)
Enabling Law	Human Rights Protection Bill (draft)
Status at APF	N/A
Status at ICC	N/A
Number of commissioners	Chief commissioner 4 commissioners (3 commissioners are part time)
Terms of office	3 years (renewable)
Number of staff	Not provided in the draft Bill Those who are qualified to be attorneys at law have to be included in the staff
Funding sources	It is not specifically provided in the draft Bill, but it is supposed to derive funds from the national budget.
Annual Budget	No information provided
% of Government budget Other Specialized Institutions	N/A

III. Compliance with the Paris Principles

The following is an assessment of the proposed Human Rights Commission under the Draft Bill against the Paris Principles:

1. Character of the NHRI

a. Establishment

The legal basis of the proposed Human Rights Commission is a law and its geographic jurisdiction covers all the areas in Japan.

b. Independence

As mentioned earlier, it is a largely shared view of NGOs that the proposed Human Rights Commission under the Draft Bill lacks independence from the

government since the Commission would be established as an agency affiliated with the Ministry of Justice. In particular, there is strong concern that effective investigation and proper remedies would not be conducted and provided for human rights violations caused by other agencies under the same Ministry, such as immigration offices or detention facilities.[170] With regard to accountability, the Commission shall annually report its activities to the Diet through the Prime Minister and publish its summary. The Commission may also publicize the result of the conduct of its functions to the public at anytime deemed appropriate.

c. Composition of the NHRI, Appointments processes, and organizational infrastructure

According to the Draft Bill, the Commission would be composed of the chief commissioner and four other commissioners appointed by the Prime Minister, with the consent of the Diet. There is no clear system in the Draft Bill to ensure a transparent process or broad consultation throughout the selection and appointment process by such means as inviting candidates from a wide range of groups in the society.[171]

The draft Bill has a provision for the consideration of gender balance in appointment of commissioners. The draft Bill provides that a minimum of two out of the five commissioners, including the chief, should be appointed from both sexes. Other than this, the draft Bill totally fails to ensure pluralism in the composition of commissioners and staffs.

The existing organization of the Human Rights Bureau of the Ministry of Justice would be abolished but it is expected that the secretariat of the Human Rights Commission will be staffed with those who are currently working for the Human Rights Bureau under the human resource management of the Ministry of Justice.

d. Relations with Civil Society and other human rights institutions

There is no provision referring civil society including NGOs in the Draft Bill. The Draft Bill only provides that the Commission may hold public hearings to widely hear opinions from the public if the Commission considers it necessary to conduct its functions.

While the Commission has the mandate of international cooperation in relation to its functions, there is no reference to cooperation with the United Nations, and regional and national human rights institutions in other countries in the Draft Bill.

e. Accessibility

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[170] The Japan Federation of Bar Associations is of the view that the Human Rights Commission should be placed under the jurisdiction of the Cabinet Office, not the Ministry of Justice,

[171] The Japan Federation of Bar Association is the view that the commissioners should be appointed by the Recommendation Committee formed within the Diet, in accordance with the criteria that represent voices of all levels of Japanese citizens.

According to the Draft Bill, the human rights volunteers would be appointed at local municipal levels throughout the country. The mandates of the human rights volunteers include collecting information on human rights violations and reporting such information to the Commission. However, it should be noted that procedures and mechanisms to ensure accessibility are not clear in the Draft Bill.

There is also no provision on the procedures and mechanisms for addressing public opinion.

The Draft Bill provides that the local offices would be established as the branches of the secretariat of the Commission. The Commission, however, may entrust the functions of the local offices to the Directors-General of Local Branches of the Human Rights Bureau of the Ministry of Justice.

IV. Competence and Responsibilities

It appears from the Draft Bill that the definition of human rights for the Commission is not consistent with that under international law. The Draft Bill defines "human rights violations" but neglects to provide a definition for "human rights". Under the Draft Bill, "human rights violations" are those acts of discrimination, abuse, and other acts that infringe human rights. Human rights violations by the government entities which may be investigated into by the Commission are practically limited only to the abuses committed by public officials. The human rights violations in the labor relations context are entrusted to the Minister of Health, Labor and Welfare. The Commission does not have the mandate to deal with them.

In addition, the provisions of investigation and remedies for human rights violations by mass media are especially incorporated, giving way to concerns about potential infringement of media freedom and the public's right to information.[172]

The Commission may also submit its opinions on matters necessary to achieve the purpose of the draft Bill to the Prime Minister, the chiefs of the relevant administrative agencies, or to the Diet, through the Prime Minister. However, the Commission is not given the clear mandate to promote and ensure harmonization of national legislation with international human rights instruments to which Japan is a party and their effective implementation.

Furthermore, the Draft Bill does not give the Human Rights Commission the mandate to encourage ratification or accession to international human rights

[172] The Japan Federation of Bar Associations is of the view that violations of any of the human rights specified in the Constitution of Japan and international human rights instruments, especially those conducted by the public power, should be stipulated to be covered by the jurisdiction of the Human Rights Commission and the Commission should be given clear responsibility and authority to make policy recommendation and implement human right education.

instruments and promoting implementation of these instruments into domestic law. Other concerns on the Draft Bill include the ambiguity in the mandate of the Commission with respect to human rights education.

The Commission may not exercise its power unless entrusted by law. The Commission is also given the investigative power for remedial functions.

The Commission also has quasi-jurisdictional competence. It can receive complaints, investigate, facilitate mediations, make recommendations, publicize recommendations, provide assistance for and participate in litigations.

V. Way Forward

It has been reported that the Cabinet will submit a revised Human Rights Protection Bill again to the Diet in 2008. Civil society has, for years, sought for an establishment of a national human rights institution in accordance with the Paris Principles. However, it has also struggled to prevent the passage of a bill that would establish a flawed national human rights institution.

The Japan Federation of Bar Associations has been working on the draft proposal for the terms of reference of a national human rights institution as an alternative to the government proposal. It is expected that such an alternative proposal from civil society would stimulate informed discussion among the public and the Diet members and eventually help achieve the goal of having an independent national human rights institution in Japan.

The year 2008 is full of international human rights events for Japan, such as the Universal Periodic Review in the United Nations Human Rights Council in May, and the consideration of the fifth periodic report of Japan by the Human Rights Committee in October. Among other pressing human rights issues, earlier establishment of an independent national human rights institution in accordance with the Paris Principles is one of the top priorities for the NGOs in Japan. Strong support from NGOs, and networks of NHRIs such as the Asia-Pacific Forum of National Human Rights Institutions (APF) is therefore needed.

Malaysia, Empowerment from Within?

Suara Rakyat Malaysia (SUARAM)[173]

I. Introduction

The Human Rights Commission of Malaysia (SUHAKAM) was established in 2000 under the Human Rights Commission of Malaysia Act 1999, but its effectiveness remains debatable. Supporters argue that having a Commission is better than not having one. Critics view SUHAKAM as a powerless body appointed for the purpose of window-dressing the government's poor human rights records, deflecting attention from the government's responsibility for rights violations and providing the international community with a sanitised version of the situation in Malaysia.

SUHAKAM's main functions as spelled out in Section 4(1) of the Act are to:

1. Promote awareness and provide education relating to human rights;
2. Advise and assist the government in formulating legislation and procedures and to recommend necessary measures;
3. Recommend to the government the subscription to, or accession of, treaties and other international instruments in the field of human rights; and
4. Inquire into complaints on infringement of human rights.

The Commission's performance under the continuing tenure of its Chairman, Abu Talib Othman, has been as disappointing as in previous years, if not even more dismal. During the period under review, little real progress was seen in terms of protecting human rights issues. SUHAKAM's major deficiencies and setbacks are linked to the lack of transparency and public consultation in the selection of commissioners; its restricted mandate; lack of structural autonomy; the government's disregard of its recommendations and advice; ambiguous human rights position involving issues deemed to be 'sensitive'; and slow response to allegations of violations.

[173] Contact Persons: John Liu, Documentation & Monitoring Coordinator, Yap Swee Seng, Executive Director, Suara Rakyat Malaysia (SUARAM)

II. Major Activities, 2007

1. Visits to prisons and detention centres

In 2006, the Commission made 22 visits to various prisons and detention centres. On 8 January 2007, it visited the Simpang Renggam detention centre in Johor, in response to allegations that inmates were being abused by wardens. However, the visit was not followed up with a public inquiry despite clear evidence of physical abuse being found.

2. Release of report on the 'Bloody Sunday' incident

In March 2007, SUHAKAM released its report on the public inquiry into alleged violations of human rights during dispersal of a public demonstration against increased fuel prices, held on 28 May 2006 in Kuala Lumpur.[174] This has since been dubbed as the 'Bloody Sunday' incident in reference to injuries that some participants sustained.

The Commission concluded that the police had used excessive force; that they had infringed the rights of some of the participants; and that certain officers could be charged under the Penal Code. To date, though, no legal action has been taken against any of the personnel said to be involved.

3. Custodial deaths and police abuse of powers

The Commission pledged to conduct public inquiry into all cases of death in custody should the police fail to conduct an inquest.[175] However, only one such inquiry has been held, in February 2006, into the death of S Hendry while in police custody. The Commission released its report in April 2006, concluding that the detainee had committed suicide in the cell and that no foul play was involved. However, the report pointed out that Hendry's death could have been avoided if the warders had conducted their patrols properly every 30 minutes as required; and if the deceased had not been placed alone in a cell.

SUHAKAM failed to probe the circumstances of Hendry's detention under the Emergency Ordinance (EO), which allows for indefinite detention without trial and which could have contributed to his negative mental state. The Commission made 31 recommendations for adoption by detention centres to prevent the recurrence of such incidents. The main proposal was for an initial risk assessment to be conducted at the registration stage for all detainees, particularly young ones.[176] The Commission failed to recommend that the EO be abolished.

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174 See SUHAKAM. 2007. Report of SUHAKAM Public Inquiry into the Incident at KLCC on 28 May 2006. Kuala Lumpur: SUHAKAM.

175 New Straits Times. 14 December 2005. "Custodial Deaths: We'll hold public inquiries."

176 See SUHAKAM. 2006. Report of SUHAKAM Public Inquiry into the Death of S Hendry 17 & 18 February 2006. Kuala Lumpur: SUHAKAM.

In June 2007, SUHAKAM submitted a list of 34 cases to the Inspector-General of Police (IGP) asking for speedy action against police personnel over violation of rights in the course of duty, brutality and deaths in custody. So far the police have only responded to 16 cases.

4. Anti-trafficking in persons

In May 2007, the Anti-Trafficking in Persons Bill was passed by Parliament. SUHAKAM has been working toward action against trafficking in persons since 2003. It has engaged various sectors, including government agencies and non-governmental organizations (NGOs) in doing so.

5. Human rights education and promotion

As in previous years, the Commission put much effort into promoting human rights by organising workshops, consultations, forums and conferences. Over the period under review, it collaborated with several government agencies. Discussions were also held with key personnel in ministries and government institutions in the area of human rights education and promotion. While enhancing awareness is important, the Commission has not balanced its activities with similar vigour in the area of human rights protection.

6. Indigenous Rights

In 2007, the Commission made field visits to several Penan villages in Sarawak to identify the problems of the Penan, in particular their right to land and socio-economic development. In addition, the Commission engaged a researcher to look into native customary land rights with focus on this indigenous group in Sarawak.[177]

The year saw the release of a report by SUHAKAM titled 'Penan in Ulu Belaga: Right to Land and Socio-Economic Development'.[178] The report was based on visits made following complaints received from two Penan headmen from Ulu Belaga, Sarawak, pertaining to logging, oil palm plantation and reforestation activities by a company and their impact on the right to land and the life of the Penan community.

In the report, SUHAKAM made several recommendations. Among others, SUHAKAM recommended that the Sarawak Land Code 1958, in particular, section 5(2) regarding Native Customary Rights, be amended to take into consideration the unique custom of the Penans in ownership and stewardship of land.[179]

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177 SUHAKAM. 2007. Report to the 12th Annual Meeting of the Asia-Pacific Forum on National Human Rights Institutions, Sydney, 24-27 September 2007.

178 SUHAKAM. 2007. Penan in Ulu Belaga: Right to Land and Socio-Economic Development. Kuala Lumpur: SUHAKAM.

179 Ibid. (p. 22-23).

III. Independence

1. Absence of structural autonomy

Under the Act, the Commission is purely an advisory body and the government is free to accept or reject its recommendations. Most of SUHAKAM's more substantial recommendations have been ignored by the government. Even though the Commission submits an annual report to Parliament, the government has steadfastly refused to facilitate debate on its contents. As in previous years, the SUHAKAM's Annual Report 2006 was not debated.

When SUHAKAM was established in 2000, it was placed under the jurisdiction of the Ministry of Foreign Affairs. Jurisdiction was transferred to the Prime Minister's Department in 2004. Being under the direct supervision of the Prime Minister's Department has further undermined the Commission's credibility and dispels claims that it has any semblance of structural autonomy from the Executive branch of the government.

Under Section 5(4) of the Act, commissioners hold office for two years and are eligible for re-appointment. 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 marginalized and, when their term is up, face potential exit. This was seen for the second time in May 2006, when Professor Hamdan Adnan, the vocal head of the investigations and complaints committee, was not re-appointed. In 2002, the tenure of two highly competent commissioners, Anuar Zainal Abidin and Mehrun Siraj – who led a probe into police brutality in the 'Kesas Highway' incident and produced a report highly critical of the government – was not renewed.[180]

2. Questionable appointment of Commissioners

The Paris Principles state that composition of an NHRI and the appointment of its members must "afford all guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights…" It must therefore have representation of various sectors, including NGOs, trade unions, and concerned social and professional organizations; philosophical or religious thought; universities and qualified experts; parliament; and government departments.

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[180] In 2001, SUHAKAM conducted an inquiry on police brutality at a gathering of 100,000 people along the busy Kesas highway in November 2000. Its report was critical of the police for violating human rights. In relation to this, former Commissioner Anuar Zainal Abidin revealed in an interview in 2006 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 inquiry. (Malaysiakini. 7 July 2006. "Ex-rights Commissioner Anuar slams Suhakam" http://www.malaysiakini.com/news/53558 last accessed 29 July 2007). See SUHAKAM. 2001. Inquiry 2/2000: Inquiry on its Own Motion into November 5th Incident at the Kesas Highway. Kuala Lumpur: SUHAKAM.

Although the composition of SUHAKAM seems to have fulfilled the criterion of plurality to a certain extent, the competence and independence of some commissioners remain open to question. There is no prescribed manner in which the public or public-interest organizations can participate in the selection process. As such, there is no consultation with, or participation of, civil society groups.

Another major problem is that the Act gives the prime minister unfettered discretion in appointing commissioners.[181] Section 5 of the Act states that the King is to appoint the members, based on the prime minister's recommendation. This means that there are no checks and balances to ensure that the appointment process is politically neutral. The Act also does not specify limits on re-appointments.

Section 5(3) of the Act states that commissioners "shall be appointed from amongst prominent personalities including those from various religious backgrounds". The definition of 'prominent personalities' is not specified. Indeed, this criterion is of concern as the meaning of 'prominent personalities' is not synonymous with integrity and competence. More importantly, human rights knowledge/experience is not stated as a criterion in such appointments.

Eighteen commissioners are serving out the 2006-2008 term. Most are either former civil servants or those who have worked closely with the government.[182] Despite being paid a handsome salary and allowances, the commissioners continue to serve on a part-time basis and are not exclusively focused on human rights work.

3. No autonomy over funds

Control over funds is another area by which the Commission's autonomy is measured. Section 19(1) of the Act states, "The Government shall provide the Commission with adequate funds annually...", while Section 19(2) prohibits the use of foreign funding. The ban reflects SUHAKAM's lack of autonomy to determine its finances, although some argue that it also ensures independence from external parties. Still, the fact that SUHAKAM is not even allowed autonomy to decide whether or not to receive a particular external fund is indicative of distrust in its ability to make independent decisions. The Commission's budget from the government for 2006 was RM7.6 million.[183]

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181 In 2002, this perception was substantiated by a controversial change of personnel when former Attorney-General (AG) Abu Talib Othman was appointed as SUHAKAM Chairman. It created a furore among 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.

182 The bio-data of Commissioners are available on the SUHAKAM website: http://www.suhakam.org.my/en/about_com_member.asp last accessed 9 Match 2008.

183 SUHAKAM. 2007. Annual Report 2006. Kuala Lumpur: SUHAKAM (p. 193).

4. Ambiguous position on contentious issues

The Commission's position on certain issues, especially those related to race and religion, is sometimes evasive and ambiguous, if not problematic.

a. 'Safe' position on freedom of religion

SUHAKAM acknowledges freedom of religion as embodied in the Federal Constitution and the UDHR but, at the same time, has maintained a 'safe' position on related issues. For instance, at a press conference in April 2007, the Chairman said: "Do not ask about SUHAKAM's stand [on] the Interfaith [Commission],[184] it is purely [a] matter for the government to decide."

In response to several controversial cases relating to religious freedom over the past two years – such as that involving Lina Joy[185] - the Commission only went as far as to "recommend [that] the court delivers its judgment as soon as possible to enable the government to examine the procedure and mechanism related to the issues".[186] The Commission has also not taken a clear stand on several other cases that have caused contention – that of M Revathi, who was sent to rehabilitative detention by Islamic authorities;[187] S Kaliammal, whose deceased husband's body was taken away by Islamic authorities who claimed that he had converted to Islam;[188] and R Subashini, who was denied her right to custody of her elder son whom her husband had converted to Islam.[189]

b. Unacceptable position on RELA

While local and international rights groups have urged the disbanding of the People's Volunteer Corps (RELA), given the alarming number of reports that its

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184 The Interfaith Commission (IFC) was proposed as a statutory body to play an advisory, consultative, and conciliatory role to promote religious harmony and national unity. The proposal was led by the Malaysian Bar and, following a two-day national conference held in February 2005, a draft bill on the proposed Commission was presented to the government. Both the Pan-Malaysian Islamic Party (PAS) and the Allied Co-ordinating Committee of Islamic NGOs (ACCIN), a loose coalition of 13 groups, boycotted the conference. ACCIN urged the government to reject the proposal. It alleged that the initiative was "anti-Islamic"; had a hidden agenda to bypass and usurp the powers of state Islamic bodies and the Syariah (Islamic law) courts; and would ultimately infringe upon Muslims' rights to practise Islam. Bowing to pressure, Prime Minister Abdullah Ahmad Badawi deferred the proposal, saying that implementation of the IFC could be a setback to national unity.

185 A Muslim by birth, she converted to Christianity in 1997. Although she successfully applied the same year to change her name to Lina Joy, she failed to have the entry 'Islam' deleted from her identity card. Her application for review of the decision was rejected by the High Court in April 2001. In April 2006, the Federal Court granted her leave to appeal. In a majority verdict on 30 May 2007, the Federal Court rejected her appeal on the ground that she should go through the Syariah Court on conversion matters. Doing so would expose her to sanctions, for Islamic courts in Malaysia have previously jailed 'apostates'.

186 SUHAKAM. 2007. Annual Report 2006. Kuala Lumpur: SUHAKAM (p. 15).

187 M Revathi was allegedly born a Muslim although she claims to have been raised as a Hindu. She was detained for 180 days by Islamic authorities for trying to officially change her religion to Hinduism. During her detention in an Islamic rehabilitation centre, she was allegedly forced to go through intensive counselling and claims she suffered mental torture. The Islamic authorities also took away her child from her Hindu husband and placed her in the care of Revathi's Muslim mother. See for instance, Malaysiakini. 11 July 2007. "Revathi: That's my name, forever" http://www.malaysiakini.com/news/69818 last accessed 2 August 2007.

188 S Kaliammal was married to M Moorthy, a national hero who had climbed Mount Everest. When he died in December 2005, the Islamic authorities obtained a Syariah Court order that declared him a Muslim at the time of his death. Kaliammal tried to reverse this via a civil court, but it refused to hear her application. She has since filed an appeal that is due for hearing in December 2007.

189 R Subashini got married in 2001 in accordance with civil laws and has two sons. Her husband embraced Islam in May 2006 and sought to dissolve his civil marriage via the Syariah Court and to obtain custody of their three-year-old son, whom he claimed to have converted to Islam as well. In March 2007, the Court of Appeal ruled that Subashini, a non-Muslim, must take her case to the Syariah Court. The Federal Court has granted her leave to appeal the decision. The hearing is set for September 2007.

untrained personnel have abused their powers,[190] SUHAKAM appears to believe that the corps plays an important role. In May 2007, Commissioner N Siva Subramaniam said: "RELA is a big help to us. Over four months this year, they have already arrested 15,000 illegal [immigrants]... up to now, there is no way other than to depend on RELA."

Although the Commission has stressed the need to curb abuse of power by the personnel,[191] its tolerant stance on RELA is unacceptable. The very existence of RELA, which falls under emergency legislation that has long outlived its purpose, and the actions of its personnel clearly go against human rights norms and principles.

IV. Mandate and Effectiveness

1. Restricted Mandate

SUHAKAM's most glaring weakness is that it does not have enforcement powers and it has a very limited mandate. This has resulted in the Commission being criticised as being ineffective and labelled as a "public relations tool"[192] of the government and further, as a "toothless tiger".[193]

According to the Paris Principles[194] a national human rights institution (NHRI), "shall be given as broad a mandate as possible". However, Section 2 of the Human Rights Commission of Malaysia Act 1999 confines the definition of 'human rights' to such fundamental liberties as enshrined in Part II of the Federal Constitution. This limits SUHAKAM's mandate tremendously.

Although Section 4(4) of the Act states that "regard shall be had to the Universal Declaration of Human Rights [UDHR] 1948 to the extent that it is not inconsistent with the Federal Constitution", there is no provision for incorporation of rights embodied in international conventions to which Malaysia is a party. The definition should be in accordance with the UDHR and other international human rights laws.

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190 Many instances of abuse of power by RELA personnel have been documented over the course of the year. See SUARAM. 2007. Malaysia Human Rights Report 2006: Civil and Political Rights. Petaling Jaya: SUARAM. (pp. 101-112). Human rights groups have pointed out that RELA should be disbanded not only because of gross human rights violations, but also because it is a product of the Emergency Act during the period of 'Confrontation' between Indonesia and Malaysian in the 1960s. As use of the legislation is no longer justifiable, it should be repealed. See for instance, The Star. 3 June 2007. "Government will not disband RELA" http://thestar.com.my/news/story.asp?file=/2007/6/3/nation/17922076&sec=nation last accessed 15 August 2007; and Malaysiakini. 9 May 2007. "Global rights watchdog: Disband RELA" http://www.malaysiakini.com/news/67003 last accessed 15 August 2007.

191 Malaysiakini. 17 August 2007. "Suhakam: Check Rela's powers" http://www.malaysiakini.com/news/71304 last accessed 18 August 2007.

192 For instance, see Syed Hamid Albar. 1999. Rationale for the Human Rights Commission of Malaysia. In Tikamdas, R & Rachagan, SS (eds.) Human Rights and the National Commission. (pp. 103-110) Kuala Lumpur: HAKAM.

193 For instance, Hector, C 2004. "BN has no respect for human rights." Aliran Monthly. http://aliran.com/oldsite/monthly/2004a/ef.html last accessed 18 August 2007.

194 Principles Relating to the Status of National Institutions (UN Commission of Human Rights Res. 1992/54 of 3 March 1992; General Assembly Res. 48/134 of 20 December 1993).

It must be pointed out that Part II is not the only section of the Federal Constitution that enshrines human rights. Many critical matters like rights of citizenship, right to universal adult franchise, eligibility to contest a seat in the Lower House of the Parliament, and protection for detainees under preventive detention laws are stated in other parts of the document. Yet, these have been deliberately excluded from the Act. Even the few fundamental liberties in Part II can be easily circumscribed as the 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 liberties.

SUHAKAM has powers similar to those of a court of law in the matter of discovery of documents and attendance of witnesses. However, Section 12(2) of the Act bars it from inquiring into any complaint relating to any allegation of 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 can be problematic as it may restrain the Commission from investigating if a case involves any other forms of violation apart from the subject matter in the courts. This could possibly give the Commission justification to refrain from investigating cases taken to court, without considering if these involve any other forms of violation. This means that there is a possibility that the Commission would have to refrain from inquiry even when the alleged violator initiates legal action to frustrate an inquiry by the Commission.[195]

The recent decision of the Commission to call off its inquiry into the use of 'live' bullets by the police during the 8 September 2007, riot in Batu Buruk, Kuala Terengganu is a clear indication how narrowly the provision in the section 12(2) of the Act is interpreted to justify its decision. In the case of Batu Buruk incident, the complaint on the shooting of unarmed protesters by the police was different from court charges of the duo for causing injury to the policeman. Clearly, the former is an obvious violation of human rights and the latter was a criminal matter. Such a stand goes completely against the moral fibre of the commission seen as the bastion of human rights in Malaysia. Civil society groups argued that section 12(2) if accorded liberal interpretation would only disallow the commission to inquire into a complaint of human rights violation only if the same case of human rights violation has been brought to court and not as claimed.

Section 12 of the Human Rights Commission of Malaysia Act 1999, when properly understood, was intended to avoid a victim of human rights violation from taking his complaint to court and at the same time asking SUHAKAM to conduct an

[195] Tikamdas & Rachagan provided a formulation in that an inquiry would be discontinued only if the complainant initiates an action in the courts, the subject matter of which is identical to the Commission's inquiry. See Tikamdas, R & Rachagan, SS 1999. Human Rights Commission of Malaysia Act: a critique. In Tikamdas, R & Rachagan, SS (eds.). Human Rights and the National Commission. Kuala Lumpur: HAKAM. (pp. 194-195).

inquiry. Such a position, as taken by SUHAKAM in this case, will only encourage more violations and a culture of impunity.

Another restriction the Commission faces is with regard to visiting places of detention. While Section 4(2)(d) provides the power, the visits have to be "in accordance with procedures as prescribed by the laws relating to the places of detention…". In order to inspect conditions of prisons, for example, SUHAKAM must first write to the Prison Department for permission. It is pertinent to stress that such notification only gives time to the authorities to clean up their act, which defeats the basic reason for checks on conditions at prisons and detention camps. SUHAKAM should be given the powers to conduct spot checks in order to get a more realistic view of conditions and to ensure that the level of maintenance and treatment of detainees are on par with stipulated standards at all times.

2. Slow response to human rights violations

SUHAKAM is clearly reactive, not pro-active, when it comes to protecting human rights. Section 12(1) of the Act states that, "[t]he Commission may, on its own motion or on a complaint made to it…" inquire into allegations of human rights infringement. However, in practice, the Commission does not open an inquiry until a complaint is lodged.

When the Commission receives complaints of violations, it is often slow in responding or, in many cases, does not respond at all. A common excuse is that commissioners need time to discuss the matter and that their meetings are convened only once a month. Yet, they have not taken the initiative to address even this situation. The commissioners are not exclusively focused on human rights work, and most of the time, are not even in the office. As a result, there is lax follow-up of complaints. As of May 2007, only nine complaints lodged in the first five months of the year had been resolved.[196] However, the Commission has periodically met with officials in the government departments accused of violations, who only pay lip service to the need to improve the situation.

In 2006, only 417 of the 1,222 complaints SUHAKAM received were deemed to involve violations of human rights.[197] In 2007, up to the month of August, only 37 of the 761 complaints has been resolved. Another 219 were still pending investigation, while the rest were not pursued as they were "not related to human rights".[198]

196 Buletin SUHAKAM. April 2007 – June 2007. (p. 11).

197 SUHAKAM. 2007. Annual Report 2006. Kuala Lumpur: SUHAKAM (p. 76).

198 Buletin SUHAKAM. July 2007 – September 2007. (p. 11).

3. Insufficient will in protecting human rights

Although it is widely acknowledged that SUHAKAM's ineffectiveness is largely due to its restricted mandate, the Commission does not seem to have made much effort to circumvent the restrictions. It seems to lack the will to do so, conveniently using the excuse that it has not been given a wide enough mandate to justify its lack of effectiveness in human rights protection.

a. Civil society's demand for public inquiry into the 'Bloody Sunday' incident

One instance of its lack of will was seen in June 2006, when civil society groups called for a public inquiry into alleged police brutality in the 'Bloody Sunday' incident. A complaint was lodged with the Commission on 31 May 2006, with photographs and video footage of police beating up demonstrators. The complainants were told that a decision as to whether or not to conduct a public inquiry would only be made at the Commission's monthly meeting on 12 June 2006 and would require the support of two-thirds of the commissioners present.

Upon learning that the Commission was reluctant to conduct the public inquiry, members of civil society organizations staged a sit-in protest at its office while the meeting was in progress. As anticipated, the Chairman announced that the Commission would need to hear the police version of the incident and to obtain more evidence before making a decision. This prompted civil society representatives to stage a walk-out protest after only five minutes into their meeting to press the Commission to hold the inquiry.

The Commission's excuse that it needed evidence was unjustifiable as the photographs and video footage submitted could already form the preliminary basis for inquiry. It was even more appalling that the decision of the Commission would have to rest upon the police version of the incident when the complaint was against police personnel. SUHAKAM's vacillation was reflective of its lack of will and slow response in dealing with blatant human rights violations. The Chairman's excuses further demonstrated that the Commission was evading its mandate to discover the truth.

At its next monthly meeting in July 2006, after civil society groups intensified pressure and the Inspector General of Police (IGP) Mohd Bakri Omar publicly defended the police action, SUHAKAM had no choice but to hold a public inquiry. This was conducted in October and the report of the findings was released in March 2007. However, the inquiry could have had more impact if the Commission had subpoenaed the IGP, especially in light of his vehement defence of his personnel in saying they had applied "minimum force" and that they had a "right

to defend themselves".[199] Power to subpoena is provided in Section 14(1)(c) of the Act, enabling SUHAKAM "to summon any person residing in Malaysia to attend any meeting of the Commission to give evidence or produce any document or other thing in his possession, and to examine him as a witness or require him to produce any document or other thing in his possession". However, since this power was not used to full effect in the 'Bloody Sunday' inquiry, SUHAKAM cannot cite its limited mandate as an excuse for its ineffectiveness in this instance.

b. Police violence during demonstrations in 2007

In November 2007, SUHAKAM Commissioner Siva Subramaniam made a statement to the effect that the organisers of a rally for free and fair elections on 10 November 2007 in Kuala Lumpur needed to follow the law on public assembly and apply for a police permit. This contradicted the Commission's own recommendations in the 'Bloody Sunday' inquiry that "peaceful assemblies should be allowed to proceed without a licence".[200] Further, despite concrete evidence documented by SUARAM and various international media that tear gas and chemical-laced water were used against crowds, and six persons were injured as a result of police violence, Commissioner Siva Subramaniam commented that the police did not resort to violence and had acted professionally in the rally.

Although the Commission had clarified that the statement made by Commissioner Siva Subramaniam was his personal opinion and did not reflect SUHAKAM's position on freedom of assembly, it did not immediately and officially correct the statement made by commissioner Siva on the 10 November rally. Rather, the Commission only clarified the matter when asked by journalists on a separate issue and during a meeting with NGOs.

4. Recommendations and advice ignored

Although SUHAKAM is frequently criticized by NGOs for its incompetence, it has – to its credit – come up with considerably good reports and recommendations. However, these initiatives to promote human rights are routinely ignored by the government and its agencies.

For example, SUHAKAM has since its inception been consistent in its position on freedom of assembly. In several comprehensive reports,[201] it has made recommendations supporting the right to peaceful assembly in line with international human rights standards. These include professional procedures in

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199 Malaysiakini. 31 May 2006. "Bloody Sunday: Police chief justifies action" http://www.malaysiakini.com/news/51840 last accessed 29 July 2007; New Straits Times. 1 June 2006. "Policemen have the right to defend themselves".

200 SUHAKAM (2007) Report of Suhakam Public Inquiry into the Incident at KLCC on 28 May 2006. Kuala Lumpur: SUHAKAM.

201 See for instance, SUHAKAM. 2001. Inquiry 2/2000: Inquiry on its Own Motion into November 5th Incident at the Kesas Highway. Kuala Lumpur: SUHAKAM.

situations where crowd dispersal is justifiable; for instance, that an audible order to disperse should be given three times at 10-minute intervals before the police move into action.

SUHAKAM's report on the 'Bloody Sunday' inquiry reiterated recommendations in protecting the right to peaceful assembly, but the authorities have not implemented any of these. Although the police have, to a certain extent, subsequently refrained from using force to the same extent, the government has continuously disregarded and disrespected freedom of assembly. This was seen in several forced eviction operations and during protests against the increase in toll-charge rates after the 'Bloody Sunday' inquiry report was released – again, there was clear evidence of excessive force by law-enforcement personnel.

During the period under review, major recommendations were made with regard to preventing deaths in custody, following the suicide of S Hendry. There is, as yet, no evidence of SUHAKAM's recommendations being adopted.

At another level, the ratification of international covenants and treaties is one of the benchmarks of human rights promotion and protection. SUHAKAM's recommendations since 2000 to the government to sign several key international documents have been ignored. Ratification of the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) remains as distant as ever.

5. Ineffective co-operation with the government

According to its 2006 Annual Report, the Commission had collaborated with several government agencies. Discussions were held with key personnel including the Minister of Rural and Regional Development, Minister of Higher Education and the Director-General of Education. The Commission said it had also worked with government agencies, including the Immigration Department, RELA, the police force and Prison Department in the area of human rights awareness and education.[202] While such activities are extremely important, their effectiveness is difficult to gauge. For example, RELA personnel are still periodically accused of abusing their power even though SUHAKAM has provided them with training on human rights.

6. Limited outcomes of intervention

SUHAKAM's ability to influence change is seldom visible. It is possible that the government and its agencies have not revealed the changes implemented, for

[202] SUHAKAM. 2007. Annual Report 2006. Kuala Lumpur: SUHAKAM (p. 63).

fear of adverse publicity or simply because of a historically poor track-record of official disclosure and accountability.

However, a positive outcome was seen in February 2006 when SUHAKAM announced its decision to hold a public inquiry into the death of A Ravindran while in police custody in Penang. This possibly led to the police expediting an inquest into the long-overdue case.[203] District police submitted the case-file to the Public Prosecutor's office on the same day that SUHAKAM issued subpoenas to witnesses, including police officers connected to the case. This resulted in SUHAKAM calling off its intended action.

A positive result was also recorded in the area of trafficking in persons. SUHAKAM's work on this since 2003, in consultation with stakeholders, contributed to the Anti-Trafficking in Persons Bill being passed in May 2007. However, the Act provides little protection for victims – instead, they can be forced into a shelter by a Magistrate and will be punished if they choose to leave the shelter.

V. Interaction with NGOs

SUHAKAM has generally had a rocky relationship with human rights NGOs since its inception.[204] During the period under review, this relationship did not change much, as plainly illustrated by the walk-out by NGO representatives in June 2006 after only five minutes into a meeting to push for a public inquiry on the 'Bloody Sunday' incident.

According to a report published by the Education and Research Association for Consumers Malaysia (ERA Consumer Malaysia), Malaysian NGOs had initiated annual consultations with SUHAKAM in each of the last five years. However, the SUHAKAM Chairman has not attended any of these sessions. Less than 10 percent of the commissioners have turned up, despite personal invitation letters being issued to all of them and reminders being sent.[205]

Still, many NGOs see the importance of the Commission and continue to co-operate with it. One reason is because SUHAKAM has access to locations – such as places of detention – where human rights violations allegedly occur and which

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[203] A Ravindran, 41, died at the Northeast District police lock-up in Patani Road, Penang, on 19 November 2005 (New Straits Times. 23 February 2006. "Suhakam move 'fires up' police").

[204] In 2002, a coalition of 32 NGOs disengaged with SUHAKAM for a period of 100 days in response to the controversial change of personnel in the Commission, and SUHAKAM's poor record. In response, SUHAKAM expressed disappointment. Commissioner Professor Hamdan Adnan said the boycott was unfair and would only cause a loss to society. He observed that the boycott showed that the NGOs had their own interests at heart and were not sincere in defending human rights. He further said they had not followed-up on key issues over which they had criticized SUHAKAM, and that it was not right to pass all responsibility to a body that was just a year old.

[205] Kang, R 2006. Malaysia's commitment to international human rights instruments and mechanisms: A review of SUHAKAM's roles, approaches and impact. In Nagarajan, S (ed.) SUHAKAM After 5 Years: State of Human Rights in Malaysia. Petaling Jaya: ERA Consumer. (p. 9).

are not easily accessible to civil society groups. However, the level of co-operation between NGOs and SUHAKAM varies from one group to another.

For example, in taking up the issue of trafficking in persons, the Commission visited the Kajang Women's Prison and observed a large number of foreign nationals, mainly young girls, being held on remand. The Commission then set up a sub-committee to study the problem of trafficking in women and children.

At the National Conference, 'Stop Trafficking in Persons: Transborder Crime in the Region' held in Kuala Lumpur in September 2006, a SUHAKAM representative gave a presentation on the Commission's experiences and initiatives. She commented: "NGOs, who operate at the grassroots […] would be able to provide vital information, motivation and support. There needs to be co-ordination between NGOs […] local community members, groups and agencies should be actively engaged."[206]

Indeed, there has been constructive engagement between SUHAKAM and NGOs working on this issue. As a result of a series of dialogues with NGOs, government agencies, individuals and selected embassies, SUHAKAM published two reports, *Trafficking in Women and Children* (2004) and *Reducing Violence Harm and Exploitation of Children* (in collaboration with United Nations Children's Fund, UNICEF, 2005).

The most recent example of engagement is on the ASEAN Human Rights Mechanism. In March 2006, SUHAKAM hosted the second meeting of the ASEAN National Human Rights Institutions' Consultation Mechanism. However, the meeting in Kuala Lumpur was organized in a rather exclusive manner, with only limited NGO engagement.[207] Subsequent meetings and roundtable discussions were similarly attended by only a handful of NGOs.

VI. Recommendations

1. To the Government:

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

206 Pillai, K 2007. SUHAKAM's Experiences and Initiatives. In TENAGANITA. (ed.) Stop Trafficking in Persons: A Transborder Crime in the Region. (pp. 45-68). Kuala Lumpur: TENAGANITA.

207 Kang, R 2006. Malaysia's commitment to international human rights instruments and mechanisms: A review of SUHAKAM's roles, approaches and impact. In Nagarajan, S (ed.) SUHAKAM After 5 Years: State of Human Rights in Malaysia. Petaling Jaya: ERA Consumer. (p. 14).

individual as embodied in the UDHR and other international human rights laws.

b. Appointment of Commissioners

Establish an independent search committee comprising members of Parliament from the ruling coalition and opposition parties, civil society groups, trade unions and concerned social and professional groups. The selection process should be transparent, consultative, free and fair. The candidates should be credible, independent and competent in the field of human rights. Commissioners should serve full time and focus exclusively on human rights work. Those who only serve on a part-time basis should not be paid full-time salary.

c. Adequate resources

The Commission should be provided with adequate resources in order to function effectively. It should have financial autonomy and be allowed to determine whether or not to receive foreign funding and to co-operate with foreign institutions on human rights promotion and protection. It should be equipped with staff of the right calibre, with the required knowledge, commitment and determination to enhance compliance with human rights.

d. Security of tenure/autonomy

Extend the tenure of commissioners to five years and immediately dispense with the practice of re-appointment so as to ensure autonomy.

e. Powers of inquiry

Clarify the Commission's powers to prevent Section 12(2) from frustrating its work by the simple means of taking matters to court. Allow SUHAKAM the discretion to conduct the inquiry after disposal of the matter in court. The Commission should also be given powers to conduct spot checks on places of detention.

2. To SUHAKAM:

a. Empowerment from within

Make use of even its limited mandate and find ways and strategies to proactively maximize its role as a credible protector of human rights.

b. **Balance** human rights promotion with human rights protection

Direct intervention into alleged violations should be carried out with the same vigour as promotional activities. The Commission must find the will to make a clear human rights stand on fundamental issues, regardless of whether these are deemed sensitive or controversial.

Accountability at Stake in the Maldives

Maldivian Detainee Network[208]

I. Introduction

The Human Rights Commission of Maldives (HRCM) is one of the youngest national human rights institutions in Asia. It is still currently going through recruiting its staff, establishing its permanent office premises, and solidifying its programmes.

The HRCM started its work by focusing on the monitoring of the conditions and human rights violations within prisons and detention centers. It reported that the conditions in prisons and detention centers are appalling. Two important cases tackled by the HRCM illustrate the type of conditions within prisons and detention centers in the Maldives. These are the deaths of Muaviath Mahmood and Hussein Solah.

Muaviath Mahmood died while in police custody at the Dhoonidhoo Island Detention Center on 9 March 2005. The HRCM did conduct an investigation on this case and its findings confirmed that Muaviath Mahmood's death was due to negligence of the police and detaining authorities. The HRCM recommended that an action be initiated in court on this matter. The government, however, did not respond. The HRCM filed a case on its own against the police and detaining authorities in December 2007, but lost the case. On the other hand, Hussein Solah was found dead on 15 April 2007, after purportedly having gone missing after being released from police custody. The HRCM conducted an investigation on this case and had to bring the body to Sri Lanka for a post-mortem examination.

The HRCM has also recently tackled the issues of riots in prisons and jailbreaks due to the alleged discrimination among inmates in different cells. It also took up the issue of police brutality and arbitrary arrests in Thaa Atoll Kinbidhoo Island and Ihavandhoo Island.

The NGOs in Maldives have noted, however, that the HRCM faces some difficulty in exerting pressure upon prison authorities and the government to implement its recommendations on how to improve prison and detention center conditions. In answer to this, the HRCM claims that they are in the process of improving their relationship with prison administration authorities so that their recommendations may be implemented. It has also alleged that it is now undertaking a human rights training programme for both prison and police officials.

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[208] Report prepared by Programme Officer Hamza Latheef and edited by Co-ordinator Shahindha Ismail

II. Independence

The HRCM was established on 10 December 2003 as an independent and autonomous statutory body created by presidential decree, with the right to sue and be sued. It is composed of nine members, but the Chairperson and six Commissioners resigned within the same year the HRCM was established. This was because the HRCM was literally an ineffectual body, operating under regulations promulgated through powers vested in the President by Article 42(e) of the Constitution. This allowed him to determine the powers, duties and responsibilities of the HRCM.

On 18 August 2005, the Human Rights Commission Act was ratified, making the HRCM a constitutionally established autonomous body. This was followed by passage of the First Amendment to Law No: 1/2005 as Law No: 1/2006 (Human Rights Commission Act), and which was ratified by the President on 17 August 2006. This new development gave the HRCM constitutional backing and thus autonomy from the government, as well as pluralism in membership, a broad mandate based on universal human rights standards and adequate powers of investigation.

The HRCM claims to be independent and free from government interference in conducting its affairs. In fact, some of its reports have been quite critical of the government and appear to be unbiased with regard to political parties in the Maldives.

On the other hand, the main opposition party, the Maldivian Democratic Party, has claimed that the HRCM is biased in favour of the ruling party, the Dhivehi Raiyyithunge Party (DRP or Maldivian People's Party). In response, the HRCM has merely cited instances where it has acted without bias.

1. Relationship with government institutions

The HRCM has stated that it enjoys a co-operative relationship with the Executive. Its relationship with the Legislature is more complex, as members of both the ruling and opposition parties are suspicious of its independence. As a result, there is a certain degree of tension among members of Parliament in their dealings with the HRCM. While the Commission has done no work with the Judiciary so far, it plans to submit recommendations to reform the judicial process and legal mechanisms.

The HRCM also claims that it gets most antagonism from the police, who refuse to accept its authority, do not take heed of its suggestions, or make any effort to implement its recommendations. The police are accountable to a separate monitoring body, the Police Integrity Commission, so the current structure does not allow the HRCM to exercise the full extent of its mandate with regard to

police impunity and prison conditions. The HRCM has not taken any action that the Maldivian Detainee Network (MDN) is aware of, in relation to the Police Integrity Commission. The latter has not held a meeting since it was established in 2006, provided details of any work carried out, or even published an annual report to date.

Currently, the HRCM is able to take up cases to other institutions and submit proposals. However, it has not been seen to follow-up on its own suggestions, whenever these are ignored by the relevant institutions.

2. Selection and election of Commissioners

Names of nominees for the position of Commissioners are forwarded to Parliament by the President. A seven-member committee selected from Parliament evaluates the choices and sends its suggestions and recommendations to the President, who then makes the final decision in consultation with the committee.

This process is a much politicized one because the President is the elected leader of the DRP, which has 29 appointed members in Parliament. The committee counteracts this bias to a small degree as its members are drawn from all parties.

III. Mandate

The HRCM's limited mandate under the Constitution prevents it from fully conforming to the Paris Principles. It has published reports on major human rights issues. However the effectiveness of its recommendations is constrained by its inability to take legal action against alleged perpetrators.

On 9 April 2006, the HRCM published its findings on the death of police held detainee Muaviath Ahmed. This was a comprehensive account of the incident, reconstructed through statements from the detaining authorities, the persons arrested along with Muaviath, his cellmate and medical officials at the Dhoonidhoo Island Detention Centre.

The concluding statement comprises recommendations to detaining authorities in relation to the incident and conditions in general at the detention centre. The HRCM attached a strongly-worded suggestion for legal action against officials of the detaining authorities for alleged negligence, which was blamed for Muaviath's death. HRCM itself has not made an effort to take the matter to court although it is empowered to do so. Many NGOs believe that it should act on its suggestions without waiting for the State to take action against itself. The HRCM should exercise its mandate fully and not stop at offering mere suggestions when remedies are required for serious human rights violations.

On 18 August 2007, a referendum was held to decide the system of governance in the Maldives – whether a parliamentary or presidential system. International observers were given too little time by the government to send observers to oversee the process. The HRCM was the only non-governmental body that was allowed to send representatives as observers.

The short window of application period was clearly insufficient to recruit a workforce for the task at hand. From a large number of applicants, the HRCM accepted just 32 applications, making it impossible to assign an observer to every polling centre in every atoll. Had the HRCM accepted more applicants, the objective could have been adequately satisfied.

The HRCM claims that it had covered at least 50% of the constituency during this referendum. However, many NGOs now doubt the sincerity of the HRCM in ensuring an environment for free and fair elections. The NGOs believe that its presence at selected polling centres was mere window-dressing, for it could not scrutinize the process in every island in the Maldivian group.

The need for an observer in at least every polling island is simply because every island is separated by the ocean and it is impossible to arrange emergency observers “in case something happens”.

Additionally, the HRCM has recently made public that the commission will not be involved in monitoring the first multi-party presidential elections in the country, scheduled for a period between August and October 2008.

IV. Interaction with NGOs

The HRCM has made little effort to co-operate with, and provide support to, non-governmental organizations (NGOs) with regard to extending action against human rights violations.

Most NGOs have not contacted the HRCM as their projects have no connection with the latter’s activities. A survey conducted by Maldivian Detainees Network (MDN) for this report found that almost all local NGOs see little relevance for themselves in the HRCM projects and programmes. They also cited lack of support and co-operation from HRCM in terms of capacity-building assistance.

The HRCM has implemented a series of awareness-raising workshops to educate NGOs and other members of civil society on basic human rights, as well as the mandate and scope of the HRCM and its activities. Typically, it issues its invitations to NGOs via a public announcement instead of contacting the groups or networks directly. Most NGOs miss the application deadlines if they are unaware of the announcement and so, miss out on the workshops. The NGOs have repeatedly requested the HRCM after furnishing them with electronic contact details to inform NGOs of relevant programs via e-mail, but a member of

the HRCM replied saying that the public announcements were "policy" communications to NGOs.

The MDN has found it difficult to build rapport with the HRCM on matters regarding monitoring of conditions in prisons and detention centres. Since 2005, the MDN has been trying to get the HRCM's assistance to better monitor conditions, but without success.

Repeated requests to allow MDN personnel into the HRCM fact-finding missions or spot-checks on places of detention have been ignored. As the only Maldivian NGO whose work is based solely on detainees, the MDN feels that co-operation would be mutually beneficial to both organizations.

V. Recommendations

The HRCM should:

- Use its resources to take legal action against those responsible for human rights violations, as it has two active lawyers as members;
- Work with, and provide support and protection to, human rights defenders; Increase collaboration with NGOs such as the MDN, with regard to strengthening rights-based work.
- Begin working more fervently against the issue of torture since the UN-Sub-Committee for the Prevention of Torture assigned the HRCM as the National Prevention Mechanism under the OPCAT.

Balancing Needs in Mongolia

Centre for Human Rights and Development (CHRD)[209]

I. Introduction

During the year under review, the National Human Rights Commission of Mongolia (NHRCM) implemented key activities to emphasize human rights – a national inquiry was held into allegations of torture by those in authority, and at the recommendation of the Commission's report, the parliament issued a decree requesting the government to take action on its officers found to have committed torture. However, information was not available at the time of the conclusion of this report regarding the implementation of this decree.

Another keenly watched event was the appointment of new members of the commission, which took place in the first quarter of 2007. The pioneer group, who had taken office in 2001, completed their six-year term on schedule.

1. Appointment of new commissioners

The State Great Khural (SGK)[210] appoints commissioners, who then report back to it. The selection of the second batch of commissioners failed the test of plurality as recommended in the Paris Principles. Also, the process did not involve consultation with non-governmental organizations (NGOs) working on human rights or appointment of their representatives to the commission.

2. National inquiry on torture

The inquiry – backed by related research – was conducted from 2005-2006, to look into serious allegations of torture and cruel or humiliating penalties. This proved to be one of the more effective activities of the commission as use of torture is common in the preliminary stages of criminal investigations.

The commission's report on *Torture and Human Rights* in 2006 was discussed at the plenary session of the SGK, which issued a decree to the government to impose penalties on officials found guilty; and to allocate more than US$1 million from the state budget to improve conditions at detention centres where preliminary investigations take place.

This was a major coup for NGOs, who have been striving to shed attention on a severe problem without access to police lock-ups. The inquiry showed that it is

[209] Contact Persons: L. Ariunchimeg, Program Director, G. Urantsooj, Chairperson, Centre for Human Rights and Development (CHRD)

[210] Parliament of Mongolia

possible to detect and correct wrongs. It further proved that the commission can be effective as a force in preventing human rights violations.

3. Selection of ex-officio members

New members were selected to the Informal Committee (IC), a significant structure in developing relations and co-operation between the commission and NGOs. The IC also has a crucial role in providing plural representation, especially when this is missing is the commission. Eleven members of the IC were appointed, representing civil society organizations including media, trade union and human rights groups. Unlike in the past, the selection process was done in open and participatory manner. The Commission announced the call for nomination on IC members among civil society community through media and NGOs networks. Ten human rights NGOs which meets the IC members' criteria, nominated their representation and 5 of them were selected by around 30 NGOs through secret ballot. However, some NGOs feel the commission had set too high a criteria for IC members as it required human rights NGOs with more than 8 years existence in order to qualify for the IC members' election. This criterion excluded some competent human rights NGOs from nominating their representative. This criterion however does not apply to the selection of the commission members.

IC's rules of operation were also revised in 2007. The important revisions made included the reporting procedure and mandate of IC members. IC is now required to report to general public and NGOs about their activities, in addition to their regular reporting to the Commission. The IC members' mandate was also expanded and they now can provide policy advice to the commission.

II. Independence

The commission has broad powers[211] to promote and protect human rights. Under its enabling law passed in 2001, it is obliged to adhere to the principles of the rule of law, independence, protection of human rights, freedoms and legitimate interests, justice and transparency"[212] in its operations. The law specifically prohibits "any business entity, organization, official or individuals" from influencing or interfering with the activities of the commission and its members.[213]

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[211] In Article 3.1 of the NHRCM enabling law, the commission "is an institution mandated with the promotion and protection of human rights and charged with monitoring implementation of the provisions on human rights and freedoms, as provided in the Constitution of Mongolia, laws of Mongolia and international treaties".

[212] Article 3.3 of NHRCM Law

[213] Article 3.4 of NHRCM Law

However, those who violate this provision can get away with a small fine or administrative sanctions[214] that do not have sufficient deterrent effect. There is a need to review the system of penalties to enhance the independent operations of the commission.

Since no parties were held liable for interference during the period under review, the implication is that the commission was able to perform its duties without influence from the SGK, government, judiciary, and other organizations and individuals.

1. Relationship with Parliament

Another feature of independent operations involves transparent reporting of the commission's operations and submission of its Annual Report on the situation of human rights and freedom in Mongolia to the SGK by the first quarter of every year. Based on current practice, the report is first discussed at the level of the Human Rights Sub-committee, following which the Legal Standing Committee will decide to table it at a parliamentary plenary session. By law, the Annual Report must be published in the *State Gazette*. Copies are regularly distributed to human rights groups, providing widespread opportunities to assess the commission's activities.

Previous reports have not always been discussed in a plenary session, only at committee stage. The 2006 Annual report was for the first time debated by the plenary session of SGK. Human rights NGOs saw this as a major success for the commission. Besides the Annual report, in 2006-2007, comments and urgent recommendations have been submitted to the Human Rights Sub-committee on the issue of obtaining justice for Altantuya Shaariibuu, who was allegedly murdered in Malaysia in October 2006; as well as to protect the rights of victims of bankruptcy of savings credit co-operatives. These are new features.

The session to discuss commission reports at SGK is held open and it gives a possibility to observe for non-governmental organizations. However, so far neither Commission nor NGOs has ever been using this platform as an advocacy tool to improve SGK responsibility on human rights issues.

The commission's co-operation with the Human Rights Sub-committee is significant as a positive influence on promoting and protecting human rights through legislation. Therefore, it is important use every opportunity to expand this relationship.

[214] Article 26.1.1 of NHRCM Law "A citizen who has violated Art 3.4 of the Law shall be liable to a fine of Tg 5,000-40,000; an official to Tg 10,000-50,000; and a business entity or organization to Tg 50,000-150,000".

For example, the commission organizes a National Assembly on International Human Rights Day every year. It is now a tradition to organize this activity under the auspices of the President, in co-operation with the Office of the President. The event opens up possibilities for effective operations at the national level on a selected area of human rights. The 2006 National Assembly was themed 'disabled people's rights'. The 2007 Assembly proposes to address the 'Rights of Victims'.

However, the SGK – which holds supreme legislative power and its Human Rights Sub-committee – are not involved constructively in this activity. If the commission involves the SGK in the National Assembly, it could lead to integration of human rights provisions into the legislative process.

2. Relationship with the government

The commission works with the government in several ways – to provide training, to investigate violations within administrative processes, and to co-organize promotional events such as public forums. These are held in collaboration with the Office for the Human Rights Action Plan under the Ministry of Justice and Internal Affairs, and National Committee on Gender Equality**.**

Special training sessions are held for employees at different levels of government organizations in order to increase knowledge and understanding of human rights. Under the commission's 2007 Action Plan, there are proposals for training police and court personnel, local government officers, teachers, and prosecutors.

During the period under review, it also carried out monitoring activities at dozens of government organizations, and dispensed recommendations and advice. But the commission could not provide information on the outcome of its intervention.

3. Relationship with the judiciary

According to Article 11.2 of the NHRCM Law, 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.

While this provision protects the judiciary and police from third-party influence, it poses a barrier to the commission when it monitors actions such as use of excessive force by the police, for example, during the investigations and trial stage of criminal proceedings. The commission is thus prohibited from being pro-active in relation to human rights violations suffered by citizens. Although the commissioners and civil society groups know about the barrier, nothing has been done to date to dismantle it.

However, it doesn't mean that the commission is unable to supervise police and court activities. It has powers under Article 18.3 of the NHRCM Law to get acquainted with decisions made in civil and criminal cases. Therefore, the

commission has access to documents relating to cases that are dropped or rejected by these two authorities for the purpose of conducting research on human rights and later making appropriate recommendations on police and court activities. Still, this is far less effective than being able to conduct direct investigations and it represents a lost opportunity to prevent the recurrence of violations.

4. Appointment of new commissioners

There was no transparency in this process even if the SGK Human Rights Sub-committee seems to think there was. NGOs were unable to observe the process or to participate in it, since they did not know who had been nominated, when the list was submitted to the SGK, and when the selection was discussed.

The sub-committee claimed that the nomination process was conducted according to the law, but there is obviously much room to include NGOs. This was not the only case of exclusion. As such, NGOs have been demanding that state organs include different stakeholders in the decision making process. Without such pressure, state agencies often ignore compliance with the principle of participation.

Only one positive aspect has been seen in the new batch of commissioners – there is better gender presentation.

5. Financial autonomy

Article 22 of the NHRCM Law regulates funding to the commission. Its operational draft budget is approved by the SGK, but the state provides the funds. The Ministry of Finance has sole authority in allocating funds for the commission's activities each year. It often cuts the budget due to financial constraints, which affects the commission's ability to deliver on its mandate to promote and protect human rights.

The commission's budget was around US$81,000 in 2006, and is US$106,000 for the current year. In 2006, only US$2,400 (or 2.2%) was spent on operations, with the rest covering administrative costs like salaries, insurance and rental. Information provided by the commission reveals that it is unable to extend its operations to rural areas, or to organize training sessions and activities to promote public awareness and monitor human rights; despite the increasing demand for human rights protection in the country. It is clear that the commission is facing serious financial problems and that it needs to resolve this through pro-active measures.

Judging from similarities in the 2007 budget, the commission presumably will not be able to exercise its mandate effectively. The commission needs to ensure its financial survival to satisfy similar expectations in Mongolia.

III. Mandate

1. Decisions on complaints

The Commission receives complaints about violations of human rights and freedoms that are guaranteed by the Constitution, domestic laws and international treaties ratified by Mongolia. In recent years, the number of complaints has been increasing.

In 2006, the commission received 220 complaints. Of these, 81 were transferred to the relevant agencies for action, 49 cases were closed, and advice offered to 49 other complainants. Another 39 complaints were referred to organizations and citizens with appropriate recommendations and advices. Two cases were resolved on compromise basis.

Although the commission is legally bound not to intervene in cases being investigated by the police and judiciary, it can assist complainants by referring them to the relevant authorities, giving legal advice and helping to mediate towards a compromise.

Two cases referred to court were resolved. One of these involved a claim by five complainants that they were jailed between 201 and 1,252 days on trumped-up charges for which there was no evidence. The court ruled that they were entitled to compensation.

The commission was particularly successful in focusing attention to law reform, drawing its arguments from international conventions that prohibit torture, and provide for compensation for damages involving the government and its officials, among other parties.

2. Implementation of recommendations

Eighteen comments and recommendations on promoting and protecting human rights are provided in the commission's Annual Reports in 2006 and these were on issues relating to torture, freedom of association and freedom of assembly. In 2007, the focus is on the rights of military employees and the disabled, and on supporting human rights education, with 23 recommendations having been submitted to the SGK and its units for deliberation.

The commission conducted investigation on complaints – 14 in 2006 and 25 up to the first half of 2007. As a result, in 2006, the commission responded with 3 demands, 3 recommendations and 155 official letters. For the first half of 2007, it issued 5 demands, 2 recommendations and 145 official letters.

The commission appears to be making progress in monitoring human rights and investigating complaints. However, no information is available as to whether its recommendations, comments and demands are being taken seriously, even

though a monitoring unit has been set up. It does not mean that implementation is not being monitored, but it is certainly a sign that monitoring is weak.

This should not be the case, for the commission is empowered by law to check on action taken. For instance, parties are required under Article 19.4 to respond to the commission within a stipulated time. Under Article 19.5, the commission may approach the courts to complain about agencies that refuse to implement the proposals.

Currently, a working group under the Commission is undertaking monitoring of recommendations prepared by the 2006 National Human Rights Assembly.

IV. Interaction with NGOs

In 2006-2007 the commission worked with NGOs, the Mongolian Trade Union, universities and institutes to extend public awareness and training. These activities also comprised the greater part of the commission's work, as is evident from the 2007 Action Plan. Although these are important, strategies to prevent violations are equally needed. It has been shown that holding public hearings is a powerful way to enlighten violators. More attention should be given to active measures that lead to protection of human rights.

During the period under review, 13 NGOs took part in a survey to gauge the effectiveness of the commission. The main finding was that certain serious human rights issues have been sidelined in its work. These include neglect of the rights of those arrested during public demonstrations; and problems faced by herders due to environmental damage from mining activities that have been widened in last decade.

Another key finding was that the commission's independence is suspect. This was attributed to the fact that commissioners are appointed from those in government agencies only, and because the commission relies on state funding. Without plural representation, the commission must depend on the knowledge, experience and commitment of those appointed in order to extend human rights protection.

V. Recommendations to the Commission

i. Target plural representation in appointing commissioners
ii. Be pro-active in seeking sufficient funding to carry out the mandate
iii. Bring about legal reform to prevent violations of human rights
iv. Systematically monitor implementation of comments, recommendations and decisions on human rights
v. Expand protection of freedom of assembly and freedom of expression
vi. Protect the rights of herders affected by mining activities

Nepal: Vacuum at the Top

Informal Sector Service Centre (INSEC)[215]

I. Introduction

The National Human Rights Commission (NHRC) of Nepal has been left in limbo for more than a year, due to the government's failure to appoint Commissioners to the body.

Following the success of the People's Movement in restoring democracy in April 2006, it was expected that an effective, impartial and independent NHRC would be created with constitutional status. While the Interim Constitution – enforced from January 2007 – did uplift its status to that of a constitutional body, the government has not appointed Commissioners as had been eagerly awaited. Hence, the NHRC has not been able to perform its functions since 9 July 2006, after the resignation of members appointed by the government that the King had set up.

Under Article 163(3) of the Interim Constitution, the law on the NHRC remains in existence until it can be duly enforced. Pending petitions and complaints have been transferred to the Commission constituted under the Interim Constitution, for action in accordance with the Interim Constitution and the laws made under it. The new law on the NHRC had yet to be enforced at the time of writing.

The absence of leadership has affected the Commission's decision-making process, its ability to take up issues concerning human rights violations, and investigation of complaints. As a result, alleged perpetrators are not being penalized, while victims and their families are not receiving the justice they seek.

In a bid to overcome these difficulties, the government decided at a cabinet meeting on 17 July 2007 to make the Secretary of the Ministry of Law, Justice and Parliamentary Affairs the administrative head of the Commission. However, widespread criticism from the human rights community and Commission staff-members led to the directive being held in abeyance.

The cabinet decision was clear indication that government intends to cripple the Commission and weaken its independence, so as to prevent probes into human rights violations. It further demonstrated the government's reluctance to protect human rights and maintain the rule of law. This is a flagrant breach of the Paris Principles, Interim Constitution and the Human Rights Commission Act 1997.

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[215] Resource persons: Bidhya Chapagain and Prakash Gnyawali

National and international human rights organizations have been urging the government to expedite the appointments and to make the process an inclusive and transparent one. Civil society members and NHRC personnel made a unanimous decision on 20 July 2007 to conduct a 'Save National Human Rights Commission Campaign' and have organized activities to exert pressure on the government and political parties.

The prime minister and government have been giving verbal assurances that the appointments will take place. On 21 August 2007, Prime Minister Girija Prasad Koirala told members of the Parliamentary Committee on Human Rights and Social Justice that political parties had almost reached consensus on the candidates and that the appointments would be made very soon.

The urgency of appointing Commissioners is partly linked to challenges anticipated in numerous areas of human rights in 2007. Apart from investigating human rights violations, there is a need to monitor implementation of the Comprehensive Peace Accord (CPA) of 2006; facilitate access to justice via available mechanisms; and ensure that human rights concerns are upheld in the context of the Constituent Assembly elections set for November 2007.

II. Independence

1. Constitutional body

Established in May 2000 under the Human Rights Commission Act 1997, the NHRC bears primary responsibility for protecting and promoting the human rights of the people. It also serves as a voice of those who are not able to speak up for their rights and as a monitor of State obligations.

The NHRC has a mandate to conduct inquiries and investigations on its own or upon a petition or complaint filed in regard to violation of human rights; and carelessness and negligence in the prevention of violation of the human rights by any person, organization or authority. It may inquire into a matter with the permission of the court in respect of any claim on violation of human rights; visit and observe any authority, detention centre or jail, or any organization under the government; and submit recommendations on required reform of functions, procedures and physical facilities for the purpose of protecting human rights.

The Act provided independence to Commissioners through a fixed five-year tenure and the authority to fulfil their mandate. However, after the coup led by King Gyanendra in 2005, the Commission came under the grip of the Executive, thereby losing its impartiality, independence and effectiveness. The royal government amended the 1997 Act through an ordinance, made changes to the Recommendation Committee and appointed pro-coup members to the Commission. In short, it became the appointed government's mouthpiece.

2. Appointment and terms of office

Article 131(1) of the Interim Constitution provides for an NHRC headed by a Chairperson who shall be a retired Chief Justice or Judge of the Supreme Court who has made outstanding contributions in the protection and promotion of human rights; or a person held in high regard and who has rendered outstanding contributions and has been actively involved in protection and promotion of human rights or social work.

Four other members may be appointed from among persons who have made outstanding contributions and have been actively involved in protection and promotion of human rights or social work. Article 131(2) states that the appointments shall maintain inclusive representation, including women.

Article 131(3) stipulates that the Chairperson and Commissioners should be appointed by the prime minister on the recommendation of the Constitutional Council.[216] The Interim Constitution has set the tenure of the Chairperson and members at six years.

However, there is a grave flaw in the Interim Constitution, which places the Constitutional Council under the prime minister. Its members comprise the Chief Justice, Speaker of the Parliament, and three ministers who the prime minister appoints and are therefore likely to be loyal to him. In any debate, the Chief Justice and the Speaker of the Parliament could be in the minority, leaving the prime minister in complete control of decisions. As such, there is the danger that the prime minister's political interests could influence the NHRC composition. To prevent this, there should be a mandatory provision in the Interim Constitution that the selection of Commissioners should pass through a parliamentary hearing.

3. Duties and functions

As set out in the Interim Constitution, the NHRC has a duty to ensure respect, protection and promotion of human rights through effective implementation. Article 132(2) outlines its functions:

a. Conduct inquiries into and investigate violation of human rights and make recommendations.
b. Forward recommendations to the relevant authority to take departmental action against those who fail to perform their duty or responsibility or who show recklessness or negligence in performing their duty in regard to preventing violations of human rights.
c. Publicize the names of the person or bodies that do not follow or

[216] The Constitutional Council consists of the Prime Minister as Chairperson, the Chief Justice, Speaker of the Parliament and three ministers. The Council makes recommendations for appointment of officials to constitutional bodies.

implement NHRC recommendations and directions in relation to human rights violations, and record them as violators.

d. Forward recommendations to the relevant authority to take departmental action or impose penalties on human rights violators.
e. Make recommendation to lodge a petition in court against those who violate human rights.
f. Work with civil society to enhance awareness of human rights.
g. Periodically review laws affecting human rights and recommend necessary reforms.
h. Recommend that the government ratifies international treaties and instruments on human rights, and monitor the implementation of those treaties to which Nepal is a State Party.
i. Forward recommendations to the government for effective implementation of human rights instruments.

These functions, however, remain on paper as there is no mechanism or mandate within the Commission to implement them at present. This is again due to inherent flaws in the Interim Constitution, which hold back the effective and independence of the Commission, and leave it without options when its recommendations are flouted or not implemented.

For instance, the NHRC is currently unable to take to task government officials and agencies that fail to implement its recommendations. It requires specific powers in order to exert its authority. The Interim Constitution should therefore be amended to grant the Commission the power to clear the appointment or promotion of government officials and security personnel by issuing a 'no objection' letter. Otherwise, there is the danger that human rights violators being slipped into the system to promote vested interests.

4. Powers

Article 132(3) provides the NHRC with these powers:

a. Require any person to appear to give a statement or information; receive and examine evidence; and order any physical proof to be produced;
b. Whenever the Commission receives information that violation of human rights has occurred or is imminent, to enter without prior notice any residence or office to conduct a search-and-seize exercise to obtain relevant documents and other forms of proof;
c. Whenever the Commission receives information that a person's human rights are being violated at government premises or other places, to enter without prior notice to rescue the victim;
d. Order that compensation be paid to victims of human rights violations;

and

e. Exercise or cause to be exercised any other power in line with its duties as prescribed by law.

The Commission does not have jurisdiction on any matter that comes under the Army Act. This could have an impact on the NHRC's ability to fulfil its mandate under the broader framework of promoting and protecting human rights.

5. Annual Report

The NHRC has to submit an Annual Report to the prime minister who will then place it before Parliament. There are several issues over this – the Interim Constitution does not spell out when the prime minister should submit the report or the penalty if he fails to do so; or how the government should proceed in relation to the comments and recommendations in the report.

It would be more practical if the Interim Constitution empowers the NHRC Chairperson or a Commissioner to appear before Parliament to report to Members of the Parliament, including the Parliamentary Committee on Human Rights and Social Justice, and clarify issues raised in the report.

6. Minimum qualifications

Article 131(6) of the Interim Constitution states that no person may be appointed Chairperson or a member of the NHRC without being in possession of a Bachelor's degree from a university recognized by the government; the person must also be of high moral character. These limited requirements create many loopholes.

It already appears that the criteria are not being taken seriously in the on-going selection process, thereby potentially endangering the independence, impartiality and effectiveness of the Commission. Some candidates being considered have previously been criticized over their 'character' or for lack of impartiality and insufficient experience or expertise in the field of human rights. If candidates are active members of a political party or do not have a commitment to human rights, democracy and the rule of law, there is a high probability of political influence creeping into their decisions.

To ensure that only qualified people are appointed, the eligibility criteria should specify that the Chairperson and Commissioners must have made special contributions through long-term involvement in the human rights sector, judicial or legal profession. They should have knowledge of peace and conflict studies and should not have been involved in violations of human rights and humanitarian law.

7. Government funding

The government has allocated NPR67.8 million[217] to the NHRC for its general administration and delivery of services for the 2007-08 fiscal year.[218] The sum is insufficient to cover needs in monitoring and investigating human rights violations. This makes up only 0.04% of the national budget by sectoral distribution, which leaves it standing last among constitutional bodies. It is a reflection of the government's disinterest in turning the NCHR into an effective mechanism by strengthening its resources.

III. Mandate

1. Complaints handling

The NHRC's processing of complaints was found to be inefficient. It has received some 7,000 complaints since its inception in 2000.

According to a Commission official, some 1,320 complaints (or 19% of the total) have been concluded up to July 2007, while 11% of the cases have been rejected over the last seven years. Of the 2,400 complaints received in 2006 and 2007, only around 700 have been processed. Of the cases pending investigation, 60% were registered from 2005.

This poor performance is reflective of how badly weakened the Commission became after the royal coup of 2005; subsequent arbitrary selection of Commissioners by the government appointed by the King; and absence of Commissioners since 2006.

It is especially disappointing that only 2% of the complaints registered since 2000 have been forwarded to the government for action. The figure for 2006-07 was only 3% of the caseload.

2. Implementation of recommendations

The Commission made 147 recommendations to the government from 2000 to mid-April 2007, with a view to seeing perpetrators being brought to book and victims compensated. However, the government has only acted fully on 16 cases and partially on 35 others. In some cases, victims were compensated but the perpetrators were not prosecuted; in other cases, violators were prosecuted but the victims were not given compensation.

Seventeen of 48 recommendations on cases of killings by security forces, and 11 of the 13 by the Communist Party of Nepal (Maoists), have yet to be

[217] US$1.06 million (NPR64 = US$1)

[218] Annual Budget 2007-08, Ministry of Finance, Nepal Government available at www.mof.gov.np

implemented. The government has fully implemented only two such recommendations.

It has done little about cases of disappearances and torture, with 9 out of 11 recommendations having been ignored up to now. None of the recommendations on re-arrest by the security forces, explosions, unidentified killings, injury by security forces, killings of innocent civilian in crossfire, and killings by Maoist retaliation committees have been implemented (See Table).

Issues	Recommendations	Fully Implemented	Partially Implemented	Not Implemented
Policy-related	29	1	-	28
Witchcraft	13	13	-	-
Killings by security forces	48	2	29	17
Killings by Maoists	13	-	2	11
Disappearance and torture by security forces	11	-	2	9
Ambush by Maoists	2	-	2	-
Re-arrest by security forces	2	-	-	2
Unidentified explosions	2	-	-	2
Killing by unidentified person	1	-	-	1
Killing of civilian in crossfire	1	-	-	1
Wounded by security forces	1	-	-	1
Killings by Maoist retaliation committees	2	-	-	2
Miscellaneous	22	-	-	22
Total	147	16	35	96

Status of NHRC Recommendations (2000-mid-April 2007)

Source: NHRC, 2007

Although the Maoists have time and again expressed commitment to principles of human rights and international humanitarian law, and have joined the Interim Government and the Interim Parliament after a formal end to the decade-long armed conflict in November 2006, they have not respected NHRC recommendations. They have not even responded to communication from the Commission, to follow-up of the recommendations. Now that the Maoists are the part of State and government, how they translate their commitments into practice is a matter of concern.

3. Impact of recommendations on policy

It is not difficult to determine the effectiveness of the NHRC based on the number of policy-related recommendations that the government has implemented to date. It amounts to just one out of 29 recommendations – on allowing the Commission's officials to visit detention centres without hindrance. In practice, though, there are obstacles to visits to army barracks or undefined detention

centres widely used by the government to detain those arrested during the years of armed conflict.

4. Commission's activities

Even without the presence of Commissioners, the NHRC personnel have been conducting regular activities in a better way than during the king's regime. It routinely exerts pressure on the government, conducts fact-finding missions, issues press statements and gives recommendations to the government on actions required. However, in many cases there has been delay in publicizing the findings of NHRC monitoring conducted at regional level. The Commission has been organizing various programmes like interactive sessions, seminars and workshops in relation to transitional justice, the peace process, internal displacement, impunity and monitoring of implementation of the CAP.

IV. Interaction with NGOs

There is limited collaboration between the Commission and NGOs with regard to activities and initiatives. In a few matters – such as discussions on Internally Displaced Persons, transitional justice mechanisms and issues of impunity – the NHRC has established co-operation through invitations to its programmes. However, there is an absence of consultative mechanisms that could facilitate regular discussions and communication with NGOs on issues at the national level.

Human rights defenders (HRDs) and NGOs are generally critical of the Commission and hold the opinion that it is not worthwhile joining hands with the administration in the absence of Commissioners. However, there are some who believe that they cannot avoid building a working relationship with the NHRC since it has been established to protect and promote human rights.

The NHRC has four regional offices and at least five contact offices in various districts. How they co-operate with HRDs and NGOs should not just involve daily operational activities, but also a policy implementation framework and institutional structure.

Although administrative personnel have been co-operative in some areas, there are still questions about the Commission's effectiveness, considering that this is a body without a head. Its recommendations are not being properly implemented even in an environment of restored democracy. The overall political system has allowed better enjoyment of human rights among the people, but this remains threatened by armed activities and lack of compliance by the government and political parties with human rights principles.

There is space for the Commission to work with NGOs and HRDs, as in the campaign for immediate appointment of Commissioners. Meetings, demonstrations and lobbying with stakeholders have pushed this to the top of

the political agenda. In the transition to democratization and peace, the role of the NHRC is imperative and this demands efficient leadership without delay.

V. Recommendations

1. To the Government:

a. Immediately appoint members of the NHRC, based on expanded qualifications and a transparent process that satisfies the Paris Principles.
b. Amend flaws in the Interim Constitution that relate to the functioning of the NCHR.
c. Allocate additional resources for NCHR operations.
d. Monitor current cases of human rights violations and follow up on past cases.

2. To the NCHR:

a. Engage with civil society groups, victims' groups, HRDs, political parties, government agencies and the international community to broaden efficacy, impartiality and independence, in line with accepted norms and standards.
b. Create and strengthen internal mechanisms, and build capacity to deliver multiple functions, especially in relation to implementation of the CPA and scrutinizing the election process.

VI. Epilogue

The government appointed the Chairperson and four members of the NHRC on 18 September 2007, based on unanimous approval of the nominations by the Parliamentary Special Hearing Committee. They took their oath of office on 19 September before Acting Chief Justice Kedar Prasad Giri.

Former Chief Justice Kedar Nath Upadhyay was appointed the Chairperson on the recommendation of the Constitutional Council. The other Commissioners are former Supreme Court Justice Ram Nagina Singh, human rights activist Gauri Pradhan, former bureaucrat Lila Pathak and university teacher and human rights activist KB Rokaya.

The Philippines: A Hamstrung Commission

Vincent Pepito Yambao, Jr[219]

I. Introduction

The Commission on Human Rights of the Philippines (CHRP) marked its 20th year as an independent constitutional body[220] on 5 May 2007.[221] Prior to its creation, President Corazon C Aquino had constituted the Presidential Committee on Human Rights (PCHR)[222] upon assuming office in February 1986 to look into the country's human rights situation. During the Marcos dictatorial regime, the protection and promotion of human rights was largely a civil society affair, with non-governmental organizations (NGOs), people's organizations, religious groups and other civic organizations at the helm.

The establishment of an independent body on human rights was envisioned as mainstreaming human rights issues and bridging the divide between the government and members of the civil society. Prosecution of human rights violations remains with the Department of Justice, and human rights cases are decided by the courts of justice.

After the initial public euphoria, tension and antagonism marred the CHRP's relationship with both government agents and NGOs. On the one hand, the CHRP was accused of taking up the cudgels of the perceived enemies of the state. On the other hand, it was criticized for being too modest in its assessment of the human rights situation.

Today, the hostility has somewhat fizzled out. However, the Commission still has not managed to fully develop a functional relationship with NGOs. Moreover, it has not matched the sophistication of most human rights organizations in terms of research, training and monitoring of cases. Thus, instead of being in the forefront of human rights protection and promotion, the Commission has constantly lagged behind.

It has slowly gained the co-operation of government agencies. However, it has remained an oddity in the general scheme of government power structures. While an independent constitutional body, the CHRP functions more like an adjunct office of the Executive. This confusion over its role is further complicated

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219 The author is a practicing lawyer in the Philippines and is a member of the Lawyers' League for Liberty (Libertas), an organization dedicated to the protection of civil liberties and advancement of sustainable democratic reforms in the Philippines.

220 1987 Phil. Const., Art. XIII, Section 17(1).

221 The Commission on Human Rights was formally organized with the issuance of Executive Order No 163 on 5 May 5 1987.

222 Created under Exec. Order No. 8 issued on 18 March 1986.

by the creation of the Presidential Human Rights Committee (PHRC)[223] under the Office of the President.

The CHRP's operations have been constantly hampered by its meagre budget; most of its programmes are funded by grants and donations. While its fiscal inadequacy is a valid concern, the Commission has been remiss even in its constitutional duties which require little or no extra budgetary allocations. Indeed, there is nothing on record that indicates that the CHRP has ever used its contempt powers to compel the attendance of high public officials in its investigations. It has not used its power to grant immunity to witnesses who may be vital in shedding light on cases under investigation. Save for its position papers on some issues, the CHRP has not substantially produced academic research to guide policy makers, students and civil society groups on recent trends on human rights. Thus far, the CHRP has yet to propose legislation to Congress to further protect and promote human rights.

Finally, the Commission has been constantly hounded by questions about its independence and competence, especially with the appointment of Commissioners who do not have adequate experience in human rights advocacy. Now in its 21st year, the CHRP is confronted with grave issues that test its capacity to fulfil its constitutionally mandated duties independently and efficiently.

1. Extra-judicial killings and enforced disappearances

Such reports figured prominently in 2006 and 2007, prompting the Supreme Court, under Chief Justice Reynato S. Puno, to designate 99 Regional Trial Courts to hear, try and decide cases involving killings of political activists and members of media.[224] The court followed this initiative by spearheading a National Consultative Summit on Extra-Judicial Killings and Enforced Disappearances[225] with participation from various stakeholders. Topping these initiatives, the Supreme Court issued new rules of procedure paving the way for the issuance of the Writs of Amparo[226] and Habeas Data.[227] These twin peremptory writs are intended to solve the extensive extra-judicial killings in the country by: (a) compelling the military and government agents to release information on the *desaparecidos;* and (b) requiring access to military and police files.

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223 Reconstituted by Administrative Order No. 29 issued by President Gloria Macapagal-Arroyo on 27 January 2002. Admin. Order No. 29 was further amended by Admin. Order No. 163 issued by President Gloria Macapagal-Arroyo on 8 December 2006.

224 SC Admin. Order No 25-2007, 1 March 2007.

225 Held on 16-17 July 2007 at the Centennial Hall, The Manila Hotel.

226 A.M. No. 07-9-12-SC.

227 A.M. No. 08-1-16-SC.

While figures vary,[228] there is consensus that cases of extra-judicial killings and enforced disappearances have risen to an alarming extent. Most victims of extra-judicial killings are political activists, members of cause-oriented groups, media practitioners, and religious leaders.[229]

At least three independent bodies apart from the CHRP confirm the rising incidence of extra-judicial killings and enforced disappearances. These include the Melo Commission[230] created by President Gloria Macapagal-Arroyo to investigate reports of killings of media practitioners and activists; the International Federation of Human Rights (FIDH);[231] and the United Nations Special Rapporteur on Extra-Judicial Killings.[232]

While the Melo Commission did not find any direct evidence linking the military to the killings, it confirmed the suspicion that the military is somehow involved in the spate of political killings. According to its report, "there is certainly evidence pointing the finger of suspicion at some elements and personalities in the armed forces, in particular General Rodolfo Palparan, as responsible for an undetermined number of killings, by allowing, tolerating, and even encouraging the killings".[233]

Other cases of extra-judicial killings involve farmers with the suspected perpetrators include landowners and those opposed to the implementation of land reform.[234] The Melo Commission found that killings of media personnel are "more or less attributable to reprisals for the victims' *exposés* or other media practices".[235]

2. Torture of prisoners, detainees and suspects

There was also an increase in documented cases of torture of prisoners, detainees and suspects.[236] Recent cases included that of the Manalo brothers (Raymond and Reynaldo) of San Idelfonso, Bulacan, who were reported missing on 14 February 2006. The duo surfaced after escaping from their captors on 13

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228 According to the Report of the Melo Commission, Task Force Usig of the Philippine National Police listed 136 killings; Amnesty International mentions 244 victims; while Karapatan is said to have counted at least 724 killings. The CHRP recorded 119 cases of extrajudicial killings in 2006.

229 See 2006 CHRP Annual Accomplishment Report. According to the Melo Commission Report, the majority of political activists killed were members of Bayan Muna, Anakpawis, Bagong Alyansang Makabayan, Karapatan and KPD (Kilusan para sa Pambansang Demokrasya). Other civilian victims belong to cause-oriented working for agrarian reform and other social justice issues such as Task Force Mapalad and UNORKA (Ugnayan ng mga Nagsasariling Organisasyon sa Kanayunan).

230 Created by Administrative Order No 157 issued by President Gloria Macapagal Arroyo on 21 August 2006.

231 Electronic copy of the Report of the International Federation of Human Rights may be accessed at <http://www.fidh.org/IMG/pdf/philippines-mission.pdf>

232 Electronic copy of the Press Statement of Mr Philip Alston, UN Special Rapporteur on Extra Judicial Killings may be accessed at <http://www.extrajudicialexecutions.org/news/Philippines_21_Feb_2007.pdf>

233 Report of the Melo Commission, p. 53.

234 Id., p. 51.

235 Ibid.

236 See 2006 CHRP Annual Accomplishment Report, pp. 2-3.

August 2007. In a video recording, Raymond recounted their ordeal of non-stop torture at the hands of alleged military and paramilitary abductors.[237]

The FIDH, which conducted an international fact-finding mission[238] to assess the human rights situation in the Philippines, has found that the "the practice of torture and ill treatment is widely used against people suspected of being 'terrorists'." According to the preliminary findings, most cases of torture occur during the investigation period when the victims are "arrested without a warrant and with no explanation, blindfolded and handcuffed before being brought to a military camp or a secret location, where they are forced to admit that they are members of 'terrorist groups' like the *Abu Sayyaf* Group or the New People's Army.".[239]

3. Right to information

The people's right to information was also one of the most threatened rights in 2007, in light of the many shadowy dealings and contracts entered into by the government. Vital information has been being withheld from public scrutiny. One questionable contract involved the National Broadband Network (NBN) project which the government signed with the Chinese firm ZTE Corporation. Copies of the contract were allegedly stolen from a hotel room in China a day after it was signed.[240] In an attempt to keep the public in the dark, it was claimed that the contract contained confidentiality provisions which bar public disclosure of its contents.

Amidst allegations of overpricing, bribery and kickbacks, public officials who had a hand in the preparation and approval of the contract refused to submit themselves to Congressional inquiry. They invoked Executive Order No. 464,[241] part of which has previously been declared unconstitutional by the Supreme Court.[242] The court has since issued a Temporary Restraining Order on implementation of the contract, pending resolution of the main petitions seeking its invalidation.[243]

With mounting pressures from church groups and civil society, President Macapagal-Arroyo announced the suspension of the NBN contract,[244] as well as,

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[237] Allison Lopez, "Torture victim recalls ordeal in military hand," <http://newsinfo.inquirer.net/breakingnews/nation/view_article.php?article_id=88044>

[238] Electronic copy of the report may be found at <http://www.fidh.org/IMG/pdf/philippines-mission.pdf>

[239] Id.

[240] President Arroyo witnessed the signing of the contract in China on 21 April 2007. The next day, copies of the signed contract were reported missing.

[241] Issued by President Arroyo on 26 September 2005. In view of the ruling of the Supreme Court declaring some portions of Exec. Order No. 464 unconstitutional, Executive Secretary Eduardo Ermita issued Memorandum Circular No. 108 on 27 July 2006. Copy of MC 108 can be accessed at < http:www.ops.gov.ph/records/mc_108.htm>.

[242] In Bayan Muna v. Executive Secretary Ermita, G.R. No G.R. No 169838, 25 April 2006.

[243] Min. Resolution, G.R. No 179317, Amsterdam Holdings, Inc. v. DOTC; G.R. No 178830, Suplico v. NEDA, 11 September 2007.

[244] Christine Avedano, "Arroyo explains delay in cancellation of NBN deal," Philippine Daily Inquirer, 24 February 2008.

the revocation of what remains of Executive Order No. 464.[245] The Senate, however, continued with its investigation in light of the disclosures from witnesses on the possible complicity of the President on the bribery-ridden contract. As of date, the Senate and the Executive Branch are horn-locked with the issue of "executive privilege" invoked by former National Economic Development Authority (NEDA) Chief, Romulo Neri to excuse himself from further appearing and answering questions in the Senate investigation.[246]

While the nation eagerly awaits the resolution on Neri's invocation of "executive privilege," the public is comforted by the High Court's repeated show of great concern in upholding the right to information in matters of public interest. Early in the year, the Supreme Court granted the petition seeking the disclosure by the Commission on Election (COMELEC) of names of nominees of party-list groups, sectors and organizations participating in the May 2007 elections.[247] Subsequently, the High Court granted the request of the *Kapisanan ng mga Brodkaster ng Pilipinas* for 'live' coverage of the promulgation of the decision in cases against former President Joseph Ejercito Estrada.[248]

For its part, Congress is currently deliberating on a bill[249] seeking to thresh out the constitutional right to information.

In contrast, the CHRP has not taken a position on issues with obvious implications for the people's right to information.

4. Right to privacy

Privacy issues resurfaced in 2007 with the revival of wire-tapping investigations allegedly involving President Arroyo and a former member of the Commission on Elections, Virgilio Garcillano, in relation to the 2004 Presidential Elections.

Beyond the political implications of the contents of the allegedly wire-tapped conversations, one largely unexplored area was the real threat posed by the unabashed use of modern technology to violate an individual's privacy. At the height of the campaign for the May 2007 elections, tapping devices were discovered on former president Aquino's telephone line.[250] Yet again, the CHRP was silent.

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245 Maila Ager and Joel Guinto, "EO 464 scrapped," Philippine Daily Inquirer, 3 March 2008.

246 The issue on the scope of the "executive privilege" is now pending with the Supreme Court.

247 Bantay Republic Act No. 7941 v. COMELEC, G.R. No. 177271, May 4, 2007.

248 A.M. No 07-9-08-SC, 11 September 2007.

249 House Bill No. 3116, "An Act to Ensure Public Access to Official Information and for Other Purposes."

250 http://www.inquirer.net/specialreports/hellogarci/view.php?db=1&article=20070504-63987

5. The Human Security Act

The 13th Congress enacted Rep. Act No 9372, otherwise known as 'The Human Security Act', in response to the call for a global war on terrorism. The law, among others defines and punishes the crime of terrorism[251] and conspiracy to commit terrorism.[252] Subject to certain limitations, the law allows surveillance over suspects and interception and recording of communications,[253] the examination of bank deposits, accounts and records,[254] restriction on travel,[255] and detention of suspects for an extended period.[256]

The CHRP has a paradoxical role in this anti-terrorism initiative. On the one hand, it serves as a protector of human rights, as it is tasked to prosecute violations of civil and political rights which may have been violated in relation to implementation of the Human Security Act.[257] On the other hand, it is placed in the position where it may potentially be a violator of human rights, as its regional officials are given the power to issue written approval for the prolonged detention of suspects "in the event of an actual or imminent terrorist attack".[258]

Critics consider the Human Security Act as the single biggest legislative threat to human rights. This is due to alleged vagueness in the definition of the crime of terrorism, and the chilling effect of its provisions. Several petitions seeking the invalidation of the law have since been filed with the Supreme Court.

6. Right to suffrage

A major challenge during the period under review was the conduct of fair, credible and peaceful elections. With the country's long history of election fraud, terrorism, vote-buying and ballot-snatching, the CHRP, for the first time, actively participated in voter education. It issued an advisory on 'Right to Suffrage – Voter Education' and entered into a Memorandum of Agreement respectively with the Legal Network for the Truthful Elections and the Philippine Institute of Authentically Humanist Society. Together with the Catholic Bishops Conference of the Philippines, the CHRP signed a covenant with government agencies and NGOs for honest, orderly and peaceful elections.

Notwithstanding these efforts, fraud still marred the May 2007 elections, particularly in the southern part of the archipelago – proof that greater efforts are

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251 Rep. Act No 9372, Section 3.
252 Id., Section 4.
253 Id., Section 7.
254 Id., Section 28.
255 Id., Section 26.
256 Id., Section 19.
257 Id., Section 55.
258 Id., Section 19.

needed to ensure that the collective choice of voters prevails over the caprices of certain groups and individuals.

7. Freedom of Expression and Press Freedom

In 2007, there were also continuing threats on the freedom of expression and press freedom.

The year 2007 was highlighted not only by the rising number of extra-judicial killing involving journalists but also of the rising incidence of legal harassment in the form of libel suits, including those filed by First Gentleman Jose Miguel Arroyo.[259]

The year was also capped by arrest and detention, on November 29, 2007, of several journalists covering the Manila Peninsula stand off.[260] The detention was purportedly part of the police verification process to ensure that none of the alleged mutineers co-mingled with the journalists. Although they were subsequently released, the media community and members of civil society denounced the arrest of the journalist as an assault on press freedom, especially considering that the cameras and video tapes of the detained journalists were confiscated.

However, the press finds an ally in the Supreme Court. Early in January 2008, the Supreme Court issued an Administrative Circular[261] setting a rule of preference for the imposition of fine only rather than imprisonment in libel cases. Subsequently, the Court ruled that the statements issued by Department of Justice (DOJ) Secretary Raul Gonzalez and the by the National Telecommunications Commission (NTC) sometime in 2005, warning media against airing the alleged wiretapped conversation between President Gloria Macapagal Arroyo and former Commission on Elections (Comelec) Commissioner Virgilio "Garci" Garcillano at the height of the 2004 presidential elections, is unconstitutional.[262] The Court said that a governmental action that restricts freedom of speech or of the press based on content is given the strictest scrutiny, with the government having the burden of overcoming the presumed unconstitutionality by the clear and present danger rule. This rule applies equally to all kinds of media, including broadcast media. Prior restraint on speech based on its content cannot be justified by hypothetical fears, said the Court.

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[259] First Gentleman Jose Miguel Arroyo has filed a total of 43 libel cases. Subsequently, however, ordered the withdrawal of the said cases. See Lira Dalangin-Fernandez, "First Gentleman orders libel raps withdrawn, seeks peace," Philippine Daily Inquirer, 5 May 2007.

[260] Senator Antonio Trillanes IV, along with Brigadier General Danilo Lim, and 25 other Magdalo officers walked out of their trial (where there are being charged for rebellion on account of the July 27, 2003 Oakwood Mutiny), and marched through the streets of Makati City. Demanding the ouster of President Gloria Macapagal-Arroyo, Trillanes and his group seized the second floor of the Manila Peninsula Hotel. They, however, surrendered to government forces after a military armored personnel carrier barged into the lobby of the hotel.

[261] Administrative Circular 08-2008.

[262] Chavez v. Gonzales, G.R.No. 168338, Feb. 15, 2008.

8. Counter-Insurgency and Internal Displacement

Following the renewed commitment of the government to put an end to the four decade insurgency problem in the country, the Armed Forces of the Philippines intensified its counter-insurgency campaigns against the communist movement and the Moro secessionist groups in Southern Philippines. Apart from the spate of extra-judicial killings, the counter-insurgency measures of the government have also intensified the problems of internal displacement, affecting mostly women and children. From January to March 2007 alone around 18,000 people in Midsayap, North Cotobato were displaced from their villages due to the intermittent clashes between the Moro Islamic Liberation Front (MILF) and government forces. On the other hand, the Task Force Detainees of the Philippine (TFDP) has documented 26 cases of forced evacuation involving 110,191 internally displaced persons (IDPs) or 22, 038 families-victims in the same year. [263]

II. Independence

1. General observations

The CHRP has been criticized by Philippine civil society as lacking the hallmarks of independence enjoyed by the other constitutional commissions. For instance, the officers of other constitutional commissions[264] are appointed on staggered basis[265] to ensure continuity of policies, and to make it unlikely that all members are appointed by the same President at any one time.[266] In contrast, the Chairperson and the four Commissioners of the CHRP are appointed simultaneously.[267]

Officers of other constitutional commissions are removable only by impeachment on grounds specifically provided by the Constitution,[268] while the Chairperson and

[263] Renato C. Mabunga, "Coercive Environment Remains Nursing a Culture of Fear and Breeding Tolerance to Impunity."Electronic copy of the article may accessed at: http://www.philippinehumanrights.org/index.php?option=com_content&task=view&id=50&Itemid=26.

[264] Such as the Civil Service Commission, the Commission on Audit and the Commission on Elections.

[265] See for instance Art. IX-B, Section 2 on the appointment of the Commissioners of the Civil Service Commission: "The Chairman and the Commissioners shall be appointed by the President with the consent of the Commission on Appointments for a term of seven years without reappointment. Of those first appointed, the Chairman shall hold office for seven years, a Commissioner for five years, and another for three years, without reappointment. Appointment to any vacancy shall be only for the unexpired term of the predecessor. In no case shall any member be appointed or designated in temporary or acting capacity." The same provisions, except for the number of Commissioners, appear in Art. IX-C, Section 2 on the appointment of the members of the Commission on Elections, and Art. XI-D, Section 2 on the appointment of the members of the Commission on Audit.

[266] Bernas, The 1987 Constitution of the Republic of the Philippines: A Commentary (1996 ed.), p. 929.

[267] Executive Order No 163, Section 2. Currently, there is a pending bill in Congress (House Bill No. 1420) providing for the appointment of Commissioners on staggered basis.

[268] 1987 Phil. Const., Art. XI, Section 2. "The President, the Vice President, the members of the Supreme Court, the members of the Constitutional Commissions, and the Ombudsman may be removed from office on impeachment for, and conviction of, culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust. All other officers and employees may be removed from office as provided by law, but not by impeachment."

the Commissioner of the CHRP may be removed from office as may be provided by law, but not through impeachment.[269]

Compared to the more expansive fiscal autonomy enjoyed by the other constitutional commissions, the CHRP has "limited fiscal autonomy".[270] The other bodies enjoy full independence in terms of budget preparation and implementation; flexibility in fund utilization of approved appropriations; and use of savings and disposition of receipts. In contrast, the CHRP's autonomy is limited to the automatic release of its budget;[271] hence, it is subject to restrictions, such as pre-audit requirements.[272] In other words, its fiscal operation is susceptible not only to Congressional influence, but also Executive influence.

2. Legal mandate

The CHRP has broad constitutional powers.

a. Investigative power

The principal function of the Commission is an investigatory one. It may act on its own, or on the complaint of any person on violation of human rights including civil and political rights.[273] There is a view that the Commission's investigative power is limited to violations of civil and political rights.[274] Nonetheless, Congress is allowed by the Constitution to expand CHRP jurisdiction to cover the other aspects of human rights through appropriate legislation.[275] Also, the power vested by the Constitution in the CHRP in monitoring government compliance with its treaty obligations[276] encompasses all aspects of human rights.

In aid of its investigative powers, the Commission may seek the assistance of Executive offices for the imposition of administrative fines and penalties for offences committed by public officers.[277]

In 2006, the Commission investigated 890 cases of violations, of which 382 were filed or referred for prosecution and/or administrative sanctions.[278] For the first Semester of 2007, the Commission received and documented 449 complaints.[279] It has thus far resolved 368 cases. Of the resolved cases, 137 were filed in various

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269 Bernas, supra., p. 990.

270 Commission on Human Rights Employees Association (CHREA) v. Commission on Human Rights, G.R. No 155336, 21 July 2006.

271 Id.

272 Id.

273 1987 Constitution, Art. XIII, Section 18(1).

274 See for instance, Simon v. Human Rights Commission, 229 SCRA 117 (1994).

275 1987 Constitution, Art. XIII, Section 19.

276 1987 Constitution, Art. XIII, Section 18(7).

277 1987 Constitution, Art. XIII, Section 18(9).

278 2006 CHRP Annual Accomplishment Report, p. 1.

279 2007 CHRP Annual Accomplishment Report (First Semester), p. 4. Of the cases documented, 249 incidents of human rights violations occurred in 2007 while the rest occurred prior to 2007.

courts and agencies, 18 were archived while the rest were closed or terminated.[280]

b. Rule-making power

The Commission has the power to promulgate its operational guidelines and rules of procedure in the conduct of its investigation.[281] While it cannot violate the Rules of Court promulgated by the Supreme Court, the CHRP is not strictly bound by rules of judicial procedure; it needs only to adopt administrative procedural norms.[282]

c. Power to cite contempt

To give teeth to its investigative function, the Constitution specifically vests the Commission with power to cite contempt.[283] So far, however, the Commission has not used this to effectively carry out its duties.

d. Recommendatory power

One of the constitutional functions of the Commission is to recommend to Congress effective measures to promote human rights.[284] This mandate presupposes active participation on the part of the CHRP in drafting necessary legislation. However, the CHRP has not initiated any Bill in Congress; it merely submits position papers when the Bills are already filed in Congress.

e. Visitation power

CHRP has the power to visit jails, prisons and detention facilities.[285] In 2006, it conducted 662 visits to various jails and detention centres covering 43,820 detainees.[286] For the first Semester of 2007, the CHRP rendered assistance to 164 prisoners/detainees during its visits.[287]

f. Monitoring power

The CHRP is mandated to monitor the government's compliance with its treaty obligations. The Commission has called the government's attention to its

[280] Id.

[281] 1987 Constitution, Art. XIII, Section 18(2).

[282] III Records of the Constitutional Commission 764-766.

[283] 1987 Constitution, Art. XIII, Section 18(2).

[284] 1987 Constitution, Art. XIII, Section 18(6).

[285] 1987 Constitution, Art. XIII, Section 18(4).

[286] 2006 CHRP Annual Accomplishment Report, p. 5.

[287] 2007 CHRP Annual Accomplishment Report, p.5

obligation to submit reports to treaty-based bodies. At present, 14 such reports are overdue.[288]

g. Power to grant immunity

The CHRP is given the power to grant immunity from prosecution to any person whose testimony or whose possession of documents or other evidence is necessary or convenient to determine the truth in any investigation conducted by it or under its authority.[289] There is no record that shows that the CHRP has ever used of this power.

h. Research and education functions

The Commission is tasked with establishing a continuing programme of research, education, and information to enhance respect for the primacy of human rights.[290] It conducts training, seminars and workshops on various human rights issues and distributes pamphlets, leaflets, flyers, posters and other reading materials. In 2006, it conducted 1,527 information and education activities for 82,055 participants and distributed 46,153 information materials.[291]

i. Other powers

The CHRP is given a broad mandate to provide "appropriate legal measures for the protection of human rights of all persons within the Philippines, as well as Filipinos residing abroad, and provide for preventive measures and legal aid services to the under-privileged whose human rights have been violated or need protection".[292]

This includes the power to issue a directive for preservation of the body of anyone who dies in custody and to prevent the authorities from hiding it, or from torturing or transferring the body until a court order is obtained. It also includes such powers as ordering that counsel or relatives be allowed to visit those detained, and the power to order medical treatment.[293]

j. Proposals to grant CHRP with prosecutorial power

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288 Including ICESCR second periodic review (due June 1995); ICESCR third periodic review (due June 2000); ICERD, 15th periodic review (due January 1998); ICERD, 16th periodic review (due January 2000); ICERD, 17th periodic review (due January 2002); ICERD, 18th periodic review (due January 2004); ICERD 19th periodic review (due January 2006); CAT second periodic review (due June 1992); CAT third periodic review (due on June 1996); CAT fourth periodic review (due June 2000); CAT fifth periodic review (due June 2004); Optional Protocol to CRC on children in armed conflict, initial report (due September 2005); Optional Protocol to the CRC on the sale of children initial report (due June 2004); and Convention on the Rights of Migrant Workers, initial report (due July 2004).

289 1987 Constitution, Art. XIII, Section 18(8).

290 1987 Constitution, Art. XIII, Section 18(5).

291 See Executive Summary of the CHRP Annual Report (2006), p. 5.

292 1987 Constitution, Art. XIII, Section 18(3).

293 Bernas, supra., p. 1094.

Presently, there are pending bills in both the House of Representatives[294] and the Senate[295] granting CHRP with prosecutorial powers.

3. Relationship with the government

There are inherent limitations to CHRP operations due to the constitutional allocation of powers among the different branches of government.

Firstly, the CHRP is essentially an investigative body and the results of its investigation are at best, recommendatory in nature. Prosecution of cases is lodged primarily in the Department of Justice which has discretion whether to file a criminal complaint in court against an alleged violator.

Secondly, the Commission is neither a judicial nor a quasi-judicial body. In real terms, its findings on human rights violations have no binding effect. It cannot issue warrants of injunction or restraining orders against alleged perpetrators to compel them to cease and desist from continuing their acts.[296]

4. Selection/election of Commissioners

The Chairperson and the four Commissioner of the CHRP are appointed by the President.[297] There is no published procedure for selection of the appointees; hence, there are no established rules for the participation of civil society groups in this process.[298] Little wonder then, that the qualifications of the Commissioners are usually questioned. It has been observed that except for the Chairperson and one Commissioner, the other members were not known to the human rights community prior to their appointment.

The Constitution limits the composition of the CHRP to natural-born citizens. It is also required that the majority of the Commissioners must be lawyers. This notwithstanding, considerable leeway is granted by the Constitution to appoint non-lawyers. Despite this, the current Chairperson and the four commissioners are all lawyers.

5. Financial independence

The CHRP shares approximately 0.021% of the national budget. Of 918 billion Pesos in 2006, the Commission had an allocation of 207.46 million Pesos. Of the 1.126 Trillion Pesos in 2007, the CHRP has 216.491 million.

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294 See House Bill No. 1420, sec. 9.

295 See Senate Bill No. 1437, sec. 5.

296 Carino v. Commission on Human Rights, G.R. No 96681, 2 December 1991; Export Processing Zone v. Commission on Human Rights, G.R. No 101476, 14 April 1994; Simon, Jr. v. Commission on Human Rights, 229 SCRA 117 (1994).

297 Exec. Order No 163, Section 2.

298 House Bill No. 1420 now pending in Congress suggests a selection and nomination process to be spearheaded by the Integrated Bar of the Philippines and human rights non-governmental organizations.

The Commissioners work full time; they are prohibited from holding any other office or employment during their tenure.[299] They are also precluded from engaging in the practice of any profession or in the active management or control of business which in any way may be affected by the functions of their office, or to be financially interested directly or indirectly in any contract with, or in any franchise or privilege granted by the government, or any of its sub-divisions, agencies, or instrumentalities, including government-owned or government-controlled corporations or their subsidiaries.[300]

Due to its limited budget, the CHRP depends on grants from private institutions to implement its projects, particularly in areas of specialized training, advocacy and information dissemination, documentation technology, and systems development. Some of the CHRP's international partners include the European Commission, the Swedish International Development Assistance (SIDA), the United Nations Development Program (UNDP), the Asia Pacific Forum on National Human Rights Institutions (APF), Organization for Economic Cooperation and Development (OECD), The Asia Foundation (TAF), the United Nations Children's Fund (UNICEF), and Australian AID (AusAID).

III. Mandate

1. Research and education

Much of the CHRP's efforts for the period under review were centred on human rights education and promotion, usually in form of training and seminars for the sector most susceptible to committing human rights abuses – the police force**.** While this strategy is laudable, there is no reliable indicator to assess its effectiveness. There is no record showing that CHRP has used any assessment tool to study the impact of its education and training programmes. Its Annual Accomplishment Report for 2006 and for the First Semester of 2007 also did not indicate whether monitoring activities were conducted to ensure the efficacy of its education programmes.

2. Investigation and complaints handling

With the rise in the number of recorded cases of human rights violations for the period under review, the CHRP stepped up its procedures to boost the quality of its legal and investigation work through the issuance of new guidelines for classifying breaches. However, if the success rate of prosecution is taken as the criterion of effectiveness of its investigation techniques and procedures, then it is safe to conclude that the CHRP has been far from successful.

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[299] Ibid.

[300] Ibid.

In 2006 for instance, the courts decided 73 cases referred by the Commission for prosecution. Of these, 51 were dismissed; 12 resulted to convictions, and 10 cases resulted in acquittal of the accused.[301] For the first Semester of 2007 (January to June), 38 cases were decided, of which 31 were dismissed, 5 resulted in convictions and 2 in acquittals. [302]

The low conviction rate may be attributed to several factors, including poor documentation and handling of evidence. The CHRP must therefore look into these factors and conduct qualitative analysis of the decided cases as part of its monitoring functions.

3. Disregard of subpoenas issued

It is not uncommon for high public officials to ignore the subpoena issued by the Commission in connection with an ongoing investigation. However, the Commission has yet to exercise its power to cite them for contempt, to compel their attendance. In an interview with a Commission official, it was revealed that the subpoenaed public officers usually circumvent the purpose of the subpoena by sending representatives. More often than not, the representatives neither have personal knowledge of the case, nor the competence to testify.

4. Impact of CHRP recommendations on human rights policy-making

There is no reliable test to assess the impact of CHRP recommendations in influencing government policy on human rights. Through inter-agency meetings and dialogues with national and local agencies, the CHRP has hoped to improve co-ordination, consultation and development of policies and strategies for the government's human rights agenda.

No doubt, the CHRP's vocal public condemnation of the rising number of extra-judicial killings and enforced disappearances has forced the government to look closely into the problem. Likewise, its visibility in large public demonstrations during the period under review has helped cool tensions, as well as served to remind the police of their duty to observe maximum tolerance. Beyond these, however, the fruits of CHRP efforts are yet to be seen.

In terms of policy legislation, Congress usually solicits CHRP recommendations on Bills involving human rights. However, there has been no research to assess the influence of the recommendations in the enactment of such laws. A number of Bills have yet to be passed by Congress despite CHRP endorsement, such as the Anti-Enforced or Involuntary Disappearance Bill and the Philippine Statute on

[301] CHR Annual Report (2006), p. 4.

[302] CHR Accomplishment Report (First Semester), p. 4.

Crimes against International Humanitarian Law and Other Serious International Crimes.

IV. Interaction with NGOs

The CHRP's rocky relationship with NGOs is one of its weakest points. There has been no periodic consultation with civil society groups, albeit consultative meetings are held on certain issues. A review of the CHRP's Accomplishment Reports for 2006 and the first Semester of 2007 reveals no sign of collaborative partnership with NGOs. This is in stark contrast to the CHRP's robust performance in the area of international and regional co-operation.

V. Recommendations

1. To the CHRP

a. Enhance investigative powers

The low conviction rate of the cases recommended for prosecution is indicative of the CHRP's ineffectiveness as an investigative body.

Apart from undertaking quantitative reporting, the CHRP should conduct qualitative analysis of court-decided cases that it has investigated and endorsed for prosecution. This will guide the CHRP in taking appropriate steps to enhance its chances of obtaining criminal convictions. In particular, it should look into its quality of handling and preserving evidence, including testimony, objects and documents.

In this connection, the CHRP must exert its powers as an independent constitutional body. It should use its power to cite contempt whenever necessary to obtain all available information on cases under investigation. It should make use of its power to grant immunity to witnesses to ensure that alleged human rights violators are brought to justice. It must also use its power to solicit Executive aid, such as the use of government medical and forensics experts, to facilitate its functions,

b. Strengthen research and education functions

As the institution tasked with promoting and protecting human rights, the CHRP must be at the forefront of discourse. It must not content itself with being a passive participant in the human rights debate. It should chart the course by:

i. Conducting and publishing in-depth research on trends and debates;

ii. Intervening, either as an interested party or as *amicus curiae*, in cases with human rights implications lodged before the Supreme Court;

iii. Initiating and proposing necessary legislation that will better promote and protect human rights; and

iv. Enlightening the public, through periodic bulletins, on the human rights implications of political issues like transparency of government dealings and privacy of communications.

v. There should also be a mechanism to assess the efficacy of its training programmes.

c. Establish a working relationship with members of civil society

The CHRP must also establish a working relationship with NGOs and other members of the civil society. They are a valuable resource, not only because they are motivated by passion and idealism, but also because of their long experience in human rights advocacy. A working relationship may be established in complaints handling, investigation and monitoring; and sharing of information and resources. The CHRP may likewise explore avenues to involve civil society in the performance of its functions. For instance, it may deputize a NGO to assist in its visits to places of detention.

2. To the Legislature

a. Set up a selection body to screen appointments of Commissioners

Executive Order No 163 should be amended to provide a selection procedure for the appointment of CHRP Commissioners. This may be done through a creation of a body akin to the Judicial and Bar Council that screens nominees for the Bench. Members of the human rights community should be represented, along with the respective Chairpersons of the Committee on Justice and Human Rights of both Houses of Congress, and members of the academe among others.

b. Adopt a rotational scheme of appointment

Executive Order No 163 should be amended to adopt the rotational scheme of appointment employed by the other constitutional bodies. Thus, upon the expiry of the term of office of the current Commissioners, the first two members of the Commission may be appointed for 7 years; another two for 5 years and the rest for 3 years. Thereafter, the succeeding Commissioners would be appointed for a term of 7 years.

c. Grant full fiscal autonomy to the CHRP

Despite the recent Supreme Court ruling on the limited fiscal autonomy granted to the CHRP under the 1987 Constitution, there is nothing to prevent Congress from granting full fiscal autonomy through legislation.

3. To the Executive

a. Appoint only those with an extensive background on human rights advocacy as Commissioners.

b. Observe the Paris Principles, especially, the need for diversity in the

CHRP.

c. Give the CHRP unhampered access to facilities and information, to assist its investigative functions.

4. To the Judiciary

a. Solicit the participation and expert opinion of the CHRP in cases with human rights implications.

b. Update judges on latest trends, approaches and techniques in resolving cases with human rights implications.

Global Spotlight on Republic of Korea

Mr. Lim Tae Hoon

I. Introduction

The establishment of the National Human Rights Commission was in keeping with one of Kim Dae Jung's presidential campaign promises in 1997. While the National Human Rights Act was passed in 1998, the establishment of the Commission was delayed three years due to contradicting views between human rights organizations and the Ministry of Justice over the independence and practicality of the Commission. While the government wanted to place the Commission as a sub-agency of the ministry, more than 70 human rights organizations demanded an independent body.

Between 1999 and 2001, more than 30 human rights activists held two hunger strikes, 100 activists participated in various workshops, more than 10 public hearings were conducted and there were more than 60 public demonstrations and campaigns. Finally in 2001, the request of civil society was passed in Congress and on 25 November, the National Human Rights Commission was established as an independent organization.

1. Organizational structure

The Commission comprises 11 members – the President, three Standing Commissioners who are civil servants and seven Non-standing Commissioners. At least four Commissioners must be women. All Commissioners are required to remain in office when their tenure expires, up to such a time that a replacement is found.

2. Process of nominating and appointing Commissioners

a. Nomination

Candidates are nominated based on their professional knowledge and expertise in human rights issues. They are nominated at three levels to ensure the independent and impartial promotion and protection of human rights:

- By the President of the Republic of Korea: Based on recommendations of the Presidential Secretariat (Commission President, 1 Standing Commissioner and 2 Non-standing Commissioners)
- By the National General Assembly: Based on recommendations of political party representatives (2 Standing and 2 Non-standing Commissioners)

- By the Chief Justice of the Supreme Court: Based on recommendations of the Court Administration Office for candidates with a legal background and expertise in human rights issues (3 Non-standing Commissioners)

b. Appointment

Candidates nominated by the National General Assembly and the Chief Justice are appointed by the President of the Republic of Korea after going through the Civil Service Commission. Some feel that this process is contrary to the independence of the Commission, because authority for nomination of members is vested solely in the President of the Republic of Korea. The Commission's only involvement in this process is to assist in ensuring that candidates are nominated according to human rights law and international human rights treaties.

c. Concerns over process

NGOs are not included in the selection and nomination process. Human rights organizations have been calling for transparency and impartiality in the nomination process since the inception of the Commission. The process is still not open to the public. According to the Paris Principles, nomination of candidates should involve various sectors, especially 'the grassroots level of society' including human rights organizations, civil society organizations, religious organizations, university professors, and members of Parliament.

Recently, member of Congress Lim Jong In, a former lawyer, submitted a revised Bill of the National Human Rights Act to the Legislation and Judiciary Committee. It points out that the nomination of three Commissioners by the Chief Justice of the Supreme Court – who himself is not nominated by the people – is contradictory to the nation's democratic values.

If the Bill is passed, the number of Commissioners will be reduced to seven. Congressman Lim also calls for the number of Commissioners nominated by the President to be reduced to three and for the number of female Commissioners to be reduced to two.

While the proposal relating to the authority of the Chief Justice appears valid, the issue affecting the quota of women is of some concern as it seems to go against the Paris Principles of pluralism. It is even more of a concern because open discussions and public hearings are not being conducted.

3. Gender representation

The Commission has never been helmed by a woman. In the current composition, two of the three Standing Commissioners and the seven Non-standing Commissioners are women. One Commissioner is a disabled person, but there is no representative of the gay/lesbian/transgender community. Four

Commissioners are from the NGO sector, three from academia, two from the legal profession and one each from the media and religious sector.

II. Independence

1. Mandate

The independent nature of the Commission is guaranteed by its enabling legislation. Article 3 of the National Human Rights Act states: "The Commission conducts its authorized activities independently." However, it does not indicate the Commission's independence from the legislative, judicial and administrative branches. As the Commission was established by law, it is impossible for it to not to be influenced by the legislature. There was a move within the Commission in 2006 to re-establish it under constitutional law, but the Secretariat rejected this.

From 1999 to 2001, civil society organizations working on disability and homosexual rights issues called for the establishment of the Commission as a judicial organization. However, this was not feasible as any amendment of the Constitution requires a referendum. While the Commission does not seem to be addressing the situation, it needs to establish itself as part of the judicial branch in the future to secure its independence.

2. Financial independence

According to reports, there are problems with the independent nature of budgets and hiring personnel, as the Commission has no authority to regulate its budget and has no other source of finance except for government funds. The Paris Principles emphasize that a National Human Rights Institution should have adequate funding and not be subjected to financial control by the government.

However, in terms of the budget and hiring of personnel, all organizations including those in the administrative and judicial branches are regulated by the Ministry of Planning and Budget, the Ministry of Governmental and Home Affairs and the Civil Service Commission. The National General Assembly has more freedom in such matters.

III. Effectiveness

1. Relationship with the administrative branch

The Commission submits recommendations to the administrative branch on ways to improve human rights policy and legislation. The Commission seems to be satisfied that most of its recommendations are being implemented. However, human rights organizations point out that the government restricts the Commission's budget and staff-force, and that the Commission lacks the right to propose legislation and comply with an independent budge**.** Ultimately, the only

reason that most of its recommendations are implemented is because it submits only those proposals that the administrative branch is likely to approve. Critics see the Commission as turning into just another body in the legislative branch and argue that its recommendations lack concern for non-legal human rights issues.

2. Relationship with the legislature

The Commission co-operates with the National Assembly in terms of human rights legislation. The National Assembly has a great influence over the Commission as it has the authority to abolish or amend laws, including the National Human Rights Act. There have been cases where National Assembly members have exerted pressure or cut the Commission's budget. While legislation governing the National Assembly is beyond the purview of the Commission's evaluation, it may submit recommendations. However, half of its recommendations remain under consideration, even though some were submitted three years ago.

3. Relationship with the judiciary

Efforts began in 2007 to raise the level of co-operation with the Ministry of Justice and the Constitutional Court. While matters before the courts and the Constitutional Court are outside the Commission's jurisdiction, it is allowed to state its opinions on relevant cases. However, a main problem is that the Commission does not investigate court cases involving human rights and discrimination. Human rights organizations are also critical of the Commission because it almost never makes comments about the judiciary. Confidence in the Commission's independence is further eroded when the courts arrive at a verdict that contradicts its conclusions.

4. Relationship with government agencies

Government agencies are required by law to contact the Commission when creating or amending legislation that will have an impact on the promotion and protection of human rights. They must take into consideration the Commission's comments or recommendations when submitting their reports. The Commission is also authorized to request data or any additional information from government agencies.

5. Disposal of appeals and complaints

The Commission's Discrimination Remedy Department investigated 321 cases in 2006, taking up an average of 152 days for each. Sometimes investigations were delayed for up to an average of five months. In 2007, the investigation of 334 cases took up only an average of 107 days for each. The Commission hopes to reduce the duration to less than 90 days.

In 2006, the Human Rights Violation Rectification Department investigated 2,059 cases, taking up an average of 141 days for each. In 2007, 2,859 cases took an average of 127 days to investigate. The number of cases increased by 921, but the department cut the average time by 14 days for each. It was also reported that government officials have co-operated with the Commission's investigations. However, there were instances when government agencies could not implement the recommendations for financial reasons.

6. Impact of recommendations

There are several reasons why the Commission's recommendations are respected although these have no legal impact. First, the government is conscious of the fact that society is more aware of human rights. Second, human rights organizations advocate the implementation of the recommendations. Third, the media publishes articles that portray the perspectives of the Commission and human rights organizations. Fourth, former Minister of Foreign Affairs Ban Ki Moon is now the UN Secretary General while the Republic of Korea is a member of the UN Human Rights Committee – as such, there is increasing pressure for the country to respect international human rights law.

IV. Relationship with National Human Rights Institutions

While the activities of the Commission and National Human Rights Institutions (NHRIs) appear to be the same, these are distinguished by law – the two are co-dependent but competitive. Since the establishment of the Ombudsmen of Korea, the Military Sub-Committee and the Police Sub-Committee, their activities have overlapped those of the Commission's Human Rights Violation Rectification Sub-committee.

While the competitive nature of jurisdiction could provide an opportunity for enhancing the quality of service to citizens, there is also a risk that the bodies may not co-operate and may push responsibility for civil appeals to other committees. Therefore, a mechanism for co-operation is required for all NHRIs, including the Commission, and their committees (excluding offices and ministries). Policy changes, amendment of laws and the promotion of human rights can be discussed and streamlined through this mechanism.

There are also similarities in the role of the Commission and other NHRIs. The Commission – as a Joint National Human Rights Organization – investigates cases in competition with other NHRIs. However, it also plays a leading role in activities by conducting education and public awareness programmes on human rights and in the establishment of human rights policy. Therefore, while the Commission provides overall recommendations and sets standards for policy making, it also

evaluates other NHRIs and ensures that its standards are met. It further examines individual cases on an independent, competitive and complementary basis.

V. Interaction with NGOs

1. Activities

Human rights NGOs are involved in the Commission's planning, investigation and evaluation processes. The Commission also involves various human rights organizations in its annual policy meeting to determine activities for the year. It further provides financial support – some 30 human rights groups have received funds since 2003; conducts training for activists; and carries out regular visits to the organizations.

However, it must be pointed out that various departments and committees of the Commission have been reluctant to co-operate with human rights organizations on a regular basis. They do not want such groups to criticize their work or insist on 'impractical' standards. It appears that the current relationship is only being sustained because of pressure by the upper management of the Commission. To stay independent of governmental organs and to hear the voice of the people, the Commission has to increase its level of co-operation with human rights groups.

2. Consultation mechanisms

a. Policy Advisory Committee

This advises the Commission on its policies and management as well as on matters regarding protection and promotion of human rights. While the Committee should meet several times annually, only one meeting has been held over the past two years – in 2007.

The Committee consists of 4 women and 13 men, which raises concern over the unequal gender balance. Although it has nine human rights NGO representatives, the majority are drawn from the executive-board level, rather than those working on the ground. There is also a need to divide the Committee into specialized groups focusing on different issues, such as refugees, gender, minorities and political prisoners.

b. Expert Committees

i. Social Rights Committee

While it is meets every two months – the highest frequency among the Expert Committees – it does not have representatives of human rights organizations.

ii. International Human Rights Committee

It does not meet regularly, and the majority of members are professors and lawyers. Its composition should be improved with the presence of NGOs involved in international human rights issues.

iii. Child Rights Committee

Its meetings are rare, while the majority of the members are lawyers and professors. Human rights organizations that specialize in child rights should be represented.

iv. Human Rights Education Committee

Not only are its official meetings conducted on regular basis, it also holds informal meetings with human rights experts to develop educational materials and raise awareness of those in the field of education. Activists conduct human rights education. The committee consists of teachers and human rights activists, although the percentage of professors is quite high. While it has a high percentage of women as members, it requires better representation of minority groups including persons with disabilities.

v. Civic Human Rights Committee

While it rarely holds meetings, it does meet informally with activists to promote human rights awareness among the military, police and other government officials. The committee comprises five men.

vi. Committee on Police Investigations

Again, it rarely holds meetings, while the members mainly consist of lawyers and professors. Human rights groups that specialize in issues involving the work of the police force should be represented.

vii. Correctional Facilities Committee

Its meetings are rare but it does involve activists and specialists in visits to correctional facilities. Most of the members are professors and lawyers, and there is only one from the human rights field.

viii. Protection Facilities Committee

It only holds meetings rarely, but involves activists and specialists in visits to protection facilities. There is only one human rights activist in the committee.

ix. Committee on Military Personnel

Its meetings are rare, and there are neither women nor human rights activists among its members.

x. Committee on Discrimination

It rarely holds meetings and lacks expertise.

xi. Committee on Gender Discrimination

It rarely holds meetings. There is only one human rights activist member and no experts on sexual minorities.

xii. Committee on Disability Discrimination

While it rarely holds meetings, it has included activists in its field visits to assess facilities for the disabled. One member is a person with disability.

xiii. Migrant Rights Committee

It rarely holds meetings but has the highest percentage of human rights activists of all the Expert Committees.

xiv. Committee on the Human Rights of the Mentally Disabled

Its meetings are rare, as well, and it lacks the presence of human rights activists as members. The percentage of women is low.

c. Analysis of membership of the Expert Committees

More than half of the 89 members of the 14 Expert Committees are professors. Human rights activists make up a low 12%, which goes against the Paris Principles. There are no regulations to require the inclusion of members representing grassroots communities and minority groups.

The breakdown of membership (excluding the head of each committee):

- Professors: 48 (53.93%)
- Lawyers: 18 (20.22%)
- Human Rights Activists: 11 (12.36%)
- Teachers: 2 (2.25%)
- Others: 8 (8.99%)
- UN and inter-governmental organization staff: 2 (2.25%)

There is a need, therefore, to amend the National Human Rights Act to diversify the membership in keeping with the Paris Principles. Another concern is that reports of the work of the Commission and Expert Committees are not open to public scrutiny via the website. It is important to enable access, so that the expertise of members and the quality of work can be evaluated.

d. Co-operation with regional NGOs

Currently, the Commission operates three regional offices in Pusan, Gwang-ju and Dae-gu to strengthen regional co-operation:

- The Gwang-ju office facilitates forums with various NGOs every three months and invites those working on various issues, such as child labour and migrant workers' rights, to conduct training workshops.
- The Pusan office conducts various events with NGOs to promote awareness of human rights.
- The Dae-gu office was only opened recently and, as yet, has not established a strong NGO network. It has plans to co-ordinate monthly discussions on regional human rights situations, international human rights law and human rights legislation.

The Human Rights Commission of Sri Lanka: Sombre Reflections and a Critical Evaluation

The Law and Society Trust, Sri Lanka[303]

I. Introduction

This Report serves as a critique and evaluation of the performance of the Human Rights Commission of Sri Lanka (referred to variously as the Commission or HRC in the subsequent analysis) over the past 15 months (since May 2006). This is the duration for which the newly appointed Commissioners[304] have held office; a time period during which the legitimacy, independence, integrity and performance of the Commission have suffered serious blows.

Established in terms of Act, No 21 of 1996 (hereafter the HRC Act), the HRC has been in existence for over a decade during most trying and challenging times due to conflict in the North/East of the country as well as due to the escalation of human rights violations in all parts of the country. Enforced disappearances, extra judicial executions, severe infringements of liberty rights including arbitrary arrests and incommunicado detention have been consistently evidenced during this period. Practices of torture on the part of law enforcement officers even during the times of relative peace have been identified as an 'endemic problem."[305] The response of the HRC to these problems had always been faltering due to a variety of problems mainly associated with its limited authority and scarce resources. Commitment difficulties of former Commissioners, (as most Commissioners have been employed on a part time basis), has also been a problem. Even at times that the appointed Commissioners functioned to their best of their capacity, the lack of enforcement powers of the Commission have resulted in their orders/directives being bypassed by governmental authorities.

The observation by a former Chairperson of the HRC summed up the situation very well:

"Furthermore, our discussions with the police and other individuals and agencies have revealed that the police had not really been trained in basic investigative skills. For some reason, the training was more of a paramilitary nature. Torture is

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303 Contact Persons: Amal de Chickera, Researcher, Human Rights in Conflict Programme (author), Kishali Pinto-Jayawardena, Deputy Director, Law and Society Trust / Head, Civil & Political Rights Programme (editor), The contribution made by Ruki Fernando, Coordinator, Human Rights in Conflict Programme is appreciated.

304 New Commissioners under the chairmanship of former Supreme Court Justice P. Ramanathan were appointed unilaterally by President Mahinda Rakapakse without the constitutionally mandated approval of the Constitutional Council (CC) on 19th May 2006. Justice Ramanathan passed away on 7th of December 2006. President Rajapakse then appointed Justice Ananda Coomaraswamy (the current Chairman of the HRC) in his place.

305 Vide interview by the London based organisation REDRESS with then Chairperson of the HRC Radhika Coomaraswamy in the Reperation Report Issue 5 May 2005, a bi-annual journal of the Redress Trust

often a short cut to getting information, and as a result it is systematic and widespread.we are not talking about isolated cases of rogue policemen: we are talking about the routine use of torture as a method of investigation. It requires fundamental structural changes to the police force to eradicate these practices….We also do not have a clear policy on protection and that is something that has been raised, but again we do not have enough resources. We intervene to make the police provide protection. At the end, the NHRC as an informal body makes recommendations."[306]

The current crisis is however far greater than the problems posed by structural challenges in regard to the functioning of the Commission. Grave questions have arisen as to the very independence of the Commission from the government. This is cause for serious concern, specially due to the steep escalation in human rights violations in the country due to renewed conflict. Seemingly, there is a direct correlation between this concern and the arbitrary appointment of new Commissioners by the President in May 2006. The Commission, which has statutory functions to fulfil, and international standards to maintain in its work, continues to distance itself from this mandate; it is fast taking on the image of a puppet institution which has compromised its legally binding duty by the people in order to tacitly support the increasing human rights violations of the government through its silence and inaction. It is imperative therefore that the performance of the HRC during this period is rigorously evaluated as against its duties and functions as statutorily detailed and failures therein are critically reflected upon.

1. Lack of Cooperation of the HRC with Critical Civil Society Organisations

It was expected that LST would carry out this evaluation in partnership with the HRC, as an exercise which would be mutually beneficial, objective and balanced. However, the Commissioners, after agreeing to meet with a staff member of LST on the 6th of August 2007, refused to dialogue or engage with him, showing their clear disinterest to be party to such an exercise and refusing to share statistical and other information which would have rendered this evaluation more comprehensive and meaningful[307]. It appeared that the Commissioners believe that their accountability to the people does not extend to being subjected to review, or to the sharing of basic information including statistics on complaints registered and addressed, with a socially responsible organisation.

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306 ibid

307 See Forum Asia 'Disengagement, threats and abuse of NGOs by the Sri Lankan Human Rights Commission – a letter to Prof. Kyong-Whan Ahn'. August 13th 2007

Even more disturbingly, LST's staff member was informed by one of the Commissioners that the HRC has powers of contempt that it will not hesitate to use whenever appropriate. This amounted to an implied warning to the recipient staff member that civil society organisations do not have the right to engage in critiques of the HRC which is in itself, is a wholly unacceptable position. Such veiled threats of contempt powers are extremely problematic at a time when contempt has been used to stifle freedom of expression of activists and ordinary citizens to an extent that the United Nations Human Rights Committee has called upon Sri Lanka to enact a Contempt of Court Act.[308]

The flippant and even threatening manner in which the Commissioners treated a human rights activist from an established organisation, gave LST first hand experience of drastic changes in the attitudes of the HRC Commissioners. The results of this meeting, on the one hand, further establish the need to review and critique the Commission. On the other hand however, the scope of this evaluation has been curtailed as a result, as LST has been denied access to information which has been publicly accessible in the past and which would have served as indicators of the HRC's work.

This being the case, LST was compelled to carry on its evaluation without further input from the HRC.

2. Structure and Focus of the Report

The primary focus of this report is evaluation of the deterioration of the statutory functioning of the HRC over the past 15 months. LST is well aware of the inherent limitations that the HRC has always possessed, including statutory and structural limitations.[309] The powers of the HRC are limited to mediation or conciliation.[310] Its mandate is limited only to violations of the limited number of fundamental rights as guaranteed by the Sri Lankan Constitution (as opposed to interventions on the much wider basis of violations of "human rights"). Further, the HRC is not empowered to approach courts directly as is the case in other countries. Relevant rules that would have permitted the HRC to refer cases to the appropriate court in terms of Section 15(3) (b) of the HRC Act have not been yet prescribed by the Supreme Court. At no point has the HRC proactively moved to request the Court

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308 Fernando vs Sri Lanka Case No 189/2003, Adoption of Views on 31, March, 2005) which involved a violation of ICCPR 9(1) as a result of the arbitrary sentencing of a lay litigant for contempt by the Supreme Court. In this case, the government has replied to the Committee saying that it could not implement the Views since it would be construed as an interference with the judiciary.

309 See Pinto-Jayawardena, Kishali, 'One Step Forward and Two Steps Backwards; The Problematic Functioning of Sri Lanka's National Human Rights Commission (NHRC') in 'Discussions on National Human Rights Institutions of the Asia-Pacific', Law and Society Trust Review, Volume 12 Issue 225 July 2006; Fernando, Basil, 'The National Human Rights Commission and the National Police Commission' in 'Sri Lanka; State of Human Rights, 2005', Law and Society Trust and Satkunanathan, Ambika 'Human Rights Commission' in 'Sri Lanka: State of Human Rights 2000' Colombo 2000 Law & Society Trust

310 In the past, failure to develop proper procedures for investigations into torture resulted in HRC's officers settling torture cases for minimal amounts of money. Following sustained protests by activists, the HRC decided in 2004, during the term of its previous (and constitutionally appointed) Commissioners that it would not mediate/conciliate complaints regarding torture.

to prescribe such Rules of Procedure. The HRC also lacks the capacity to conduct detailed investigations of a criminal nature into complaints of torture and is blocked by law enforcement officers at every point of the investigative process.[311]

Whilst being mindful of these existent problems which have been exhaustively examined in the previous NGO report to the Asia Pacific Forum in 2006[312] and in the other critiques referred to above, this report focuses instead on practical aspects of the crisis that the Commission is facing at the moment in a manner that complements the structural focus. The performance of the Commission will be evaluated in the context of its existing obligations and its own strategy plan. It will also be compared to its own performance in the past (under previous Commissioners who faced the same statutory and structural inhibitions). By doing so, the report will look at:

a. What the Commission is mandated to deliver by statute and international convention.
b. How past Commissions have lived up to this mandate.
c. What the present Commission has promised to deliver in terms of its Strategic Plan.

The Report will then critique and analyse the performance of the present Commission. This analysis will be preceded by a brief history of the HRC, describing the structure of the Commission and highlighting the unconstitutional appointment of the new Commissioners.

II. Background and Context

1. The Structure of the Commission and its Past Work

The Human Rights Commission of Sri Lanka was established in terms of the HRC Act and has been in existence for over a decade during which time it has operated amidst many limitations and constraints. According to Section 3 of the HRC Act, the Commission shall comprise five members, appointed by the President on the recommendation of the Constitutional Council, of which one shall be made chairperson. Article 41B of the Constitution[313] states that *'no person shall be appointed by the President as the Chairman or a member of any of the Commissions (including the HRC)... except on a recommendation of the (Constitutional) Council.*

311 For example, a circular issued by the Police Department some years back allowed the HRC to inspect only the cells of police stations but not the entire precincts of the station including the toilets and the kitchen, which are the very places in which torture is practiced. A wider power of inspection was not allowed without prior notice which defeated the very purpose of such monitoring

312 See Pinto-Jayawardena, Kishali, supra

313 See the 17th Amendment to the Constitution

Whilst initially the Commission failed to deliver as expected, since 2000 or so, the Commission responded in part to sustained public critiques of its performance and attempted to proactively engage in its mandate to uphold, promote and protect human rights in Sri Lanka, despite the statutory, financial and practical constraints that it perennially faced.

Such efforts were evidenced in the areas of police abuse and custodial torture, internally displaced persons (IDPS) and victims of the tsunami. During this period, the Commission was mindful of the importance of fostering constructive and meaningful relationships with civil society and international actors. It embarked on building strong partnerships with the international community and civil society, and attempted to enhance the credibility and visibility of the Commission, increasing its capacity in terms of resources (through donor aid) and continuing discourse with other stakeholders in the human rights field. It is regrettable therefore that this constructive relationship has been in steep decline during the period of the current Commission.

The Commission has its head office in Colombo, with regional offices in Ampara, Anuradhapura, Badulla, Batticaloa, Jaffna, Kalmunai, Kandy, Matara, Trincomalee and Vavuniya. The Commission also expanded its programmes by establishing an internally displaced persons IDP) Unit in 2002[314] and the DRMU[315] - its Tsunami Unit in early January 2005. The DRMU set up regional offices in all tsunami affected districts (except LTTE controlled areas and Gampaha) further extending the reach of the Commission.

III. Mandate, Obligations and Strategic Plan

The basic functions and duties of the HRC are set out in the HRC Act. In addition to these explicit statutory provisions, the Commission is also bound in principle to uphold the internationally recognised Paris Principles relating to the status and functioning of national institutions for the protection and promotion of human rights. Finally, the Commission itself has drafted a strategic plan for the period of 2007 – 2009, which sets out the goals, objectives and activities that the HRC intends to pursue within this period.

1. The HRC Act

Section 10 of the HRC Act sets out the functions of the Commission. Accordingly, it is obligated to inquire into and investigate complaints regarding procedures and infringements of fundamental rights; advise and assist the government in formulating legislation and administrative directives; make recommendations to

314 The National Protection and Durable Solution for Internally Displaced Persons Project

315 The Disaster Relief Monitoring Unit

the government to ensure that domestic laws and practices are in accordance with international human rights standards; make recommendations to the government on subscribing or acceding to international human rights instruments; and to promote awareness and provide education with regard to human rights.[316] Section 11 stipulates the powers of the Commission including the powers to investigate infringements of human rights, intervene in court proceedings relating to human rights infringements, monitor the welfare of persons in detention and make recommendations for improving their conditions, research into and promote awareness of human rights and to *'do all such other things as are necessary or conducive to the discharge of their functions'*.[317] The Commission is also obligated to report to parliament on an annual basis in addition to any other special reports it may submit on specific matters.[318]

2. The Paris Principles

When compared with the internationally recognised Paris Principles, the mandate of the HRC is rather narrow. However, past Commissions have been creative in their approach to their mandate and have therefore, been able to broaden it through their actions. One example is the importance placed by the Commission on social, economic and cultural rights in the past, even though Sri Lanka's Constitution does not directly recognise such rights as fundamental rights justiciable by invocation of the jurisdiction of the Supreme Court.

IV. The Paris principles are divided into four sections:

1. Competence and Responsibilities

According to this section, 'a national institution shall be vested with competence to protect and promote human rights'[319], 'given as broad a mandate as possible'[320] and responsibilities pertaining to submitting opinions, recommendations and reports to the government on legislative and administrative instruments and violations of human rights; promoting and ensuring the harmonising of domestic standards with international ones; encouraging the ratification of international instruments, cooperating with the

316 Section 10 (a – f) of the HRC Act

317 Section 11 (a – h) of the HRC Act

318 Section 30 of the HRC Act.

319 Principle A 1 of the Paris Principles

320 Principle A 2 of the Paris Principles

UN and its agencies; and contributing towards human rights education and awareness.[321]

2. Composition and Guarantees of Independence and Pluralism

This is an extremely important section of the Principles. Accordingly, the appointment of members to a national institution 'shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces involved in the protection and promotion of human rights'[322]. National institutions should have adequate infrastructure and funding (which ensures independence from the government)[323] and perhaps most importantly, the appointment of members 'shall be effected by an official act which shall establish the specific duration of the mandate.'[324]

Whilst the 17th Amendment to the Constitution was a step in the right direction in terms of upholding the Paris Principles, the arbitrary appointments of the new Commissioners show clear disregard for these international principles (as well as the Constitution).

3. Methods of Operation

This section sets out seven methods of operation for national institutions, including freely considering any questions falling within their competence, hearing any person and obtaining any information necessary for assessing situations, addressing public opinion directly through the press – particularly to publicise their opinions and recommendations, maintaining consultation with other bodies responsible for the protection and promotion of human rights and develop relations with NGOs devoted to protecting and promoting human rights and related fields.[325]

4. Additional Principles Concerning the Status of Commissions with Quasi-Jurisdictional Competence

These Principles deal with the manner in which a national institution should address complaints and petitions.

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321 Principle A 3 of the Paris Principles

322 Principle B 1 of the Paris Principles

323 Principle B 2 of the Paris Principles

324 Principle B 3 of the Paris Principles

325 Principle C (1 – 7) of the Paris Principles

V. The Strategic Plan of the HRC

The HRC intends to fulfil its above obligations through the goals, objectives and activities set out in its Strategic plan for the years 2007 – 2009. This plan follows the 2003 – 2006 strategic plan which was drafted and implemented by the previous Commission under the chairpersonship of Dr. Radhika Coomaraswamy. The present plan re-emphasises certain activities and objectives which were in the former plan as well as incorporating new ones. Interestingly, the goals of the new plan remain exactly the same as the old, namely:

a. Stronger institutions and procedures for human rights protection and a human rights culture among all authorities, awareness and accountability
b. Public awareness on fundamental and other human rights and a willingness and capacity to enforce them
c. The development of the commission into an efficient organisation, able to fulfil its mandate to promote and protect human rights for everyone in Sri Lanka
d. A final resolution – equality in dignity and rights of all the people in the country, resulting from respecting and protecting fundamental and human rights of all in Sri Lanka.[326]

Whilst there are many objectives and activities set out under these broad goals, the strategic plan gives priority to the following:

- To protect human rights and uphold the rule of law and strengthen monitoring mechanisms.
- To improve and adopt new techniques to handle fundamental rights cases.
- To strengthen the HRC Act.
- To create a *Bills Watch* team.
- To give special attention to vulnerable groups, especially conflict and tsunami affected IDPs, elders, migrant workers, the disabled, women and children.
- To develop an appropriate human rights education system through developing strong human rights networks among government institutions, INGOs, NGOs and UN Agencies.
- To strengthen labour rights.
- To improve the administrative efficiency of the Commission.
- To assist in the Peace Process.[327]

[326] See Human Rights Commission of Sri Lanka Strategic Plan 2003 - 2006 & Strategic Plan 2007 - 2009

[327] Please see Human Rights Commission of Sri Lanka Strategic Plan 2007 - 2009

The above is an extremely cursory glance at the functions and obligations of the HRC according to international norm, domestic law and the internal planning of the Commission.

The Strategic Plan presents a positive picture, which (on paper) appears to satisfactorily meet the obligations of the Commission as per the HRC Act and more importantly, international norms. Sadly however, the performance of the Commission as contrasted to the grandiose objective set out in the Strategic Plan has been grossly minimal; in reality, it has neglected its duties, broken relationships with civil society and shrunk its mandate. The stark difference between what the HRC has put down on paper and the manner in which these objectives have been translated into action is cause for grievous concern and raises questions of institutional indifference, inefficiency and at the worst, deliberate collusion with the government as opposed to being an independent monitor of human rights violations as statutorily mandated.

VI. The Performance of the New Commission

Despite the above ambitiously conceived strategic plan, the HRC has successfully managed to further minimise its scope and capability through its actions, decisions and inactions over the last year as discussed below. It is possible to identify trends and an unarticulated shift in the priorities and mandate of the Commission.

1. Unconstitutional Appointment of the New Commissioners

The 17th Amendment clearly vested the duty of recommending members and chairpersons to be appointed to Commissions (including the HRC) solely in the hands of the Constitutional Council (CC). [328] The President therefore acted in excess of his authority and in violation of the Constitution when he appointed persons to the HRC and other commissions including the National Police Commission (NPC) without such persons being nominated by the CC. In fact, a few of the existing Commissioners at the time refused the invitation of the President to extend their term, precisely due to the unconstitutional nature of the appointments process.

General concern expressed nationally and internationally that these arbitrary appointments would compromise the independence, credibility and performance

[328] According to Article 41 B of the 17th amendment to the Constitution, it is the duty of the Constitutional Council to nominate persons to be appointed by the president as chairpersons and members of key commissions including the HRC, the National Police Commission (NPC) as well as approve other nominations to important posts such as appointments to the Court of Appeal and the Supreme Court, the Attorney General, the Inspector General of Police (IGP) as well as to the Judicial Services Commission. However, the Constitutional Council has still not been formed ostensibly due to disputes between the smaller parties in Parliament over the nomination of their representative to the CC. This dispute, which could have been easily resolved by the President or the Speaker (who is the Chairman of the Council) has been allowed to drag on for over one and a half years without settlement, thereby allowing the President to make his own appointments to the commissions as well as to the specified public offices. Many of the appointments to the NPC and HRC have predominated with his supporters or persons lacking strong commitment to rights protection.

of the Commission was high.[329] The UN High Commissioner for Human Rights expressed concern stating that she hopes the *'standing and independence of the Commission will not be compromised by the ongoing controversy over the appointments of its members.'*[330] Given this context, there was concern that the existing programmes and partnerships of the Commission would suffer with the new appointments, closing one more door in the face of victims of human rights violations seeking redress and justice.

Evaluating these concerns with the actual performance of the HRC thereafter, there is undoubtedly reasonable cause for apprehension that the country's main monitor of rights abuses has seriously lapsed in its statutory duties. Whilst the Commission has formulated a seemingly progressive strategic plan for the period of 2007 – 2009, its grandiose objectives have been completely belied by the actions of its own Commissioners over the past few months. Before discussing these details however, it would be helpful to examine the working and mandate of the Commission as espoused by international convention, domestic law and internal planning.

2. Breaking Partnerships with the Human Rights Community

As stated above, the HRC has a history of strong partnership with other players in the Human Rights community, be they NGOs, INGOs or the UN and its agencies. Principles C 6 and 7 of the Paris Principles too emphasise the importance of fostering such good relations. However, the reception given to an LST staff member by the Commissioners clearly marked a shift in attitude. The Commissioners subjected the staff member to a general criticism of all NGOs, refused to discuss any matters raised by him and stated that they are not under obligation to disclose information to the general public, as they are not accountable to them.[331] This manner of response has been evidenced in relation to other non-governmental organisations who have publicly expressed strong criticism of the unconstitutional appointments process of the Commissioners. The HRC has stated in writing that it will not release information collected by it, to the public. For example, one letter dated 10.10.2007, signed by the Secretary to the Commission and sent in response to such a request by a non-governmental organization, it is claimed 'that the information and data collected by the Commission is for the purpose of meeting the requirements of the Commission

[329] See, among many statements on these appointments, the following; Statement of the Commonwealth Human Rights Initiative, Friday 26 May 2006; Statements by the Asian Human Rights Commission (AHRC), May 10, 2006, May 19, 2006, May 23, 2006, May 27, 2006, May 29, 2006, May 30, 2006 , June 1, 2006, , June 2, 2006, June 3, 2006, and June 4, 2006; Statement of Forum Asia 'Open letter to the President on the arbitrary appointment of Commissioners to the National Human Rights Commission' 20th May 2006.

[330] See Louise Arbour, UN High Commissioner for Human Rights 'Letter to Mahinda Samarasinghe, Minister for Disaster Management and Human Rights' 30 June 2006.

[331] See Forum Asia 'Disengagement, threats and abuse of NGOs by the Sri Lankan Human Rights Commission – a letter to Prof. Kyong-Whan Ahn'. August 2007

and that therefore no information could be released to any other agency." Verbally, officers of the Commission have stated that they would release information only to the Government or to the UN agencies.

However, at times, the response of the HRC to other organisations has been different; for example, the HRC shared statistical information with PAFFREL[332], which in turn published this information in a recent report.[333] The PAFFREL report which named the LTTE, the Karuna Faction and the Underworld as the three main perpetrators of violence appeared to downplay credible reports of the involvement of elements of the government in extra judicial executions and enforced disappearances.'[334] It is perhaps a moot point as to whether the engagement of the HRC is currently limited to non governmental organisations perceived as engaging in a 'soft critique' of the government rather than with civil society in general. This poses serious questions regarding the independence of the HRC and its capacity to act in the best interest of safeguarding human rights of individuals in all circumstances.

The reluctance to speak and share information with other actors in the human rights arena is not limited to the Commissioners alone. The staff in the regional offices of the HRC, are also reluctant to speak, perhaps for different reasons. LST was repeatedly informed by HRC personnel, that they could not share information with us from regional offices, as they had been directed to channel all information to the centre for further dissemination from there. This is a new development, as LST's past experience with the very same personnel (during the term of the previous Commissioners) had been that they were willing to share experiences and information with responsible and committed groups.

The change in attitude towards other actors in the human rights community is a clear signal of the change in the role that the HRC sees for itself. Open statements regarding their non-accountability to the people and the apparent confidence that the HRC can successfully operate without maintaining meaningful partnerships with other actors are cause for grave concern.

Further, while the HRC domestically initiates such clearly antagonistic policies towards selected non governmental organizations, it professes quite the reverse internationally. Thus, in its Report submitted to the 12th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions (APF sessions) in Sydney, September 2007, the HRC claimed, that it 'closely collaborates' with *interalia*, 'non governmental organizations by providing information reported to the

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332 People's Action for Free and Fair Elections

333 PAFFREL 'Programme on interventions by PAFFREL, on abductions, disappearances and killings etc'

334 See CMC, FMM & LST 'First in a series of submissions to the Presidential Commission of Inquiry and public on human rights violations in Sri Lanka' August 23, 2007

Commission.' There is, as clearly demonstrated above, a palpable inaccuracy in this claim. It is these evident contradictions and inconsistencies that go to the systematic deterioration of the HRC and deprives it of credibility and integrity.

3. Limiting the Scope of the Mandate of the HRC

Despite the comprehensive nature of the strategic plan of the HRC, in reality, the Commission has only acted to limit its scope and effectiveness. Some concrete examples will illustrate the extent of the problem. In one instance, the Note of the Secretary to the HRC (29th June 2006) stated that the HRC had decided to stop inquiring into the complaints of over 2000 enforced disappearances of persons in the past, viz," for the time being, unless special directions are received from the government." Astoundingly, this decision was justified purportedly on the basis that "the findings will result in payment of compensation, etc." Due to this minute being leaked to the media and activists by concerned staffers of the HRC, sustained criticism of the HRC resulted in the revocation of this decision while the Minister of Human Rights issued a statement stating that the HRC did not need to wait for directions to be issued by the government when acting in pursuance of its statutory mandate. It must be noted that though these inquiries re-commenced and were carried out during the current period under scrutiny, the commitment with which the inquiries are being engaged in, is subject to reasonable doubt considering the circumstances.

In another more recent instance, an administrative decision was made by the Commission (through internal circular No 7 dated 20.06.2007) to stipulate a three months limitation from the date of incident of the alleged violation of human rights in respect of the acceptance of such complaints by the HRC. The Act establishing the HRC does not stipulate a time limit within which a complaint must be accepted. The HRC (in its previous term) had detailed that, excepting allegations of torture, complaints accepted must be lodged within one year of the alleged human rights violation. Complaints submitted in regard to incidents not coming within this time frame were accepted at the discretion of the Commission. However, the current Commissioners' decision drastically reduces that time period to three months with a rider that acceptance of complaints in regard to incidents later than three months would be at the discretion of the Commission. [335] This condition of three months, applies without exception to all cases, thus including complaints of torture/enforced disappearances as well.

This decision is unacceptable on many fronts. In the first instance, as stated before, the Act under which the Commission is established does not stipulate a time limit and consequently the imposition of such a time limit by circular is *per*

[335] See Chitral Perera, 'An open Letter to the Chairperson of the Human Rights Commission' July 2007

se contrary to the provisions of the Act. From another perspective, the inclusion of even complaints of serious human rights violations within this short time frame has grave implications for the role of the HRC in the current climate of renewed war and the question arises as to whether such a time period has been stipulated with the express objective of numerical reduction of the number of complaints accepted by the HRC so as to project a misleading picture as to the severity of the rights violations being committed.

It must be further pointed out in this regard that there is a constitutionally prescribed one month timeframe for all fundamental rights petitions to the Supreme Court[336] which has made the operation of the constitutional remedy very difficult for victims. Many who seek redress at the HRC are victims who have failed to satisfy the one month requirement of the Supreme Court for various reasons. By drastically reducing the HRC complaints' time frame, a significant percentage of persons would not have either option available to them. The manner in which the HRC had put this decision into action is also questionable. There was no public awareness raising campaign on the new timeframe, no rational justification for the reduction (except to state that large numbers of complaints were being lodged which is in itself an unacceptable decision for stipulation of a restrictive time frame) and no attempt to engage the public in any discussion regarding the decision.

There have been further problematic developments in this regard. In an order dated 31/01/2008, the HRC found that no violation of rights had occurred as a result of a group of police officers insisting that they should be within earshot of two lawyers who had attempted to confer privately with suspects detained under emergency laws at the Boosa detention centre. The relevant order states *inter alia* that 'still some international laws and standards have not been incorporated into our law…..further it should be noted that the Sri Lankan government is not bound to follow all international laws and standards." This is remarkable reasoning for a body which is statutorily enjoined to ensure that national laws and administrative practices are in accordance with international human rights norms and standards (Section 10(d) of the Human Rights Commission Act).

4. Inaction of the HRC

Over the past one and a half years, Sri Lanka's human rights record has degenerated into crisis proportions. The Government, LTTE and other militant factions have collectively marginalised and violated the human rights of the

[336] Article 126 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

people; all with equal impunity. These violations have been documented and commented upon domestically as well as internationally. [337]

To quote one example;

> 'The resumption of war between the Sri Lankan government and the Liberation Tigers of Tamil Eelam (LTTE) has been accompanied by widespread human rights abuses by both sides. While the LTTE has continued its deliberately provocative attacks on the military and Sinhalese civilians as well as its violent repression of Tamil dissenters and forced recruitment of both adults and children, the government is using extra-judicial killings and enforced disappearances as part of a brutal counter-insurgency campaign.' [338]

In this context, one would imagine that the HRC would be inspired to work tirelessly with the people, document violations, call for justice and publicise the escalating crisis. Unfortunately, the predominant reaction of the HRC has been silence and inaction. The failure of the HRC, to in the very least, engage in continuing and consistently strong public statements on the prevalent crisis of human rights violations is a flagrant violation of its statutory obligations (as recognised by Principle C 3 of the Paris Principles). This has been reflected upon in the following manner.

> 'Since its appointment in May 2006, the present Human Rights Commission has issued no reports on high-profile human rights violations, disappearances, the Emergency Regulations or any other matter. It has occasionally published some figures on complaints but these are incomplete or contradictory' [339]

The prioritised objectives of the HRC according to its Strategic Plan includes protecting human rights and upholding the rule of law, giving special attention to vulnerable groups including IDPs and assisting in the peace process. However, these are objectives which the Commissioners are clearly satisfied to confine to theoretical concepts alone. Following, are just two specific instances of inaction on the part of the HRC, in direct violation of its statutory obligations:

a. IDPs

As stated above, the HRC has an IDP Unit which has been operational since 2002. However, despite the escalating IDP crisis over the past few months, and repeated concerns being raised by NGOs and UN agencies, the HRC has remained

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337 Report of Phillip Alston, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions; Mission to Sri Lanka, 28 November – 6 December 2005, published in LST Review, Vol. 16, Issue 221 March 2006.

338 International Crisis Group 'Sri Lanka's Human Rights Crisis' 14th June 2007

339 ibid

stubbornly silent. When LST, as part of a coalition of NGOS, visited the Batticaloa district in order to monitor the resettlement of IDPs, the absence of the HRC on the field told the story of an indifferent, non-independent institution which did not take its mandate seriously. The HRC articulated at the time (which was two months after the initial displacement took place) that it was planning to visit the area which was not a satisfactory reason to advance by a unit purportedly dedicated to the wellbeing of IDPs. Furthermore, even though NGOs were refused access to areas where the government was forcibly resettling IDPs, the HRC made no attempt to either visit the areas itself, or to lobby for the right of NGOs to visit them.[340]

b. Humanitarian workers and the Media

The past year has seen humanitarian workers and the media being increasingly targeted by violators of human rights. Since January 2006, at least seven journalists have been murdered. Numerous other journalists have been abducted, physically attacked, threatened or forced into exile.[341]

5. According to the International Crisis Group;

Most seem to be targeted because they are seen as actively supporting the LTTE,[342] have criticised the government too strongly or revealed information the government did not like,[343] or are linked to opponents of the government'.[344]

The Defence Secretary himself allegedly threatened an editor of the Daily Mirror after publishing a particular article.[345]

Humanitarian workers too have been targeted in unprecedented numbers. Whilst the most quoted case is the killing of 17 ACF aid workers in Muttur in August 2006, a total of 60 humanitarian workers and religious leaders have been abducted and killed in 2006 and 2007.[346] The HRC embarked upon an inquiry regarding the extra judicial killings of the 17 ACF workers only several months after the complaint from ACF was recorded at its regional offices and that too, after repeated letters were sent requesting the HRC to act in accordance with its statutory mandate.

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340 See CPA, INFORM, IMADR and LST 'Batticaloa Field Mission' May 2007 for details.

341 The Sunday Leader 'The war on the media' April 22 2007.

342 For example, the killing of two in an armed attack on the offices of the Uthayan newspaper in Jaffna, in May 2006, carried out in broad daylight in a government controlled area, "Uthayan attack condemned", www.bbc.co.uk/sinhala/news/story/2006/ 05/ 060503_cpj_uthayan.shtml.

343 The murder of Sinhala journalist Sampath Lakmal de Silva seems likely to have been connected to his writings on sensitive military and criminal topics, Dharisha Bastians and Santhush Fernando, "Messenger killing: shrouded in mystery", The Nation, 9 July 2006.

344 International Crisis Group 'Sri Lanka's Human Rights Crisis' 14th June 2007

345 Free Media Movement, 'Sri Lanka's Defence Secretary threatens editor', 17 April 2007.

346 See CMC, FMM & LST 'First in a series of submissions to the Presidential Commission of Inquiry and public on human rights violations in Sri Lanka' August 23, 2007

The HRC should cultivate a special relationship with the media and other human rights workers (as per C 4, 6 & 7 of the Paris Principles). However, there has been no show of solidarity, public denunciation or call for justice in regard to any of these incidents.

VII. Recent Downgrading Of the HRC

The recent decision by the sub-committee on accreditation of the International Coordinating Committee (ICC) of National Human Rights Institutions, UN Office of the High Commissioner for Human Rights, to downgrade the status of the HRC from category "A" to category "B" was as a result of the HRC failing to abide by the Paris Principles.

This process culminating in the adverse decision of the ICC Sub-Committee on Accreditation and endorsed by the ICC members, commenced in March 2007. Pursuant to section 3(g) of the ICC Rules, the ICC proceeded to consider the following two questions relating to the accreditation status of the Sri Lanka's HRC, namely first, 'it is not clear whether the appointment of Commissioners has been in compliance with the Law of the Commission and therefore in compliance with the Paris Principles; and secondly "it is not clear whether the actual practice of the Commission remains balanced, objective and non-political, particularly with regard to the discontinuation of follow-up to 2000 cases of disappearances in July 2006."

The review process entertained submissions relating to these two questions, in the course of which more than thirty eight civil society organizations from Colombo based non governmental organsations to rural based community networks working in the field for over thirty years or so, sent in critical reports pointing to the fact that the HRC has failed to live up to its mandate and has been unwilling and unable to respond to the severe human rights crisis facing the country. Further, it was requested that the ICC facilitate the transformation of the HRC as a matter of urgency, so that it may once again be a credible and effective actor on behalf of the victims of human rights abuse in Sri Lanka.

Thereafter, the IC sub-committee called for representations from the HRC itself in response to the allegations leveled against it. It was consequent to this process that the decision to downgrade its status was arrived at.

The precise reasoning of the Sub-Committee in arriving at this decision is a good illustration of the essential problems affecting the HRC and therefore will be noted as follows. The Sub-Committee observed that firstly, the Paris Principles provide for the appointment of the governing body and other guarantees of independence. The 2006 appointment of the Governing Body was done without recommendation of the Constitutional Council prescribed in the Constitution. Secondly it is noted that the Commission did not take measures to ensure its

independent character and political objectivity, as required by the Paris Principles. Thirdly, it is noted that the Commission has failed to issue annual reports on human rights as required by the Paris Principles.

In addition, the Sub-Committee noted that the state of emergency still prevails in Sri Lanka and thus refers to the General Observation on "NHRIs (National Human Rights Institutions) during situations of a coup d'état or a state of emergency." In this context, it was observed as a principle, that the Sub-Committee expects that, in the situation of a coup d'état or a state of emergency, an NHRI will conduct itself with a heightened level of vigilance and independence in the exercise of its mandate.

The Sub-Committee also emphasized the importance for NHRIs to maintain consistent relationships with civil society. It was pointed out that "the appointment process has caused civil society in the country to question the constitutionality of it, which has affected the credibility of the Commission."

VIII. Conclusion

As stated above, this report does not serve as a comprehensive evaluation of the functioning of the HRC. However, certain trends have been identified, and conclusions can be made by analysing them.

If one were to summarise the journey of the HRC since 2006, it would be as follows:

- In May 2006, the President bypassed the Constitution by appointing new Commissioners to the HRC without the nominations being made by the Constitutional Council;
- The new Commissioners drafted a strategic plan which *prima facie* satisfies their obligations according to international norm and domestic statue;
- The actions and inactions of the HRC have however completely belied the objectives of the strategic plan and have resulted in the deliberate breaking of relationships with civil society organisations, self imposition and *ultra vires* limitations of its statutory mandate as well as inaction in circumstances when the committed, swift and needed action on the part of the HRC has been needed most during a situation of renewed conflict and grave violations of human rights of Sri Lankans.

This sequence of events leads to two logical conclusions.

- Firstly, that the HRC has no independence and it does not have the capacity, resolve or independence to carry out its mandate.

- Secondly, that the HRC has intentionally changed its attitude, neglecting its statutory mandate towards the people, and is functioning merely to 'cover up' human rights violations of state actors;

Undoubtedly, these are not desirable conclusions that can be arrived at regarding the functioning of the country's premier human rights monitor. It is clear that the Human Rights Commission of Sri Lanka has drastically fallen short of its legally binding mandate in regard to the protection and advancement of humans rights.

Taiwan: "The Long Wait"

Taiwan Association for Human Rights (TAHR)[347]

I. Introduction

Taiwan, forced to withdraw as a member-state of the United Nations (UN) in 1971, has become isolated from the process of human rights development led by the global body. The international human rights regime has gone through significant development in the past thirty years in terms of norm-setting, monitoring, institution building, and NGOs participation. Taiwan was totally left out from this developmental process.

At the national level, Taiwan, a colony of Japan for fifty years, was under the Nationalist Chinese (i.e. KMT) martial law rules for over four decades, until 1987. Although the constitution was restored when democratization began in the early nineties, its bill of rights section was primitive by post-war standards, and the function of judicial review by the constitutional court has been slow to develop.

In view of the overall situation and what it implies, Taiwan's NGOs began to study and push for the establishment of a National Human Rights Commission (NHRC). In the mid-nineties, led by the Taiwan Association for Human Rights (TAHR), twenty-two NGOs formed an Alliance for the Promotion of a NHRC in 1999, a presidential election year.

The Alliance set up a working group to draft a NHRC Bill. Through months of intensive meetings and debates, the first draft bill for NHRC was completed in the year 2000, followed by an international conference for further consultation. The Alliance's proposal for a NHRC was endorsed by most parties, and later adopted by the new government on 20 May 2000 in the form of President Chen Shui-Bian's inaugural address.

To create and maintain pressure from all political parties, and to defend the integrity of its draft bill, the Alliance also began lobbying in the Legislative Yuan. President Chen's administration also submitted its own bill in 2001. Unfortunately, due to bitter political rivalry, following the first ever democratic rotation, the Legislative Yuan (where the oppositional party KMT and its alleys were the majority) failed to consider the bills by the year 2004 when the term of the office expires. According to domestic law, any bill not considered within a given term has to be resubmitted. Since then, although the government has

[347] Contact Persons: Prof. Fort Fu-Te Liao and Rebecca Fan, Taiwan Association for Human Rights (TAHR)

prepared a new bill, it still awaits to be submitted. Meanwhile, the NGO Alliance is reorganizing itself to take advantage of the upcoming presidential election in the year 2008.

This following report bases itself on two sets of draft bills: one by the NGO Alliance of 2001, and another by the government of 2006, the still un-submitted draft bill. The NGO Bill consists of two parts: an amendment to the “Law on the Structure of the President’s Office” (with a new paragraph to Article 17), and the ‘National Human Rights Commission Act’. The Government Bill includes a similar amendment to the ‘Law on the Structure of the President’s Office’ (with a new Article 17-1), the ‘National Human Rights Commission Act’, and the ‘Executive Powers of the National Human Rights Commission Act’.

II. Independence

The Paris Principles emphasizes that a national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text.

The NGO Alliance wants the proposed NHRC to be independent from the five major branches of government: the executive, legislative, judiciary, control and examination branches (the latter two are peculiar to the Constitution brought to Taiwan by the KMT regime from China). Achieving this would require constitutional amendments that would accord the NHRC constitutional status, a difficult task in Taiwan given the current state of Taiwan’s party politics. The Alliance therefore decided that the NHRC should be placed under the President’s Office – hence the need for specific legal provisions through a new paragraph to Article 17 on the Commission’s status.

The Government Bill adopted this idea. With the amended Article 17-1, the proposed NHRC would operate alongside two other independent agencies that are also under the President’s Office: the Academia Historica (i.e. national history archive) and the Academia Sinica, the national research institute.

To ensure the Commission’s independence, the NGO Bill includes four key points. First, the Executive Yuan will have no power to reduce the Commission’s annual budget (Article 12). Second, no commissioner can be removed from office unless he or she is found guilty of a criminal offence or has been indicted. Third, commissioners cannot be prosecuted on the basis of what they say or how they vote during meetings (Article 14). Fourth, the Commission will have the power to enact rules for its meetings and procedures (Articles 20 and 21). The Government Bill does not include such measures.

1. Relationship with the Executive, Legislature and Judiciary

Both Bills propose to grant the Commission the power to request relevant government agencies to provide opinions as to whether their promulgated regulations, policies or administrative measures infringe upon human rights, and to proffer remedial plans. They also propose independent powers of enquiry and the right to obtain documents from the government. The NGO Bill further extends this to assistance from the police, army and relevant agencies (Article 7(2)).

The NGO Bill also requires the Commission to review the constitution, laws and regulations, and to propose amendments to the above and to legislative bills in accordance with international human rights standards. While the Bill emphasizes that the legislative branch must comply with international human rights standards, the Governmental Bill merely requires the Commission to formulate and review any laws, regulations and policies intended for the promotion and protection of human rights. Under both Bills, the Commission will have to send its reports to the Legislative Yuan.

To prevent overlapping jurisdiction with the judicial branch, both Bills state that the Commission cannot accept complaints that are under judicial review or the subject of litigation. While the Governmental Bill grants the Commission power to apply for constitutional interpretation (Article 10 of Executive Powers of the National Human Rights Commission Act), the NGO Bill does not include this.

2. Election of commissioners

The NGO Bill proposes 15 commissioners, with the president to appoint eight and the Legislative Yuan to elect seven. The commissioners themselves will elect the chairperson and two deputies, so as to avoid direct administrative appointments. The chairperson leads meetings and bears responsibility for the general affairs of the Commission. The deputies assist the chairperson in the performance of functions (Article 10). The Government Bill proposes 11 commissioners, all appointed by the president, who also appoints the chairperson and a deputy (Article 3).

NGOs want the commissioners to be appointed from three groups: (a) those who have made a special effort for, or contributions to, protection and promotion of human rights or minority rights in particular; (b) those who have demonstrated expertise on human rights, or who have made special contributions to related research or education; and (c) those who have served as a judge, prosecutor, lawyer or have participated in other judicial works contributing significantly to human rights protection. It is also explicitly required that the appointment of commissioners must give consideration to diversity in society (Article 11). The Governmental Bill only contains (a) and (b), and does not emphasize the diverse representation of society (Article 4).

Both of the NGO Bill (Article 13) and the Government Bill (Article 4) require that the commissioners exercise their powers independently and that they do not participate in activities of political parties.

The NGO Bill defines commissioners as officers of ‘special appointment rank’, who are not classified as general civil servants. Their term is for six years. However, at the first appointment, the president and the Legislative Yuan shall respectively appoint three commissioners for a three-year term (Article 10), to avoid political influence and to maintain continuity as much as possible. Commissioners may be re-elected or re-appointed once. They may not serve in other government bodies or engage in professional practices.

The Government Bill defines commissioners as officers of highest civil servant rank. They are appointed for a four-year term (Article 3). There is no special rule on the first appointment or to prevent commissioners from serving in government agencies or engaging in professional practices. Commissioners can be re-appointed.

Other aspects covered by the NGO Bill relate to the Commission’s operations. First, it may establish specialized committees as it deems necessary (Article 15). Second, it may appoint domestic and foreign consultative advisors, on the strength of powers to make such provisions (Article 16). Third, commissioners, at their own initiation, may appoint 4-6 persons as assistants, specialists or researchers (Article 17). Fourth, administration will be divided into five departments (Article 18), for operational effectiveness and efficiency.

The Governmental Bill adopted similar provisions on the appointment of domestic and foreign consultative advisors and administrative staffing (Articles 7-12 and 14). It further states that the Commission may establish specialized committees and that the Commission is empowered to appoint human rights investigators and researchers (Article 13).

3. Financial independence

To ensure the Commission’s financial independence, the NGO Bill states that the Executive Yuan will have no power to reduce its annual budget (Article 12). It means that the Legislative Yuan is the only branch that can see to the Commission’s finances. This provision is not found in the Government Bill.

4. Relationship with other domestic human rights mechanisms

The Control Yuan (an ombudsman institution, one of the five branches under Taiwan’s Constitution) is vested with powers of impeachment, censure, and auditing. It may also propose corrective measures, take written complaints from the people arising from official misconduct, carry out investigations, and examine

disclosure of assets by public functionaries. As the Control Yuan is a constitutional institution and holds power to investigate any administrative misconduct, it has opposed any proposal that grants the NHRC the role of receiving individual complaints and the power to investigate.

To resolve the jurisdictional conflicts, the NGO Bill states that the NHRC shall not admit any case that is under investigation by the Control Yuan (Article 5). However, NGOs believe that a NHRI is different from an Ombudsman. While the latter focuses on irregularities in administration, the main duty of the NHRI is to promote and protect human rights. Both may investigate government agencies but do so from different viewpoints. Therefore, NGOs would prefer the NHRI to co-exist with the Control Yuan. In this respect, the NGO Bill states that the Commission, when receiving complaints or of its own volition making enquiries into human rights violations, may suspend its investigations or assistance, if relevant government agencies are handling these cases. The NGO Bill also requires the relevant government agencies to inform the Commission of the outcome of such cases (Article 5). This would allow the Commission to continue its monitoring function even when issues are being reviewed by the Control Yuan.

III. Mandates

1. Protection of rights

The government's Executive Powers of the National Human Rights Commission Act focuses on existing laws, regulations and measures that may violate human rights protection by Commission or omission, as well as cases that do not fall under the mandate of the Control Yuan or that are being examined by the judiciary (Article 6). It requires the NHRC to refer cases to the Control Yuan on matters where the latter has jurisdiction (Article 17). The Commission should not intervene in cases before the courts (Article 6).

In the NGO Bill, the Commission may perform similar functions of reviewing existing laws, regulations, measures, and of suggesting changes. It may also delegate investigatory power to specific agencies or groups, scholars or experts (Article 7, Paragraph 3). The Commission will have the power to impose fines ranging from NT$10,000 to NT$110,000,000 on those who violate its orders (Article 9).

The government's Executive Powers of the National Human Rights Commission Act proposes that commissioners may delegate power only to human rights investigators, who are on the staff of the Commission. The fines will range from NT$30,000 to NT$300,000.

2. Promotion of rights

Under Article 2 of the NGO Bill, the Commission's functions include proposing national human rights policies; undertaking and promoting research and education in the field of human rights; as well as preparing national human rights reports, both annual and thematic.

The Government Bill sees at the Commission's functions in three main areas: to examine laws, review administrative procedures and investigate individual complaints. There is no explicit stipulation requiring for the Commission to promote human rights. It appears that the government believes this function is covered by Article 2(5), which provides that "other promotion of domestic and international protection of human rights" is one of the functions of the Commission.

IV. Interaction with NGOs

The NGO Bill expressly stipulates that the Commission must co-operate with civil society, international organizations, other NHRIs and NGOs in promoting human rights protection (Article 2). The Government Bill is less specific on this matter, but empowers the Commission to engage in any issue relating to the promotion and protection of human rights. It is the government's view that the provision sufficiently enables the Commission to interact with NGOs. However, it must be pointed out the provision does not make it a legal duty for the Commission to co-operate with NGOs. Much will depend on how the Commission undertakes its functions.

V. Recommendations

1. To the government

It was seen as a positive move for President Chen Shui-Bian to announce that the establishment of a NHRC was a top priority and sent a Bill to the Legislative Yuan. However, the Government Bill requires much amendment to fully comply with the Paris Principles, as pointed out earlier in relation to appointments, internal powers and financial independence of the Commission.

If the government is committed to establishing a NHRC, it should have sent its new Bill to the Legislation Yuan by now. Since it has not yet done so, we urge it to revise its Bill as soon as possible and submit it for legislative deliberation.

2. To opposition parties

One reason why the Legislative Yuan did not pass the initial Government Bill by 2004 was due to the fact that opposition parties formed the majority in this body at the time. They dominated the Procedures Committee and kept the bills off

legislative agenda despite their pledge in the presidential election of 1999. Since human rights should not be a partisan issue, the motive behind such conduct is difficult to decipher. We urge the opposition parties to look at this issue from the human rights viewpoint, not through the lens of partisan politics.

3. Involve NGOs in process

During its drafting process, the government did not invite human rights NGOs to provide their views except the initial stages. We urge the government to involve NGOs in its revising process for a new Bill, in accordance with the Paris Principles.

4. International co-operation and pressure

Given Taiwan's peculiar if not unique international situation and status, the country is definitely part of the global village of human rights, yet excluded from the formal international human rights regime by geo-politics. It is only obvious that solidary pressure and assistance is sorely needed.

Turbulence in Thailand

Subhatra Bhumiprabhas & Pravit Rojanaphruk[348]

All rights and liberties guaranteed in the Constitution
are meaningless if people have no power to enforce them.
Prof Saneh Charmarik
President of the National Human Rights Commission
Remark at a symposium on 26 July 2007 to mark the end of the NHRC's six-year term

I. Introduction

The National Human Rights Commission of Thailand (NHRC) was established under Section 199 and 200 of the 1997 Constitution and the National Human Rights Commission Act B.E. 2542 (1999) as an independent body to guarantee respect for human rights.

The 11 full-time Commissioners have traditionally comprised individuals with extensive human rights experience, while consideration has been given to gender balance and a pluralistic composition. Their tenure of office is six years, with each serving no more than a single term.

Although the Commissioners completed their term on 13 July 2007, they continue to serve in a caretaker capacity as their replacements have yet to be selected. This is due to the absence of an elected Senate as a result of a military coup in September 2006, which has also affected the workings of the NHRC.

The NHRC has completed implementing its first five-year Strategic Plan (2002-2007). The drafting process involved over 200 representatives from governmental and non-governmental organizations (NGOs) including civil society groups and the media. It set up 37 sub-committees to work on five focus areas – rights protection, legal and justice system, social policy, natural resources and

[348] The researchers would like to acknowledge the co-operation of the following people who gave their time to be interviewed for this report:

1. Prof Saneh Charmarik	President of the National Human Right Commission
2. Ms Naiyana Supapung	National Human Rights Commissioner
3. Assistant Prof Jaran Dithapichai	National Human Rights Commissioner
4. Mr Surasee Kosolnavin	National Human Rights Commissioner
5. MrVasant Panich	National Human Rights Commissioner
6. Mr Kanchai Kongsanai	Director, Rights Protection Department, Office of National Human Rights Commission
7. Mr Ekachai Pinkaew	Office of National Human Rights Commission
8. Mr Sarawut Pratoomraj	Human rights lawyer and member of NHRC sub-committees
9. Mr Ratsada Manooratsada	Human Rights Committee, the Lawyers Council of Thailand
10. Assoc Prof Somkiat Tangnamo	Midnight University
11. Mr Bundit Thanachaisethavut	Director and labour rights researcher, Arom Pongpangan Foundation-Labour Resource Centre
12. Mr Baramee Chaiyarat	Advisor to the Assembly of the Poor
13. Ms King-oua Laohong	Reporter, Krungthep Turakij
14. Ms Supara Janchitfah	Reporter, Bangkok Post
15. Mr Supalak Ganjanakhundee	Reporter, The Nation

community rights, and international treaties on human rights. For example, it revived investigation cases of victims of the so-called War on Drugs who were allegedly extra-judicially killed. The NHRC successfully convinced the Justice Ministry's Department of Special Investigation to reconsider about two dozens cases. The NHRC also succeeded in amending the penal code to offer legal protection to women against marital rape.

Also, it managed to push the Thai government in adopting the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

1. Political turbulence

The period under review has been a turbulent one, in part due to the military coup that overthrew the elected government of Prime Minister Thaksin Shinawatra on September 19, 2006.

The military junta, initially calling itself the Council for Democratic Reform under the Constitutional Monarchy,[349] was led by Army Chief General Sonthi Boonyaratglin. It suspended the Constitution, dissolved Parliament, banned protests and all political activities, suppressed and censored the media, declared martial law, and briefly detained some Cabinet members and ministers.

There was doubt as to whether the NHRC could continue its work on human rights protection under the military rule. The Commissioners and staff were themselves uncertain as to whether the NHRC had been dismantled, since the 1997 constitution had been nullified by the junta's post-coup actions.

Public confidence dipped when NHRC president Prof Saneh Charmarik commented to the local media a day after the coup: "I do not think [the coup] is about progression or regression [of democracy] but about problem solving."

He also said the coup, while not legitimate, was the only "solution".

His statement was a disappointment to some human rights advocates. A group of students and young activists criticized Saneh, saying he had accepted the 'legitimacy' of the coup makers and displayed approval of the junta's human rights violations. Some demanded his resignation and urged other Commissioners to take a stance on the issue, but to no avail. However, several scholars and social activists who had been working with the NHRC's sub-committees resigned to express their dissatisfaction with Saneh.

[349] The junta later changed its name to Council for National Security.

On 24 September, the junta, in an apparent move to try and ease international pressure, announced that the NHRC would be retained and that it should proceed with its duties.

Two days later, the NHRC issued a statement expressing grave concern over the deteriorating human rights situation under military rule. It urged the junta to respect international human rights obligations to which Thailand is a party, and to allow people to exercise their fundamental rights and freedoms. The NHRC also declared that it would continue to independently perform its duties in monitoring the actions of the junta and its appointed regime, to ensure full respect for human rights in accordance with international standards and treaties.

But the NHRC itself fell into disarray when certain Commissioners adopted positions to the contrary. For example, a Commissioner joined a junta-appointed government delegation on a sponsored tour to Europe, during which only the alleged human rights violations under the Thaksin Administration were highlighted. The Commissioner has since denied having lent support to the junta.

However, another Commissioner, Jaran Dithapichai wrote a letter of appeal to the United Nations High Commissioner for Human Rights, in which he exposed human rights violations under the junta's rule. He even led an anti-coup rally that ended in a violent crackdown by the police on 22 July 2007. The police and protesters have blamed each other for starting the violence. Jaran was briefly detained after the clash and later released on bail.

A group of students then submitted a letter to the NHRC president, asking for a probe as to whether Jaran's involvement was a breach of human rights principles. At a press conference on 3 August, the Commission defended Jaran, saying that he had merely exercised his civil and political rights in leading the protest.

On 24 August, the NHRC set up a sub-committee to investigate the clash, to verify which party had started the violence. That same month**,** the junta-appointed Parliament – the National Legislative Assembly (NLA) – began impeachment proceedings against Jaran for leading the demonstration.

At least 88 members of the NLA launched a motion at the NLA to impeach Jaran. They claim Jaran, as national human rights commissioner, was acting partially unbefitting of a government officer. The group accused Jaran's performance was against Section 9 of the NHRC Act.[350]

Jaran insisted however that he exercise his right to express his political stance by leading a political protest against the regime and the current political order which he deemed as illegitimate

[350] Section 9 of the National Human Rights Commission Act states: Members shall perform their duties with independence and impartiality and shall have regard to the interests of the country and the public.

The NLA, on August 9, set up the standing committee to consider the matter. The special committee consists of 11 NLA members, none of them were among the 88 members who signed the letter. The committee was warranted to report to the NLA within 30 days.

Meanwhile, many commissioners have stressed that they are independent and able to carry out their duties as in the past. Saneh has cited these varying responses to the coup as proof that the NHRC remains independent to either agree or disagree with the junta.

2. Human rights violations under military rule

After the coup, on 16 November 2006 the NHRC set up a new sub-committee on freedom of expression to handle complaints on violations related to the coup and the junta's orders. Eight cases were submitted including warning letters sent by the junta to community radio to exercise self-censorship on items positive towards Thaksin and the dismantling of an anti-coup protest stage.

On 9 October 2006, the Midnight University – an informal public intellectual network based in Chiang Mai province – submitted a petition urging the NHRC to investigate the blocking and dismantling of its website (www.midnightuniv.org) by the Ministry of Information and Communication Technology. This occurred after some members held a high-profile protest against the junta's draft interim constitution and posted the contents on the website. The group said the action had caused the loss of some 1,500 academic articles, as well as a lively web-board with thought-provoking debates.

The Assembly of the Poor, a major rural-based grassroots organization complained that the military had harassed its leaders in Nakhon Sawan and Ubon Ratchathani provinces on 9 December 2006. This was to prevent the group from marching to Bangkok to mark International Human Rights Day on 10 December.

Leaders of the Klong Toey slum communities, Bangkok's largest slum and known for its pro-Thaksin sentiment, filed a complaint on 12 January 2007 that a group of armed soldiers had entered and patrolled their communities. They also revealed that the military had set up posts in the area and that officers were stationed there in order to keep 'peace and order'. Community leaders said they believe the soldiers were spying on them.

In response, the NHRC sub-committee held a press conference on 16 January 2007 during which it demanded that the junta lifts martial law[351] in dozens of provinces and to withdraw orders which violate freedom of expression and rights to assembly. The junta has paid little heed to this.

[351] On 28 November 2006 the junta lifted martial law in 41 of the 76 provinces.

As at September 2007, martial law was in effect in 35 of the 76 provinces. Thailand is set to hold its general election in December 23, 2007 with half of the kingdom still under martial law.

3. Emergency Decree

Although the military junta and its appointed regime had promised to uphold international treaties to which Thailand is a signatory, the human rights situation has not improved. This is particularly evident in their failure to adhere to judicial procedures in dealing with separatist violence in the predominantly Malay-Muslim provinces in the south.

Human rights violations in the three southernmost provinces of Yala, Narathiwat and Pattani continue unabated and have even worsened since the Fourth Army Region launched 'Operation South Protection', utilizing an Emergency Decree passed during the Thaksin Administration. This has enabled a combined military and police force to carry out a series of raids – mainly in the pre-dawn period – on villages and schools.

There were arbitrary arrests of villagers suspected of being members of the separatist insurgency. Over 1,000 people have been arrested since the operation was launched in June 2007. Under the Emergency Decree, a suspect is not allowed to see relatives and lawyers during the first three days of detention.

According to a statement posted on the government's website, the Office of Internal Security Operation Command stated that 331 suspects were being held in five military camps in Pattani, Songkla, Narathiwat and Yala as of 14 July 2007.

The NHRC has been working with the Lawyers Council of Thailand (LCT) to investigate some of these cases. In a letter dated 13 October 2006, the NHRC made recommendations to the Fourth Army Commander to accord suspects with all rights due to citizens by:

- Informing the village headman or religious leader about arrests;
- Allowing suspects to receive visits by family members and lawyers as soon as the arrest is effected; and
- According those arrested the right of bail.

4. Excessive use of force

The military-appointed administration has allegedly resorted to excessive use of force on several occasions. On 12 May 2007, the Governor of Surat Thani province led some 1,000 police officers armed with guns, batons and tear gas to break up a 3,000-strong demonstration by landless people who had occupied an oil palm plantation and demanded that the government allocates land to them.

The governor said he was exercising his new powers provided by the junta in order to maintain “security”.

The crackdown led to about 1,000 people being arrested – 14 demonstrators also suffered varying degrees of injury. In addition, some of the protesters’ belongings, including temporary shelters were damaged.

The NHRC looked into the case and concluded that the police had resorted to excessive use of force in dispersing the demonstrators. The Commission urged the authorities to compensate those injured and those whose property had been destroyed in the incident. The governor rejected the request, claiming that he had merely been performing his duty under a court order which declared that the group had to vacate the plantation.

5. Plight of stateless people

There has been no resolution of the situation of people born in Thailand but who do not have documents guaranteeing Thai citizenship. Many government officials still lack understanding of the issue and have made racist or ethnically insensitive statements – for instance, requiring some without a Thai identity card or citizenship to undergo a DNA test to establish biological links with Thai citizens. This is because the authorities distrust reports or testimonies from local villagers. The NHRC is attempting to take some cases to court.

II. Independence

The only aspect pointing to the Commission’s lack of independence is the fact that its secretariat is dependent on the government, as it is designed to serve under the Office of Parliament. The Office of the NHRC is served by 80 civil servants and 70 employees on annual contract.

All permanent staff-members are drawn from various ministries and have to report to both the Commission and the Office of Parliament. Because the personnel are in fact civil servants, the Commission is different from other so-called independent organizations set up under the Constitution and which have their own rules and regulations.

1. Financially independent by law, not in practice

Section 75 of the 1997 Constitution states that the State shall allocate adequate budgets for the independent administration of the Election Commission, Parliamentary Ombudsmen, NHRC, Constitutional Court, Courts of Justice, Administrative Counter-Corruption Commission and State Audit Commission.

Section 21 of the NHRC Act B.E.2542 (1999) states:

> The office of the [NHRC] shall, with the consent of the Commission submit an estimated annual budget to the Council of Ministers via the President of the National Assembly for its consideration of appropriation budgets, adequate for the independent administration of the Commission, in an annual appropriation bill or supplementary appropriations bill, as the case may be. In this matter, the Council of Ministers, the House of Representatives, the Senate or the Standing Committee may, if requested by the President, allow the President or the persons entrusted by the President to give explanations.

In the first year of its existence, the NHRC received 36 million Baht for its budget. By the latest fiscal year, the figure had risen to about 120 million Baht per annum.

The NHRC, however, cannot write its own rules on how to spend the money. This makes its expenditure procedures very bureaucratic and time consuming. The Commission could bypass this by re-allocating part of its budget to cover certain items on a case-by-case basis.

The Commissioners receive a salary equivalent to that earned by Cabinet ministers, with perks like a limousine and driver but without other fringe benefits enjoyed by ministers such as life insurance coverage. They are also not entitled to pension.

2. Issues beyond NHRC reach

Some executive decrees passed by numerous previous governments are outdated and go against human rights principles. In addition, the *lese majeste* law – which stipulates that anyone found guilty of criticizing or defaming the monarchy could face up to 15 years in jail – prevents the realization of rights such as freedom of expression. Although *lese majeste* charges have at times been used as a political tool, the NHRC has made no attempt to challenge this.

The issue is a sensitive one for the majority of citizens who revere the monarch as a 'semi-divine' figure. However, a small but not insignificant number of intellectuals are increasingly critical about the role of the monarchy in modern Thai society and see the need to be able to at least constructively criticize the institution of the monarchy. To them, such freedom of expression is an important pre-requisite for a free and democratic Thailand.

On 1 September 2007, the London-based *Financial Times* reported on its front page that two Thai people had been arrested for criticizing the monarch. Further media investigations revealed that at least one arrest had been carried out in secret, without informing the person's relatives. The government denied any such

arrests. Up to two weeks later, the NHRC had yet to act or even issue a statement; the majority of the local media had ignored the report as well.

Another restriction is found in Section 22 of the NHRC Act 1999. The Commission is barred from investigating any case which is being litigated in court or that upon which the court has already given final order or judgment.

There is also a need to extend the NHRC's power to demand relevant documents or evidence, or summon any person to give a statement of fact. The penalty for non-compliance is currently not applicable to government officials.

Others who fail to give statements, deliver objects, documents or evidence as summoned – or who resist or obstruct the performance of duties – are liable to imprisonment for a term not exceeding one year or subject to a fine not exceeding 20,000 Baht (about US$588 at the time of writing).[352]

3. Pre-2007 selection of Commissioners

Prior to the junta taking power, the process of selecting Commissioners was among the most progressive in Thailand as it was open to people from all walks of life.

The Selection Committee consisted of the respective Presidents of the Supreme Court and Supreme Administrative Court, Prosecutor-General and Chairman of the LCT. Other members were selected among themselves from various professions including representatives of education institutions, human rights organizations, political parties which have at least one elected MP, and members of the media.

The selection committee was tasked with selecting and preparing a shortlist of 22 candidates deemed suitable as Commissioners. Gender balance was also taken into consideration, but no age limit or educational requirements were imposed.

The list was then submitted to the Speaker of the Senate who convened the Senate for passing, by secret ballot, a resolution selecting 11 names from the list.

4. Procedural changes in junta-sponsored charter

Under the junta-sponsored new Constitution in 2007, the number of Commissioners has been reduced to seven and they will have to retire at the age of 70.

Powers of selection are now vested in a seven-member committee composed mainly of senior judges.

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[352] Section 34 of the National Human Rights Commission Act states: Any person, who fails to give statement, deliver objects, documents or evidence as summoned under section 32 (2) shall be liable to imprisonment for a term not exceeding six months or to a fine not exceeding 10,000 Baht, or to both.Section 35 of the National Human Rights Commission Act states: Any person, who resists or obstructs the performance of duties under section 32 (3) shall be liable to imprisonment for a term not exceeding one year or to a fine not exceeding 20,000 Baht, or to both.

This process has been criticized as being elitist and pro-bureaucracy. Many fear that incoming Commissioners will comprise senior bureaucrats and those sympathetic to the junta, and that candidates from civil society will lose out.

III. Mandate

1. Mixed achievements

Over the year under the military-appointed government, the NHRC has failed to draw the attention of the authorities to its mandate. The Commission submitted 28 investigative reports on human rights violations together with related recommendations. As with the Thaksin government, the regime under Surayud Chulanont has not responded to any of the reports. It has also ignored the NHRC's draft proposal to enhance people's participation in formulating the new Constitution.

Still, the Commission's investigative reports have been well received by the courts. For instance, some reports were quoted in a lower court's ruling and upheld by the Appeals Court on 31 August 2007 to justify the dropping of charges against protesters against the Thai-Malaysia gas pipeline project in Chana district, Songkla province.[353] Also, in December 2006, the Ministry of Justice ordered public prosecutors to drop charges against 58 Tak Bai protesters in Narathiwat province after the NHRC became involved as negotiator.[354]

Another success story was the Cabinet resolution on August 7, 2007 to adopt the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, the Cabinet insisted on making an Interpretative Declarations. The move was a result of recommendations of both the Commission and Ministry of Justice. It appears to be a calculated move by the junta-appointed regime which is seen as short on legitimacy.

The NHRC was further able to convince the Ministry of Defence to abolish discriminatory categorization of transsexuals, homosexuals or people of different gender orientation, in drafting recruits for compulsory military service. The ministry had been describing them as "permanently and mentally ill" to prevent them from entering military service.

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[353] In December 2002, protesters staged a demonstration against the Thai-Malaysia gas pipeline construction project in their Chana home district, leading to a clash with the police who tried to disperse them. The court took the NHRC's report into consideration and concluded that the protesters had merely been exercising their constitutional rights to assembly and to participate in decision-making process over natural resources management.

[354] On 25 October 2004, a combined police and army force opened fire on Thai Malay-Muslim protesters in Tak Bai district, Narathiwat province, killing seven people on the spot. Another 78 were suffocated to death while being transported – piled five bodies deep – in military trucks to army camps. Additionally, 58 protesters were charged for allegedly inciting violence that led to the crackdown.

2. Large case-load

From January 2006 to September 2007, the NHRC received 1,042 complaints. Most of these were related to problems with the law enforcement system.

There were about 245 allegations of physical assault while in police custody, torture, and search or arrests without warrants. Others involved claims of violations against community rights.

The Commission has been burdened with a backlog of complaints since its first year. At the end of its tenure, it had concluded only 30 per cent of the cases. It appears that the Commission is short of staff to process the cases expeditiously.

IV. Interaction With Other Groups

1. Relationship with people in the South

A study conducted by Assistant Prof Srisomphob Jitphiromsri of the Prince of Songkla University's Pattani campus revealed that the NHRC is seen as a trustworthy organization in five southern provinces of Pattani, Yala, Narathiwat, Songkla and Satun. The research was conducted from February to April 2007.[355] While social activists and rights advocates agreed with the findings and praise the NHRC for helping the abused to be heard, some quarters in the media felt that people in the region may be confused about the effectiveness of the Commission and not-for-profit human rights organizations. They were disappointed with the lack of progress in the Commission's work over the past year, suggesting that it should have worked more closely with the media over major cases of violation.

2. Relationship with NGOs

The NRHC gets much admiration and trust from NGOs. This partly stems from the fact that a good number of Commissioners had worked with NGOs prior to taking office. However, this has also led some governmental agencies to believe that the Commission is pro-NGOs and that it subjects the civil service to particular scrutiny.

3. Relationship with workers

Some in the NHRC sub-committees feel that the Commission cannot do much in cases related to employment rights, as most are taken to the labour court. Workers do not appear to be aware that, once the matter is before the court, the NHRC has no mandate to intervene.

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[355] The five most trusted organizations involved in resolving the on-going violence in the south are: the NHRC, Central Institute of Forensic Science, Department of Rights Protection, Malaysian broadcast media and the National Reconciliation Commission. Meanwhile the most distrusted organizations are the army, police, Parliament, central government and local politicians.

4. Relationship with courts

The NHRC cannot file a direct complaint with the Administrative Court and Constitution Court. It can only do so if the Office of the Parliamentary Ombudsman decides to take the matter to the court. Under the junta-sponsored Constitution, however, the Commission is empowered to file a case in court on behalf of complainants.

5. Relationship with Parliament

There are three dimensions to the relationship. The Senate is the approving body for the selection of the Commissioners; the Parliament approves the NHRC budget; and should the government ignore the Commission's proposals**,** it can forward these to Parliament.

V. Recommendations

- The NHRC's investigative powers should be extended by introducing a penalty for government agencies or officials refusing to co-operate with requests for documents, testimony and so on.
- The NHRC should have full-time investigators like that of the rights commission in South Korea, to handle the growing number of complaints and to conduct investigations in a professional and competent manner.
- The Commission should have independence over its budget management.
- It should be able to recruit its staff beyond the pool of applicants from the bureaucracy.
- The new selection process needs to be revised in order to guarantee the impartiality and diversity of future Commissioners.
- Commissioners should engage more with the public sector, especially considering the fact that many human rights violations are allegedly committed by State actors.
- Human rights education should be expanded for both government officials and the private sector, as well as for rural and poor people.
- The Commission should be more pro-active in suggesting legislation that will enhance the protection of human rights. For example, it could do more to change the attitude of citizens about capital punishment.

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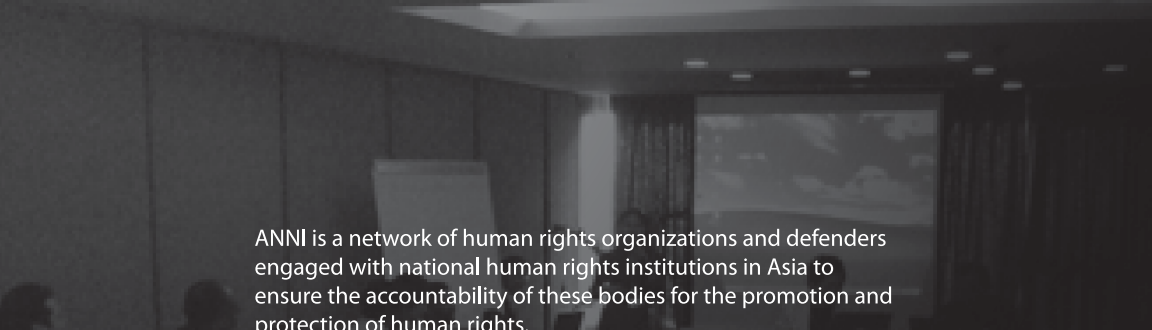

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