

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

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

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

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ISBN: 978-626-90352-2-0

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Foreword


The Asian Forum for Human Rights and Development (FORUM-ASIA), as the convener of the Asian NGOs Network on National Human Rights Institutions (ANNI), welcomes the publication of the 2010 ANNI Report on the Performance and Establishment of NHRIs in Asia. We thank all members of the ANNI and human rights defenders on the ground for filling this book with rich inputs and incisive comments from their experiences monitoring and assessing their NHRIs.

The country reports in this book cover the developments within the period from January 2009 to the first quarter of 2010. It is clear from these reports that the ANNI members have grown leaps and bounds in terms of their understanding of the nature of NHRIs and the international standards and principles relating to these bodies. The research and drafting of these country reports were guided by a set of indicators developed and adopted by the ANNI members in December 2008. These indicators contributed towards the crafting of insightful and relevant accounts about the situation of NHRIs or the process of establishment of NHRIs in their countries within the reporting period.

We would also like to thank all the people involved in producing this book: the editors, lay-out designer, and the team at the Human Rights Defenders Department of FORUM-ASIA, as well as the

other staff at the FORUM-ASIA Secretariat. We would also like to express our deepest gratitude to the experts who always unselfishly share their knowledge on NHRIs to the ANNI: Professor Nohyun Kwak, Mr. Anselmo Lee, and Mr. Ciarán Ó Maoláin. Also, we wish to thank HIVOS, Freedom House, the Ford Foundation, and the Swedish International Development Cooperation Agency (Sida), for the financial support to the work of the ANNI, without which this publication would not be made possible.

As in every year, through this publication, we hope to express our deep and sincere commitment to work with NHRIs in building a community devoted to the promotion and protection of human rights in Asia.

A handwritten signature in black ink, appearing to read 'Yap Swee Seng', written in a cursive style.

Yap Swee Seng

Executive Director

FORUM-ASIA

An Unwavering Struggle for Independent and Effective NHRIs

Emerlynne Gil, ANNI Coordinator

I. The Year in Context

In 2009, the role of national human rights institutions (NHRIs) in fostering a culture of human rights promotion and protection in Asia appeared to become clearer to human rights movements across the region. There are also indications that Asian NHRIs are starting to recognize this role, as clearly illustrated in the steps taken by the four NHRIs from Southeast Asia (Thailand, Philippines, Malaysia, and Indonesia) in the process of the establishment of the ASEAN Inter-governmental Commission on Human Rights (AICHR). These NHRIs took on a proactive role of trying to ensure that international human rights principles are reflected in the AICHR's terms of reference. Moreover, the International Coordinating Committee (ICC), the international grouping of NHRIs, also vigorously called on ASEAN member states to ensure the independence of this newly-established regional human rights body so that it may be able to effectively discharge its mandate of promoting and protecting human rights in the region.

The year under review was also significant as this was when the Asian NGOs Network on National Human Rights Institutions (ANNI) focused on encouraging fellow human rights defenders on the ground and various human rights movements at the national level to work for the development and establishment of independent, effective, transparent, and accountable NHRIs.

In India, for instance, People's Watch (PW) held a series of consultations and discussion groups among local and grassroots human rights defenders, spreading the word about the importance of assessing and monitoring the work of the NHRI. In Thailand, the Working Group for Justice and Peace (WGJP) translated their report on the National Human Rights Commission (NHRC) of Thailand from the previous year into the local language so that more human rights defenders on the ground are able to access it and use it in their work. The WGJP also co-sponsored a launch of this translation where the Chairperson of the NHRC of Thailand spoke to local groups about her plans for the Commission.

There were several key events in 2009 that made significant impact on NHRIs in Asia and non-governmental organizations (NGOs) that are engaged in the work of developing and establishing NHRIs. One of these events is the victory of the Democratic Party of Japan (DPJ) in August 2009, marking the end of more than 50 years of almost uninterrupted rule by the Liberal Democratic Party (LDP). Under the DPJ administration, it is expected that there would be rapid developments on the establishment of an NHRI in Japan, after years of slow progress under the LDP.

The continued downward spiral of South Korea in terms of respect for human rights also had a significant impact in the region. Since President Lee Myung-bak assumed power in 2008, there has been an increase on reports of allegations of President Lee Myung-bak's implementation of questionable policies that disregard any impact on the human rights situation in the country. On 30 June 2009, the then-Chairperson of the National Human Rights Commission of Korea (NHRCK), Professor Ahn Kyong-Whan, resigned from his post due to policies by the government compromising the independence and effectiveness of the NHRCK. The resignation of the then-Chairperson of the NHRCK and the measures taken by the government of Korea to compromise the independence of the NHRCK could potentially impact negatively on the region, considering that it has always been viewed as one of Asia's leading NHRIs. It was held up as a model in the region for its independence and effectiveness for promoting and protecting human rights at the national level. The NHRCK's decline left a vacuum of leadership among NHRIs in Asia.

In Sri Lanka, since the escalation of fighting between the military and the Liberation Tigers of Tamil Eelam (LTTE) in early 2009, human rights defenders grappled with an NHRI that stood silent as the government clearly expressed how it views voices that are critical of its policies. Sri Lanka's Secretary of Defense, Mr. Gotabaya Rajapaksa, in an interview with BBC News in early April 2009, clearly stated that he believes it is an act of treason to express dissent or criticism during a time of war. On 08 January 2009, Mr. Lasantha Wickrematunga, the editor of the Sunday Leader newspaper, was murdered on his way to work. He was one of Sri Lanka's most prominent journalists and a strong critic of the government, frequently exposing issues such as government corruption and racism.

In May 2009, the Sri Lankan government announced that it had won the war against the LTTE, after the army had taken control over the entire island and killed Tamil leader, Mr. Velupillai Prabhakaran. Still, in the aftermath of the war, defenders in the country continue to be persecuted. Those who persist on speaking in public against the repressive policies of the government are labeled as "LTTE supporters" or "terrorists". Enforced disappearances and extrajudicial killings of human rights defenders in Sri Lanka continued until the end of 2009, while others were charged with harassment suits by the government. Many defenders had to flee the country because of this environment. In the midst of all this, the Human Rights Commission of Sri Lanka (HRCSL) stood silent and powerless. By 17 June 2009, the terms of all of the HRCSL's members ended and only the Chairperson continued sitting in the Commission until the end of the year.

The rising prominence of fundamentalist groups in the previous year also brought in a dangerous trend in the region. These groups push forward an agenda that justify violations of human rights in the name of tradition, culture, or religion. In the Maldives, because of the disappointment largely felt by the people with the country's fledgling democracy, groups proposing as alternatives an ultra-conservative version of Islam and a throwback to the past non-democratic system are gaining the sympathy of the people. Meanwhile, in the Philippines, morals were used as basis by the Commission on Elections (COMELEC) to justify denying the petition of the LGBT group, Ang Ladlad, to participate as a party-list candidate in the 2010 national elections.

At the end of the year, the region was rocked by the shocking news of the brutal massacre in the town of Ampatuan in Maguindanao, Philippines. Fifty-seven (57) people were murdered allegedly by the private army of the town mayor, Andal Ampatuan, Jr. Among those murdered were members of the family of a rival political clan, lawyers, motorists, witnesses, and at least 34 journalists. According to the Committee to Protect Journalists (CPJ), the massacre was the “single deadliest event for journalists in history.” The Commission on Human Rights of the Philippines (CHRP), known in the past as a “toothless tiger”, flexed its muscles and conducted an investigation into the massacre. The proactive steps taken by the CHRP to address this issue underlined the fact that an NHRI, with strong political will and effective leadership, can turn itself around and prove that it can significantly contribute to respect for human rights in the country.

II. The Continuous Call of NGOs for Transparency and Pluralism

Issues surrounding the selection and appointment processes of members and the very composition of NHRIs remain a very pressing concern in the region. None of the processes for the selection and appointment of members of NHRIs in Asia can be touted as a best example in the region. The selection and appointment process of the NHRC of Thailand, which had long been held as a good example in the region, was thrown out recently by the abolition of the country’s 1997 Constitution. Thus, as it stands in Asia right now, members of NHRIs in most countries are chosen either only by the President or Prime Minister, or by a select group of like-minded people, which would often result to appointments based on reasons other than human rights expertise.

Transparency in its selection and appointment process was one of the key recommendations given by the ICC Sub-Committee on Accreditation (SCA) to the Human Rights Commission of Malaysia (SUHAKAM) during its accreditation review in 2008. In 2009, things came to a head in the Malaysian parliament between members from the ruling and opposition parties when the government bulldozed amendments to the enabling law of the SUHAKAM.

These amendments still do not reflect the recommendations given by the ICC SCA and the government proceeded with a selection and appointment process heavily criticized by civil society organizations as being “flawed” and “not inclusive and transparent”. Civil society groups were largely kept in the dark from the very start in the selection of the new members of the SUHAKAM. In the Philippines, transparency is also a major concern since only the President can select and appoint members of the CHRP.

Pluralism in the composition of the NHRI is also a principle largely ignored in the region. At the beginning of 2009, the ANNI called the attention of the Senate of the Philippines to a particular provision in the draft law which was then pending before it that required the Chairman and the members of the CHRP to be members of the Philippine Bar and to have been engaged in the practice of law for at least ten (10) years. In India, the NHRC of India went without a Chairperson for quite some time since it is provided under the law that only former Chief Justices of the Supreme Court of India may be appointed to the post of Chairperson of the NHRC. It was only in 3 June 2010 that the government of India appointed Mr. Justice KG Balakrishnan as Chairperson of the NHRC of India, shortly after he retired as Chief Justice of the Supreme Court. The abovementioned provision in the enabling law of the NHRC of India also means that for the next few years, there will be no women members sitting in the Commission.

Transparency in the selection and appointment process of members of the NHRI and pluralism in the NHRI’s composition are two pivotal elements in ensuring the independence and effectiveness of NHRIs. There should be a widespread call for people or groups of people representing different segments of society and human rights fields to recommend candidates for membership to the NHRI. This would ensure the appointment of members coming from a variety of backgrounds and human rights expertise. In this scenario, inputs from different sectors of society will have more chances to be figured into the work and programmes of the NHRI. Thus, the NHRI would have more opportunities to identify and address all possible human rights violations, minimizing the danger of neglecting other “less mainstream” issues which may be affecting groups considered to be minorities in the country.

III. The Role of Governments in Maintaining Independent and Effective NHRIs

In addition to the delayed appointment of the Chairperson of the NHRC of India, as of the June 2010, at least three (3) NHRIs in the region, namely in Sri Lanka, Bangladesh, and Malaysia, operated without Commissioners for a significant period of time due to the failure of the respective governments to appoint members of NHRIs in a timely manner.

In Sri Lanka, four (4) commissioners of Human Rights Commission (HRC) ended their terms in May 2009, while the commission's chairman also ended his term in December 2009. Since then up to the time of publication of this report, no commissioners and chairperson have been appointed.

In Bangladesh, the NHRC was without a Chairperson and members for several months. It was only in June 2010 that the government appointed members to the Commission under the NHRC Act of 2009. The same is the case in Malaysia where the SUHAKAM was left without commissioners for more than one month (from 26 April 2010 to 7 June 2010), after the previous batch of commissioners ended their respective terms on 23 April 2010.

The absence of commissioners in the NHRIs in Sri Lanka and Bangladesh posed a particularly critical problem for human rights defenders in both countries who operate in the context of tough restrictions on freedom of speech and expression, and thus continuously face numerous forms of threats and challenges in their work there. In Malaysia, on the other hand, during that period of more than one month, because of the absence of commissioners, no investigation could be carried out on allegations of human rights violations.

The failure to appoint members of NHRIs by governments in due time, as exemplified in the cases of Sri Lanka, Bangladesh and Malaysia, clearly shows their lack of political will to maintain strong, independent, and effective NHRIs.

IV. Strengthening ties between NGOs and NHRIs

In the past reports of the ANNI, many NGOs lamented the lack of cooperation and collaboration between NGOs and NHRIs. This was indeed a major concern since both groups should theoretically be inevitable partners of each other, considering that both have dedicated mandates to promote and protect human rights.

Only a few NHRIs in Asia have enabling laws formalizing their relationships with NGOs in their countries. In Mongolia, for instance, the National Human Rights Commission (NHRC) of Mongolia is required under the law to work with an ex officio council consisting of nine (9) NGO representatives. However, this ex officio council has not been successful in significantly influencing the policies of the NHRC of Mongolia on key issues. The same goes in Nepal, where the Interim Constitution and the draft NHRC Act provides specifically that the NHRC of Nepal should work in a coordinated manner with civil society groups. However, the NHRC of Nepal initiates very limited activities with NGOs.

There are efforts though by some NHRIs to develop a mechanism for cooperation with NGOs. In the Maldives, the HRC of Maldives recently took steps to formalize constructive ties with NGOs by establishing an NGO Network, although the impact of this on the working relationship between the two has yet to be determined. The HRC of Sri Lanka organized a 'civil society forum' in March 2010, in an attempt to draw in NGOs from various districts. However, many human rights defenders declined the invitation to the forum as they continue to be critical of the Commission's lack of a formal mechanism to effectively cooperate with NGOs and the absence of tangible outcomes from similar forums initiated by the Commission in 2009.

In those countries where the relationship of the NHRI and NGOs is not formalized under the law, the interaction and collaboration would be largely determined by the kind of personal relationships built and maintained by individuals from the two groups, as well as the type of issues at hand. The NHRC of Bangladesh, for instance, included members of civil society in its independent inquiry mission on allegations of extrajudicial killings in the country. The

current CHR of the Philippines is reported to have a better working relationship than the past Commission. This is largely attributed to a leadership that reaches out to and has strong support from the wide range of human rights groups in the country, as well as from the academe and professional organizations.

V. A Resolute Pursuit

Asia may arguably be a region in the world where many human rights groups vibrantly and actively pursue the discourse on the development and establishment of NHRIs. It may also be arguably the only region in the world where human rights groups, such as members of the ANNI, resolutely work on monitoring and assessing the performance of NHRIs.

It is interesting to note that the key issue that emerged this year, as in the previous year, directly relates to the principle of independence. The lack of transparency and pluralism, whether it be in the selection and appointment of the NHRI's members or in the institution's working processes, is often a clear sign that the NHRI does not stand independent from the government. In turn, an NHRI perceived by civil society as lacking independence would not be able to build strong and constructive relationships with human rights defenders on the ground. As a consequence, the NHRI, more often than not, would have huge difficulties working to effectively address human rights violations without the cooperation and support of these defenders in the country.

The importance of developing and establishing effective and independent NHRIs cannot be emphasized enough, especially in this region. While the debate rages on whether or not the newly-established AICHR can be an effective human rights body, Asia remains as the only region in the world without a working regional human rights mechanism. It is for this reason that human rights defenders and organizations, particularly the members of the ANNI, will continue to soldier on with their work in the hope that one day, these NHRIs would become pillars in a regional community where there is respect for human rights.

Bangladesh: General Overview of the Country's Human Rights Situation in 2008

Ain o Salish Kendra (ASK)¹

I. General Overview: Human Rights Issues in 2009

A new hope greeted the year 2009 with a democratic government coming to power with a significant mandate. Naturally, people had very high expectations of the new government. In its first year, positive steps taken by the government include setting up a new cabinet which kept out many experienced candidates but whose previous records were not very clean because of allegations of corruption and misuse of power. The government also conducted free and fair local government elections, handled the Pilkhana Carnage² with great patience and maturity, resumed the long pending trial of Bangabondhu killing,³ and started the process for the trials of the 1971 war crimes, among others.

But in some areas, the government failed to deliver expected results. For example, though the government stated many times that they will have zero tolerance for extrajudicial killings, it is still rampant. However, it has denied the existence of 'cross-fire' incidents, instead describing these as 'shooting in self defense'. According to the statistics prepared by ASK's

1 Prepared by Ms. Sultana Kamal, Executive Director, and Mr. Sayeed Ahmad, Senior Coordinator (Media and International Advocacy)

2 Pilkhanais the location of the headquarters of the Bangladesh Rifles (BDR, now named as Border Guards). The incident occurred on 25-26 February 2010, when BDR soldiers carried out a violent mutiny against their superiors, and brutally killed 57 Army officers.

Documentation Unit, in 2009, a total of 229 persons have been killed by law-enforcement agencies, which is comparatively higher than 2008's toll of 175 persons. Even after the issuance of two higher court rulings against the government, extra judicial killings have not stopped. It must be recalled that when the previous coalition government ministers spoke in favour of 'cross fires', the then opposition Awami League strongly criticised these. After they assumed power, the government echoes similar statements on this issue, thus giving rise to apprehensions of serious social instability as allegations of clandestine killings and killings for not getting demanded bribe are being raised against the Law enforcers.

The Pilkhana carnage was a very critical incident that the Government had to face at the very beginning of their tenure. The government succeeded in resolving the crisis through dialogue instead of using military force at an early stage. However, subsequent deaths of BDR members while in military custody has become a matter of concern. According to information obtained from BDR headquarters, 47 persons have died until the end of 2009 (with some newspapers placing the figure at 53 deaths).

A key element in the election manifesto of the Awami League was the promise to start trials for the 1971 war crimes during the country's independence struggle. As initial steps, the government announced its intention to set up a trial court, appointed a panel of lawyers, and set up an office for the investigation organization in the old High Court Building. The court was established on 25 March but it is still unclear when the trials will commence in reality.

3 The Bangabondhu killing refers to the murder of the architect of the liberation movement of Bangladesh and the first President of the country Bangabondhu Sheikh Mujibur Rahman, seven of his family members and three security personnel. They brutally killed by a gang of army officers on 15 August 1975. Soon after the killing, their accomplice Khandaker Moshtaque took over power as president and framed an indemnity ordinance to protect the killers. In 1996 the indemnity ordinance was repealed and on 2 October 1996 Sheikh Mujibur Rahman's personal assistant Mohitul Islam filled a murder case. The 13-year legal battle ended on 19 November 2009 with the order of the appellate division of the Supreme court dismissing the appeal petitions of five convicts against the third judgment of the High Court that handed them and seven others the death penalty.

The period around national election on 29 December 2009 saw a number of incidents of attacks by opposition groups on supporters of different political groups in various places around the country. According to the statistics compiled by ASK's Documentation Unit in 2009, a total of 41 people were killed and over 4,000 injured due to inter- and intra-party clashes. In addition, clashes took place between the student wings of various political parties in various educational institutions. As a result the academic environment has been severely damaged.

The government has taken the initiative to increase the momentum for the implementation of the 1997 Chittagong Hill Tracts Accord which has been stalled during the previous coalition government. Noteworthy initiatives include the withdrawal of the army camp in the disputed area and the commencement of a survey for resolving land disputes. The land survey announcement however generated some apprehension that the interests of the indigenous people could be undermined by the method being adopted. Still, there was not much improvement in the human rights situation in the area. Violence between the indigenous peoples and the settlers continued throughout the year.

With the aim of fulfilling peoples' right to information and ensuring accountability of relevant authorities, the Right to Information Act was promulgated on 5 April 2010. Although this law was enacted in response to the long-term demands of the public, it has not been implemented until now. On the other hand, journalists especially at the local level have been under pressure from the local influential quarters mostly affiliated with the ruling party. The ASK Documentation Unit recorded four journalists killed and over 250 harassed, threatened or tortured in 2009 in incidents linked with local disputes involving politicians. Notable incidents include the arrest of Masum, a reporter of the English language daily *New Age* by Rapid Action Battalion (RAB) and the beating of Abdullah Al Amin Biplob, a local correspondent of a Bangla daily for publishing a news item against the local Member of the Parliament.

Freedom of assembly also remained under threat as demonstrated on 2 September 2009, when police violently

dispersed the procession of the civil society group, National Committee for Protection of Oil-Gas and Mineral Resources, in which renowned economist D. Anu Muhammad and almost fifty others were injured.

II. Independence

A. A New NHRC Law

After the new Government came to power in early 2009, the Law Ministry was asked to draft a new law on the NHRC. The National Human Rights Commission Bill of 2008 prepared by the Law Ministry contained significant changes from the 2007 Ordinance (See Annex A). The bill was placed before Parliamentary Standing Committee for further review and to propose several changes. The Parliamentary Standing Committee organized a consultation meeting with NGOs on 6 July during which ASK participated and presented its written recommendations. . On 9 July 2009 the parliament passed the 'National Human Rights Commission Act of 2009' which was enacted into law by the President on 13 July. It should be noted that some of the recommendations proposed by ASK were incorporated in the new law.

B. A New Structure

Except for the Chairman, two other members resigned on April 2010. No commissioners were appointed until 22 June 2010. On the other hand, while the Government is supposed to adopt a Rules of Procedure for the Commission, they did not do so. The Rules, which will guide its proper conduct of affairs and in particular to enquiries into complaints of violations of human rights, was drafted by Commission itself, and as required by the law, sent it to the Government for the approval of the President, who has yet to approve it.

Immediately after its formation, the Commission prepared its organisational structure, and drafted the Rules for staff recruitment,

which was sent to the government. The Commission also drafted the Rules of Procedure. The Rules were likewise submitted for approval by the President, as required by the law.

In the absence of an organisational structure, the Commission started its work in 2008 with a staff of four: one Secretary, a joint secretary to the government, one computer operator and, an office orderly. The latter three were personnel on secondment from other government offices. After some days, the Government withdrew the computer operator and the office orderly without giving any explanation. .

Later, the government also deployed on secondment four Secretary-level officials to work as directors and a deputy director at the Commission. Additionally, five staff members from the UNDP's Access to Justice and Human Rights of the Government Project are working temporarily as NHRC staff.

C. Membership and Selection

The new Act increased the membership of the Commission from two members to a maximum of six members in addition to the Chairman. Among the six members, only one will be a paid member and will work for full time, others will work voluntarily. The composition and number of the selection committee has also been changed. From the previous six members, it has been increased to seven, including the Speaker of Parliament, the Minister for Law, Justice and Parliamentary Affairs, the Home Minister, the Chairman of the Law Commission, a Cabinet Secretary and two Members of the Parliament, one from the ruling party and the other from the opposition. The MP members of the selection committee will be nominated by the Speaker. It is a positive step to include an MP from the opposition. However the quorum can be filled with four persons, who can all come from the ruling party: the Speaker, the two Ministers and the Member of Parliament. This composition has raised questions about partisanship in the NHRC selection process.

III. Effectiveness

A. A Stronger Mandate

The National Human Rights Commission Act 2009 empowers the Commission to inquire suo-moto or “on an application” presented to it by a person affected or any other person on his/her behalf into a complaint of violation of human rights or its abetment by any person, staff of a government agency or public servant. The Commission may also visit jails or other places where persons are detained or kept for correction, custody, treatment, etc., and may make recommendation to the government for improvement of those places and conditions of detention. It may also review conditions as to human rights provided by the Constitution, research laws and international instruments on human rights, and advice the Government on the matter. It also shall encourage and coordinate the efforts of NGOs and institutions working in the field of human rights.

In case of receiving reports of human rights violations, the Commission may take steps to resolve it through mediation and arbitration. Failing mediation the commission may enquire into the complaint. If the allegation is found true, they may recommend appropriate remedies including filing of cases. If the Commission’s recommendation is not complied with, the Commission shall make a report to the President who may place the report to the Parliament for discussion.

The Commission has been empowered to receive complaints of cases of violations committed by members of the law enforcement agencies. However they can only seek a report from the concerned authority in such cases. The Commission has also been given authority to become a party in any case.

Since the National Human Rights Commission has no rules of procedure, it has so far limited its activities to visiting victims and issuing statements. The Commission also does not have its own office yet. It is conducting its office in a rented house with inadequate space and other facilities including the security measures. (See Annex A for a list of NHRC activities, and Annex B for a List of Complaints Handled by the NHRC as mentioned in their report).

IV. Consultation and cooperation with Civil Society

The Commission has been very cordial in terms of engaging with members of the civil society, whom it had invited to its offices on several occasions. It also responded to the invitations given by the latter and took up some cases referred by the NGOs. In a few cases of the allegations of extra judicial killings, the Commission pursued the matter toby forming independent inquiry commissions, which included the members from civil society.

V. Conclusion and Recommendations

Since the adoption of the National Human Rights Commission Act 2009 on 14 April 2009, the Commission was being run by the chairman only. On 22 June 2010, reaching the age of 70, he has ceased to continue as the Chairman. On the same day, the Government appointed a new Chairman, as well as full time and honorary commissioners. We now hope that the Commission will be fully operative. But in order to make the Commission more effective, ASK would like to put forward the following recommendations:

For the Government:

- In order to conduct the activities of the NHRC properly and in particular to conduct enquiries in to the complaints of violation of human rights, the Rules of Procedure and the organogram should be approved immediately.
- The Commission should be allotted its own offices immediately.
- Adequate budget should allocate for the Commission and to make it public.

For the Commission:

- The newly appointed commissioners should develop a strategic action plan in consultation with the citizen's groups.
- The Commission should creatively find ways to maximize its role overcoming the limited mandate.
- In order to accomplish peoples' trust and support, the Commission should balance its activities in relation with Human Rights Protection and Promotion.

Annex-A: A comparison between the National Human Rights Commission Act 2009 and the NHRC Ordinance 2007

Title	National Human Rights Commission Ordinance 2007	National Human Rights Commission Act 2009	Remarks and recommendations of ASK
Preamble	As it is the “duty of the state is to protect and promote Human Rights”.	As it is the ‘main aim’ of the state to protect, promote and ensure Human Rights of the country	The 2007 Ordinance is stronger in stating that human rights is a “duty of the state”, which is also more consistent with international norms. .
Definition of Human Rights	“Human Rights’ means the Fundamental rights guaranteed in the 3rd chapter of the constitution and such rights embodied in the International Human Rights instruments acceded to and ratified by the Peoples Republic of Bangladesh and that are recognized by the existing laws.	Life, liberty, equality and dignity guaranteed by Constitution of People Republic of Bangladesh and rights that are embodied in the International Human Rights instruments acceded to and ratified by the Peoples Republic of Bangladesh of which are enforceable by the existing courts of Bangladesh.	The definition has been made more specific and wide. But ‘enforceable by the existing courts of Bangladesh’ maybe a limiting clause. , Economic, social and cultural rights are also included.
Office of the commission	No mention	Head office of the Commission must be situated in Dhaka, and in case of necessity of commission offices can be established in Upazilla, District & Division level	It is positive change to specify the location of the office, including establishing local offices.

Office of the commission	No mention	Head office of the Commission must be situated in Dhaka, and in case of necessity of commission offices can be established in Upazilla, District & Division level	It is positive change to specify the location of the office, including establishing local offices.
Number of the members	NHRC is comprised of a Chairman and two full time members.	NHRC to comprise a Chairman and not more than six members, one of which will be a full time member and the balance will be honorary members who only attend formal meetings of the Commission. At least one member should be women and one should come from the "ethnic community".	The decision of increasing number of members is positive, although the number of full-time commissioners has been reduced. The provision of including women representatives from and representatives from 'ethnic community' is also positive but it could be better if the Act specified reference for disadvantaged groups, including ethnic minorities.
Age of the Members	Commissioner members must be aged between 50 and 72 years	Commissioner members must be aged between 35 and 70 years	The reduction in age requirement creates an opportunity for the younger generation.
Selecting committee	Six member Selection Committee for the selection of NHRC's Chairman and Members comprising: Appellate Judge of the Supreme Court Cabinet Secretary Attorney General Comptroller and Auditor General Chairman of the Public Service Commission Secretary, MoLIPA	Selection Committee for the selection of NHRC's Chairman and Members is comprised of the following members, chaired by the Speaker of Parliament: Minister of Law, Justice and Parliamentary Affairs, Minister of Home Affairs, Chairman of the Law Commission, Cabinet Secretary and Two members of parliament	The recommendation of ASK regarding the representation of the Mps has been accepted. But as the quorum will be met with four members, it can be comprised of the Speaker, two Ministers and the lawmaker of the ruling party. Moreover the Cabinet Secretary is also from the executive branch, thus the impartiality of the selection committee still remains in concern, because only one member comes from the opposition.

Power of investigation	Power of investigation & judicial power was not specified.	It has been included "In case of investigation the Commission will have the same power of a Civil Court according to the Civil Procedure Code-1908"	A positive inclusion
Procedure to follow with the disciplined force	No mention	The Commission can seek reports from the government on allegations of human rights violation by a disciplined force. If they find the report satisfactory, it will not proceed further. NHRC will, however, recommend that the government take measures against them, if necessary. In that case, the government will have to turn in a follow-up report within six months. According to 152 (1) of the constitution, the disciplined forces stand for the armed forces and police and "any other force declared by the law as a disciplined force".	It is positive to include the disciplined force in the mandate of the NHRC. But the mandate is limited to asking for report from the government agency concerned.
Cases pending before a court	The Commission will not be able to take up case, which is pending before a court.	The provision in regard with the pending case remains same but a new section has been added to enable the Commission to be a party of such pending case.	Positive decision.

Disclosure of Investigation report	Disclosure of investigation report has been discouraged.	Remained same	Any report of the Commission should be published. In that case there should be a clause that Commission will disclose its all activities in written reports. If the Commission considers the disclosure of any act may hinder national interest, they will submit to the president with proper reason of not disclosing the report.
Co-ordinating activities with NGO's	Encourage the activities of NGOs in the field of human rights and to co-ordinate the activities of those organizations	Provision unchanged.	There is the authority called "NGO Affairs Bureau" for supervising and coordinating the activities of NGOs. Human Rights Commission can take joint programs though the coordinated planning with NGO's.
Training of the member of law enforcing agencies	It was not mentioned specifically.	It has been mentioned as a specific activity.	Positive inclusion.

Annex-B: List of some key activities in 2009 of the NHRC of Bangladesh

4 January 2009

On getting information through the press that a Mro (an indigenous people) leader named Raunglai had been kept in chained condition in a hospital, the Chairman and the Members of the Commission rushed to the hospital to visit him and talked to his physician. They took up the matter with the Ministry of Home Affairs. As a result, he was unchained.

14 January 2009

A girl child became victim of acid throwing. On receiving information from the local papers, Members of the Commission went to the hospital to visit the victim and found her burnt with acid all over her body, except for the face. The Commission took up the matter with the authorities to file a case against the perpetrators and also arranged her proper treatment. The Commission also issued a statement on this issue.

3 February 2009

The Commission came to know that one Abu Masum of Village Surun of Kaligonj Upazilla had been lying in Gazipur Sadar Hospital being victim of hot oil thrown on his body. The Chairman along with a Member and Secretary of the Commission rushed to the hospital and visited the victim in deplorable condition and came to learn that a bodyguard of an police officer in the wake of eviction of street hawkers from the street threw hot oil to the victim who had been selling potato chips there. The Commission took serious view of the matter and took up the matter with the Home Ministry for taking action against the offender as a result of which he was immediately closed and departmental proceeding was started against him and better treatment was arranged to the victim.

10 December 2009

The commission organized a seminar on 'Protection and Promotion of Human Rights in Bangladesh: The role of national Human Rights Commission, Law enforcing agencies and NGOs'.

Moreover the commission issued several statements on the issues like border killing by the Indian Border Security Forces (BSF), on extra judicial killing, clash between indigenous people and the settlers, Israeli aggression into the Gaza Strip etc.

The Commission received 112 complaints as of 2 March 2010, out of which 65 were already disposed of. Of the remaining complaints, reports have been requested from relevant authorities, and also for enquiries. The pending matters have been fixed for disposal on various dates.

Annex-C: Complaints Received and Steps Taken

The Commission received 112 complaints as of 2 March 2010, out of which 65 were already disposed of. Of the remaining complaints, reports have been requested from relevant authorities, and also for enquiries. The pending matters have been fixed for disposal on various dates.

The pending complaints include:

1. An alleged abduction of a student leader from Barisal for which Police and RAB have been asked to hold enquiries and send reports. Similarly regarding misuse of power by an Officer in Charge (OC) of a Police Station the matter has been referred to Inspector General of Police (IGP) for action.
2. Under Trial Prisoners Anis and Ram Krishna have been allegedly kept in chains (locally known as danda beri) for four months in Bagerhat jail. The matter has been sent to local District Magistrate for enquiry and report.
3. Alleged killing of one Alauddin Howlader while in police custody in Barisal and was labeled a “crossfire” killing. The matter has been sent to IGP for enquiry and report.
4. Abduction of one Rupa Mandal (12) by miscreants and negligence of the Police of Paikgacha Police Station, Khulna. The matter has been sent to IGP for action and report, has been referred to the District Legal Aid Committee for legal aid to the victim.
5. Abducting and killing in custody of one Delwar Hussain by the Rapid Action Battalion (RAB). The matter has been referred to the District Legal Aid Committee for legal aid to the victim.
6. Torture of one Monirul Islam Monir and another Shahidul Islam, day labourers by Paikgacha Police Khulna. The matter has been referred to the District Legal Aid Committee for legal aid to the victim.

7. A report of the Asian Human Rights Commission, Hong Kong that one Monirul Islam Moral, inspite of being released on bail was illegally taken to custody by the Police and was tortured for two days. The matter has been sent to the IGP for action and report compliance.
8. A complaint against one Abdul Hussain Sub Inspector of Kaira PS, Khulna for abetting accused Ayub Ali for throwing acid upon a certain Reshma, for refusing to marry him. The matter has been sent to the IGP for action and report compliance, and referred to the District Legal Aid Committee for legal aid to the victim.
9. Complaint of one Mrs. Kalpana Bairagi alleging the killing of her husband while in Police Custody. The matter has been sent to the Inspector General of Police (IGP) for action and report compliance.
10. The unauthorized occupation of land of some members of a minority community. The matter has been referred to the Deputy Commissioner for necessary action and report compliance.
11. A "crossfire" killing of one Babu son Akkas Ali by RAB. The matter has been sent to the Secretary of the Minister of Home for a high level independent enquiry committee, consisting of officials with at least the status of a Deputy Secretary, Superintendent of Police and a representative from the Civil Society of the choice of the aggrieved party and for reporting compliance.
12. Torture of one Nazmul Huq Shah, a human rights activist, by some police officers of Dhaka Metropolitan Police (DMP). The matter has been sent to the Commissioner DMP for action and report compliance.
13. The complaint of one Advocate Rabindra Ghosh, also a human rights activist, by a Deputy Inspector General of Police. The matter has been sent to the IGP for holding a high level enquiry.

14. The alleged murder in “crossfire” of Kaiser Mahmud Bappi. Suo moto directions have been issued by NHRC for necessary action asking the Secretary of the Minister of Home for getting it enquired by a high level independent enquiry committee.
15. The alleged abduction of one Tushar Islam Tito. Suo moto directions have been issued by NHRC for necessary action regarding asking the Secretary of the Minister of Home for getting it enquired by a high level independent enquiry committee.
16. The alleged murder of Aminul Islam Mintu. Suo moto directions have been issued by NHRC for necessary action asking the Secretary of the Minister of Home for getting it enquired by a high level independent enquiry committee.
17. The alleged illegal police custody and torture of one Md. Sajib and four others. The matter has been referred to the Inspector General of Police (IGP) for action and report compliance.
18. Complaint against some other Police Officers of Paikgacha PS, Khulna received from Asian Human Rights Commission, Hong Kong. The matter has been sent to the Inspector General of Police (IGP) for necessary action and report compliance.
19. One Kamrul Hassan lodged The complaint of one Kamrul Hassan against his employer for terminating his Service without notice and without payment of any compensation. NHRC took up the matter and succeeded to arrange compensation for him from his employer for which the Complainant expressed gratitude in writing for the prompt effective action of NHRC.

Cambodia at an Impasse

The Cambodian Working Group on the
Establishment of an NHRI¹

I. General Overview of the Country's Human Rights Situation

The human rights situation in Cambodia continues to come under international scrutiny and criticism. For the first time, the UN Committee on Economic, Social and Cultural Rights considered Cambodia's state report, which had not been submitted for 14 years. The Committee identified serious shortcomings in the implementation of a number of treaty obligations, including those relating to the judicial system, housing and gender inequalities. In December 2009 Cambodia was also subject to its first Universal Periodic Review of its human rights record at the Human Rights Council in Geneva.

Forced evictions continued to affect the lives of thousands of Cambodians, resulting in the displacement of around 27,000 people, the vast majority from communities living in poverty. In July 2009, a number of international donors called for an end to forced evictions until fair and transparent procedures were in place for dispute resolution and resettlement.

Freedom of expression was further limited with the passing of the Penal Code in October 2009, which retains defamation as a criminal offence and permits criminal prosecution for expression of

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opinion and peaceful demonstrations. Demonstrations and protest marches were systematically denied and/or curtailed through the violent presence of the armed forces. A number of journalists, human rights defenders and members of the opposition party were restricted from movement and freedom of expression through the increased use of legal actions by the Royal Government of Cambodia (RGC), in particular the repeated and successful use of defamation claims in the courts.

The number of reported cases of rapes and sexual violence against women and girls increased, with the average age of the victims falling. Prosecutions of rape, however, remained rare.

The RGC were criticized for violating the 1951 Refugee Convention by forcibly returning asylum seekers to countries where they fear persecution, without first allowing them to complete the application for refugee status.

The judiciary was accused of lacking independence, with all key judges being Cambodian Peoples' Party (CPP) members.

The first trial to address past Khmer Rouge atrocities took place. The defendant, Duch, pleaded guilty, but later asked to be acquitted.

II. Current Status of Cambodia's Proposed NHRI

Whilst Prime Minister Hun Sen committed to establishing an NHRI in his key note speech at the the Regional Conference on the Establishment of a National Human Rights Institution in Cambodia in September 2006, no NHRI has been established. In the absence of an NHRI, there are a few institutions with the mandate to address human rights issues in the Kingdom. These are, however, not considered independent of government: the Constitutional Council - the supreme body through which citizens should be able to challenge state decisions that affect their constitutional (including human) rights; the annual National Congress (which has never been convened) is provided for within the Constitution as an institution of direct democracy whereby Cambodians can meet their rulers to raise issues and make proposals for the state authorities to address; and the Human Rights and Complaints Reception Committees of the Senate and the National Assembly.

The Cambodian Working Groups (CWGs) are a group of representatives from Human Rights NGOs and another group that includes government representatives. The CWGs have successfully completed a draft legislation (the “Draft Law”) that, when passed, will establish a NHRI in Cambodia. It is intended that the Draft Law will go through a process of public consultation before being presented to the government for comment. The Draft Law will then need to be debated and accepted by both the Council of Ministers and the National Assembly.

III. Independence

A. Relationship with the Executive, Judiciary, and Parliament

The Draft Law has already been through a series of consultations with NGOs in the country, the Office of the High Commissioner on Human Rights (OHCHR) field office in Cambodia and RGC representatives. The final consultations will be with the public through a press release of the Draft Law followed by press conferences, public forums and an online space for comment.

The Draft Law proposes that the NHRI be established by an Act of Parliament which will enshrine its functions, powers and limitations into the law of Cambodia. Article 3 proposes that it be a constitutional body, independent from the institutions of the RGC.

The NHRI will have the power to demand information from government ministries if necessary for its investigations (Article 17, pa.2). The NHRI will also be able to request that the ministries make interventions to protect complainants and witnesses (Article 17, pa.4); and suspend officials under investigation by the NHRI for committing human rights violations (Article 17, pa.5).

The Draft Law also grants the NHRI the power to summon witnesses for inquiry under oath; to issue an order or warrant to compel those who refuse to provide answers at the request of the NHRI; to issue search warrants and conduct searches for evidence; to order state institutions to hand over any documents related

to cases under NHRI investigation; and to question witnesses or accused, publicly or on camera (Article 17, pa.1).

The NHRI will be required to coordinate with state institutions, NGOs and international organisations (Article 16).

B. Selection Process of Members

To guarantee the independence of the NHRI, the Draft Law provides for a selection committee composed of members from different institutions (Article 5). This committee should include:

- One representative from each political party represented in the National Assembly;
- Six representatives from NGOs that have carried out activities promoting and protecting human rights for at least five years and have an adequate operational budget;
- Two representatives from the media;
- Two representatives from trade unions;
- One lawyer from the Bar Association of the Kingdom of Cambodia.

The selection criteria for candidates (Article 6) provide that NHRI members must:

- Be Khmer nationality from birth;
- Be at least 25 years old;
- Hold at least a bachelor degree or equivalent;
- Have at least five years working experience in the field of human rights;
- Have not held any active position in any political party for at least the last two years.

No person who has been a member of the selection committee may be selected for the NHRI. The NHRI shall have nine members

(Article 3), who shall be appointed by the King after being selected by the National Assembly from among 18 candidates submitted by the selection committee (Article 4).

C. Resourcing of the NHRI

In order to guarantee the independence and effectiveness of the NHRI, the current draft proposes to allocate sufficient funds to the NHRI as part of a national budget. The NHRI is also able to seek and receive funding from charitable sources and foreign donors (Article 21). However, it may not receive financial assistance from commercial enterprises or other profit-making businesses operating in Cambodia.

The Draft Law does not include any procedure for administering the finances of the NHRI, and it is therefore impossible to comment on the NHRI's financial management. However, regarding the transparency of financial management, the Draft Law requires the NHRI to keep accounting documents for at least 10 years for auditing purposes; and auditing must be carried out by the National Auditing Authority or an independent private company (Article 22).

IV. Effectiveness

A. Protection

The NHRI will have the power to visit prisons without asking permission from the governments (Article 16, Para 14).

The NHRI will have the power to receive complaints from individuals and conduct investigations into their claims (Article 18).

The NHRI will have the power to issue search warrants and summon witnesses (including government officials) and order governments officials to protect complainants and witnesses (Article 17).

B. Promotion

The NHRI's duties to promote human rights are clearly and specifically defined by the Draft Law; the NHRI must promote human rights awareness among the general public and civil servants at all levels (Article 16, pa.1). However, the draft is also limiting. It only tasks the NHRI with submitting comments to the government on the ratification of international human rights instruments, reports to human rights treaty bodies, and damage and compensation resulting from violations by state institutions (Article 16, pa.7-9).

V. Consultation and Cooperation with NGOs

Through the use of public forums seeking civil society input on the formation of the proposed NHRI, there will be an increased awareness amongst civil society groups of the intended function, power and limitation of the institution. These forums will continue in order to encourage civil society engagement with the proposed NHRI.

VI. Conclusion and Recommendations

1. The government should remain firm on its commitment to establish an NHRI consistent with Paris Principles;
2. The government should support and expedite the process of reviewing the Draft Law, ensuring transparency by facilitating public participation in its review.

Hong Kong in 2009 and the First Quarter of 2010

Prepared by the Hong Kong Human Rights Monitor (HKHRM)¹

I. Highlights of the year 2009 and the first quarter of 2010

A. Concerns over the promise of “One Country, Two Systems”

Despite the fact that the Basic Law promises a high degree of autonomy under the principle of “one country, two systems”, the interference of the Chinese Central Authority in Hong Kong affairs has been increasing gradually and has undermined human rights protection in the territory.

1. Background of judicial independence and the sudden resignation of the first Chief Justice

The rule of law and judicial independence is regarded as one of the last bastions of the principle of ‘one country, two systems’ and the freedoms promised by the Basic Law and Sino-British Joint Declaration for Hong Kong.

The increasing number of judicial reviews in recent years challenging Government’s decisions violating human rights acts as a check on the power of the unelected government and upholds human rights protection.

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However, a fundamental problem remains that the Standing Committee of the National People's Congress (NPCSC) has the ultimate authority to interpret the Basic Law which inevitably weakens judicial independence.²

For instance, the NPCSC's overturning in 1999 of the Court of Final Appeal ruling on the right of abode for children from Hong Kong parents born in the mainland in 1999 generated shock and opposition among the public. The overturn showed the judicial independence was violated and existed only in name.

Since then the NPCSC has twice reinterpreted the Basic Law, first on Annex 1 & 2 concerning the election methods for the Chief Executive and Legislative Council (LegCo), and again on Article 53 regarding the term of office of Chief Executive.

Hence, when the first Chief Justice Andrew Li suddenly announced his early resignation for reason of "orderly succession" in September 2009, there was public concern as to whether judicial independence would be maintained.³ Chief Justice Li been known for maintaining the rule of law and independence of the Hong Kong judicial system since the 1997 handover.

2. Proof of Chinese Central Authority's interference in HK affairs

The Chinese central authority has shown an increasing tendency to interfere in Hong Kong affairs in violation of the principle of "one country, two systems" and its high degree of autonomy, when for instance, Chinese officials keep promoting "cooperation among the administrative, judicial and legislature areas".

Two Chinese liaison officials also explicitly urged for the Central Authority's interference in Hong Kong affairs in 2009. One of them claimed that his office had reached a 10-point agreement with the Hong Kong government in a closed door meeting to activate the role of local deputies to the National People's Congress and

2 Article 158, The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.

3 *South China Morning Post*, "Surprises as top judge goes early" & "A judicial achiever who steadied the ship" 3 Sept 2009.

Chinese People's Political Consultative Conference in Hong Kong affairs, which would institutionalize a working body under the Central Authority to interfere in Hong Kong's internal affairs.⁴ Another one argued in a Communist Party journal that there was a second governing team comprising central government officials in Hong Kong after 1997 handover.⁵ Both the Liaison Office and HK government dismissed the incidents and denied that there was any breach of the principle of "One Country, Two Systems" without providing further explanation or clarification.

Civil society groups were concerned that if indeed there was a second ruling team, it would weaken the power of the Hong Kong government leading to the implementation of the mainland's political policy and culture of "supervising the administration behind the scenes" and breaching the principle of "one country, two systems".

In addition to the abovementioned speeches, the Diaoyu (Fishing) Islands incident in May 2009 also provides proof that the Chinese Central Authority is stepping into Hong Kong affairs through the Chinese Liaison Office. In this incident, the Police and Marine Departments blocked a protest ship twice over registration issues and fire standards. Chinese Liaison Officials then met with the protest groups before they set sail, asking them to sail from Taiwan and promising to pay for their airfares.⁶ When the officials failed to convince the group, the protest ship was consequently prohibited from sailing. This was the first time since 1996 that the Hong Kong government blocked a protest ship from defending Chinese sovereignty over the Diaoyu Islands.

The Government stated that the three-time blockage of the protest ship by the Police and Marine Departments was over safety issues and for being registered as a fishing boat.⁷ However, civil society opined that the ship was blocked due to the warming of Sino-Japanese ties.

4 *South China Morning Post*, "Is it one city but two governing team?" 19 April 2009.

5 *South China Morning Post*, "2 governing teams remark causes concern" 18 April 2009.

6 *South China Morning Post*, "Protesters' ship stopped on its way to Diaoyu Islands for second time in two days." 4 May 2009.

7 *South China Morning Post*, "Diaoyu protest ship halted for its own safety" 15 May 2009.

3. Hard-line approach on protestors which threatened the freedom of expression and assembly

Since the 1 October 2008 protest for democracy and human rights outside the Chinese Liaison Office, the government seems to have taken a hard-line approach on protestors, by way of political prosecutions⁸ and abuse of law and procedures.⁹ Particularly affected are protests outside the Chinese Liaison Office. Civil society has questioned the political neutrality of the law enforcers as they abuse the law to encroach on the citizens' freedom of expression and assembly. Civil society also suspected the government was pressurized by the Chinese Central Authority to suppress "social instability".¹⁰

B. Calling for genuine universal suffrage

Hong Kong people have been demanding universal suffrage for years. In spite of the promise in Article 45 of the Basic Law that the Chief Executive, and in Article 68 that all LegCo members will be ultimately elected by universal suffrage in accordance with the principle of gradual and orderly progress, no concrete timetable or procedures were ever made known. This triggered discussions and protests from civil society.

8 For instance, four protestors from the Hong Kong Alliance in Support of Patriotic Democratic Movements in China protesting outside the Chinese Liaison Office on 1 October 2009 were arrested for assaulting police, obstructing police and disorder in public places. Six protestors from the Hong Kong Alliance in Support of Patriotic Democratic Movements in China protesting outside the Chinese Liaison Office on Christmas day 2009 were arrested for unlawful assembly. Two protestors on the first of January 2010 who protested for universal suffrage outside the Chinese Liaison Office were arrested for assaulting police and disorder in public places respectively.

9 For instance, the Hong Kong Police cooperated with the Food and Environmental Hygiene Department to seize the Hong Kong Alliance in Support of Patriotic Democratic Movements in China's "Goddess of Democracy" statues, which symbolized the 1989 Tiananmen Massacre, and discontinued its display in a public area as part of the memorial events. The Police also arrested the protestors for disrupting law enforcement. They claimed the statues were taken away for lack of a license for "public entertainment" according to the Places of Public Entertainment Ordinance. See South China Morning Post, "Tiananmen art show in piazza shut down", 30 May 2010, "Statues released and placed in Victoria Park", 2 June 2010.

10 *South China Morning Post*, "Protests not in HK interest, chief says". 19 Jan 2010.

1. Constitutional reform 2010 failed to comply with the ICCPR

The HK government released separately the public consultation document which sets out its proposals on the methods for selecting the Chief Executive and for forming the LegCo in 2012. It is made under the framework of the NPCSC's December 2007 re-interpretation of the Basic Law, which impeded the principle of "one country, two systems", independence of the judiciary and undermined Hong Kong's democratization process. The framework is as follows: (1) the election of Chief Executive and all LegCo members shall not be implemented by universal suffrage in 2012; (2) the half-and-half ratio between LegCo members returned by functional constituencies elections and geographical constituencies through direct elections shall remain unchanged; (3) Hong Kong *may* implement universal suffrage for the election of the Chief Executive in 2017 and for the LegCo in 2020.

Referring to the NPCSC's framework, the Government proposes the following for the corresponding election methods in 2012: (1) To increase the number of members of the Election Committee from the current 800 to 1200, i.e. an increase of 100 for each sector while the new members in the District Council sector would be elected by elected district councilors; (2) To maintain the nomination threshold of the CE candidates at a 1/8 ratio of the Election Committee resulting in an increase of the number of nominators from 100 to 150; (3) To increase the number of LegCo seats from sixty to seventy, of which five seats are for geographical constituencies through direct elections and another five for functional constituencies elected among elected district councilors.¹¹

However in June 2010, three days before the LegCo vote, the government suddenly announced that it would adopt the Democratic Party's proposals on the new five functional constituency seats but declined to provide any substantial details or conduct public consultation. In the new proposals, the candidates for the new five

¹¹ Constitutional and Mainland Affairs Bureau, HKSAR: *Package of Proposals for the Methods for Selecting the Chief Executive and for forming the Legislative Council in 2012*. April 2010. <http://www.cmab-cd2012.gov.hk/en/package/index.htm> Date of access: 7 June 2010.

functional constituencies will first be nominated by elected district councilors, and then voted on by citizens who are not able to vote in other traditional functional constituencies. Despite criticisms on the violation of proper procedures, deprivation of universal and equal election rights (particularly the right to be nominated, nominate, be elected and elected) and failure to address the route to universal suffrage, the amended proposals were passed due to the support of the Democratic Party.

More importantly, the role played by the Hong Kong government in the adoption of the Democratic Party's proposals is found to be insignificant. The Democratic Party's report on its exchange with Beijing released on 8 July 2010,¹² stated it had negotiated directly with the representative from the Chinese central authority on the constitutional reforms. Once the Central Authority approved the revised proposals, the Hong Kong government went ahead with the LegCo voting. During the negotiation, the Hong Kong government only acted as a messenger of the central authority. The so-called "high degree of autonomy" was thus put into doubt.

In spite of the UN's repeated criticisms since 1995 on the functional constituency elections and the whole election system being in violation of Articles 2, 3, 25 and 26 of the International Covenant on Civil Political Rights (ICCPR), and its calls for immediate steps to be taken to ensure the electoral system be put in conformity with the ICCPR, the government's proposals reflect its continued disregard of the ICCPR, which is applicable to Hong Kong according to the Basic Law.¹³

Civil society criticized the government's proposals for focusing on the election methods in 2012 again and failing to substantially contribute to democratic development in Hong Kong for not addressing the route for universal suffrage and the abolition of functional constituencies.

Civil society also criticized the proposed election methods in 2012 as a step backward because it maintains strict limits for

12 South China Morning Post, "Democrats were urged to renounce alliance", "The deal is assembled", 9 July 2010.

13 Article 39 of the Basic Law.

the nomination of the Chief Executive candidates and keeps the shortcomings of the systems of functional constituencies including maintaining unreasonable restrictions, violating the principle of universality and equality, giving undue weight to the business community, and discriminating between voters on the basis of property and functions.¹⁴

In addition to the discussions on constitutional reform, Chinese central government leaders and their Hong Kong counterparts delivered speeches which distorted the definition of universal suffrage under the ICCPR to serve their political interests.

Qiao Xiaoyang, the deputy secretary general of the NPCSC, defined the meaning of universal suffrage for Hong Kong in June 2010. While stressing the universality and equality of election rights, he claimed that it was an international norm to impose “reasonable restrictions” by law on such rights according to each country’s own situation. He emphasized the need to “sufficiently consider” Hong Kong’s legal status, comply with the executive-led political system, balance the interests of different sectors and be conducive to the development of the capitalist economy. The stance on abolishing functional constituencies remained vague. He said that it was necessary to evaluate them objectively because functional constituencies had been existing since the introduction of elections to Hong Kong. Although there were differences in opinion on the details of the system of universal suffrage for LegCo, consensus could be reached in the community through rational discussions. Such differences should not have hindered the endorsement of the constitutional reform package for 2012.¹⁵

Civil society criticized Qiao’s definition of universal suffrage and questioned its consistency with the ICCPR.

First, the underlying message of “reasonable restrictions” as being accordance with own situations is to adopt to the outdated

14 Para. 19 of the UNHRC’s Concluding Observations on the UK Government’s 4th periodic report relating to Hong Kong (1995).

15 *South China Morning Post*, “Beijing offers definition of HK suffrage”, 8 June 2010 & Ming Pao, “Constitutional Reforms in HK and issues on universal suffrage in the future – the full text of Qiao Xiao-yang’s speech”, 8 June 2010. <http://hk.news.yahoo.com/article/100607/4/ih3k.html> Date of access: 15 July 2010.

idea of “Asian values”, instead of the universality of the right to suffrage. Referring to the the Human Rights Committee’s General Comments No.25, the restrictions should be based on objective and reasonable criteria like residency and minimum age. Restrictions on the right to vote on the grounds of physical disability, literacy, educational or property requirements or party membership are regarded as unreasonable.¹⁶ However, Qiao’s speech seems to favour unreasonable restrictions like those based on poverty, class, social status, occupation, tax contribution, economic status and suzerainty. The rejection of “reasonable restrictions” will become the core issue for attaining genuine universal suffrage.

Moreover, the definition he suggested is at least incomplete as he did not touch on the opportunity and the right to be nominated and elected equally, universally and without reasonable restrictions.

Qiao’s speech leaves room for implementing universal suffrage in “Chinese style”, which may retain the functional constituencies in certain forms or distort the rights related to elections and violate the ICCPR.

In addition, Hong Kong Chief Secretary Henry Tang spoke in Nov 2009 suggesting the co-existence of functional constituencies with universal suffrage.¹⁷ His speech along with the proposals reflects that the Hong Kong government ignores its obligations on implementing genuine universal suffrage.

Civil society worries that Chinese central authority has little interest to adopt the universal definition and standards of universal suffrage laid down in the ICCPR and ignores the UN’s recommendation that all interpretations of the Basic Law including those on electoral and public affairs issues should be in compliance with the ICCPR.¹⁸ It may eventually take away the complete election rights promised by the Sino-British Joint Declaration and the Basic Law.

16 Human Rights Committee. General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) : . 07/12/1996. CCPR/C/21/Rev.1/Add.7,

17 Ming Pao, “Tang implied functional constituencies can co-exist with universal suffrage. Equal and fair by one person two votes”, 20 Nov 2009.

18 Para. 18 of the UNHRC’s Concluding Observations on HKSAR (2006).

It is unsure if the NPCSC will re-interpret the Basic Law on the definition of universal suffrage according to the Chinese Central Authority's political interests.

2. Government lost its neutrality in the promotion of elections

In May 2010, five LegCo lawmakers from two of the pan-democrat political parties resigned in order to trigger by-elections. The by-elections was a de-facto referendum, which immediately enabled Hong Kong people the right to express their demand for genuine universal suffrage and the abolition of functional constituencies through voting.

The Chinese Central Authority attacked the de-facto referendum through various means. For instance, the State Council's Hong Kong and Macau Affairs Office and pro-Beijing politicians accused the campaign as seeking independence, unconstitutional, inconsistent with Hong Kong's legal status and challenging the Basic Law and the central government, etc. Pro-Beijing political parties boycotted the by-elections. Some also tried to vote down the by-election funding. One of them tabled a private member's bill to prohibit any resigned lawmakers from standing as candidates for the remainder of their unexpired term, which would have constituted a breach of the opportunity and right to vote and to be elected without unreasonable restrictions entitled by Article 25 of the ICCPR.

Despite carrying out its duty to arrange by-elections according to the law, the Hong Kong government played down the by-election through public speeches and in its logistical work required during the by-elections.¹⁹ In doing so, it has lost its political neutrality, failed to promote fair election and undermined the citizens' election rights.

Instead of encouraging people to vote in accordance with their civil responsibility as in previous elections, the government

¹⁹ For instance, the government changed the rules for election all in a sudden. It decided against ordering the removal of politicians' roadside banner due to the pro-Beijing politicians' opposition and undermined the opportunity and right to be elected equally and universally of the candidates.

officials boycotted the by-elections in 2010. For instance, Chief Executive Donald Tsang revealed to the press that he might not vote in the by-elections as it was “deliberately engineered”.²⁰ He then issued a press statement two days before the election, stating that he and his political team decided not to vote due to the special nature of the by-elections. He quoted some views that they were an “abuse of the electoral system” and a “waste of taxpayers’ money”, and “could have been avoided”.²¹ The Undersecretary for Home Affairs Bureau Florence Hui, whose Bureau was responsible for promoting civil responsibilities, claimed she decided not to vote because she was fulfilling her civil responsibilities.²² Speeches of these officials set a bad example confusing the citizens on what civic responsibilities encompass. They discouraged citizens to vote in the by-election. While the Chief Executive claimed that civil servants could still go to vote without fear, the pressure against voting was obvious. Clearly, the government has compromised its role to conduct fair elections in a neutral and impartial manner.

C. CERD Hearings in August 2009.

The UN Committee on the Elimination of Racial Discrimination (CERD) held hearings on the implementation of ICERD and received reports from HK Government and NGOs in August 2009.

In the Concluding Observations, the Committee expressed concerns and made recommendations on the Race Discrimination Ordinance (RDO), domestic migrant workers, refugees and torture claimants, and the education for the ethnic minority school children.

The Committee criticised the narrow definition of racial discrimination in the race legislation, which had triggered the follow-up and early warning procedures in August 2007 and March 2008 respectively. The RDO which entered into full

20 *South China Morning Post*, “Tsang may not vote in “engineered” by-elections. 8 Feb 2010

21 CE’s statement on 14 May 2010. <http://www.info.gov.hk/gja/general/201005/14/P201005140326.htm> Date of access: 7 June 2010

22 Hong Kong Economics Journal, “Florence Hui claims she decided not to vote because of fulfilling the civil responsibilities”, 6 May 2010.

operation in July 2009 still kept the serious defects identified by the Committee, NGOs and lawmakers. These included the weak definition of indirect discrimination with regard to language; excluding immigration status and nationality among the prohibited grounds of discrimination (i.e. excluding the mainlanders and asylum seekers) and not covering all government functions. The Committee also recommended adopting a race equality plan instead of the administration guidelines and strengthening the EOC for implementation of the RDO. The Government again refused to acknowledge the flaws of the RDO.

The Committee also expressed concerns over the “two-week rule”, “live-in” requirement, deprived working conditions and the exclusion of foreign domestic workers in the Minimum Wage Bill which denied their equal entitlement to labor rights and discriminated against them on the grounds of race and non-citizen status. The Government misleadingly claimed that the existing laws and mechanisms already protected the migrant workers’ working rights. It was required to submit detailed information for the Committee’s follow-up.

The Committee expressed concerns over the lack of a refugee law and screening procedures for asylum seekers. It recommended the adoption of refugee laws by extending and incorporating the 1951 Refugee Convention and its 1967 Protocol to Hong Kong and a comprehensive procedure for screening asylum seekers which ensures their rights to information, interpretation, legal assistance and judicial remedies. The government would only present a legislative framework of a high standard of fairness for handling torture claims.

The Committee recommended the development of teaching Chinese as a second language education policy for the non-Chinese speaking students in consultation with teachers and the communities. However the government refused such a policy for its early integration policy and resources on current supplementary programmes.

Despite calls by NGOs for a meeting regarding follow-up actions on the Concluding Observations, the government rejected

them by claiming the existence of discussion platforms like LegCo meeting and human rights forums.

All of these showed that the government lacked sincerity and displayed explicit unwillingness in fully implementing the ICERD and the Committee's recommendations.

D. Obstacles impeding the establishment of NHRI

1. Government's unwillingness to set up such an institution

Various UN treaty bodies and the local civil society have repeatedly urged the Hong Kong government for the establishment of a national human rights institution (NHRI).²³ However, in the report for the Universal Periodic Review (UPR) of China, Hong Kong and Macao SAR in February and June 2009, the Government reiterated it had no intention of setting up such an institution.

The government again claimed in its report that the existing human rights protection mechanisms were operating well, and setting up such an institution will supersede or duplicate the existing mechanisms. However, it did not provide any substantial studies and researches on the effectiveness or institutional weakness of the current mechanisms.

The reason the Government rejects setting up such an institution is probably to maintain its ease of governance. It does not want to be monitored by a human rights commission with a wide mandate, which may criticize the Government's policies and measures for human rights violations and may be regarded as weakening the governing authority.

All these show that the government denies its obligations under international human rights covenants and gives a low priority to the promotion and protection of human rights. This does not bode well for the prospect of establishing a human rights commission in the foreseeable future.

23 Please refer to "Appendix 1: UN recommendations on the setting up of HRI" and "Appendix 2: Events in the debate on the establishment of a human rights commission and its substitute body, the EOC" in the chapter "Hong Kong mulls its options" in ANNI 2008 Report. Page 50-56.

2. Restraints on the partly elected LegCo

There is a strict limit for LegCo members to introduce only private bills, which means they may only introduce bills that do not relate to public expenditure, political structure or the operation of the government.²⁴ The restraints mentioned account for most of the scope of the legislature.

For bills relating to government policy, the Chief Executive's written consent is required.²⁵ Given that the Government rejects the setting up of a human rights commission, a LegCo member planning to introduce a private bill on setting up the human rights commission may not be approved by the Chief Executive and may eventually fail to be tabled in LegCo.

Even if a private bill is tabled in LegCo, it requires the majority support of members from both the group on functional constituencies as well as the group on geographical constituencies whose members are directly elected.²⁶ Too often, members from functional constituencies oppose motions favoring public interests, not to mention that their status violate the principle of universal and equal suffrage. Thus, it is likely very difficult for a bill to set up a human rights commission to be passed.

3. Weak cooperation among civil society

Apart from the UN's recommendations and the government's unwillingness, the cooperation among NGOs in Hong Kong for urging for the establishment of a human rights commission is not strong. NGOs focus on different issues, of which establishment of a human rights commission issue but one, and certainly not the main issue. This makes the demand for the establishment of human rights commission in Hong Kong not unified and focused. Hence, it is important to reconsider the strategy for motivating and networking NGOs with a view to better promoting public awareness through education, and in campaigning for a human rights commission for Hong Kong.

24 Article 74, Basic Law.

25 Article 74, Basic Law.

26 Part 2, Annex 2: Basic Law.

Prologue to Analysis

Although there is no human rights commission in Hong Kong, existing human rights protection mechanisms consist of such bodies as the Hong Kong Equal Opportunities Commission (EOC), the Office of the Ombudsman, the Office of the Privacy Commissioner for Personal Data (PCPD),²⁷ the Independent Police Complaints Council (IPCC) and the Commissioner for Covert Surveillance.²⁸

An analysis of the EOC would be sufficient to demonstrate the similar shortcomings of these bodies. The EOC is regarded as a substitute body of human rights commission, and is accredited by the International Coordinating Committee (ICC) with C status.

For the analysis of other human rights protection bodies, please kindly refer to ANNI Report 2009.

II. Independence of the EOC

A. Relationship with the Executive, Judiciary and Legislature

1. *General Background*

The EOC is a statutory body set up in 1996 under the Sex Discrimination Ordinance (SDO) to implement anti-discrimination

²⁷ There are two updates about PCPD. First, the Government published “Consultation Document on Review of the Personal Data (Privacy) Ordinance” in August 2009 based on the PCPD’s review report with recommendations on 50 amendments to Constitutional and Mainland Affairs Bureau in Dec 2007. There were 43 proposals put forward by the Government to amend the Ordinance and also nine proposals put forward by the Privacy Commissioner for Personal Data but refused by the Government. During the consultation, PCPD particularly pointed out the need of inclusion of IP address as personal data and the exemptions on Public Interest Determination. The Human Rights Monitor, a civil society group, commented on the proposals put forward by the Privacy Commissioner but was rejected by the Government and also urged the government to incorporate the principle of the best interest of children and appeal mechanism in considering the privacy rights of children. Until now the Government has not yet announced the result of the review. The full report can be found at the following url (date of access: 22 Jun 2010): http://www.cmab.gov.hk/doc/issues/PDPO_Consultation_Document_en.pdf

Secondly, the Government released an open recruitment advertisement for Privacy Commissioner for Personal Data in March 2009. But it shared the same shortcomings with EOC such as inappropriate hiring criteria, non-transparent selection process and unrepresentative selection committee.

legislation. It is overseen by the Constitutional and Mainland Affairs Bureau (CMAB) and is subject to monitoring by the LegCo and the Audit Commission. It is expressly stated in the law 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”.²⁹ However, the EOC Chairperson and members are all appointed by the Chief Executive.

2. Independence in doubt: EOC as a revolving door for ex-government officials?

January 2010 was the first time that the EOC had a leadership vacuum, when Mr. Raymond Tang completed his five year term and the government did not announce its appointment of a new Chairperson.³⁰ NGOs expressed concerns that the power vacuum would lead to a paralysis of decision-making in anti-discrimination work and serve as a reflection on the Government’s unwillingness on the promotion of anti-discrimination.

The government did not reveal any news on the new EOC Chairperson till 14 January 2010. The Government then announced Mr. WK Lam, a former top government official, as EOC Chairperson with a three-year term, which was term than the former Chairperson’s. NGOs expressed concerns over the non-transparent selection process, failure to meet the requirements stated in the Paris Principles, and possible adverse impacts on the independence and stability of the EOC.

It is not the first time that the Government made the chief position of human rights protection body a “revolving door” for

28 Regarding the commissioner for Covert Surveillance, Justice Woo has released his second annual report in June 2008 in which he raised serious concerns about possible loopholes in dealing with confidential privileged conversations between lawyers and clients, and about his inquiries into the mishandling of the ICAC to destroy reports on operations. The Government has stated that the Ordinance would be reviewed after the next report. Please refer to the part of “Commissioner for Covert Surveillance” in ANNI 2009 Report.

29 Section 63(7), Sex Discrimination Ordinance (Chapter 480). http://www.legislation.gov.hk/blis_ind.nsf/CurEngOrd/9D022A8D840660CFC82564830033EEBC?OpenDocument Date of access: 11 June 2010

30 South China Morning Post, “EOC without leadership as chief bows out”, 12 Jan 2010

government officials. Such a reputation will harm the independence and competence of the human rights bodies, and the credibility of the chief. For instance, a conflict of interest exists when a chairperson fails to make the watchdog perform its job because he/she wants to return to the government later. Worries were also expressed on letting former government officials to take control and weaken the power of an independent body. NGOs thus urged Mr. Lam to promise he would not return to Government after completing his term.

Apart from being a former top government official, NGOs questioned Mr. Lam's human rights record. He should be held accountable for the human rights violations during the Olympic equestrian games in Hong Kong organized by the Equestrian Company, where Lam was serving as the CEO at the time. The company issued unreasonable regulations which restricted freedom of speech: prohibiting the display of political matters on clothes and handing over of a female audience who had not broken any rules to the police officers for strip search.

Mr. Lam stated in LegCo hearings that he would make the EOC's operation more transparent and abandon the previous low-key approach. Since he reported for duty, he has been quite high profile in anti-discrimination work, even though improvements are yet to be seen in the EOC's willingness to cooperate with civil society.³¹

B. Non-transparent Selection Process of Members

The composition and selection process of the EOC members does not comply with the principles of independence and pluralism in the Paris Principles. It The Chief Executive appoints the EOC Chairperson and members and determines the requirement, remuneration and the terms and conditions of the appointments.

31 South China Morning Post, "anti-bias watchdog vows to be more open". 11 Feb 2010

32 The appointments were often criticized as some of those appointed did not have track records on human rights and equal opportunities. 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.

The whole process is kept under wraps, and has long been criticized for not being open or transparent, and for excluding civil society participation.³² The only publicity in this process is the publication of every appointment in the Gazette.³³

Although non-governmental organizations have proposed some candidates experienced in anti-discrimination work and are independent-minded, the government has never adopted any suggestions and nor were reasons ever given for disregarding these. Instead members lacking experience in anti-discrimination work were appointed or those low attendance rates in the EOC meetings re-appointed.

For instance in 2009, the selection process and composition of the selection board and hiring criteria settings were again kept in the dark.

The Government released the recruitment advertisement for EOC Chairperson in Sept 2009.³⁴

Despite having for the first time a selection board to recommend the best candidate to the Chief Executive, the selection process and criteria for board members utterly lacked public participation and monitoring.

The independence of the five-member selection board was also questionable: two of them were government policy secretaries while the rest were all current or former cabinet members. The government could easily intervene the decision making in choosing the candidate and may recruit those who were close to government.

Moreover, the representation of the board was in doubt as the composition of the board was not in compliance with the principle of pluralism stated in the Paris Principles. The members were all male and lacked any human rights and anti-discrimination background. Particularly, none were from NGOs and service providers for the unprivileged groups.

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

34 Government's Press release on open recruitment of the Chairperson of the EOC begins, 2 Sept 2009. <http://www.info.gov.hk/gia/general/200909/03/P200909020216.htm>

Apart from the selection board, the hiring criteria were heavily criticized as being more for a CEO than an EOC Chairperson. Although NGOs urged the government to ensure the EOC Chairperson satisfies the attributes based on the Paris Principles, including expertise, independence and a strong commitment to human rights etc. and called for public participation, the hiring criteria instead emphasized experience in public administration and management. The Government ignored the fact that the experience and commitment would facilitate the EOC Chairperson defense of human rights. It was suspected of deliberately weakening the EOC position as an anti-discrimination watchdog.

The Government again ignored calls from NGOs to involve the public in the selection of the EOC Chairperson, e.g. for the shortlisted candidates to take public questions in public forums.

C. Resourcing and non-transparent and non-accountable performance of the EOC

1. General Background

The EOC is publicly funded, which is proposed by the Chief Executive and then appropriated by the Legislative Council. The Secretary for Financial Services and the Treasury may give directions in relation to the amount of money which may be expended by the Commission in any financial year and to which shall comply with.³⁵ Subject to such constraints including the examination of its books by the Director of Audit proper use of resources, the EOC has the power to direct its own resources. For the constraints on the EOC's strategy due to the control of budget by the Government, please refer to ANNI 2009 Report.

2. Public criticisms on the operation and performance of the EOC

The Director of Audit's report published in April 2009 criticised the performance of the EOC over its lavish spending and lax supervision. More importantly, NGOs criticized the EOC for its

35 Para 15, Schedule 6 under the SDO.

misallocation of resources and failure to give high priority in deploying resources for anti-discrimination given the government's spending constraints. NGOs also criticized the EOC's passive role in anti-discrimination and human rights work.³⁶

The government has for a while proposed turning the EOC Chairperson into a part-time and nominal position in June 2009 despite the fact that the Sex Discrimination Ordinance states that the Chairperson shall be appointed on a full-time basis.

Disappointingly, the EOC agreed with the government's proposals. It showed that the then EOC Chairperson and members were insensitive to the possible serious adverse impacts of such proposals on the independence and effectiveness of the EOC.

NGOs objected to the government's proposals and worried that they were aimed at restricting the autonomy and independence of the EOC. These proposals weakened the power of the EOC Chairperson in a way inconsistent with the Paris Principles instead of solving the problems of mal-administration.

Eventually the government decided to keep the post of EOC Chairperson on full-time basis.

NGOs pointed out the root causes for the EOC's mal-administration was the non-transparent and nepotistic selection process, which rejected independent persons with human rights and anti-discrimination work background and the lack of participation of civil society. Instead pro-government or passive figures were selected. As a result, nepotistic Chairperson and members were appointed without background and commitment to anti-discrimination and human rights work and were found to hold a passive position on anti-discrimination work.

Additionally, the EOC's operation was seriously lacking in transparency, keeping secret important information on its operations including the report on internal reviews in 2004 on its role and human resources management, the report on the EOC's credibility by independent Panel of Inquiry in 2005, its draft

³⁶ Please refer to ANNI Report 2009.

Memorandum of Administrative Arrangements (MAA) with the Constitutional and Mainland Affairs Bureau (CMAB) and minutes of meetings.³⁷ The public have no access to these papers and therefore could not monitor its work.

NGOs also urged the government to enhance the transparency and the operation of the EOC by filling the Membership of the EOC with independent persons with backgrounds and qualities in line with the Paris Principles.

III. Effectiveness

A. Protection

1. Limited jurisdiction

The EOC has a narrow mandate as it can only enforce the Sex Discrimination Ordinance (Cap 480) (SDO), the Disability Discrimination Ordinance (Cap 487) (DDO), the Family Status Discrimination Ordinance (Cap 527) (FSDO), and the Racial Discrimination Ordinance (Cap 602) (RDO).

2. Inconsistence among the discrimination laws

The RDO provides less protection from discrimination than the SDO, DDO and FSDO. This inconsistency causes confusion for the EOC in its enforcement of the anti-discrimination laws. For instance, while section 21 of the SDO provides, “it is unlawful for the Government to discriminate against a woman in the performance of its functions or the exercise of its powers”, the Government has deliberately excluded a similar provision in the RDO with respect to racial discrimination.

3. Complaints Handling

The EOC can receive complaints based on the grounds of sex, disability, family status and race discrimination.

³⁷ For further information, please kindly refer to the part of Resourcing and Performance in ANNI Report 2009.

According to Article 80 of the Basic Law, only the judiciary has power to adjudicate under the framework of separation of power. The EOC itself does not have adjudication powers.

The EOC handles complaints through mediation. If mediation fails, the matter may be resolved by going to court.³⁸

The EOC has been criticized for taking a non-committal approach towards handling complaints. Please refer to ANNI 2009 Report.

The EOC may grant legal assistance for clients instituting legal proceedings in particular if the case raises a question of principle or it is reasonable to expect the applicant to deal with the case unaided given the complexity of the case.³⁹

However, the EOC is not that willing to approve legal assistance to the complainants. In 2009, among the 921 complaints, there were 68 applications for legal assistance. Thirty-one of the applications (45.6%) were granted, 30 applications (44.1%) were rejected and seven of the applications (10.3%) were under consideration.⁴⁰ It appears that it was less reluctant to grant an application than in 2008.⁴¹

And if an application for assistance is rejected, there is no independent board for the complainant to lodge an appeal.

B. Promotion

The EOC has the role to conduct research, educational activities and services in order to promote equality of opportunities and principles of anti-discriminations in public education.⁴²

38 The discrimination laws are complicated and involved substantial legal costs so EOC proposed since 2003 to set up a tribunal in order to deal with the dispute in a quick, cheap and efficient manner. The only way to set up such tribunal under the judiciary is to persuade the executive, legislature and judiciary to agree on the proposals.

39 Sect 85(2), Sex Discrimination Ordinance (Chapter 450).

40 Equal Opportunities Commission (EOC): Statistics on Enquiries, Complaints and Legal Assistance for the Period of 1 January 2009 to 31 December 2009. <http://www.eoc.org.hk/eoc/graphicsfolder/inforcenter/papers/statisticcontent.aspx?itemid=8664> Date of access: 15 June 2010

41 The percentage of granted applications is about 10% higher than in 2008 while the percentage of rejection is similar. For the figures of 2008, please refer to ANNI 2009 Report.

42 Sex Discrimination Ordinance (Cap 480), Sect 65.

However, NGOs criticized the EOC for not being proactive in promoting equality of opportunities and principles of anti-discrimination in 2009. For instance, the EOC was reluctant to give advice to schools on whether the school policies and practices were in compliance with the principles of anti-discrimination.

The new EOC chairperson in 2010 promised to take a more proactive approach. So far, the EOC seems to have been adopted quite a high profile in its anti-discrimination work.

IV. Potential Cooperation/engagement between the NHRI & the NGOs

Until now the EOC does not have any formal relationship with civil society groups. It is unsure if the new Chairperson will strengthen the participation of civil society in the work of the EOC.

The NHRC in India - Another Department of the Govt. of India?

People's Watch-India (PW)¹

Established in October 1993, the National Human Rights Commission (NHRC) of India has been operational for almost 17 years. This report provides an opportunity to look back at its history and comes at an apt time for two reasons: (i) the Commission's sixth Chairperson has just begun his term; (ii) later this year, India's NHRC is due to submit its application for re-accreditation of its 'A' Grade status to the International Co-ordination Committee for NHRIs (ICC).² In the absence of any proposed recommendations for amendments of the NHRC's founding statute, the Protection of Human Rights Act, 1993, by the NHRC in anticipation of this re-accreditation process, this report offers a critical analysis of the Commission's work. India desperately needs an effective, independent, victim-sensitive, transparent, and accountable national human rights institution (NHRI) capable of providing effective leadership to the other 158 statutory human rights institutions in the country.

I. Highlights of 2009: Issues addressed by the NHRI

The NHRC held its Foundation Day celebrations on 12 October 2009, marking exactly 16 years since its establishment in 1993 and addressing

1 Prepared by Mr. Henri Tiphagne, Executive Director, with assistance from Ms. Sabitha (National Program Coordinator, NHRIs) and Ms. Bharthi Pillai (NYU Fellow).

2 India's re-accreditation review is set for the first half of 2011.

for the first time the issue of human rights defenders (HRDs) through a well-organized one-day seminar attended by the Acting Chairperson, members, Commission staff, and civil society representatives, including HRDs. Follow-up included the appointment of Mr. A. K. Parashar, former Deputy Register (Law) as a focal point for HRDs. While it remains to be seen precisely what roles this focal point will assume, as one of the NHRC's longest-serving staff members, it is expected that Mr. Parashar will rise to the occasion.

Further, the Secretary General of the Commission was for the first time the sole NHRC representative at the 14th Asia Pacific Forum (APF) meeting in Amman, Jordan in 2009. The absence of the Acting Chair or any NHRC members – even its 'Deemed Members'³ – at this important meeting indicates the concerns that this report seeks to address.

II. Independence

A. Law or Act

Under both international and domestic pressure, the Protection of Human Rights Act (PHRA)⁴ was passed into law on 12 October 1993 and provided for the establishment of the NHRC at the national level and State Human Rights Commissions (SHRCs) at the state level. The history leading up to the creation of the NHRC reveals that the Commission was viewed primarily as a means of deflecting increasing international criticism.⁵ However, even if it was created with this purpose, it is deeply troubling that 17 years after its formation and despite numerous problems that have arisen from the PHRA, the NHRC has not made any attempt whatsoever

3 Deemed members of the National Human Rights Commission have been specified in the Protection of Human Rights Act, Chapter II, Section 3(3) to include the Chairpersons of the National Commission for Minorities (NCM), the National Commission for the Scheduled Castes and Scheduled Tribes (NCSC/ST) and the National Commission for Women (NCW). Note the National Commission for Scheduled Castes and Scheduled Tribes have been divided into two separate commissions, the National Commission for Scheduled Castes (NCSC) and the National Commission for Scheduled Tribes (NCST) since the PHRA was passed in 1993; the Chairpersons of both Commissions are included as deemed members.

4 Protection of Human Rights Act, 1993.

to rectify the problems that have been created by its founding law. The General Observations by the ICC on the Paris Principles are intended to guide institutions developing their own processes and mechanisms in compliance with the Paris Principles, persuade domestic governments to address or remedy issues relating to an institution's compliance with the standards articulated in the General Observations; and guide the ICC's Sub-Committee determinations on new accreditation applications, re-accreditation applications, or special reviews. Other NHRIs in the Asia Pacific Region, such as the Commission on Human Rights of the Philippines, have prepared for their applications for ICC re-accreditation by proposing a completely new statute to ensure their effectiveness several years after their establishment. By contrast, although the PHRA was last considered before Parliament and amended in 2005, the NHRC has continued to fail to undertake any internal review of its legislation or request any external review. The NHRC's silence in this regard, even after the issue was raised by the NGO Core Group meeting in New Delhi in 2009 and where opportunities for reaching an effective statute are so closely within the ambit of Parliament, indicates the NHRC's extreme negligence in failing to identify and inform Parliament about the PHRA's non-compliance with the 'Paris Principles.'

Relationship with the Executive, Legislature, Judiciary, and other specialized institutions in the country

The NHRC has not managed to utilize other institutions in the Indian democratic system, such as Parliament, to advance the protection and promotion of human rights in India. Significantly,

5 The general view point is indicated in two statements published by the South Asia Human Rights Documentation Center in its illuminating book, "Judgment Reserved: The Case of the National Human Rights Commission of India." Page 1 of the book reports that after winning the election in 1992, then Indian Home Minister Mr. S. B. Chavan told the Rajya Sabha that the purpose of the Human Rights Commission was to "counter the false and politically motivated propaganda by foreign and Indian civil rights agencies," and further stated that whether it would be totally government-sponsored or placed in the voluntary sector had yet to be decided. On 24 April 1992, Mr. V. N. Gadgil, the official spokesperson of Congress (I) Party stated that his party would call for a national consensus on the role and powers of the proposed Indian Human Rights Commission, but reported that the Commission's findings, according to Gadgil would act as "correctives to the biased and one-sided reports of the NGOs" and would also be "an effective answer to politically-motivated international criticism."

this strategy was used when the NHRC opposed the continuation of the Terrorist and Disruptive Activities (Prevention) Act (TADA) in 1995, when the then Chairperson addressed all parliamentarians and political parties on the issue. In contrast, today, the NHRC confuses independence from government with the maintenance of proper, effective relationships with important actors, including government and non-government institutions throughout India, and internationally. Specifically, while there is a pressing need for changes to the PHRA, the NHRC is unwilling to appeal to Parliament on the issue because it seems to believe that doing so would amount to interfering with the Commission's independence. The Commission fails to appreciate that advocacy, especially advocacy that supports and encourages government institutions to advance human rights, is an essential function expected from the NHRC under Section 12 of the PHRA and under the Paris Principles.

In examining the financial arrangements of the NHRC, it becomes clear why independence is so crucial to an effective NHRI. Currently, the NHRC is over-extended and under-resourced, which directly impacts its ability to fulfill its mandate. So, as the scope of work and number of complaints registered with the NHRC rises dramatically every year, the NHRC requires an increase in its staffing pattern, annual budget, and other resources if it is to even attempt to meet the demands of its mandate. Yet, rather than granting an increase in funds, the government has sharply cut the annual allocation of funds for the 2010-2011 financial year by 20 percent, granting only 18 Crores INR (USD \$3,829,771) of the requested 24.10 Crores INR (USD \$5,127,655) to the NHRC.⁶ The Commission has also moved to downgrade the security given to certain NHRC members.

Despite the establishment of 18 SHRCs under the PHRA, the NHRC continues to have no real working relationship with these state institutions in monitoring human rights throughout the states. Interaction appears limited to solemn invitations to national conferences. Further, the NHRC is unable to formally request any

⁶ NHRC budget slashed by 20% for 2010-2011, *available at* <http://igovernment.in/site/nhrc-budget-slashed-20-2010-11-37817>.

of the SHRCs to monitor adherence to the various NHRC human rights guidelines – such as the NHRC guidelines on extrajudicial killings – within the states over which the SHRCs have jurisdiction. As a result there are several states where SHRCs have failed their obligation to continuously submit biannual reports to the NHRC on deaths occurring in police encounters.

In addition there are seven other thematic NHRIs and around 150 state human rights institutions (HRIs). Rather than sharing its breadth of knowledge and expertise with these statutory institutions, the NHRC continues to ignore its responsibility to lead these other human rights institutions and seems to view itself as an exclusive, elite institution. Although the appointment of the Former Chief Justice of the Supreme Court of India as the NHRC Chairperson should have resulted in an improvement in leadership, it has not followed. For example, the NHRC has benefited from participating in numerous training programs through the ICC, APF, and the Office of the High Commissioner for Human Rights (OHCHR), but has never in its 17 years extended an invitation to a member of an SHRC or other thematic NHRI, including ‘deemed members’ of the NHRC, to participate in these programs. These trainings are conducted in order to ensure that regional, national, and local protectors of human rights understand and internalize the wide range of principles in which human rights institutions are founded. Although the failure to extend participation to members from a variety of human rights institutions has been pointed out previously, the NHRC has failed to change this practice.

Following India’s Universal Periodic Review (UPR) on 10 April 2008, the Indian government only accepted five of the eighteen recommendations. The remaining thirteen were commented on with no clear position presented.⁷ Over two years later, the NHRC has issued no reminders or otherwise pressed the government to act on the recommendations from the UPR process. The NHRC’s failure to take a strong stand and push the government to comply with international standards once again demonstrates its lack of independence or ability to be a promoter of human rights.

7 Recommendations by Working Group to India, Universal Periodic Review, [upr-info.org](http://www.upr-info.org), available at <http://www.upr-info.org/-India-.html>

Further, there have been several outstanding requests from Special Rapporteurs (SR) – notably the SRs on Torture, Extrajudicial Killings, and Human Rights Defenders – to visit India during the past six years. Although the NHRC participates in almost every session of the UN Human Rights Council, the NHRC has never followed up with the government on these requests, emphasizing the need for such visits. This failure, too, is attributed to their ‘non-independent’ character.

The NHRC has failed to be a strong voice encouraging the implementation of international human rights standards in the country. Even where the NHRC has supported international treaties, it has failed to push forward legislation that is realistic and enforceable under Indian law. From 1995 to 1997, the NHRC was instrumental in advocating India’s signing of the United Nations Convention Against Torture (UNCAT). Thereafter, the NHRC consistently recommended that India ratify this Convention. In 2008, more than ten years after India had signed the UNCAT, it began drafting a Bill on the Prevention of Torture to ratify the UNCAT. During this time, the government asked the NHRC for its recommendations, which the NHRC duly provided. In 2010, the government proposed The Prevention of Torture Bill – a woefully inadequate, one and a half page, six-section law to address the overwhelming occurrence of torture in India.⁸ This proposed law goes completely against the spirit and intent of the UNCAT, with its narrow definition of torture,⁹ and fails to meet national and

8 The Prevention of Torture Bill, 2010, Bill No. 58 of 2010.

9 While UNCAT’s definition of torture includes “other cruel, inhuman, or degrading treatment or punishment,” the Prevention of Torture Bill’s definition limits torture to ‘previous hurt to any person,’ or “danger to life, limb or health (whether mental or physical) of any person.”

10 Mathur was appointed temporarily by the President to serve as the Chairperson of the National Human Rights Commission from June 1st, 2009 to the date a new Chairperson could be appointed. Daily News, The India Post, June 3, 2009, *available at* <http://www.theindiapost.com/2009/06/03/justice-gp-mathur-to-act-as-chairperson-of-nhrc/>

11 Protection of Human Rights Act, 1993, Chapter II, Section 4 states that the Chairperson and other Members shall be appointed by the President by warrant under his hand and seal after obtaining the recommendations of a Committee consisting of the following members: 1) The Prime Minister serving as Chairperson; 2) Speaker of the House of the People (Member); 3) Minister in-charge of the Ministry of Home Affairs in the Government of India — Member; 4) Leader of the Opposition in the House of the People — Member; 5) Leader of the Opposition in the Council of States — Member; 6) Deputy Chairman of the Council of States — Member.

international standards. Despite the Working Group on Human Rights (WGHR) in India and the UN recently issuing a brief report on the Bill's shortcomings and requesting the intervention of the UN SR on Torture to ensure that the Bill is amended before being passed by the Rajya Sabha, a body elected by states' assemblies and known as a 'Council of States,' the NHRC has remained silent. The NHRC should have, on its own initiative, addressed members of parliament on the serious inadequacies of the Bill before it reached and was passed on 6 May 2010 by the Lok Sabha, the lower house of Parliament, referred to in the Constitution as the 'House of the People.' An intervention could have compelled Parliament to refer the bill to a select committee for amendment. Again, the NHRC's silence reflects its continued unwillingness and inability to speak up independently and challenge the government on important issues affecting human rights at crucial times and in meaningful ways.

B. Membership and Selection

In 2009, the NHRC still lacked an official chairperson. Acting Chairperson Shri Govind Prasad Mathur¹⁰ temporarily presided over the Commission¹¹ until the retirement of the Chief Justice of the Supreme Court of India (CJI), Mr. Justice K.G. Balakrishnan. As expected, less than a month after demitting his position as Chief Justice of the Supreme Court of India, the sixth and current Chairperson of the NHRC was appointed on 3 June 2010.¹² Despite his candidature being widely criticized for a number of his controversial stands – such as blocking the prosecution of former Justice Nirmal Yadav for corruption,¹³ attempting to exempt the Office of the Chief Justice of India from the purview of the Right to Information Act,¹⁴

12 Balakrishnan stepped down as Chief Justice of the Supreme Court of India on May 11, 2010. Deccan Herald, June 3, 2010, *available at* <http://www.deccanherald.com/content/73161/justice-balakrishnan-nhrc-chief.html>

13 Ajay Sura, *Cash-for-judge: HC Bar flays CJI*, TIMES OF INDIA, Feb. 10, 2010, *available at* <http://timesofindia.indiatimes.com/india/Cash-for-judge-HC-Bar-flays-CJI/articleshow/5554244.cms>

14 *CJI's Office Comes Within RTI Act: Delhi HC*, OUTLOOK INDIA.COM, Jan. 12, 2010 (quoting, "The 88-page verdict is being seen as a personal setback to CJI KG Balakrishnan, who has consistently been maintaining that his office does not come under the transparency law and hence cannot part with information like disclosure of judges' assets under it."), *available at* <http://news.outlookindia.com/item.aspx?672590>

and delaying action against Justice P.D. Dinakaran after Parliament initiated an impeachment motion in connection with a land dispute and corruption case – the government willfully passed on other eligible candidates and waited more than a year to appoint Justice K.G. Balakrishnan to lead the NHRC. The Commission, now more than ever, is in need of strong, ethical, and courageous leadership. It remains to be seen whether this former Chief Justice will act differently from his tenure leading the Supreme Court.

There remains a great lack of diversity in the NHRC. There continue to be no full women members or persons with disability in the NHRC. Despite positions being set aside for two members with expert knowledge of practical experience of human rights, the Appointment Committee has continued to fill these posts only with Indian Police Service (IPS) officers or Indian Foreign Service (IFS) officials. The NHRC is, therefore, composed of officials who have spent their careers as representatives of India, promoting the image of India and strengthening its relations with other countries, rather than of civil society leaders and experts who have spent their careers in the field investigating human rights violations, assisting and empowering marginalized groups, or educating communities. Although India is proud of such eminent figures, Professor Upendra Baxi, Mr. Harsh Mander, and Ms. Aruna Roy, they are never considered for appointment to the NHRC.

In seventeen years, there has never been a civil society representative among the twenty former members of the Commission. Of the two members appointed most recently, Shri P.C. Sharma and Shri Satyabrata Pal, who should have been selected for their human rights expertise, neither has demonstrated any great commitment to promoting human rights at the grassroots level. Sharma has been widely accused of receiving the NHRC membership position as a reward for withdrawing charges against a political leader while acting as Director of the Central Bureau of Investigation (CBI)¹⁵ The then Congress spokesman Mr Kapil Sibal said, “This is a reward for the decision of the CBI

15 Times of India, Former CBI Director Sharma Joins NHRC, 4.3.2004, *available at* <http://timesofindia.indiatimes.com/india/Former-CBI-director-Sharma-joins-NHRC/articleshow/535560.cms>

to retract conspiracy charges against Advani,” and deemed the appointment “very unfortunate.” Mr. Kapil stated that the former CBI chief should not have accepted the post as it undermined the independence of the premier investigating agency. “It just shows how these offices are used by the government to its political advantage,” he added.¹⁶ Despite Justice J.S. Anand writing to Prime Minister Vajpayee, requesting him to “reconsider the appointment to prevent criticism at national and international levels,” Sharma was appointed to the NHRC in 2004.¹⁷ Though this occurred under the Bharatiya Janata Party (BJP) government, the Congress government also reappointed Sharma.

Shri Satyabrata Pal has spent over 30 years abroad as a diplomat. While his academic and theoretical knowledge, experience with international politics, and adeptness at working in a bureaucracy may be strong, his is not a strong advocate for marginalized victims and has no experience of grassroots human rights issues facing Indians today.

These appointments reflect a pattern of political appointments in the short history of the NHRC: a pattern replicated at both the national and state levels. The current substandard composition of the NHRC’s membership leaves the Commission with absolutely no civil society representation, making it extremely ill-equipped to offer protection to victims and address human rights violations in India.

16 Id.

17 Sharma’s appointment did generate much criticism, notably, within the NHRC itself. Ravi Nair, Executive Director of the South Asia Human Rights Documentation Centre, resigned from the NHRC’s NGO Core Committee due to the appointment of Sharma. Nair stated that the commission was not “forthright in its condemnation of an appointment that appeared to have been practically forced on it.” Nair has also objected to the fact that a “significant proportion of NHRC staff is drawn from the intelligence services— an injudicious step for a body charged with protecting and promoting human rights.” In a letter to NHRC chief Justice A. S. Anand, Nair said Sharma’s appointment is “another indication of NHRC’s continuing emasculation by the state. I believe, it reflects the extent to which the establishment is willing to undermine the cause of human rights in this country,” Nair wrote. He argued that Sharma’s appointment “runs counter to the provisions of the Human Rights Act, 1993, and the Paris Principles which lay down the maximum standards for national human rights institutions.” Clarifying that he had no “personal animus” against Sharma, Nair said: “He (Sharma) has not demonstrated substantive knowledge of human rights issues nor has he shown any commitment towards the same.” (Times of India 15.1.05), available at NHRC/ Rights Panel - 2005

The process of appointment to the NHRC under the PHRA does not ensure the pluralist representation of social forces involved in the promotion and protection of human rights. The selection and appointment process is non-transparent without any broad consultation; the vacancies are not advertised broadly to maximise the number of potential candidates from a wide range of backgrounds. It remains to be seen how the NHRC will respond to this lack of diversity and pluralism in its application for re-accreditation to the ICC.

Prior to the establishment of the NHRC, the National Commission of Women (NCW), National Commission of Minorities (NCM), and the National Commission for Scheduled Castes and Scheduled Tribes (NCSC&ST) were the only NHRIs protecting human rights in India. After the establishment of the NHRC, these institutions were joined by the creation of the National Commission for the Protection of Child's Rights (NCPCR), the National Commission for Persons with Disabilities (NCPWD), and the Central Information Commission (CIC). The impetus for the creation of an overall NHRC in 1993 was to build a team of NHRIs working together to more effectively promote and protect human rights throughout India. In order to ensure this, the Chairpersons of the existing NHRIs were made 'deemed members' of the NHRC. Unfortunately, what was envisioned in 1993 has still not taken place and most of the responsibility for protecting human rights has fallen on the NHRC. This only points to a continued failure of the NHRC to collaborate with its 'deemed members,' as envisioned by the statute, in addressing human rights problems in India.

C. Resourcing of the NHRI

The NHRC lacks the resources necessary to run an effective, powerful NHRI that can protect and promote the human rights of over 1 billion people. The budget for 2010-2011 has been reduced from 24.10 Crores INR (USD \$5,127,655) to 18 Crores INR (USD \$3,829,771). In other words, the government of India has allocated a mere 0.158 INR (USD \$0.00335991) per person or less than one third of a United States penny per person, per year, towards the protection and promotion of human rights.¹⁸

18 This average was calculated using a conservative estimate of the population of India, 1,139, 964,932 people, by the World Bank in 2008.

Of course, even with limited resources, the NHRC has the opportunity to speak out and develop a human rights culture in the country. However, the NHRC has remained a shell of an organization over the past 17 years. Rather than selecting and retaining talented, dedicated members and staff, the NHRC operates like a revolving door, hiring staff almost exclusively 'deputed' from government positions to temporarily fill a similar position at the NHRC. Today the NHRC has almost no senior officers with the expertise and practical knowledge that comes from experience of the Commission's 17 years. The NHRC also has little physical documentation to speak for its history. While it is slowly trying to make up for the loss of documentation by now scanning new documents, more than a decade's worth of information on the NHRC's history in the field of complaints-handling has already been destroyed.

Notably, neither Commission's members nor its staff receive any additional training to serve as protectors of human rights at the time of their induction. Unsurprisingly, then, the staff and members continue to perform their jobs in an identical manner to their previous government work. The same bureaucratic, inefficient, and unjust processing of cases that has blighted the Indian judicial system is replicated in the NHRC. As for the investigation division, NHRC staff members have not developed a manual of procedures to ensure a victim-centered approach to investigating sensitive human rights violations, contrary to their expertise in investigating crimes. In spite of these widely-recognized problems, the NHRC has not adjusted its complaints-handling, training, or investigation methods.

The total of 349 staff cannot meet all the responsibilities expected from the NHRC. The NHRC has also stopped appointing expert 'advisers', which was the only way the NHRC was resourced to handle the complex human rights issues the country faces. After the report on the implementation of the Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989, an act intended to help the social inclusion of members of scheduled castes into Indian society, revealed dismal results, the NHRC created a 'Dalit Cell' specially within the NHRC to address protection of this highly vulnerable group. However, this 'Dalit Cell' has not been functional for more

than two years. Hence, there is a need for the NHRC to appoint 'resource persons' or 'experts' in different fields in order to provide access and proper advice on important human rights concerns.

III. Effectiveness:

The NHRC has become increasingly ineffective in protecting and promoting human rights in India. The NHRC has great potential to provide assistance to the many victims of human rights violations who are unable to seek justice in the over-crowded, time-consuming judicial system. Despite the NHRC's ineptness at handling complaints effectively, the desperate public has been approaching it for assistance at increasing rates. The five-member Commission responsible for these cases is overwhelmed by a constantly growing caseload, now over a hundred thousand, without any accompanying increase in resources. Analysis of the Commission's disposal rates seems to indicate that cases are dealt with at random. Of 3,111 cases considered between 1 August 2009 and 15 August 2009, an overwhelming 75 per cent of cases were dismissed before the opportunity to present evidence before a court. 11 per cent of cases were transferred to SHRCs, where the NHRC is highly unlikely to conduct any follow up, and another 11 per cent were disposed of with directions. While 3.15 per cent remained under consideration, only a single case was closed.

The most recent figures for July 2009 to May 2010 from NHRC newsletters suggest that a total of 81,981 complaints were received and 86,916 disposed by the Commission. This figure appears incredible, since a team of five commissioners – and during the period under scrutiny there were sometimes only three of them – could surely not dispose of over 86,000 complaints relating to human rights violations.

Further scrutiny of cases of torture and extrajudicial killings between January and May 2010 reveal that in almost all these cases,¹⁹ the recommendations are for payment of monetary relief or compensation to the victim of the violence and the seeking of a

19 In Case Numbers 1190/35/2004-2005, 406/1/2004-2005-CD, 1974/7/2002-2003, 2316/30/2006-2007, 14303/24/2006-2007, 25106/24/2006-2007, 126/6/2005-2006-CD, 40190/24/2002-2003, 6036/24/60/2007-2008

compliance report with proof of payment. In none of these cases have there been specific directions for the initiation of criminal prosecutions against the perpetrators. Significantly, virtually no prosecutions are launched through the NHRC's orders in cases of gross human rights such as torture and extra judicial killings.

Alarming, most cases disposed of during this period were registered several years ago.²⁰

Month under study: total cases referred to:	Cases disposed off pertaining to						
	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007	2007-2008
Feb' 2010: 24	1	1	4	5	6	3	3
March 2010: 12	1	1	3	1	1	2	2
April 2010: 53	2	4	5	8	5	7	11
May 2010: 45	2	6	9	5	3	4	7

The table above reveals that of the 106 complaints handled during a 4-month period in 2010, 9.4 percent of the cases were from the year 2002-2003; 19.8 percent from 2003-2004; 17.9 percent from 2004-2005; 16.01 percent from 2005-2006; 15.1 percent from 2006-2007; and 21.7 percent from 2007-2008. Therefore, almost 50 percent of the cases handled were registered five years earlier.

This is only a sample of the delays that complainants face in seeking assistance from the NHRC. People who continuously

20 Sourced from the website of the National Human Rights Commission of India

approach the NHRC have already lost their faith in this institution, and if urgent measures are not taken to improve the institution, it will lose whatever respect and repute it still enjoys among victims of human rights and human rights organizations. The Commission has consistently failed to change its methods, utilize available assistance from civil society, or demand an increase in their staffing patterns. Complaints-handling will become effective only if the NHRC is able to consider appointing honorary SRs in all the existing 620 districts of the country, so that these SRs may be the eyes and ears of the NHRC and travel to the site of an alleged violation within hours of a complaint reaching the NHRC. Credible persons from different fields could be invited to undertake such tasks on an honorary basis. But there must be the will for this to become a reality.

A further case in point is that of the response of the NHRC to a complaint relating to human rights defenders. Mr. Kirity Roy, Secretary of the human rights organization MASUM, organized a state-level 'Peoples Tribunal on Torture' (PTT) in May 2008 where 82 cases of extrajudicial killings, custodial death, rape, mysterious disappearances, and police torture were heard. These were conducted under the auspices of the National Project on Preventing Torture in India (NPPTI) of which Mr. Roy was also State Director. The PTT was inaugurated by Dr. Syeda Hameed from the Planning Commission of India, and the jury comprised several prominent figures at the national and state level, including a former Chief Justice of the Sikkim High Court and former Chairperson of the National Commission for Women.

Immediately after the PTT, the Kolkotta police registered a criminal case against Mr. Roy under several sections of the Indian Penal Code, including Section 120 (B) for criminal conspiracy, Section 170 for impersonating a public servant, and Section 229 for impersonating a juror or accessor.²¹ This was followed by a police investigation both in Kolkotta and Madurai, the national headquarters of the NPPTI. The NPPTI immediately submitted a complaint in this regard to the NHRC on 12 June 2008²² and sent

21 Indian Penal Code sections quoted in case registered at the Taltola Police station in Crime No 134 dated 09.06.2008.

22 Case No 169/25/2008-2009/ UC

notices to the Director General of Police in Kolkotta on 17 June 2008. However, the complaint was later closed by the NHRC on the ground that the police investigation was still underway. In the meantime, MASUM approached the High Court of Kolkotta with a Writ Petition²³ to quash the First Information Report (FIR) registered against Kirity Roy. The FIR was dismissed, and MASUM filed an appeal in MAT (Mandamus Appeal Tender) 1219/2009 in a Division Bench of the High Court of Kolkatta. While the appeal was pending, the Kolkotta police suddenly arrested Mr. Roy on 7 April 2010 and submitted a charge sheet against six other NPPTI staff. The final order of the High Court on 18 May 2010 directed a Committee of two senior police officials and one academic to review the matter.

The NHRC missed an opportunity to intervene in this case long before it reached the High Court, demonstrating the ineffectiveness of its complaints-handling system in cases concerning HRDs.

Another indicator that the complaints-handling system of the NHRC is failing its mandate is the Commission's handling of complaints relating to police 'encounters,' known as deaths arising out of predominately fake or staged encounters of alleged criminals with the police or army personnel. On 21 May 2010, the NHRC published the results of its investigations into so-called 'encounter deaths.' Of the 2,956 cases registered between 12 October 1993 and 31 April 2010, 1,590 had been registered on the basis of information received from the public authorities, while the remaining 1,366 were complaints registered by members of the public. These numbers suggest that there were no cases in which both the public authorities and the public attempted to register a complaint. After 17 years, the NHRC had only completed investigations into 62 percent of these killings, leaving 1,110 unexamined in 2010. Of the investigated 1,846 cases, only 27 were found to be murders during a staged encounter by the police. The remaining 1,819 killings were determined by the NHRC to be the result of genuine police encounters. It is unclear whether the cases investigated were the killings registered by the public authorities or the public. In the 27 cases of staged encounters, the NHRC recommended that the

23 WP NO Writ Petition No. 25022(W) of 2008

state authorities take punitive action against the guilty officials and pay compensation to the next of the kin of the deceased. As 1,110 cases remain unexamined, however, it is clear that the NHRC is unable to handle its caseload. Encounter death cases are only a small fraction of the cases the NHRC must dispose of every year. While the number of NHRC members is still just five, the number of complaints received by the NHRC has risen from a few hundred to over one hundred thousand complaints every year. A dramatic increase in the body and membership of the NHRC is required if it is to be adequately equipped to effectively perform the task of investigating these complaints thoroughly and reaching a considered conclusion. If the NHRC is to adequately protect and promote human rights in India, the ICC General Observations must be urgently heeded.

IV. Conclusion

Amidst the large number of HRIs in India, the NHRC seems unable take the lead in the national discourse on human rights. Around 450 million people in India live below the poverty line, with the national poverty rate amounting to 37.2 per cent. 46 per cent of India's children are undernourished – the highest rate in the world, double that of Sub-Saharan Africa. India's maternal mortality rate is among the highest in the world, at 450 deaths per 100,000 live births. According to an independent Committee appointed by the government to study employment in the informal sector, about 77 per cent (850 million) of the working people of India subsist on Rs. 20 per day or USD \$0.43. Approximately 93 percent of the working population is employed in the informal sector.²⁴ Over 131 million people are landless according to the Ministry of Rural Development. Land reform measures have not been successfully implemented, neither has surplus land been equitably distributed. A large percentage of India's population lives in inadequate housing without security of tenure or access to basic services, such as water and sanitation,

24 The "informal sector" has been given a variety of definitions, but generally includes economic activity that is neither officially regulated by the government nor taxed. It is not included in the country's Gross National Product (GNP). Global Development Research Center website, *available at* <http://www.gdrc.org/informal/001-define.html>.

with the government failing to provide affordable and low-cost housing options. This is the backdrop against which the NHRC has to understand its role, functions, and specific strategies.

The country is also witnessing widespread protests for justice, both nonviolent and violent. Today, a total of 51 Districts are considered seriously affected by conflict, with 18 districts moderately affected, 62 districts marginally affected, and 34 districts targeted. In total, this suggests that 165 out of India's 625 districts are affected. One of the worst manifestations of the struggle between the state army and civilians occurred in the state of Chhattisgarh during the Salwa Judum – "Peace March" or "Purification Hunt." The state recruited local indigenous people, including many children, who had previously been fighting the Naxalite insurgency in India to fight as state "Special Police Officers" (SPOs). The violence, accounting for 65 percent of the Naxalite violence in the country, escalated dramatically and was responsible for the burning of at least 644 villages, forcing 300,000 people to flee their homes and leaving 40,000 individuals living in displacement camps.²⁵ However, while the NHRC has rightly condemned the Maoist violence which resulted in the deaths of over 76 paramilitary personnel of the Central Reserve Police Force (CRPF), it has failed to speak on behalf of the affected populations of the region. An NHRC which is independent, transparent, believes in cooperation, and is effective should be able to take a stand on such situations before they reach such horrific levels.²⁶ For this to take place, the NHRC must be courageous and give allegiance to the struggling poorest of the poor.

The NHRC must also work with a number of national level coalitions and joint civil society initiatives that are studying the government's draft of the Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, and the government's second draft of the Protection of Children from Sexual Assault Bill. It must also respond to actions initiated by civil society organizations and welcome closer working relationships with such organizations. The

25 Campaign for Peace and Justice in Chhattisgarh, What is Salwa Judum?, *available at* <http://cpjc.wordpress.com/what-is-salwa-judum>

26 Salwa Judum – menace or messiah? The Times of India, 20 March 2010, *available at* <http://timesofindia.indiatimes.com/articleshow/5704885.cms>.

Housing and Land Rights Network (HLRN) in Delhi has raised a number of important concerns regarding India's decision to bid for the Commonwealth Games in 2010.²⁷ Active engagement with the HLRN would have provided the NHRC an opportunity to engage with more than 500,000 people directly affected by displacements caused by planning for this event, and therefore, with current economic, social, and cultural rights issues. It is this kind of human rights activism – as opposed to merely performing 'judicial functions' – that the NHRC must engage in if it is serious about changing its path.

Yet another opportunity for the NHRC to engage in human rights activism this year was during the 20th anniversary of the Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act, 1989. The National Coalition for Strengthening the SCs & STs (Prevention of Atrocities) Act produced a report card assessing 20 years of the Act and proposing amendments to the Act. However, the NHRC, despite having been instrumental in conducting perhaps the country's most unique study on the SC/ST Prevention of Atrocities Act in 2004, had nothing to do with this coalition of organizations gathered from across the country. The NHRC once again opted to remain an elite, detached institution.

From 28 June 2010 to 1 July 2010, the Working Group on Human Rights in India and the UN (WGHR) traveled to Geneva to speak with a number of actors, including the Chair of the ICC, the head of the OHCHR, and several Special Procedure Mandate Holders, regarding the need to rebuild the NHRC as an effective protector of human rights in India. This push is part of a new movement in India, developed throughout 2009 through the "Voices of Protest" network and leading to the powerful coalition, the All India Network of Individuals and Organizations Working with National Human Rights Institutions (AINNI). This growing group of individuals across India united in several meetings to gather information across India for a comprehensive report on NHRIs in India with special focus on the NHRC. With the evidence collected through AINNI, the country is getting ready to challenge the NHRC as it approaches the ICC for its re-accreditation.

27 Available in the publication "The 2010 Commonwealth Games: Whose Wealth? Whose Commons?" by Housing and Land Rights Network

The Indonesian National Human Rights Commission's Performance in 2009 to Early 2010

The Indonesian Human Rights Monitor (IMPARSIAL)¹

I. Key human rights issues in 2009-2010

During 2009 Indonesia was occupied with parliamentary, regional and presidential elections. Although Indonesia is recognized internationally as a democracy, with the reelection of President Yudhoyono considered a successful democratic development, election misconduct still took place during the 2009 elections. There was evidence of miscounting, a flawed registration process that left millions of citizens unregistered, as well as reports of corruption and vote-buying, or 'money politics'.² Another serious concern is the increase of generals standing as candidates for the presidency and vice-presidency who are alleged to have committed gross human rights violations in the past. These include General Prabowo Subianto³ and General Wiranto⁴.

1 Ms. Poengky Indarti, Executive Director

2 Money politics has been endemic in Indonesia since the fall of President Soeharto in 1998. It normally involves buying votes by giving people money and food, such as instant noodles, rice, eggs, and vegetable oil. It can also mean a candidate usually giving large sums of money to political parties to secure their support or to be chosen as their candidate.

3 General Prabowo Subianto is the son-in-law of former President Soeharto. During the Soeharto regime, Prabowo Subianto allegedly used force against civilians, for example in Mapnduma, Papua, in 1995; in East Timor during Indonesian occupation; and in Jakarta in enforced disappearance cases of student activists in 1996-1997, as well as during the May riot in 1998. General Prabowo Subianto has never been brought to justice for these allegations.

Both before and after the election, violence erupted again in the restive Papua region, including a shooting by unidentified gunmen at the mining site of PT Freeport McMoran Indonesia, which killed three people and injured dozens more. The government blamed Kelly Kwalik, leader of the OPM (the separatist Free Papua Movement) in Timika, Papua, and in November 2009 state security forces shot and killed him. But Kwalik's death did not stop the shootings, which have continued into 2010. The government and state security forces have responded harshly, deploying the military, police and intelligence in large numbers in Papua, as well as suppressing groups critical of the government by accusing them of separatism and bringing treason charges against them.

One month after the presidential election, there were explosions at the JW Marriott and Ritz Carlton hotels in Jakarta, allegedly carried out by the terrorist leader Noordin M Top. As a result of these attacks, police conducted a series of arrests that violated the basic legal principle of the presumption of innocence. Police shot dead several suspects rather than prosecuting them in the criminal courts. Noordin M Top was among those, shot dead by Densus (Special Detachment Anti Terror) 88 in September 2009.

2009 also saw religious and ethnic fundamentalist groups grow stronger in Indonesia. Even where they used violence, police seemed reluctant to prosecute the perpetrators. Authorities 'tolerated' many criminal acts allegedly committed by these groups, including the destruction of churches and property. Efforts to arrest Ahmadiyah⁵ members are ongoing.

There have been some cases where religious or customary law contradicts state law. For example, the Aceh *qanun* (bylaw) prescribes death by stoning as the penalty for adultery. Due to significant protests from the community, the application of *qanun* has been postponed.

4 General Wiranto is a former Indonesian Military Chief during Soeharto period. He is alleged to be responsible for a series of human rights violations in Indonesia, including in East Timor after its 1999 referendum, and the May riot in 1998.

5 Ahmadiyah is a persecuted sect of Islam considered deviant by the majority of Indonesian Muslims and by government.

Meanwhile, a 2009 review of economic, social and cultural rights highlighted many eviction cases, violence related to land disputes, and serious concerns regarding deforestation. The Lapindo⁶ case, prolonged since 2006, was finally dissolved. Many farmers have been criminalized in disputes with the plantation and agricultural industry concerning land ownership and land rights. Here, the state provides support and protection to private sector actors operating in these areas. Moreover, many state forestry officials have allegedly shot at peasants in the forest areas.

In early 2010, state support of fundamentalist agendas seemed to grow stronger with the rejection of petitions against the anti pornography bill and the blasphemy law.

Protection for human rights defenders from security forces has also weakened. In March 2010, fundamentalist groups attacked several LGBT activists organizing an international conference in Surabaya. In April 2010, the National Human Rights Commission (NHRC), while conducting training sessions for groups of transvestite and/or transgender activists at a separate event in Depok, West Java, also proved powerless against attack from fundamentalist groups.

II. Response by the Indonesian National Human Rights Commission

The Indonesian NHRC still consists of eleven members, divided into four sub-commissions – research and analysis, counseling, monitoring, and mediation – in accordance with the Commission’s functions that are regulated by Law 39/1999.

In 2009 the Commission again failed to urge the Attorney General to conduct investigations into cases of gross human rights violations. One case – ‘Wasiar and Wamena’ – remains suspended nine years on, having been returned by the Attorney General to the NHRC office. This highlights a weakness of the Commission,

6 The ‘Lapindo case’ refers to the mud flows in Porong, Sidoarjo, which sunk several villages in May 2006, after the Lapindo Company drilled the land in order to exploit gas. The company refuses to give compensation to the affected communities.

which lacks the authority as an investigator to summon the suspects of human rights violation, with serious implications for the Commission's effectiveness. As a result, in 2009 the Commission filed an amendment to Law 39/1999 appealing for additional powers to investigate human rights violations.

The abduction of activists is understood by members of the House of Representatives to be a serious violation. In 2009 members therefore recommended that the President immediately issue a Presidential Decree to establish an ad hoc human rights court for cases of forced disappearance. The turn of the duties of the House of Representatives in the period of 2004-2009 to the period of 2009-2014, however, have led this case to be uncertain. At the time of writing, the Chairman of the House of Representatives for 2009-2014 has still not formally made the proposed recommendations to the President.

During 2009, the Indonesian NHRC conducted some research and assessment activities including, inter alia, research on the draft State Secrecy Act. It also conducted an inquiry into the South Jakarta District Court decision acquitting Muchdi Purwopranjono of the murder of the human rights activist Munir, who was killed on board a flight from Jakarta to Amsterdam on 6 September 2004.

The NHRC also recommended that the government immediately ratify the Rome Statute. Although the government has already agreed to this proposal in principle, the matter was set aside during the 2009 election period and has not been taken up again by either government or parliament.

In handling the Lapindo case, the plenary session of the Commission in March 2009 decided that the case qualifies as a gross human rights violation. The Commission therefore agreed to establish an ad hoc team to operate a pro-justitia investigation. However, at the time of writing, this team has still not been formed.

The Commission received many complaints from citizens who experienced violations of their right to vote. Despite promises to bring these cases to court, the NHRC collected data on those who had their right to vote denied, but failed to actually bring the cases to court.

In 2009, the NHRC also conducted a monitoring activity with regard to Indonesian migrant workers and is cooperating with National Human Rights Institutions (NHRIs) in several other countries hosting the greatest numbers of Indonesian migrant workers – namely South Korea and Jordan.

Several teams formed by the NHRC to investigate gross human rights violations have not yet resolved their cases, including cases of extra-judicial killings and state-sanctioned violence in ‘military operations areas’ in Aceh and Papua.

The NHRC has filed its objections to cases of police violence against terrorist suspects. However impunity for state security forces is still a serious issue, as police continue to use lethal force to deal with terrorist suspects.

In a plenary session in June 2009, the NHRC decided to hold a presidential and vice-presidential candidates’ dialogue ahead of the presidential election. Unfortunately, the dialogue never took place due to a lack of participants. Only one pair of candidates accepted the Commission’s invitation: the incumbent President Yudhoyono, and Vice President Candidate Boediono. The other candidates – Jusuf Kalla, Megawati, Wiranto and Prabowo Soebijanto – were not willing to attend the dialogue. Prabowo and Wiranto are understood to have refused because of allegations that they committed gross human rights violations. They had previously refused to be summoned by the Commission in relation to these cases.

Limited capacity means that the majority of the activities of the NHRC involves dealing with complaints as well as taking stronger action on just a few larger cases. The NHRC’s effectiveness also suffers from poor coordination among the Commissioners and a lack of strong leadership. The Commission is known as a skillful institution for gaining massive media attention on certain cases, but often fails to follow up adequately to resolve these cases of human rights violations.

In January 2010 a change in NHRC leadership was expected to revitalise the Commission. However, the change of personnel was not comprehensive. Vice Chairman of External Affairs

Hesty Armiwulan was replaced by Nurkolis Hidayat; and Vice Chairman of Internal Affairs Ridha Saleh was replaced by Yoseph Adi Prasetyo. Commission chairman Ifdhal Kasim remained.

In early 2010, two incidents involving the NHRC are worth noting. Firstly, the case of Koja in North Jakarta, where the Civil Service Police Unit (Satpol PP) clashed with the civilian community which had questioned the eviction of the historical Mbah Priok tomb. In this case, the Commission took the role of mediator in the dispute between these two parties. Secondly, the aforementioned assault cases against LGBT groups carried out by fundamentalist groups in Surabaya and Depok. Following the Surabaya attack, the NHRC urged all parties to respect the rights of the LGBT community as Indonesian citizens with the right to free assembly, and urged police officers to ensure the safety of the participants in the conference. However, following the FPI attack, the NHRC was accused of weakness, and was seen to lack the power to deal with fundamentalist groups. This further undermined the Commission's authority among the government and state security forces.

III. The Independence of the National Human Rights Commission

NHRC Commissioners for the period 2007-2012 were appointed by a selection committee chosen by the plenary meeting of previous Commissioners. The selection committee must be credible, recognized experts, namely: Professor Soetandyo Wignjosoebroto (Chairman, lecturer in sociology at Airlangga University); Dr Siti Musdah Mulia (an expert on pluralism, gender and Islam; Maria Hartiningsih (journalist, expert on women's issues); Kamala Chandrakirana (gender expert, ex-chairman of the National Commission for Women), and Professor Komarudin Hidayat (Muslim scholar, rector of the Islamic University IAIN). The first stage of the process identified 178 candidates for administrative review, followed by a second stage examining written submissions by the remaining 155 candidates. This narrowed the pool down to 90 candidates. The selection committee then held a public elimination system to select just 45 of these candidates, who are submitted to

a plenary session of the NHRC before further scrutiny before the House of Representatives. According to Article 83 paragraph (1) of Law No.39/1999 on Human Rights, the House of Representatives are authorized to appoint 35 people as NHRC Commissioners.

The 178 initial candidates were selected from various backgrounds, including activists, lawyers, retired military and police members, professors, researchers, judges, prosecutors, journalists, consultants, religious leaders, entrepreneurs and retired civil servants. Prior commissioners were also among those considered. The majority of the prospective members were male. Of the 178 initial candidates, only 21 were female.

Parliament narrowed the 45 candidates down to 11 people: 10 men and one woman. Commissioners for the 2007-2012 periods were fewer when compared with the 2002-2007 period, which consisted of 21 people (18 men and 3 women). It should be noted that at the House of Representatives stage, political interests are influential in determining whether or not prospective Commissioners pass their tests.

The final 11 candidates included activist NGOs (human rights and environment), journalists, lecturers, judges, and lawyers. None had an army or police background. The Commission is now chaired by Ifdhal Kasim (lawyer, former director of the ELSHAM, a human rights organization based in Jakarta), accompanied by deputies Ridha Saleh (WALHI, Friends of the Earth) and Hesti Armi Wulan (lecturer and women's rights activist).

The eleven Commissioners selected by the House of Representatives are formally appointed by the president. However, NHRC Commissioners for 2007-2012 are considered independent from government intervention.

According to Article 81 of Law No.39/1999, the Secretary General of the NHRC, who deals with the Commission's administration, must be a civil servant who is not a Commissioner. This complicates the independence of the Commission, particularly in the area of budgeting, due to the limitations imposed by government bureaucracy. For example, the Commission's funding must be authorized by the Secretary General, so that often the Commission

cannot be present because it clashes with bureaucratic obstacles. The NHCR Chair is aware of this obstacle and is seeking an appropriate solution.

IV. The Effectiveness of the Human Rights Commission's Work in 2009 – Early 2010

In certain cases, the Commission's credibility seemed diminished within government circles. Minister of Defense Juwono Sudarsono, for example, has instructed military retirees suspected of committing human rights violations not to cooperate if summoned or investigated by the NHRC.

In 2009, the Commission was also less active in lobbying members of parliament and intervening in discussions of draft legislation going through parliament. Moreover, the NHRC has also been less active in holding other state institutions to account in order to protect and enforce human rights.

The small number of Commissioners against the huge volume of cases the NHRC receives reflects an image that the new Commissioners are slow and disoriented. Many cases, old and new, are not swiftly or effectively handled by the Commission.

Poor leadership from the NHRC Chairman exacerbates this perception. All the Commissioners seem unable to coordinate effectively. Consequently, many cases are abandoned.

The NHRC seems reactive in its handling of cases. It often promises to expend great effort to settle a case, but then fails to bring it to a successful resolution. It also prioritizes poorly, with many significant cases not completed. Conversely, non-priority tasks that actually fall outside the Commission's remit have been tackled and resolved, such as the NHRC's work on the chaotic case of Permanent Voters Election list 2009.

The Commission appears ambitious regarding cases of high political value, but unrealistic about its capacity and resources – for example, in its efforts to uncover human rights violations during the Soeharto regime. The Commission confuses its role with that of a *pro justitia*

investigator, forgetting that it would still face serious complications if the results of its investigation were handed over to the Attorney General, given that it is still very conservative and corrupt.

V. Consultation and Cooperation with NGOs

The NHRC's consultation and cooperation with NGOs has been good. The majority of Commissioners have activist backgrounds as NGO representatives, lawyers and judges who had previously worked in NGOs. This cooperation is further enabled by the mutual trust between Commissioners and civil society representatives, given that there are no retired armed forces or police on the Commission.

The current Commissioners are accessible when human rights violations occur. The Commissioners are aware that they require NGO support, and therefore prioritize maintaining close collaboration with NGOs. The NHRC is well-accepted by NGOs, particularly in comparison with its poor acceptance in government circles.

VI. Conclusions and Recommendations

Serious human rights concerns during 2009 were not matched by swift and effective responses by the NHRC, particularly given that it is not only current human rights violation cases that must be addressed, but also cases of past human rights violations which remain unresolved. Stagnated investigations at the hands of the Attorney General also proved disappointing, including instances where the Attorney General returned case files without giving any reason.

The National Human Rights Commission of Indonesia still needs to increase its capacity and ability to work strategically. Therefore, some recommendations for its improvement are as follows:

1. Improving leadership and teamwork skills to improve the performance and effectiveness of the Commission;
2. Increasing the capacity of the Commissioners;
3. Improving the Commission's reputation within the government and House of Representatives;

4. Undertaking serious political analysis, enabling the Commission to negotiate more effectively with other institutions;
5. Securing external financial resources to strengthen the position of the Commission vis a vis government;
6. Promoting revised Law no. 39/1999 on Human Rights and Law No.26/2000 on the Human Rights Court among parliament, government and civil society, in order to secure their support to strengthen the Commission's legal position.

Rapid Developments in Japan

Citizens' Council for Human Rights Japan¹

General Overview of Japan's Human Rights Situation

After a long-awaited regime change in September 2009, the INDEX 2009, a policy document setting out the intentions of the new ruling Democratic Party of Japan (DPJ), gave human rights groups hope that the human rights situation in Japan could improve under the new administration. These policies promised to tackle several human rights issues that had remained deadlocked under the previous Liberal Democratic Party (LDP) government, including antidiscrimination legislation on protecting people with disabilities; revision of the Civil Code; voting rights for foreigners with permanent resident status; the establishment of a National Human Rights Institution (NHRI); and ratification of several Optional Protocols.¹ During her inaugural press conference, the new Minister of Justice Keiko

1 Prepared by Shoko Fukui

2 "Five of the human rights treaty bodies (Human Rights Committee, Committee on the Elimination of Racial Discrimination, Committee against Torture, Committee on the Elimination of Discrimination against Women, and Committee on the Rights of Persons with Disabilities) may, under particular circumstances, consider individual complaints or communications from individuals. Any individual who claims that her or his rights under the covenant or convention have been violated by a State party to that treaty may bring a communication before the relevant committee, provided that the State has recognized the competence of the committee to receive such complaints. Complaints may also be brought by third parties on behalf of individuals provided they have given their written consent or where they are incapable of giving such consent."

Please refer to the website of Office of United Nations High Commissioner for Human Rights. <http://www2.ohchr.org/english/bodies/petitions/index.htm>.

Chiba raised three key human rights issues: the establishment of an NHRI; state recognition of the competence of UN human rights committees to receive individual complaints; and the transparency of police investigation processes.

Human rights in Japan have been exposed to the international spotlight in the past few years. The UN Human Rights Committee considered the fifth periodic report submitted by Japan in October 2008;² the Committee on the Elimination of Discrimination against Women considered the sixth periodic report by Japan in July 2009;³ and the Committee on the Elimination of Racial Discrimination considered the combined third to sixth reports by Japan in February 2010. Jorge A. Bustamante, Special Rapporteur on the human rights of migrants, also visited Japan in March 2010.⁴

In July, a new immigration control system was introduced by revising three laws: the Immigration Control and Refugee Recognition Act; the Special Act on the Immigration Control of, Inter Alia, Those who have Lost Japanese Nationality Pursuant to the Treaty of Peace with Japan; and the Act of the Basic Resident Registers. The new system introduced tighter control measures on foreigners residing in Japan. The new measures include a new registration card containing an integrated circuit chip which non-citizens must carry at all times. If they do not, they may be subjected to penalties. Undocumented residents and asylum seekers may be excluded from resident registration, effectively rendering them invisible to state authorities.

The Cabinet Office set up an expert panel on the Ainu indigenous people and submitted a report to the government which recommended policies to establish a symbolic space for

2 The Concluding Observations are found in <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/401/08/PDF/G0940108.pdf>

3 The Concluding Observations are found in http://www.bayefsky.com/pdf/japan_t4_cedaw_44.pdf

4 The Concluding Observations are found in <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/415/82/PDF/G1041582.pdf>

5 In Ashikaga, Tochigi Prefecture, in 1990, a four year old girl went missing and Toshikazu Sugaya was convicted of her murder before receiving a life sentence in 1993. His conviction was based on his confessions and DNA testing; however he later retracted the confession, claiming it was coerced. His appeal for retrial was admitted in June 2009 and he was found innocent in March 2010.

the Ainu people. Other recommendations include conducting a nationwide survey on Ainu living outside of Hokkaido (where Ainu indigenous people have historically lived.) This report led to the establishment of an implementation panel in January 2010 which includes five Ainu people.

The Cabinet Office also set up a task force on systemic reform for people with disabilities in December 2009. Poverty-related issues, such as problems facing the ‘working poor’ and makeshift shelters for temporary workers, were also major human rights concerns during the latter part of the year.

Effort to Establish NHRI

In October 2009, the Japan Federation of Bar Associations (JFBA) held a public gathering on the Optional Protocol to the Convention against Torture and the call for the establishment of an NHRI. This was attended by the President of the European Committee for the Prevention of Torture, Secretary General of the Association for the Prevention of Torture, representatives from National Human Rights Institutions in Asia and the director of Asia-Pacific Forum.

Following the inaugural statement by the Minister of Justice Keiko Chiba in September 2009, several civil society groups including Citizens’ Council for Human Rights Japan (CCHRJ) jointly called for the government to set up an NHRI based on the Paris Principles, along with the enactment of antidiscrimination laws and ratification of Optional Protocols recognizing the competence of the human rights committees to consider individual complaints. The CCHRJ organized a public

7 In 2003 an elected official, his family members and other associates were arrested on suspicion of violating the Public Offices Election Act in Kagoshima Prefecture. The prefectural police conducted wrongdoings during the investigation and the Kagoshima district court denied the credibility of the depositions by the arrested, and handed down a ‘not guilty’ verdict.

8 Two men were arrested and sentenced to life imprisonment in 1978 for burglary and murder in Ibaraki Prefecture. They were convicted on the strength of their confessions and eyewitness testimonies. They claimed they had been forced to confess by police; but their life sentences were finalized at the Supreme Court in 1978. They were released on parole in 1996 and have always protested their innocence. Their retrial was decided in 2009.

gathering at Diet Members Building in January 2010, attended by various civil society groups, at which a statement containing the aforementioned request was signed by nearly 100 civil society groups and more than 100 individuals and submitted to the then Prime Minister, Minister in Charge of People with Disabilities, Minister of Justice, Minister of Foreign Affairs and the ruling DPJ.

Since these civil society efforts came just after the DPJ took power in September, it is perhaps too soon to assess their success. However, considering that the NHRI issue had only previously been seriously raised by a few civil society groups (such as the JFBA and Buraku Liberation League or BLL), these efforts do represent a step forward since they demonstrate collaboration among civil society groups within human rights fields.

The Point of Contention

Legal scholars, lawyers and BLL members have discussed the key components for a desirable NHRI. Their critical observation concerns the ministry with which the NHRI should be associated. According to the Paris Principles, an NHRI should be independent and conduct its mission without being directed or advised by any other government agency. However in Japan, the NHRI would need to be associated with one of the ministries in order to be legally established. The Cabinet Office would be the preferred option, but it is widely admitted that the office does not have sufficient financial or human resources to organize an NHRI. The Ministry of Justice is not ideal, but human rights issues are traditionally handled under its control and it is better financed and staffed than the Cabinet Office. However in June 2010, the three key officials of the Ministry of Justice made public an interim report on the establishment of a new human rights relief organization. It recommends that the organization of a new Human Rights Commission should be examined continuously, with a mind to establishing it under the Cabinet Office.

Conclusion

The debate on an NHRI may have just restarted for the first time since 2003, when the previous Human Rights Protection Bill was scrapped, but is expected to develop rapidly. Japan is required to report its progress on the establishment of an NHRI within one year of the adoption of the concluding observations⁹ of the Committee on the Elimination of Racial Discrimination, the treaty body of International Convention on the Elimination of All Forms of Racial Discrimination, so the related bill may be submitted in the next year. In Japan there are strong claims by parties opposing an NHRI that such an institution could infringe the freedom of expression by employing vague definitions of 'human rights' or 'violations', or by conducting house searches without writ. In order to make an NHRI in Japan a reality, civil society groups should not only insist on adherence to the Paris Principles but also work together to refute such misleading claims.

9 The Concluding Observations are found in <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/415/82/PDF/G1041582.pdf>

Malaysia: Substantial Reforms Still Elusive

Suara Rakyat Malaysia (SUARAM) and Education and Research Association for Consumers, Malaysia (ERA Consumer)¹

I. Introduction

In 2009, the Human Rights Commission of Malaysia (SUHAKAM) celebrated the 10th anniversary of the passing of its enabling law, the Human Rights Commission of Malaysia Act 1999 or Act 597. On this occasion however, the Commission faced a serious crisis of public confidence because of two major factors: firstly, its underperformance and inability to bring about significant improvements in human rights in Malaysia; and secondly, the possible downgrading by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC). The boycott by 42 civil society organizations is the most notable reflection of the crisis of public confidence faced by SUHAKAM.

Nevertheless, the year also saw perhaps the most significant development relating to SUHAKAM since its establishment, namely, the enabling law of SUHAKAM – the Human Rights Commission of Malaysia Act 1999 – was amended in 2009. Government, by virtue of the majority commanded by the ruling party, hurriedly tabled and passed the first set of amendments

1 Prepared by Mr. John Liu, Documentation & Monitoring Coordinator (SUARAM) and Nor Azwani binti Abdul Rahman, Legal Executive of the Human Rights Desk (ERA Consumer)

in March 2009, without the knowledge of, and consultation with any civil society group. The amendments were minor and superficial, and were bulldozed through by the government, just one day before the ICC convened to decide on the status of SUHAKAM, in a desperate attempt to avoid international embarrassment of SUHAKAM's impending downgrading by the ICC

Among the amendments was a limit to the tenure of SUHAKAM Commissioners, which caused all incumbent Commissioners to leave SUHAKAM after their term ended in April 2010. The new amendments prescribed a maximum of only one reappointment of incumbent commissioners. However, it took the government 45 days to appoint a new batch of Commissioners, resulting in a disruption of the work of SUHAKAM during the interim period.

II. Independence

A. The Enabling Law

Since its establishment under the Human Rights Commission of Malaysia Act 1999, SUHAKAM's lack of independence has been a matter of serious concern, especially among civil society organisations working on human rights in Malaysia.

Before the enabling law of SUHAKAM was amended in 2009, SUHAKAM Commissioners were appointed by the King solely upon the advice of the Prime Minister. In addition, Commissioners held office for two years and were eligible for re-appointment for any number of times. These aspects seriously undermined SUHAKAM's independence since there was a real danger that Commissioners could practise self-censorship and conduct themselves in such a way to continually gain the confidence of the Prime Minister and secure renewal of tenure. However, a notice of possible downgrading by the ICC forced the government to address these issues by amending the enabling law of SUHAKAM.

International Concerns over SUHAKAM's Independence and the Malaysian Government's Response

Particularly since 2008, concerns regarding SUHAKAM's independence have become a matter of concern to the international community. In 2008 and 2009 alone, SUHAKAM has been reviewed three times by the ICC due to the fact that it does not fully comply with the Paris Principles and has not fully addressed all recommendations made by the ICC. Further, when Malaysia was reviewed in the UN Human Rights Council's Universal Periodic Review (UPR) in February 2009, four countries made recommendations to the Malaysian government about these issues.²

In its April 2008 review of SUHAKAM, the ICC Sub-Committee on Accreditation gave a one-year notice to SUHAKAM to make improvements based on the following four recommendations:

1. The independence of the Commission needed to be strengthened by the provision of clear and transparent appointment and dismissal process in the founding legal documents.
2. With regard to the appointment of the members of the commission, the Sub-Committee noted the short term of office of two years.
3. The importance of ensuring the representation and involvement of different segments of society in suggesting or recommending candidates to the governing body of the Commission.
4. The need for SUHAKAM to interact more with mechanisms of the international Human Rights System, and participate in human rights mechanisms and making recommendations at national level.

Failing these, the Commission's accreditation would be downgraded from "A" status to "B".

2 Report of the Working Group on the Universal Periodic Review of Malaysia, A/HRC/11/30, (paragraph 106(7), (pp. 27-28).

Malaysian Government Rushes Through Superficial Amendments

Implementation of the first three of the four recommendations made by the ICC required the amendments to the enabling law of SUHAKAM, the Human Rights Commission of Malaysia Act 1999. There had been no visible efforts to act upon this notice throughout the one-year period given by the ICC.³ However, on 24 March 2009, just two days before the ICC convened its accreditation meeting, amendments were tabled and hurriedly passed by the next day. These amendments were made without any consultation with civil society groups. In fact, members of parliament themselves were given very little time to study and debate on the bill.⁴

Among the amendments made on 25 March 2009 was to Section 5(2) of Act 597 which gave the Prime Minister the sole prerogative of selecting candidate commissioners for appointment by the King. It proposed the creation of selection committee comprising:

- i. the Chief Secretary to the Government who shall be the Chairman of this committee;
- ii. the incumbent Chairman of SUHAKAM; and
- iii. three other members, from amongst eminent persons, to be appointed by the Prime Minister.

However, a provision stated that the views or recommendations of the committee are not binding upon the Prime Minister in the new selection process.

3 The total lack of commitment of the government to strengthen SUHAKAM was clearly seen during the Universal Periodic Review (UPR) on Malaysia in February 2009. Here, four countries recommended to ensure the independence of SUHAKAM in accordance with the Paris Principles and also to widen the scope of SUHAKAM to cover all rights in the Universal Declaration of Human Rights. The government of Malaysia merely noted by the these recommendations, which were not listed as those which enjoyed its support.

4 In protest at the hasty and non-consultative manner in which the bill was pushed through, opposition Member of Parliament Lim Kit Siang said, "We were not given proper notice and there was no consultation. We should have been given a day's notice to review the amendments... this is totally against the Standing Orders of the House." The Speaker of the Lower House of Parliament subsequently suspended Lim temporarily when he pressed on further to challenge the manner in which the amendments were tabled.

Amendments were also made to Section 5(4) of the Human Rights Commission of Malaysia Act, with regard to the Commissioners' terms of office. The amendments extended the commissioners term of office from two years to three years, but with a maximum of two terms in office. Previously, there were no limits to the extension of a Commissioner's term in office. This amendment effectively disqualified all current Commissioners serving their terms in 2009 from being re-appointed as all of them have served for either two terms or more.

Finally, the amendments included a provision which states that the Prime Minister may determine suitable mechanisms, including appropriate key performance indicators, to assess the performance of Commissioners in carrying out their functions and duties. These indicators shall be taken into consideration in the future appointment and dismissal of Commissioners.

ICC's March 2009 Special Review and Recommendations

In its special review on 26 March, the ICC recommended that "consideration of [the accreditation status] of SUHAKAM be deferred to its next session" as the amendments to the enabling law of SUHAKAM was still then before the Upper House of the Parliament.⁵ The ICC also noted that "some of the concerns it raised at its April 2008 session have been addressed (e.g. the expansion of the term of office to 3 years renewable)".⁶ The ICC further:⁷

1. expressed its disappointment that the amendments do not make the process more transparent through a requirement for broad based participation in the nomination, review, and selection of Commissioners, and recommended that the process be further strengthened through inclusion and participation of civil society;

5 Under the Malaysian parliamentary system, a bill has to be passed firstly by the Lower House (House of Representative), followed by the Upper House (House of Senate). When a bill has completed these two parliamentary stages, it will need the Royal Assent and affix Public Seal by the King before being gazetted as a law.

6 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, "Report and Recommendations of the Session of the Sub-Committee on Accreditation", Geneva, 26-30 March 2009 (p. 10).

7 Ibid.

2. expressed its concern with regard to the inclusion of performance indicators, used in relation to re-appointment or dismissal decisions, and stressed that such requirements must be clearly established and appropriately circumscribed, so as not to interfere in the independence of members; and made public; and
3. stressed the need for SUHAKAM to continue to promote ratification and implementation of international human rights instruments.

The Government's Further Amendments

On 22 June 2009, further amendments to Act 597 were tabled for the first reading in the Lower House of the Malaysian Parliament. However, the proposed amendments changed the previous amendments passed in the Lower House of Parliament in March 2009, and these were:⁸

1. specifying that three members of the selection committee be appointed from amongst civil society, where previously it merely mentioned "eminent persons" as members, apart from the Chief Secretary of the Government as the Chairman, and the SUHAKAM Chairman; and
2. the omission of the provision in the March 2009 amendments which stated that the opinion, view or recommendation of the committee upon consultation by the Prime Minister will not be binding on the Prime Minister.

Despite the inclusion of members of civil society in the proposed committee, there remain concerns that no provision was included to ensure civil society's full and transparent participation in the process. Another concern is the possibility of the Prime Minister appointing government-organised NGOs to the proposed selection committee.

8 Human Rights Commission of Malaysia (Amendments) (Amendments) Bill 2009.

Furthermore, the amendments only address one of the several concerns raised by the ICC. Other concerns of the ICC were ignored, such as those pertaining to the transparency of performance indicators for Commissioners, and as well as SUHAKAM's encouraging ratification of international human rights treaties.

Noting that the latest amendments would not be adequate to ensure SUHAKAM's full compliance with the Paris Principles, SUARAM and ERA Consumer submitted on 1 July 2009 their own proposal for amendments to the Prime Minister's Department. The two NGOs proposed the following amendments to Act 597:⁹

1. Changing the composition and procedures of the proposed selection committee to ensure transparency and public participation, and including a public process for nomination of candidates;
2. Ensuring that the proposed performance indicators for commissioners are made public; and
3. Compelling the Parliament to debate on reports of SUHAKAM in order to ensure that SUHAKAM's recommendations, including those pertaining to ratification to international human rights treaties are acted upon by the government.

In addition, the two NGOs raised other longstanding concerns, including that all Commissioners serve full-time in office, and that SUHAKAM be placed under Parliament instead of the Prime Minister's Department so as to ensure structural autonomy from the Executive.¹⁰

None of these proposals were included when the Lower House passed the government-proposed amendments on 2 July, and the Upper House passed them on 9 July 2009.

9 See Proposed Amendments to the Human Rights Commission of Malaysia Act (Act 597) by SUARAM and ERA Consumer, June 2009; and SUARAM, Letter to Datuk Seri Mohamed Nazri Abdul Aziz, 'Re: Proposals by Human Rights NGOs for Amendments to the Human Rights Commission of Malaysia Act', dated 1 July 2009.

10 Ibid.

ICC's November 2009 Special Review of SUHAKAM

In November, the ICC resumed its special review to determine SUHAKAM's status, during which the Commission was accredited with an "A" status. The ICC nevertheless noted that the final amendments may not, in practice, address all its concerns raised in previous sessions, namely:¹¹

1. the selection of civil society representatives on the selection committee is at the sole discretion of the Prime Minister; and
2. decision of the selection committee are only recommendatory, since the Prime Minister is required merely to consult with, but is not bound to accept its decisions.

The ICC also noted the need to assess the proposal to develop performance indicators during re-appointment or in cases of dismissal and whether these are "clearly established; appropriately circumscribed, so as not to interfere in the independence of members; and made public".¹²

Because of these outstanding concerns, the ICC stated that it would further reassess SUHAKAM's "A" status after a period of one year. Nevertheless, SUHAKAM announced its "A" status accreditation in a press conference on 26 November 2009, even before the ICC made public its decision.¹³

B. New Selection Process Flawed from the Very Beginning

Civil society organisations anticipated the setting up of the selection committee in early 2010 because of the imminent expiration of the terms of incumbent Commissioners by 23 April. However, the government did not announce any development relating to the new selection process until February 2010.

11 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, "Report and Recommendations of the Session of the Sub-Committee on Accreditation", Geneva, 16-18 November 2009 (pp. 8-9).

12 Ibid. (p. 9).

Subsequently, the selection process that followed was entirely flawed by being largely shrouded in secrecy - from the appointment of the selection committee to the nomination and appointment of Commissioners.

New Selection Committee Kept Secret

Among the amendments made in July 2009 was the inclusion of a new five-member committee to advise the Prime Minister in the selection process of the new set of commissioners. However, civil society raised concerns over the Prime Minister's full discretion to appoint civil society representatives in the selection committee.

Due to these concerns, on 1 February 2010, SUARAM sent an invitation to then-SUHAKAM Chairperson Abu Talib Othman for a dialogue with Malaysian civil society organisations to obtain updates on the selection committee. As the incumbent chairperson, Othman is automatically a member of the selection committee. SUARAM was particularly to find out how the three civil society representatives in the selection committee would be appointed, and how the selection committee would carry out the selection process.

However, on 4 February 2010, the then SUHAKAM Chairperson declined SUARAM's invitation, stating that the selection committee had already been set up although it was yet to meet. As such, he also said that he was in no position to provide any information pertaining to the new selection process.¹⁴

It must be emphasised that government never publicly and officially announced the setting up of the selection committee. It was only through the then SUHAKAM Chairperson's reply that civil society organisations were informed that the selection committee already existed.

13 "It's still grade A for Suhakam", Malaysiakini, 26 November 2009, <http://www.malaysiakini.com/news/118411> (accessed at 26 April 2010).

14 Letter to Mr. John Liu, "Re: Invitation to a Dialogue with Malaysian NGOs on the Developments of the New Selection Process of SUHAKAM", 4 February 2010, signed by Tan Sri Abu Talib Othman.

On 1 April 2010, less than one month before the respective terms of the incumbent commissioners expired, Malaysiakini reported that it had received information from undisclosed sources that the Bar Council vice president, Lim Chee Wee; Director of NAM (Non-Aligned Movement) Institute for the Empowerment of Women Malaysia, Rafiah Salim; and former Chief Judge of Malaya, Haidar Mohamed Nor, were appointed as “civil society representatives” to the selection committee. However, the online news portal failed to obtain confirmation from the three individuals about their appointments.¹⁵

It was only on 6 April 2010, Deputy Minister in the Prime Minister’s Department Liew Vui Keong confirmed the three names which were reported by Malaysiakini on 1 April 2010 as the appointed “civil society representatives” in the selection committee. Liew was replying to a query by an opposition MP about this news item.¹⁶

Selection Process Not Inclusive and Transparent, Extremely Short Period for Nominations

Later in the month of February 2010, several Malaysian civil society organisations received letters from the Director-General of the Prime Minister Department’s Legal Affairs Unit about nominations for candidates for new commissioners. Each organisation was allowed to give one nominee. However, only selected organisations received this letter. The letter also gave an extremely short deadline of about one week for selected civil society groups to make nominations.¹⁷

In response, SUARAM, together with Amnesty International Malaysia and Tenaganita (two other organisations which received the nomination letter) wrote a letter to the Prime Minister’s

15 See “Suhakam replacements shrouded in secrecy”, Malaysiakini, 1 April 2010, <http://www.malaysiakini.com/news/128118> (accessed on 23 June 2010).

16 Liew Vui Keong (6 April 2010) First Meeting, Third Session of Twelfth Parliament, Hansard, DR.6.4.2010 (p. 11) <http://www.parlimen.gov.my/hindex/pdf/DR-06042010.pdf> (accessed on 23 June 2010).

17 SUARAM received the official nomination letter by post on 22 February 2010.

Department on 22 February 2010 to open up the nomination process to the public by making the nomination form available on the department's website and a public announcement. This is to ensure inclusiveness in the selection process. The groups also urged the government to reveal the names of the three civil society members of the selection process.¹⁸

On 24 February 2010, civil society organisations sent another letter to the Chief Secretary to the Government as the designated chairperson of the selection committee about the selection process. The letter, signed by 29 organisations, urged that members of the Commission be selected from a pool of qualified candidates proposed through a transparent, participatory and inclusive process guided by the Paris Principles and international human rights standards. They further urged the selection committee to make public all names and profiles of candidates received; and to hold public interviews. They argued that the public must be fully informed of the process, each candidate's qualifications, competence and integrity and the basis for the committee's decisions.¹⁹

However, neither the Prime Minister's Department (which coordinated the selection process) nor the Chief Secretary to the Government (as the designated chairperson of the selection committee) replied to the letters sent to them by civil society organisations. They kept silent on this matter until the new set of commissioners was announced. Thus, the selection committee operated in a secretive manner, with no news or statements on the development of the status of the selection process.

Government Says NGOs Need Not Be Consulted

On 6 April 2010, opposition MP Teresa Kok questioned the government of its reasons for not consulting with civil society

20 Letter to Dato' Abdullah Sani Ab Hamid, "Re: Nominations for the Appointment of Members of the Human Rights Commission of Malaysia (SUHAKAM) for 2010-2013", 22 February 2010, signed by SUARAM, Amnesty International Malaysia, and Tenagnita.

19 Letter to Tan Sri Mohd Sidek Haji Hassan, "Re: New Selection Process of Members of the Human Rights Commission of Malaysia (SUHAKAM)", 24 February 2010, signed by 29 civil society organisations.

while setting up its selection committee. Deputy Minister Liew Vui Keong replied by saying, "There is no provision in the enabling law of SUHAKAM that says the Prime Minister needed to discuss with NGOs before making the appointments."²⁰

Two Candidates Omitted – No Explanation by the Government

On 21 April 2010, the newspaper The Star reported that the selection committee selected nine nominees to be considered by the Prime Minister for the appointment to SUHAKAM. They were:²¹

1. Malaysia's former United Nations permanent representative Tan Sri Hasmy Agam;
2. Indigenous rights activist Jannie Lasimbang from Sabah;
3. National Customary Rights advocate and lawyer Detta Samen from Sarawak,
4. Children's rights activist Dr James Nayagam;
5. Women's rights activist Maria Chin Abdullah;
6. FOMCA (Federation of Malaysian Consumers Associations) secretary-general Muhammad Sha'ani Abdullah;
7. Former ABIM (Malaysian Islamic Youth Movement) president Ahmad Azam Abdul Rahman;
8. Universiti Malaya deputy vice-chancellor Prof Datuk Dr Khaw Lake Tee; and
9. International Institute of Islamic Thought and Civilisation deputy dean Prof Datuk Dr Mahmood Zuhdi Abd Majid.

20 Liew Vui Keong (6 April 2010) First Meeting, Third Session of Twelfth Parliament, Hansard, DR.6.4.2010 (p. 11) <http://www.parlimen.gov.my/hindex/pdf/DR-06042010.pdf> (accessed on 23 June 2010).

21 "Suhakam gets nine candidates", The Star, 21 April 2010, <http://thestar.com.my/news/story.asp?sec=nation&file=/2010/4/21/nation/6100672> (accessed on 23 June 2010).

No further development was heard for more than one month until the Prime Minister finally announced the appointment of seven new Commissioners on 7 June 2010. Former diplomat Hasmy Agam was named as the Chairperson of the Commission, along with six other new commissioners.²² Of the nine nominees, two did not make the cut: Maria Chin Abdullah and Ahmad Azam Abdul Rahman. No explanation was given for the omission of these two candidates, or for appointing the seven commissioners.

Concerns over the fact that the Prime Minister is not compelled to accept recommendations from the selection committee have been raised since the enabling law of SUHAKAM was first amended. A provision which stated that the selection committee's recommendations are not binding upon the Prime Minister was deleted in July 2009. Thus, the amended Act 597 is currently silent on whether the Prime Minister is obliged to accept the recommendations of the selection committee, and thus effectively allowing discretion of whether or not to accept the recommendations of the selection committee.

B. Relationship with the Executive, Parliament, and Other Agencies

Structurally, SUHAKAM operates under the jurisdiction of the Prime Minister's department. Being under the direct supervision of the Prime Minister's Department has seriously undermined the Commission's credibility, and dispels claims that it has any semblance of structural autonomy from the Executive branch of the government.

Notwithstanding this, SUHAKAM has often cited the lack of cooperation from government agencies as a major obstacle in its work. Frustrations over the general lack of seriousness in the government's attitude towards the work of SUHAKAM were voiced in August 2008 by the then-Chairman Abu Talib Othman. In an interview he said, "[Y]ear after year, our reports

²² "Hasmy Agam new Suhakam chairperson", *Malaysiakini*, 7 June 2010, <http://www.malaysiakini.com/news/133893> (accessed on 23 June 2010).

to parliament detailing our activities and recommendations are never debated in Parliament, much less acted upon by the relevant ministries. On the contrary, there is a tendency to undermine our independence by certain ministries.”²³

One recent example of the lack of cooperation towards SUHAKAM’s work was seen in the police’s refusal to provide its standard operating procedures on the use of firearms when the Commission requested for it. SUHAKAM was inquiring into the high number of police shooting cases, including the case of a 15-year-old boy who was shot dead by the police on 26 April 2010.²⁴ In another example, SUHAKAM was also denied access to an immigration detention centre in October 2010. (See the Section “Visits to Detention Centres” in this chapter)

While SUHAKAM has occasionally come up with good reports and recommendations, these initiatives to promote human rights are routinely ignored by the government and its agencies. None of the reports of SUHAKAM have been debated in Parliament, be they annual reports, thematic reports, or reports of public inquiries.

C. SUHAKAM’s Questionable Positions on Human Rights

Good reports notwithstanding, SUHAKAM also held some questionable positions on several human rights issues, resulting in further doubts on its independence. One such example in 2009 was when SUHAKAM refused to send a monitoring team to a rally on 1 August to demand for the abolition of the Internal Security Act (ISA), a law which provides for detention without trial. The rally subsequently was cracked down by the police, who used tear gas and water cannons to disperse the 30,000-strong crowd, and arrested 589 people, including 44 minors.²⁵

Expecting an imminent crackdown by the police, rally organisers, the Abolish ISA Movement (Gerakan Mansuhkan

23 “Suhakam treads an arduous path”, *New Straits Times*, 3 August 2008.

24 “Suhakam denied shooting guidelines”, *The Nut Graph*, 30 April 2010, <http://www.thenutgraph.com/suhakam-denied-shooting-guidelines/> (accessed on 23 April 2010).

25 See SUARAM (2010) *Malaysia Human Rights Report 2009: Civil and Political Rights*, Petaling Jaya: SUARAM Komunikasi.

ISA, GMI), requested SUHAKAM to monitor the situation. Their anticipation was based on stern police warnings to call off the rally. However, SUHAKAM refused to do so, by arguing that organisers had to first obtain a police permit. This contradicted the Commission's own position in 2006 that "peaceful assemblies should be allowed to proceed without a licence".²⁶

After taking office in June 2010, another controversial position was reflected by a statement of SUHAKAM's new SUHAKAM Chairperson Hasmy Agam on a complaint of violation of the civil and political rights of students filed with the Commission on 24 May 2010. The complaint was filed by four students facing disciplinary action from their university for being present at a political campaign during a by-election and allegedly "showing support, sympathy or opposition to political parties in Malaysia" – an offence under the Universities and University Colleges Act (UUCA). Despite the clear violation of human rights in this case, the new SUHAKAM Chairperson said that the Commission found that it is "not an issue which falls within the scope and purview of SUHAKAM".²⁷

At the same press conference, Agam appeared to be ambivalent to the issue of Lesbian, Gay, Bisexual and Transsexual (LGBT) rights, saying that while "it concerns a person's right, but at the same time we have to look into our local, cultural and religious contexts".²⁸

D. Resourcing SUHAKAM

Section 19(1) of Act 597 stipulates that the Government shall provide the Commission with adequate funds for its operation; while Section 19(2) prohibits the Commission from receiving foreign funding. Further, Section 19(3) only allows local funding

26 Quoted from SUHAKAM's Report of SUHAKAM Public Inquiry into the Incident at KLCC on 28 May 2006, (p. 97), investigating the police brutality to disperse the peaceful assembly on the said date.

27 "Suhakam's new commissioner addresses student issues", The Malay Mail, 16 June 2010, <http://www.mmail.com.my/content/40122-suhakams-new-commissioner-addresses-student-issues> (accessed on 23 June 2010).

28 Ibid.

from individuals or organizations for the purposes of promoting awareness or for human rights education.

In 2009, SUHAKAM received 10,167,775 Malaysian Ringgit (MYR) while an additional 7,315 MYR were received from other sources of local funding.²⁹

II. Effectiveness

Another major area of weakness in SUHAKAM's work is its general ineffectiveness in pushing through substantial institutional, structural and legislative changes in Malaysia in accordance with human rights principles and standards. As discussed earlier, the lack of cooperation by the government and its agencies, and the failure of the Parliament to debate SUHAKAM's report have played a major part in this.

According to a written reply dated 30 June 2009 to a parliamentary question posed to the Prime Minister, the government has in the last 10 years taken into consideration only on five occasions SUHAKAM's recommendations in its annual reports. These pertain to:³⁰

1. the establishment of the Judicial Appointments Commission to improve public confidence towards the judiciary;
2. the passing of the Evidence of Child Witness Act 2007;
3. the passing of the Anti-Trafficking in Persons Act 2007;
4. the awareness of the government of its obligations under the Convention on the Elimination of All Forms of Violence Against Women (CEDAW); and
5. the passing of the Persons With Disabilities Act 2008.

29 SUHAKAM (2010) 2009 Annual Report, Kuala Lumpur: SUHAKAM (pp. 228 – 229)

30 Jawapan bukan lisan, Mesyuarat Pertama, Penggal Kedua, Parlimen Kedua belas, #127 [Parliamentary written reply, First Sitting of the Second Session of the Twelfth Parliament, #127].

Even in these instances, a closer examination would reveal that the effectiveness of SUHAKAM's recommendations is in fact limited. For example:

- The creation of the Judicial Appointments Commission also the recommendation of a Royal Commission of Inquiry was up in 2008 to investigate the issue of independence of judges;
- The Anti-Trafficking in Persons Act 2007 was tabled and passed mainly due to external pressure after Malaysia's blacklisting by the US Department of State's Watch List on trafficking; and
- With regard to CEDAW, SUHAKAM has failed to encourage the government to withdraw its existing reservations.

Part-time Commissioners

SUHAKAM Commissioners serve on a part-time basis, which compromises the effectiveness of the Commission and underscores the lack of total commitment of the government to protecting human rights. While the length of the Commissioners' terms in office was changed with the amendments to the enabling law of SUHAKAM, the part-time nature of SUHAKAM Commissioners remains despite repeated recommendations by NGOs for those positions to be made full-time.³¹ Furthermore, the ICC in a general recommendation in April 2008 had noted, "Members of the NHRIs should include full-time remunerated members [...]."³²

A. Complaints-Handling

From January to December 2009, the Commission received a total of 962 complaints, 26 of which were in the form of memoranda.

³¹ For example, see SUARAM's Letter to the Minister in the Prime Minister's Department, "Re: Proposals by Human Rights NGOs for Amendments to the Human Rights Commission of Malaysia Act", 1 July 2009.

³² International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, "Report and Recommendations of the Sub-Committee of Accreditation", Geneva, 21-23 April 2008 (p. 12).

Of these, 427 are in relation to human rights violations, including complaints on law enforcement officers/police abuse of power, land matters, Emergency (Public Order and Prevention of Crime) Ordinance 1969, migrant workers, freedom of religion, deaths in custody, refugees, and the Internal Security Act 1960. The other 535 complaints involved administrative inefficiency of government agencies, crimes that require investigation, and cases that fell outside their jurisdiction, because of either pending trial or being disposed by Courts.³³

Out of the 482 cases, 180 cases were resolved while the others were still pending; either under investigation or waiting for responses from the related agencies. The high number of pending cases, according to SUHAKAM's annual report, is apparently due to the fact that the Commission has to wait for response and feedback from ministries and agencies, as well as the procedural formalities slowing the process down.

Another limitation with regard to receiving complaints is that SUHAKAM's offices in Kuala Lumpur, Sabah and Sarawak are located in the cities, making it difficult for people from suburban and rural areas to lodge their complaints. The Commission has no mobile ground staff to reach out to local communities. While there are means of electronic communication such as the Commission's e-complaint form (available on its official website) and email, the effectiveness of these methods cannot be ascertained. To lodge a complaint in person, victims may have to travel long distances to SUHAKAM's offices.

Complaints Pile-Up in the Absence of Commissioners

For a period of more than one month – from 23 April 2010 to 7 June 2010 – SUHAKAM operated without any Commissioners in office following the end of the respective terms of the previous batch of Commissioners.³⁴ A news report on 12 May 2010 stated that

33 SUHAKAM (2010) 2009 Annual Report, Kuala Lumpur: SUHAKAM (pp. 27-29).

34 "Complaints pile up in empty Suhakam", The Malaysian Insider, 12 May 2010, <http://www.themalaysianinsider.com/malaysia/article/complaints-pile-up-in-empty-suhakam/> (accessed on 23 June 2010).

SUHAKAM already received 136 complaints but no investigation or further action could be made because of the absence of Commissioners. As the new Commissioners were only appointed on 7 June 2010, the number of complaints could have presumably increased from what was reported.

B. Public Inquiries

SUHAKAM has powers similar to those of a court of law in the matter of demanding access to documents and attendance of witnesses. However, Section 12(2) of the Act bars it from inquiring into any complaint 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. Thus, a court case may restrain the Commission from investigating any form of violation related to the case; or pending cases could be used by the Commission to justify why it should refrain from investigating related human rights violations. Also, an alleged violator can possibly frustrate a SUHAKAM inquiry by simply initiating legal action.³⁵

In cases of public inquiries, SUHAKAM has been reactive rather than pro-active, even though Section 12(1) of the Act 597 states that “[t]he Commission may, on its own motion or on a complaint made to it [...]” inquire into allegations of human rights infringement. In practice, the Commission has not opened an inquiry until a complaint was lodged. Since SUHAKAM started operating in 2000, the seven public inquiries conducted were only held after complaints were lodged with the Commission.

The only public inquiry conducted by SUHAKAM in 2009 was on the arrest of five lawyers of the Kuala Lumpur Legal Aid Centre (KL LAC) on 7 May. The lawyers were arrested in a police station while on duty to provide legal representation to 14 individuals arrested for holding a candlelight vigil earlier that day.

35 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, S.S. (1999) “Human Rights Commission of Malaysia Act: a critique,” In Tikamdas, R. & Rachagan, S.S. (eds.) *Human Rights and the National Commission*. Kuala Lumpur: HAKAM (pp. 194-195).

In response to the arrest, the Bar Council submitted a memorandum requesting SUHAKAM to conduct a public inquiry into the arrest. Pursuant to Section 12(1) of the Human Rights Commission of Malaysia Act 1999, a Panel of Inquiry was set up, with the following terms of reference:³⁶

- i. To establish if the arrest and detention of the five lawyers constitutes a denial of legal representation and a contravention of Article 5 of the Federal Constitution and Section 28A of the Criminal Procedure Code (CPC), and therefore a violation of human rights;
- ii. To determine whether there was any justification or necessity to arrest and detain the lawyers under Section 27 of the Police Act 1967, thereby violating their human rights; and
- iii. If a violation of human rights occurred, to determine:
 - Which person or agency was responsible;
 - How the violations occurred;
 - What administrative directives and procedures or arrangements contributed to this; and
 - What measures should be recommended to ensure that violations do not occur.

The public inquiry was delayed mainly due to the initial refusal of most police officers to give written statements to SUHAKAM during the proceedings. This matter was only resolved on 11 September 2009, after SUHAKAM issued an interlocutory decision, stating that Section 14(1)(a) of the SUHAKAM Act empowers the Commission to record statements of witnesses, whether civilians or police officers. The police officers subsequently provided the required documents to SUHAKAM.

36 *Ibid.* (pp. 43-44).

37 SUHAKAM (2010), "Decision of the Public Inquiry into the Arrest and Detention of Five Lawyers of the Bar Council Legal Aid Centre", 23 April (pp. 40-41), available at: http://www.suhakam.org.my/c/document_library/get_file?p_l_id=35723&folderId=262020&name=DLFE-7902.pdf (accessed on 23 June 2010).

On 23 April 2010, SUHAKAM announced its findings, that:³⁷

- i. The arrest and detention of the five lawyers did constitute a denial of legal representation and a contravention of Article 5(3) of the Federal Constitution and section 28A of the Criminal Procedure Code, and therefore was a clear violation of human rights; and
- ii. There was no justification or necessity to arrest and detain the five lawyers under section 27 of the Police Act 1967 as they were there not participating in the cause of their clients but simply performing their duties as legal practitioners in defence of the 14 individuals who were earlier arrested. It is therefore a clear transgression and a violation of human rights.

In its findings, SUHAKAM also named the two most senior police officers at the police station as being responsible for committing the violation of human rights in this case. The Commission stated that “such violations of human rights occurred because the relevant officers did not understand nor appreciate the functions and duties of defence lawyers in the context of the criminal justice system”.³⁸

The Commission therefore recommended thus:

“[T]he Police on the ground in charge of crime enforcements [sic] [must] be made to be familiar with the constitutional provisions in relation to fundamental liberties and human rights. Section 28A [of the] CPC [Criminal Procedure Code] must be thoroughly explained to the Police on the ground perhaps from the Police Headquarters after consultation with the Attorney General’s Chambers. The Police must be made familiar with the basic local and international instruments pertaining to human rights.”³⁹

38 Ibid.

39 Ibid.

40 Jawapan Lisan Dewan Rakyat Ahli Parlimen Kelana Jaya, Gwo-Burne Loh [Parliamentary Oral Reply at the Dewan Rakyat by Member of Parliament of Kelana Jaya, Gwo Burne Loh], 9 June 2010.

The government did not take any action against the two senior officers. The inaction of the government was confirmed by the Home Ministry on 9 June 2010, when an opposition MP queried if any action was taken against the two police officers as a result of SUHAKAM's report on the matter.⁴⁰

C. Visits to Detention Centres

The Commission faces restrictions in relation to visiting places of detention. While Section 4(2) (d) provides it with the power to do so, 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 seek permission from the Prison Department. 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 in prisons and detention camps. SUHAKAM should be given the powers to conduct spot checks in order to get a more realistic view of detention conditions, and to ensure that the treatment of detainees are on par with stipulated standards at all times.

In practice, SUHAKAM usually does not face problems in requesting for visits to places of detention, and visited 14 such places in 2009.⁴¹ However, in October 2009, Immigration authorities denied such a request made by a SUHAKAM Commissioner to visit 207 Sri Lankan refugees and asylum seekers arrested and detained at the Immigration Detention Centre. Despite the Immigration Department's refusal to allow access, SUHAKAM Commissioner Siva Subramaniam decided to proceed with his visit on 23 October 2009 and was eventually allowed into the detention centre.⁴²

D. Encouraging Ratification of International Human Rights Treaties

A good benchmark of the level of human rights promotion and protection is a country's ratification of international covenants and

41 SUHAKAM (2010) 2009 Annual Report, Kuala Lumpur: SUHAKAM (p. 33).

42 Personal communication with SUHAKAM Commissioner Siva Subramaniam, 7 December 2009.

treaties. Since 2000, the government has ignored SUHAKAM's recommendation to ratify basic international human rights instruments such as 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).

III. Relationship with Civil Society

A good illustration of SUHAKAM's relationship with civil society is the aforementioned boycott of the Commission's Human Rights Day event marking its 10th anniversary of establishment. The boycott was announced on 8 September 2009, to register the 42 organizations' protest and disapproval of the failure of SUHAKAM to proactively protect and promote human rights, the failure of the government to make SUHAKAM a truly independent and effective institution, and the failure of the government to implement most of SUHAKAM's substantial recommendations. They also announced that they would engage conditionally with SUHAKAM, pending the implementation of the following demands for SUHAKAM to:⁴³

- i. Intensify public campaigns, especially on issues where recommendations have been ignored by the government.
- ii. Provide an action plan with specific timeframes for the government to implement all pending recommendations and publicly release progress reports on the status of implementation.
- iii. Play an intermediary role between civil society and relevant government agencies by holding regular constructive meetings, including the implementation of SUHAKAM's recommendations as well as reforms on SUHAKAM.

43 See "42 Malaysian NGOs Boycott SUHAKAM's Human Rights Day Event, Announce Conditional Engagement with Specific Timeframe for Substantial Reforms", Joint NGO Statement In Conjunction with SUHAKAM's 10th Anniversary, 8 September 2009.

- iv. Conduct regular monitoring on the ground, particularly in cases of imminent threats of human rights violations.
- v. Be more prompt, vocal and visible in responding to cases of human rights violations.

The groups also urged the government to:⁴⁴

- i. provide SUHAKAM with wider powers and mandate, including all rights in the Universal Declaration of Human Rights and other international human rights laws;
- ii. ensure more transparency in the selection process of Commissioners, with full consultation with civil society at all stages of the appointment process;
- iii. ensure that all Commissioners are full-time;
- iv. clarify SUHAKAM's powers to prevent Section 12(2) from undermining its work by the simple means of taking matters to court, and to allow SUHAKAM the discretion to conduct an inquiry even after disposal of the matter in court;
- v. give powers to SUHAKAM to conduct spot checks on places of detention, even without prior notice to authorities concerned;
- vi. place SUHAKAM under the jurisdiction of the Parliament, rather than being placed directly under the Prime Minister's Department; and
- vii. officially table and debate SUHAKAM's reports in Parliament.

Nevertheless, in some specific issues, there has been some form of institutionalised cooperation between SUHAKAM and certain civil society groups. For instance, in its work on the rights of women, particularly in monitoring the implementation of the

44 Ibid.

CEDAW, the Human Rights Education and Promotion Working Group of SUHAKAM established a Sub-Committee on Women's Rights in February 2008,⁴⁵ including NGOs working on women's issues and a number of gender and women's rights experts.⁴⁶

On a less institutionalised level, SUHAKAM has collaborated with some NGOs, in conducting trainings and workshops on various human rights issues. For instance, SUHAKAM in recent years has invited SUARAM to assist the Commission in its human rights trainings for police officers.

However, in most other areas of SUHAKAM's work, its cooperation and consultation with civil society groups can be described as irregular and lacking in continuity. Although SUHAKAM has held roundtable discussions with civil society groups on a number of issues, the problem of a lack of follow-up action in SUHAKAM's consultations with NGOs was raised by several NGO representatives present at a roundtable discussion organised by the newly-merged Economic, Social and Cultural Rights and Civil and Political Rights working groups on 11 March 2009.

In 2009, SUHAKAM announced that it had set up a human rights defenders desk to improve its protection of human rights defenders. According to Commissioner Michael Yeoh who made the announcement in a Roundtable Discussion with NGOs on 11 March 2009:

"[T]he idea of setting up the Human Rights Defenders Desk arose from suggestions from participants of the previous civil and political rights session with NGOs held on 17 July 2008. As human rights defenders from NGOs and civil society face risks of arrest and harassments at public assemblies and demonstrations from law enforcement [personnel], participants urged SUHAKAM to publicise the need for protection of human rights defenders."⁴⁷

45 SUHAKAM (2009) 2008 Annual Report, Kuala Lumpur: SUHAKAM (p. 55).

46 Ibid. (p. 31).

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

However, the desk has not been functioning actively as of 31 December 2009. Not only was there no follow-up in terms of providing protection for human rights defenders at risk, on certain occasions, SUHAKAM even refused to do so despite requests by human rights defenders facing imminent threat, as seen in the example of the 1 August anti-ISA rally.

V. Conclusion

The international spotlight on SUHAKAM over the past two years has forced the government to address several longstanding concerns about its independence, effectiveness and compliance with international standards. While the government twice introduced amendments to the enabling law, many other concerns remain. The amendments were minor and superficial. Substantial reforms to SUHAKAM have thus remained elusive despite the changes made in 2009.

Meanwhile, SUHAKAM's performance in protecting and promoting human rights in Malaysia has not improved much. SUHAKAM's lack of effectiveness in playing its expected role as a public defender of human rights in Malaysia has resulted in a serious crisis of public confidence in the Commission. Particularly, the government has routinely ignored most recommendations that SUHAKAM has made.

Although SUHAKAM was given an "A" status by the ICC, several concerns of the international body have yet to be fully addressed by SUHAKAM and the government. As such, SUHAKAM will once again be scrutinised by the ICC in 2010. At the next review, the ICC will assess whether the 2009 amendments to the enabling law of SUHAKAM are applied in a manner which complies with international standards. Based on observations of the Malaysian civil society, the manner in which the amendments were made and applied has been highly flawed. The secretive manner in which the selection process was conducted is a manifestation of the total disregard of international standards and best practices as provided by the Paris Principles as well as the ICC's numerous recommendations.

Thus, in 2010, SUHAKAM may well face the same challenges that it has faced in the past two years – consistently trying to prove its worth at both the international and national levels. The challenge to regain the confidence of the public will be left to a new set of SUHAKAM Commissioners starting in June 2010.

VI. Recommendations

A. To the Government

1. Implement all recommendations made by SUHAKAM, including:
 - i. to ratify all remaining core international human rights treaties and withdraw reservations on the CEDAW and the Convention on the Rights of the Child (CRC);
 - ii. to abolish all detention-without-trial laws;
 - iii. to uphold Constitutional rights to freedom of speech, assembly and association, by repealing or amending legislations or provisions in legislations which curb these rights; and
 - iv. to adopt and implement a National Human Rights Action Plan as proposed by SUHAKAM.
2. Further amend the enabling law of SUHAKAM:
 - i. to ensure more transparency in the selection process of Commissioners, with full consultation with civil society at all stages of the appointment process;
 - ii. to appoint ensure that the Commissioners, as opposed to the current part-time duties;
 - iii. to provide powers to SUHAKAM to conduct spot checks on places of detention, even without prior notice to authorities of places of detention; and
 - iv. to compel SUHAKAM's reports to be officially tabled

and debated in Parliament.

B. To Parliament

1. Push for debates in parliament whenever SUHAKAM releases its reports, which include annual, as well as thematic, reports.
2. Monitor the performance of SUHAKAM with regard to its mandates and functions as an NHRI, as well as the government's implementation of SUHAKAM's recommendations.

C. To SUHAKAM

1. State clearly its stand on the flawed selection process.
2. Intensify public campaigns, especially on issues where recommendations have been ignored by the government.
3. Provide an action plan with specific timeframes for the government to implement all pending recommendations and release progress reports on the status of implementation publicly and regularly.
4. Play an active intermediary role between civil society and relevant ministries or government departments by holding regular constructive meetings, including for the implementation of SUHAKAM's recommendations as well as reforms on SUHAKAM.
5. Conduct regular monitoring on the ground, particularly in cases of imminent threats of human rights violations.
6. Be more prompt, vocal and visible in responding to cases of human rights violations.

Needing to Scale the Communication Barrier

The Maldivian Democracy Network (MDN)¹

Background and Context

The Maldivian journey towards democracy began with prison riots in 2003 to which the state responded with force; riots that turned into demonstrations in the capital Male', demanding political reforms, democracy and respect for human rights. These pressures eventually led to the adoption of a new constitution in August 2008 which, for the first time in the country's history, established the separation of powers as well as creating independent Commissions. Soon after, in October 2008, the country held its first multi-party presidential elections, bringing an end to 30 years of uninterrupted rule by the incumbent as the opposition Maldivian Democratic Party (MDP) came to power on a coalition platform. However, in March 2009, the ousted Dhivehi Rayyithunge Party (DRP) gained control of parliament in parliamentary elections. The Maldives is thus a young and fragile democracy grappling with severe economic and social problems against a backdrop of raised expectations and political polarization. Some groups are already disillusioned with the democratic experience and the language of human rights is increasingly unpopular, with ultra-conservative Islam and the prior non-democratic governmental system being proposed as alternatives.

1 Prepared by Mr. Ahmed Irfan, Executive Director, MDN

I. Character of the HRCM

A. Establishment

The Human Rights Commission of the Maldives (HRCM) is both a constitutional and a statutory body but was first established by presidential decree in 2003. However, a law was passed in 2005 establishing the Commission in statute. This law was amended in 2006² and it is the current Human Rights Commission Act which now defines the functions and powers of the HRCM. This Act details the principle objectives of the Commission; the scope of the Commission's investigative powers; the responsibilities of the members; the criteria for eligibility to become a member; and reiterates the independence of the Commission.

The Maldivian Constitution ratified on 7 August 2008 includes a separate section on the establishment of the HRCM and states that "There shall be a Human Rights Commission of the Maldives"³. The Constitution further states that there shall be no less than five members in the Commission, including the President of the Commission, and gives it the broad mandate of promoting and monitoring human rights in the country as well as investigating and taking steps to secure appropriate redress for human rights violations.

The current members of the Commission were approved by Parliament and appointed by the President of the Republic on 27 November 2006.

B. Independence

The Constitution states that: "The Human Rights Commission is an independent and impartial institution. It shall promote respect for human rights impartially without favour and prejudice."⁴ This independence is reiterated in the Human

2 Law No: 6/2006

3 Constitution of the Republic of Maldives page 69

4 Section (b), Article 189

Rights Commission Act (hereafter 'the Act') which states that: "The Commission is an independent legal entity with a separate seal, possessing power to sue and suit against and to make undertakings in its own capacity."

Furthermore, both the Constitution and the Act state that members of the Commission may not undertake any other employment. The Act specifies that a member may not hold any elected office or be employed by the government or private sector; and must not be a member of any political party or be engaged in the activities of a political party. The Act also states that should a matter arise where the personal interest of a member is involved, that member should refrain from all involvement in that case.

In case of a previously unforeseen conflict of interest arising during a Commission member's tenure, the Act empowers the President of the Republic to submit to parliament that the Commission member be either dismissed or suspended. A two-thirds majority is required in parliament to carry through this motion.

Remuneration to Commission members is decided by parliament but cannot be altered until their tenure is over.

The Commission's independence is further bolstered by the Immunity Clause of the Act which states that: "No criminal or civil suit shall be filed against the President or Vice President or a member of the Commission in relation to committing or omitting an act in good faith whilst undertaking responsibilities of the Commission or exercising the powers of the Commission or the powers conferred to the Commission by a law." MDN understands that this immunity also extends to HRCM staff.

The HRCM is accountable to parliament and to the President of the Republic to the extent that it must submit an annual report and financial audit to both. The annual report must contain the cases filed at the Commission; decisions by the Commission; recommendations to the government; recommendations adopted or abandoned by government.

Given the strong emphasis on independence in the legislative framework of the Commission and the background of the current Commissioners in place, the Maldivian Democracy Network (MDN) does not believe that independence from the executive, parliament or judiciary is an issue in the country. This is manifest from the multiple occasions on which the HRCM has criticized the government both privately and publicly on various issues. These include public clashes between the HRCM and the President's Office as well as the Police Service. MDN is not aware of any cases where the HRCM has taken instructions from the Executive or even of instances where the Executive has attempted to instruct the Commission.

Although it has refrained so far from commenting on parliament or court cases publicly, MDN does not believe this to be an issue of independence but rather one of disappointing inactivity in the legislative and judicial sphere.

The financial independence of the Commission remains one area of concern and is addressed later in this report.

C. Composition, Appointment Process, and Tenure

Composition

The Act states that members of the Commission should be appointed from human rights organizations and from among persons active in promoting human rights in social and technical fields . It does not include a requirement of diversity among the members. However, this is largely reflective of the homogenous nature of Maldivian society in terms of ethnicity, language and religion. A degree of gender balance has been achieved notwithstanding, with the Commission currently consisting of two female and 3 male members.

Only the President of the Republic may nominate members to the HRCM and his nominations must then be approved by parliament.⁵

5 Human Rights Commission Act, Article 4

The current composition of the 5-member Commission in terms of background is:

- 1 former diplomat, currently President of the Commission
- 1 NGO sector professional (development work), currently Vice-President of the Commission
- 1 education sector professional (school management and curriculum development)
- 1 lawyer
- 1 Islamic religious scholar

One area of concern is that the law explicitly states that a Commission member must be a Muslim⁶. While this matches general expectations in a country which is officially 100% Muslim, it is unclear why this provision is necessary given that the Constitution states that all Maldivian citizens are Muslims and the Act states that all members must be Maldivians.

The Act provides for the posts of President and Vice-President of the Commission (both posts currently being filled by male members) and a Secretary General to administer the Commission.

MDN notes a lack of direct human rights experience among current Commission members. While this is reflective of a lack of human rights capacity and the extremely politically charged nature of human rights discourse in the country prior to the appointment of the current Commission, it is an area of weakness for the Commission. MDN also notes the lack of representation of particular groups (such as persons with disabilities or former detainees) or people who have experience working with such groups.

Furthermore, the fact that gender balance is not required by law means that future incarnations of the HRCM may not be characterised by an appropriate gender balance. MDN stresses the importance of enshrining this provision in law, especially given

6 Human Rights Commission Act, Article 6

the recent rise of an extremist Islamist ideology in the country which challenges the independence and rights of women.

Selection and Appointment

Both the Constitution⁷ and the Act state that the President of the Republic shall nominate names for membership of the Commission to the parliament. Those names approved by a parliamentary majority shall be appointed as members. The Act specifies that a 7-member ad hoc committee shall be formed in parliament to review the nominees, interview candidates and prepare recommendations for parliament⁸. This same procedure is followed for the appointment of a President and Vice-President of the Commission from among its members.

The enabling legislation does not require the President of the Republic or parliament to engage in a consultative process or advertise vacancies for the Commission widely. Neither does it require that members represent diverse groups within society. In practice too, there was no broad consultation regarding appointments or advertising of vacancies for the Commission.

Tenure

The tenure of a Commission member is specified in Article 7 of the Act and is defined as 5 years from appointment. Members can be re-appointed for a second 5-year term. All members are full-time, barred from any other employment and remunerated accordingly.

Article 15 of the Act states that a member may be dismissed by the President of the Republic upon submitting the matter to parliament and gaining a two-thirds majority in favour of dismissal. However, a member may only be dismissed on the following grounds:

- Being declared bankrupt as per Shari'ah
- Being unable to perform the duties and responsibilities

7 Constitution of the Republic of Maldives, Article 190

8 Human Rights Commission Act, Article 5

of the Commission as a member; or being confronted with a situation whereby conflicts arise between undertaking the responsibilities of the Commission as a member and self-interest or personal gain

- Breaching the Oath
- When the parliament deems a member has caused disrepute by being convicted of an offence
- Being negligent and reckless in performing responsibilities of the Commission as a member

There have been no cases of dismissal or resignation of HRCM Members since the current Act of 2006.

D. Organisational Infrastructure

HRCM has the power and authority to appoint and dismiss its own staff, including the Secretary General of the Commission.

The HRCM moved to a larger premise on 1 May 2008. Prior to this move the Commission often complained of inadequate space and cited this to explain its inadequate staffing levels. Following the move, the Commission has greatly increased its staff numbers. MDN notes especially the marked increase in staff working at the Complaints Department from just 4 in 2008 to 7 in 2009. MDN believes that this is an adequate number of staff and is not currently aware of a staffing shortage at the Commission – with the notable exception of staffing shortages in the National Preventative Mechanism at the HRCM.

However, a lack of human rights expertise among HRCM staff has been of concern to MDN and other NGOs in the past. This is again reflective of a general lack of capacity in the country and MDN is pleased to note that HRCM has been taking steps to ensure increased training for their staff.

With regards to accessibility, MDN has 3 main comments:

1. Lack of accessibility to the atolls: The HRCM does not have an office or branch outside of the capital, making

it largely inaccessible to two-thirds of the population. Although complaints can be lodged by phone initially, paperwork must follow for the verbal complaint to be officially addressed. Given the difficulty in communications and transport services in the country and the expense incurred by people traveling to the capital in order to reach the Commission, this is an extremely important issue.

2. Lack of disabled access: The HRCM is currently located in a building which is not wheelchair accessible. While MDN recognizes the relative scarcity of wheelchair accessible office space in the capital, this is an issue that the HRCM should address as a matter of urgency.
3. It is positive that the HRCM is located away from government or other state offices and thus provides a secure and comfortable location for those seeking to approach it.

E. Financial Independence and Budget

Article 30 of the Human Rights Commission Act states: “The state treasury shall provide the Commission the funds from the annual budget approved by the People’s Majlis, essential to undertake the responsibilities of the Commission”.

In 2008 the HRCM started bypassing the Ministry of Finance (MoF) and sending its budget request directly to parliament as the MoF was sending reduced figures to parliament. However, the Commission complains of not being given the funds necessary for it to properly fulfill its mandate. For instance, the HRCM requested MRf 23,231,342 (approx. USD 1,822,066) for the fiscal year 2009 but was granted only MRf 9,769,511 (approx. USD 766,236) by parliament⁹. By the end of the year, this was increased to MRf 13,891,265 (approx. USD 1,089,511).

9 Annual report of the HRCM, 2008, p.86

For the fiscal year 2010, MDN understands that the Commission has had to reduce the number of staff it can appoint and the activities it can carry out as a result of funds not being available. Even after these reductions, the HRCM requested MRf 17,592,702 (approx. USD 1,379,820) but has been allocated only MRf 15,463,678 (approx. USD 1,212,837).

However, MDN notes that in the fiscal year 2008 parliament initially allotted MRf 8,523,089 (approx. USD 668,478) to the HRCM but increased this to MRf 21,184,279.93 (approx. USD 1,661,512) by the end of the year. On the other hand, by the end of that fiscal year, HRCM was able to spend only MRf 13,257,673.44 (approx. USD 1,039,817) leaving close to MRf 8 million (approximately 40 per cent of its budget) unspent. This figure was much improved during the fiscal year 2009, with only 5.4 per cent of the budget unspent.

Part of the explanation for this unspent budget also points to a serious concern regarding the HRCM's independence: although the HRCM is allotted a budget, it still requires the approval of the Ministry of Finance for all capital expenditures. Furthermore, the HRCM does not have an independent bank account and all payments need to go through its account at the MoF. This has led to several payment requests being rejected by the MoF as well as delays in paying creditors which have, by their own admission, made it extremely difficult for the Commission to function¹⁰. The nature of the work of the HRCM requires urgent and large expenditures, such as hiring a boat to travel to a location in connection to investigations. It is impossible to carry out such tasks at the required speed due to MoF regulations which state that all expenditure must first be submitted to the MoF for authorisation.

MDN and other NGOs have repeatedly expressed concern over the lack of financial independence of all independent institutions in the country, including the Elections Commission, Anti-Corruption Commission and the Human Rights Commission of the Maldives.

¹⁰ Ibid., p.87

II. General Mandate

A. Mandate to Protect and Promote Human Rights

The Human Rights Commission Act states that the objectives of the Commission are:

- a. To protect, promote and sustain human rights in the Maldives in accordance with Islamic Shari'ah and the Constitution of the Republic of Maldives.
- b. To protect, promote and sustain human rights in the Maldives in accordance with regional and international conventions and declarations which the Maldives is a party to.
- c. To assist and support Non-Governmental Organizations involved in the protection of human rights.¹¹

Human rights are defined as the fundamental rights stipulated in the constitution of the Republic of Maldives and the rights not contradictory to the basic tenets of Islam, stipulated in international conventions and declarations, to which the Maldives is a party¹².

As such, the HRCM has an extremely broad mandate to protect and promote not just civil and political rights, but also economic, social and cultural rights. In theory, there are no legal barriers to investigating any type of right in any area of the country. However, it must be noted that the provision for the tenets of Islam means that the HRCM cannot take up the cause of certain rights such as freedom of religion and conscience.

In practice the HRCM is free to pursue matters in a wide field of areas. It has recently been involved in detainee rights, employment rights, crime reduction and the housing situation in the country. Various studies on the employment and housing situation as well as the causes of crime were welcome efforts on socio-economic rights. However, there is still a general perception among the public that

¹¹ Human Rights Commission Act, Article 2

¹² Human Rights Commission Act, Article 36

the HRCM focuses on civil and political rights, especially detainee rights, at the expense of socio-economic rights. This has led to apathy and, to some extent, to anger among the public. There is an urgent need for the HRCM to look into the rights of disabled people given the lack of facilities available to them, and into the rights of women given the recent backlash against women's rights in the country.

The HRCM should be taking a more proactive role in both pursuing socio-economic and cultural rights as well as publicising its efforts in this area. Failure to do this could lead to a negative perception of human rights in the country. An inability to publicise its studies and recommendations and to bring appropriate pressure on the authorities on housing and employment in particular are marked failings of the Commission in this area.

B. Advisory Functions

Functions regarding national legislation

Article 20 of the Human Rights Commission Act states that it is among the responsibilities of the Commission to: "Advise the government in the formulation of laws, regulations and administrative codes concerning the promotion of a high regard for human rights and the protection and sustenance of such rights."

NGOs have long been critical of the lack of human rights focus in parliamentary debates since the constitution was ratified in 2008. Despite an official policy of making its comments on draft legislation public, MDN notes that such commentary is rarely heard or discussed in the public domain. While private lobbying is certainly important, MDN notes that often such lobbying has been ineffective, indicating the need for a more public approach. The Special Procedures Against Child Sex Offenders Act and the Act on Assistance for People Special Needs are good examples. While the HRCM did comment on both these bills in draft stages and highlighted major rights issues, the final Acts did not incorporate these recommendations and were widely criticised by both local and international NGOs.

C. Monitoring Functions

The Human Rights Commission Act specifically mandates the HRCM to carry out research on human rights. Under this mandate the HRCM has to date conducted multiple studies and reports, including reports on detention facilities in the country. MDN notes that valuable research was done by the HRCM in areas such as housing, employment and crime. However, MDN also notes that the HRCM failed to publicise its findings to a satisfactory level. This resulted in the authorities ignoring recommendations and the general public being left with the perception that the HRCM does not work on social or economic rights.

HRCM recommendations being ignored by the government has been a continuous theme for the past few years. In many cases the government acknowledges the work done by the Commission and notes its recommendations but very often, no follow up is carried out. HRCM needs to improve its follow up activity in order to pressure the government into adopting its recommendations. Better publicising issues and recommendations would be one immediate effective step. Another strategy could be to build coalitions within civil society to coordinate lobbying efforts rather than acting independently.

With regard to monitoring decision-making bodies such as government agencies and parliament, the HRCM needs to be much more proactive, especially with regards to parliament. Parliamentary debates and anti-rights comments made by parliamentarians in the Majlis need to be monitored by the Commission in order to promote a human rights perspective among both parliamentarians and the general public. MDN highlights the case of the debate on the draft penal code, where many members of parliament refused to even consider the omission of the death penalty or amputations from the penal code. MDN contends that the HRCM's role should be to state the human rights perspective on capital punishment or at least back the calls for further religious opinion on the issue.

D. Investigations

The Human Rights Commission Act vests the HRCM with wide-ranging investigative powers. Under Article 22 of the Act the HRCM

has the power to summon people to the Commission, procure and examine relevant documents and even instruct a person involved in an inquiry to not leave the country. Furthermore, if the government fails to provide requested information, the Act states that the HRCM has the power to inquire into the matter in its own capacity.

Article 26 of the Act clearly states that it is the duty of every Maldivian citizen to obey orders to summon to the Commission, or provide information or submit a document to the Commission. Failure to do so is punishable by 3 months house-arrest and redundancy if the person is a government employee.

The HRCM has often used its powers of summons and subpoena in order to conduct its investigations. MDN notes that it is not aware of authorities or private parties defying HRCM orders but that administrative delays do occur in obtaining information on some occasions. MDN is aware of one case where a hospital initially refused to release medical records of patients to the HRCM. However, even in this case, the hospital did eventually release the documents after talks with the Commission.

MDN is pleased to note that during 2008 the HRCM was able to complete investigations and close 421 of the 705 cases it received¹³. During 2009, the Commission received 546 complaints of which 376 had been investigated and closed¹⁴. The general public perception of the Commission in this area is that it is able to investigate to a reasonable extent and people do see the utility of submitting complaints to the Commission.

E. Promotional Functions

The HRCM is mandated by law to: “Promote awareness on human rights by conducting seminars, workshops and other programs and carry out research and publish the findings openly”; as well as to “Disseminate general information on human rights to the public, and make relevant publications.”¹⁵

13 Annual report of the Human Rights Commission of Maldives, 2008, pg.57

14 Annual report of the Human Rights Commission of Maldives, 2009, pg.64

15 Human Rights Commission Act, Article 21

Workshops are the main awareness-raising activity undertaken by the HRCM. These have included extremely useful human rights training for state authorities and NGOs. While MDN recognises the need for and efficacy of workshops on human rights across the country, many NGOs do not feel that this is enough of an effort, especially given the country's current human rights challenges.

The Maldives has recently been witnessing the rise and growing influence of an extremist Islamist ideology which challenges the values and language of human rights as essentially Western and alien to the Maldives. In particular, this ideology represents a threat to women's rights in the country and freedom of speech which is constitutionally bound by the 'tenets of Islam'.

MDN argues that that the HRCM should take a much more proactive stance in combating this ideology and the threat it represents to human rights in the country. Until now, the HRCM's response has been limited to two news conferences in which they have called upon the government to tackle religious extremism more aggressively. It has failed so far to build a platform for more liberal Islamic scholars to be heard and to communicate to the public that Islam and human rights are not antithetical.

A second issue is the negative image of human rights among vast sections of the population as exclusively concerning detainee rights or political rights. This has been exacerbated by failures in the criminal justice system, leading the public to believe that rights language exists to protect criminals at the expense of society. The HRCM has failed to make appropriate efforts to tackle this perception head-on and to explain to the public the importance of detainee rights, proper judicial proceedings and how these serve all of society. It has also been unable to make human rights relevant to the common person and to highlight the benefits of a rights-based discourse in improving people's everyday lives. A lack of education among the public about the socio-economic rights enshrined in the current constitution, such as the right to adequate shelter and even adequate electricity, are particularly noteworthy. The HRCM's inability to perform this function has led to deep resentment among some portions of the population. This resentment was well illustrated during February 2010 when

inhabitants of one island refused to let an HRCM team enter the island, claiming that the HRCM was concerned only with the rights of offenders.

A third issue of particular concern is tolerance of diversity and racism in the country. The HRCM has not done enough to promote a culture of diversity and respect for other cultures and religions. There is a largely unspoken problem of racism towards migrant workers, and particularly those from South Asia. This includes racist abuse and a lack of legal protection for migrants. Given that there are over 80,000 migrant workers living among a population of just 300,000 Maldivians, this is an issue which the HRCM needs to prioritise, with a particular focus on youth. MDN is also disappointed to note that the HRCM does not seem to be bringing sufficient pressure to bear on the government to sign the International Convention on the Protection of the Rights of All Migrant Workers and members of their Families (ICPMW).

In general, the HRCM has not been taking a mass-media approach to human rights promotion and has instead focused its efforts on ad-hoc workshops which attract a small number of participants or on publications with extremely limited readership. MDN notes the urgent need for the HRCM to be more proactive in using popular media sources such as television and radio to popularise human rights language and values.

III. Relationship with Relevant Human Rights Stakeholders

A. Relationship with the Courts

Article 24 of the HRCM Act states that should the HRCM be unable to reconcile the parties or come to an amicable solution, the HRCM should refer the matter to the court.

Where the HRCM's investigations lead it to believe that there is room for criminal prosecution, the HRCM forwards its findings to the Prosecutor General's (PG) Office who then takes the case to court. This is in line with the Constitution ratified in 2008 which

makes the PG the only body able to prosecute criminal cases. MDN believes that this process is functioning relatively smoothly, notwithstanding problems within the criminal justice system itself.

Where the matter is of a civil nature, MDN is aware of one case where the HRCM has attempted to file a claim in its own name with the consent of the aggrieved party. In this case the court ruled that the HRCM was not entitled to file civil cases in its own name unless it is directly aggrieved. However, the HRCM continued to insist that it did have this capacity under the Human Rights Commission Act and appealed to the High Court. Despite the High Court ruling against the HRCM, MDN understands that the HRCM intends to continue to file civil cases in human rights issues and to continue to test the judicial system on the matter.

There is a specific clause in the Human Rights Commission Act which defines the HRCM's relationship with the courts in terms of assisting during an ongoing trial¹⁶. This article states that "Should the Commission receive information in relation to an infringement of human rights of a person in an ongoing trial, the Commission, with the permission of the presiding Judge of the trial, may submit the information to the court." MDN is not aware of the Commission having made use of this clause to date.

B. Relationship with Civil Society

The HRCM recently inaugurated its 'NGO Network' which was an attempt to formalise its relationship with NGOs across the country and better coordinate with relevant civil society partners. Given that this Network was inaugurated only on 10 December 2009, its effectiveness in facilitating cooperation and partnership between the HRCM and civil society partners remains to be seen.

In addition, MDN has the following comments:

1. MDN believes the HRCM should be more proactive in building coalitions within civil society in its efforts to lobby the government to implement its recommendations. This would mainstream efforts

16 Human Rights Commission Act, Article 23

currently being made by disparate actors and improve effectiveness.

2. MDN has repeatedly requested the HRCM to establish a focal point for Human Rights Defenders. While it is positive that MDN has now been assigned a focal point of contact within HRCM, this should be a more broad-based initiative and the need for a Human Rights Defenders focal point remains.
3. MDN believes the HRCM should make more of an effort to improve the provision of its service to the media. MDN is aware of multiple cases where journalists have been threatened or intimidated for their work and feel that they do not have an authority they can approach with ease. HRCM should make a proactive effort to ensure that a climate of fear does not overtake the journalism profession and that when threats do occur, journalists feel that the HRCM is an approachable institution. Furthermore, human rights training targeting journalists should be a priority for the country, given the current lack of awareness.
4. MDN is pleased to note that the HRCM has made an active effort to involve NGOs in its consultations and trainings. HRCM has also taken positive steps to involve NGOs in some of its initiatives such as the year long campaign against child abuse in 2009.
5. MDN is also pleased to note the HRCM's public backing for the role of NGOs in promoting and protecting human rights in the country.

IV . Specific Mandate

A. National Preventative Mechanism under OPCAT

The HRCM was designated as the National Preventative Mechanism (NPM) under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment

or Punishment (OPCAT) for the Maldives in December 2007. It was deemed as the most suitable institution in the country to take up the role given that the Human Rights Commission Act states that: “The members of the Commission or persons assigned by the Commission accompanied by the members may without prior notice, inspect any premises where persons are detained under a judicial decision or a court order” and also that “The Commission, during their inspections as per subsection (c), shall inquire whether infringements of human rights of the detainees have occurred, and review the well-being of the detainees and make recommendations to the relevant government authorities should they deem the amenities offered to them or the facilities of detention need improvement.”

This legal definition of places of detention has been broad enough to allow the NPM to visit a number of diverse places of detention including prisons, juvenile rehabilitation facilities and mental health facilities. MDN is pleased to note that the NPM has visited these places and produced detailed reports, including recommendations, to the state authorities. However, as noted above, there is a serious issue of state authorities not acting on HRCM recommendations.

Although established in December 2007, the NPM operated as part of the HRCM’s complaints department until January 2009. NPM did not have a specifically designated director until January 2010 and was managed by the director of the Complaints Department and a Commission Member.

MDN has the following concerns with regard to the current functioning of the NPM:

1. NPM requires that its staff include medical professionals and psychiatrists. However, the NPM at the HRCM does not include these individuals and is staffed by individuals previously attached to the Complaints Department. MDN understands that the NPM advertised for professionals to join the NPM but was unsuccessful in attracting any candidates to even join NPM visits as consultants, probably due to the low salary that the Commission was able to offer.

2. The NPM currently has only three staff, including the director. This is not a sufficient number of staff to effectively carry out its mandate.
3. Although the NPM has received funding to hire a further two staff for 2010, MDN understands that there is not funding for the training of these new staff or improve the level of training for existing staff.
4. Funding for the NPM is not guaranteed. NPM does not have the funding to attract or train the staff that it requires to effectively carry out its mandate.
5. NPM does not have sufficient reach into the atolls. All staff are based in the capital Male' and travel costs and logistics mean that the NPM cannot effectively monitor the multiple detention facilities across the country.
6. MDN is aware that the NPM has not been granted appropriate access to detention facilities on multiple occasions, experiencing delays before being granted entry. While the NPM claims that guards at these detention facilities still await orders from the Ministry of Home Affairs before allowing NPM members into the facility, the Ministry of Home affairs claim that delays in granting access occur because NPM members do not carry the necessary identification – a claim that the NPM strongly denies. The NPM and state authorities should urgently work together to address this situation.

MDN is pleased to note that the NPM has recently begun to make more of an effort to incorporate civil society actors such as MDN into their work and have been sharing their findings closely with civil society.

ISSUE	RESPONSE	GAPS
<p>Rising violent crime across the country, especially gang related activity since 2008</p>	<p>Public support by the Commission for joint operations by the police and army to curb crime</p> <p>Meetings with stakeholders to discuss the situation</p> <p>A report on the causes of crime along with recommendations to all concerned authorities</p>	<p>Sufficient follow up on the recommendations made by the Commission to the authorities</p> <p>Adequate communication to the public that human rights exist to protect victims and the general public</p> <p>Adequate explanation of the role of the HRCM as an institution which does not necessarily investigate individual crimes</p>
<p>Rising Islamic fundamentalism, especially with regard to women's rights, children's rights and freedom of expression</p>	<p>Two press conferences expressing concern about the situation, and specifically addressing the issue of children being denied vaccination on religious grounds</p>	<p>Creating a platform for moderate Islamic scholars</p> <p>Actively publicising the compatibility between Islam and human rights</p> <p>Actively advocating against the portrayal of human rights as 'Western' and alien to the Maldives</p>
<p>Major riots in the main prison in March and October 2009, causing severe damage to the prison and forcing authorities to transfer some inmates to a temporary prison under supervision by the Army</p>	<p>Condemned the violence</p> <p>Prison visited by members of the NPM</p> <p>A detailed report and recommendations to improve prison conditions for both inmates and officials (March)</p> <p>Reiteration of need to implement earlier recommendations (October)</p> <p>Visits by the NPM to the temporary prison</p> <p>Met with the Vice-President to urge a quick end to the military supervision of inmates</p>	<p>A robust public defence of detainee rights following the public backlash against detainees</p>

<p>Public sector pay cuts, the brunt of which were borne by civil servants</p>	<p>Urged the government to reconsider the pay-cuts and ensure that they were fair to all public employees if they were indeed necessary</p>	
<p>Calls by some political parties and NGOs to investigate alleged crimes committed by the previous government</p>	<p>Explained the legal limitations under which it operates, which make the investigation of these crimes impracticable without amendments to current legislation</p> <p>Proposed a 'truth and reconciliation' model to deal with the issues and stressed the need for national unity</p>	<p>Effectively communicate the concept and utility of the 'truth and reconciliation' model to the general public</p>
<p>Two separate reports alleging that young girls were being used as concubines (May-July 2009)</p>	<p>Aggressive investigations by the HRCM including threats to subpoena hospital records</p> <p>Strong public claims that the allegations were true, despite police dismissing them as false</p>	<p>Failure to condemn professional negligence by some of those involved, including doctors, nurses and journalists in terms of failing to notify the relevant authorities in due time about their concerns.</p>
<p>Severe beating in police custody of six men accused of sexual assault (2010)</p>	<p>Comprehensive investigation into the torture allegation by the HRCM</p>	<p>Failed to investigate the case of the woman who had been sexually assaulted, once again giving the false impression of prioritising detainee rights at the expense of victim rights</p>

<p>The growing negative image of human rights in the country as either exclusively detainee rights or political rights, or as being 'Western'</p>	<p>Workshops, press statements and posters to promote human rights</p>	<p>A greater focus on socio-economic rights, especially in publicising the work undertaken by the Commission on this front</p> <p>A greater focus on ensuring that victims rights are not perceived to be neglected</p> <p>Clear and robust explanations of and advocacy for detainee rights</p> <p>Much greater use of mass-media to promote human rights</p>
<p>Racism and migrant rights</p>	<p>-NPM visited the immigration detention centre in 2009 and made recommendations</p> <p>-Specific recommendations for improving the housing conditions of migrant workers made in HRCM rapid assessment of the housing situation in the Maldives</p>	<p>Explicit advocacy for and promotion of migrant's rights</p> <p>A special focus on youth in promoting tolerance and respect for others</p> <p>A focal point for foreigners, as well as translators. The Commission needs to make itself much more accessible to foreigners in the country</p>
<p>Threats to journalists from criminal gangs, religious extremists and political parties leading to self-censorship in the media</p>	<p>Press statement condemning threats to and intimidation of journalists</p>	<p>Promoting itself as an institution easily approachable by journalists and encouraging journalists to come forward and report threats</p> <p>Clearly defending freedom of expression even in matters with religious overtones as long as it is within the bounds of the Constitution</p>

VI. RECOMMENDATIONS

- Urgently pursue financial independence by lobbying both;
 1. Government, to amend financial regulations;
 2. Parliament, to amend laws as necessary for this purpose.
- Urgently take steps to ensure that the HRCM offices are easily accessible by persons with disabilities
- Implement measures to open branch offices in the atolls
- Establish a dedicated desk for Human Rights Defenders
- Take steps, either through the NGO Network or separate to it, to ensure that the HRCM builds coalitions and consensus within civil society in order to further strengthen its own lobbying efforts
- Take proactive steps to reach out to the journalistic community in order to encourage them to report incidences of intimidation as well as seek the support of the HRCM
- Publicise the commentary that the HRCM provides to the Attorney General and parliament on draft legislation
- Advocate more aggressively on the compatibility between Islam and human rights.
- Increase the focus on socio-economic rights while better publicising work currently being done in this area by the HRCM
- Communicate better with the public on detainee rights issues and be robust in defending them
- Urgently focus on the issue of racism and migrant rights in the Maldives. In particular, pressure the government to sign and ratify the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families

- Make efforts to better communicate and explain the role of the HRCM to the public
- Ensure that the Commission effectively utilises mass-media sources in all its functions

The Report on the National Human Rights Commission of Mongolia

The Centre for Human Rights and Development (CHRD)¹

I. General Overview of the Country's Human Rights Situation

The political situation in the country for the reporting period was stable. The presidential election was held on 24 May 2009, and was considered largely free and fair. Former Prime Minister Tsakhiagiin Elbegdorj of the opposition Democratic Party won the election, defeating the incumbent Nambaryn Enkhbayar of the Mongolian People's Revolutionary Party (MPRP). The new president made some progressive steps in the human rights field, including the establishment of a 'citizen hall' where citizens may express their views. Since its establishment, citizens have used it to discuss many draft laws including those on the independence of the judiciary and freedom of expression. Another important development was president Elbegdorj's announcement of a moratorium on the death penalty on 14 February 2010.

The parliamentary Subcommittee on Human Rights enjoyed a heightened profile over the past year. Since late 2009 its work entered the public consciousness after organizing, for the first time in its history, two public hearings on the riots which occurred on 1 July 2008. The Subcommittee also organized a meeting with human rights NGOs, collecting comments and suggestions for its work plan, and set up a working group on 23 June 2010 to monitor

¹ Prepared by Ms. Urantsooj Gombosuren, Chairperson

the progress of Parliament Resolution 41 on the implementation of the National Action Plan for Promotion and Protection of Human Rights. The Parliament of Mongolia ratified the Optional Protocol of the International Covenant on Economic, Social and Cultural Rights.

Prime Minister Sanjaagiin Bayar transferred his leadership – of both government and of the Mongolian People’s Revolutionary Party – to Sukhbaatariin Batbold. Under the unity government (led by the new Prime Minister and still dominated by an MPRP majority), there have been some efforts to institutionalize cooperation between government and NGOs. A Civil Council was established to work with government and various ministries.

The State Registration General Agency officially recognized the LGBT [lesbian, gay, bisexual and transgender] Centre in December. The Agency had previously rejected its application for recognition stating that it conflicted with ‘Mongolia’s traditions and customs’ and had the potential ‘to set the wrong example for youth and adolescents’.

There was less progress regarding the rights of citizens to access information; participation in decision-making; and access to justice. These rights still have no legal guarantee, and many citizens’ movements are demanding these rights in relation to, for example, mining investment projects.

Human rights NGOs become more united in their efforts over the past year, establishing the NGO Forum on the UPR [Universal Periodic Review] and preparing two joint submissions and five individual submissions on issues including the right to food, minority rights, refugees and internally displaced people, mining, the environment and human rights, and human trafficking.

A. What are the key issues that the NHRI needed to face?

The National Human Rights Commission of Mongolia (NHRCM) participated in the public hearing organized by the parliament subcommittee on Human rights on the July 2008 public riots. As result of this event both the NHRCM and the government

officially recognized that state security forces did commit human rights violations, including the right to access to legal assistance, fair trial and freedom from torture, during the arrest and detention of the rioters.

The NHRCM also faced issues around violations of LGBT rights, including the right to free association. The Commission supported the LGBT Centre and advocated for its registration in December 2009, after the State Registration General Agency had refused to allow it to register.

B. What are the issues that the NHRI actively confronted?

According to the annual report of the NHRCM, the Commission has focused on three areas for the reporting period. It researched 1) the rights of national minorities (kazah, tsaatan/reindeer people and duha); 2) the right to education for disabled people; 3) the rights of people in criminal procedures. The research aimed to promote and protect the rights of national minorities and disabled people; to assess the current situation in implementation of their human rights; to ensure their active participation in society, economics, politics and culture; and to consider human rights issues during criminal investigation procedures, particularly arrest, detention, and punishment.

The annual report describes several policy recommendations, such as greater inclusion of tsaatan/reindeer people and other national minorities in poverty alleviation programmes to provide them with jobs, literacy training, and civil documents for access to health services and social security schemes. The Commission recommends that these policies are combined with initiatives to maintain and develop minority traditions and culture. Regarding disabled people, the NHRCM recommended amending the definition of a disabled person in social security law, as well as ensuring that education legislation is in line with the Convention on Human Rights of People with Disabilities. Other key recommendations included a country-wide assessment of the root causes of disability and consideration of prevention measures, and adequate premises and access for disabled people in civil construction planning. Regarding criminal investigation

procedures, the NHRCM recommended improvements in criminal law in relation to arrest and detention, as well as an end to the practice of arrest without the authorization of a judge.

II. Independence of the NHRCM

The enabling law of the NHRCM does not guarantee its independence. The Commission itself is not able to recommend changes in the law to better enable it to fulfill its mandate. The NHRCM proposed one draft amendment to the law; however this amendment omitted the nomination and selection process and failed to introduce the requirement that Commissioners must have human rights expertise. Since the NHRCM is dependent on government, it was not able to adequately fulfill its human rights protection mandate during the states of emergency in July 2008.

The Chief Commissioner's term expired on 6 February 2010. According to present guidelines, the Chief Commissioner should have brought the issue to parliament and sought approval of a new Chief Commissioner. However, the Chief Commissioner missed the spring session. According to interviews, there has been some politicization of the nomination process for the position of chief commissioner.

The non-transparent nomination and selection process of new Commissioners effectively divides Commissioners and staff into two groups. This division hinders the exchange of information, communication and cooperation between Chief Commissioner and the two other Commissioners, which further leads to a split between staff. As an example of the negative consequence of this split, note that two Commissioners are actually not aware of the Commission's UPR submission.

III. Effectiveness of the NHRCM

There is no complete data on the complaints-handling operations of the NHRCM in 2009. According to the available data from the NHRCM website, it received eight complaints in January 2009 and nine complaints from 1-24 February 2009. Three of those nine

complaints were received from provinces, five from the capital Ulaanbaatar, and one from a citizen living abroad. Six of these nine complaints were transferred to competent authority, one was closed with a request to provide an advocate, one was closed through legal advisory, one with demand and one with recommendation. Two complaints were legally inadmissible and were returned to the complainants. In February 2009, the Commission provided legal advice for 33 citizens for a total of seven hours.

In the first half of 2009 the NHRCM handled 62 complaints and eight requests, in addition to 17 complaints from the previous year. 23 complaints were from provinces and 54 were from Ulaanbaatar, while two were from a citizens living abroad. 33 complaints, or 41 per cent, were received from prisons and detention centers. Only three complaints were closed without consideration for failing to meet complaints requirements. The others were considered and resolved in different ways, including one claim to the court.

The NHRCM received 94 complaints and eight requests from citizens and organizations by 21 June 2010. The Commission considered and resolved 86 complaints and eight requests. In comparison with the previous year, this number shows an increase of 45.7 per cent. 70 of these complaints were classified under criminal laws; 12 under civil; and 20 under administrative. 85 were from Ulaanbaatar, 17 from the provinces, three from foreigners living in Mongolia, and 49 from prisoners or detainees.

The Commission was able to handle the 94 complaints in due time. It also provided legal advice for 72 people for a total of 42 hours.

31 complaints related to heavy sentences or false punishment; 22 related to the actions of law enforcers during criminal procedures; and five to torture. Nine complainants requested legal assistance; four complained of non-implementation of court decisions; 10 of illegal acts or abuse of power by officials; one requested compensation for damages; –one complaint related to the violation of child rights; seven related to the right to work.

In conclusion, the Commission handles complaints within its law. However it could achieve greater results if the Commission worked better together as one team.

IV. Consultation and Cooperation with NGOs

The NHRCM routinely organizes consultations with NGOs to discuss its research findings. It also cooperates with INGOs including Amnesty International and Save the Children, as well as trade unions and disabled people's organizations, on human rights trainings. However its cooperation with NGOs does not go beyond this.

According to the enabling law of the NHRCM, it has an ex officio council consisting of nine NGO representatives. However, the ex officio council has not been able effectively influence the Commission's strategies, capacity development or improvement of its cooperation with human rights NGOs.

V. Conclusion and Recommendations

The National Human Rights Commission of Mongolia needs to be creative in developing its capacity to obtain adequate funding from the Government.

The NHRCM should be proactive in its submission and advocacy of draft amendments to the enabling law to ensure its independence.

- This should include amendments to the nomination and selection process of Commissioners – including the Chief Commissioner position – to require candidates to demonstrate human rights expertise.
- The amendments should also ensure the Commission's power to protect, as well as promote, human rights.

The NHRCM should improve its transparency, accountability and cooperation with NGOs. It should improve its ex officio council's work.

The NHRCM should improve its internal coordination, in order to work better as one team and publicize its work more effectively.

National Human Rights Commission of Nepal (NHRC): Flaws and Challenges

Informal Sector Service Centre (INSEC)¹

I. General Overview

Nepal's peace process is still shaky. Despite many rounds of discussions among the parties, the country has not seen any indication of consensus on solving some of the critical issues related to the peace process. This would likely hamper the promulgation of the new constitution within the stipulated time. Because the Constituent Assembly (CA) was unable to perform its task of drafting a new constitution within the time frame expected by the people, the three major political parties extended its tenure by one more year in order to prevent the country's on-going peace process from turning into a fiasco. If such an extension had not been agreed upon by the time it was due to expire on 26 May 2010, the country would have been pushed into a constitutional vacuum generating further complexities and uncertainty in Nepali political situation. However, even after the extension of the term of the CA, procrastination regarding implementation of the 26 May agreement has persisted. Stakeholders are seemingly not serious about their commitments, and what their signed agreements explicitly mean and imply. These events portend a situation that will further worsen and lead the political parties towards confrontation.

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Extension of the CA's term may have saved the peace process momentarily but the real challenge of settling many contentious issues has begun now for the parties and other stakeholders, including National Institutions and civil society. Of the multiple problems and concerns, the National Human Rights Commission of Nepal (NHRC) is one of the contentious issues of concern in establishing a democratic government.

The NHRC signed an agreement with Nepal Field Office of the Office of the UN High Commissioner for Human Rights (OHCHR-Nepal) in February 2009 to strengthen the former's capacity to perform its work. However, the NHRC submitted a memorandum to the Prime Minister on 26 June 2009 arguing that Nepal does not need any international human rights organization, including OHCHR-Nepal, because it might encroach into the constitutional mandate of the NHRC. The negative stance taken by the NHRC towards OHCHR-Nepal manifests the non-cooperative attitude towards international human rights agencies.

The constitutional human rights watchdog has a crucial responsibility to play as an intermediary between civil society (the NGOs and the community-based organisations, CBOs) and the government, and in moving the peace process forward by facilitating the quest for justice in a country in transition like Nepal. While the constitution is being drafted, the NHRC could focus on pushing for guarantees of strong and effective human rights provisions in the charter, and also by taking initiative in ensuring a participatory constitutional drafting process.

However, in 2009 the Commission seemed to be busy in recruiting staff, in introducing unlawful amendments of its regulations, adding infrastructure, and settling internal disputes arising between the commissioners and secretary of the commission.

II. Independence

The draft prepared by Constitutional Assembly committee on the Structure of Constitutional Bodies has recommended for a Federal Human Rights Commission consisting of a Chairperson and four members, selected on the basis of proportionate

representation and inclusiveness. However, it has also allowed the continuation of provisions in the Interim Constitution, including all the grave flaws which hold back the creation of an effective and independent Commission.

Autonomy, independence and impartiality are essential principles for an effective and credible NHRI. However, there is no reference to these principles in the draft NHRC Act recently proposed by the government to the parliament.

Implementation of recommendations by it is a major challenge for the NHRC. The existing NHRC Act does not clearly specify what actions can be taken if a body or agency of concern fails to implement the former's recommendations. The draft is likewise silent on the establishment of effective mechanisms for the full and effective implementation of its recommendations.

The draft further intends to restrict the work of human rights organizations by proposing that such organizations consult with and seek the approval of the NHRC in the registration process.

On 31 July 2009, the NHRC submitted a set of suggestions on the draft bill. To include the terms like 'independent and autonomous' as per the Paris Principles of NHRIs, to include the regulatory powers to be able to prosecute human rights violators, to increase the amount of compensation given to the family of the persons killed due to human rights violations from 300 thousand to 500 thousand Nepali rupees (NPR), to constitute separate classification for service ('Human Rights Service') for NHRC personnel, to be able to appoint its own personnel, and to make it mandatory for the Nepal Government to consult with the NHRC before signing human rights treaties or such agreements with donor agencies. However, NHRC did not suggest any measure for the effective implementation of its recommendations.

Government allocated NPR 70.535 million (around 904,295 USD) for the fiscal year 2009-10² to the NHRC for its general administration and delivery of services. This makes up only 0.25% of the national budget by sectoral distribution, leaving the NHRC

2 NPR78 = US\$1

last among constitutional bodies in terms of funding. Although the amount is 0.21 % more than the amount allocated to it for the previous fiscal year, this amount is still insufficient to cover the needs in monitoring and investigating human rights violations. This is a reflection of the government's lack of interest in developing the NHRC into an effective mechanism by strengthening its resources.

The 1997 NHRC Act, the current law under which the NHRC operates, has a provision allowing the body to explore other means of generating resources required for the performance of its functions, such as grants from donor agencies.³ The draft bill, however, does not speak about such alternative financial sources. The proposed amendment submitted by the NHRC to the Prime Minister is silent about the fiscal autonomy of the NHRC. However, the Commission has submitted a memorandum submitted to Prime Minister demanding a building, financial and technical support, and sufficient human resources to make the NHRC more effective and to develop its capacity.⁴ It has not suggested any particular provision through legislation to ensure financial autonomy.

While the NHRC itself has been demanding for adequate resources, there are reports that suggest financial irregularities in the NHRC. One of the commissioners publicly said that the NHRC is marred by financial irregularities.⁵ The controversy over the multi-million vehicle procurement deal has created a crisis of confidence among the commissioners.

The NHRC is also demanding more autonomy in recruiting its own staff. To shift the project-based staff to regular positions once the projects are over, the NHRC amended its regulations in an effort to legalize this mode of recruitment. The Interim Constitution contains a provision requiring all constitutional bodies to appoint staff in consultation with the Public Service Commission. The move was questioned at the Supreme Court, which scrapped the recruitment of the NHRC and stopped the latter from being anarchistic by disobeying the rule of law.

3 Article 15, NHRC Act, 1997

4 Memorandum submitted to Honorable Prime Minister by National Human Rights Commission, 26 June 2009

5 Corruption slur on NHRC, available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=7767

III. Effectiveness

According to the status report⁶ of the NHRC, it has received a total of 10,164 complaints on human rights violations as of March 2009. Recommendations were sent to the government on 285 of these complaints, of which 21 (7.37%) has been fully implemented, 22 (7.72%) has been partially implemented and 77 (27.37%) are currently under process. The report says that the NHRC has no information about the remaining 164 (57.54%) recommendations.

Also according to the report, it has received 1,707 complaints from 2007 July to June 2009, while 138 cases have been decided, 810 cases have been concluded and 38 have been dismissed.⁷ In 2008, a total of 138 recommendations were submitted to the government, out of which only five (4%) have been fully implemented and two (1%) have been partially implemented, while 78 (57%) are being processed, and 53 (33%) are pending.

The above-mentioned statistics indicate a poor performance by the Commission, which can be linked to its weak mandate for addressing human rights issues. According to Article 132 (2) of the Interim Constitution, the NHRC has a duty to ensure the protection and promotion of human rights through effective implementation. However, in the absence of a binding mechanism for the government to comply with NHRC recommendations can achieve very little in practice.

Another important issue connected with NHRC is the personal integrity of the Commissioners which has come under public scrutiny. In its report published on 10 June 2009, the National Vigilance Center (NVC) of Nepal found that NHRC Commissioners, including the Chairperson, had violated the Corruption Control Act by not submitting details of their properties details to the relevant government bodies.⁸ This submission is mandatory for all public officials, including the Chairperson and members of the

6 Status of the implementation of the recommendation of the National Human Rights Commission, NHRC, 22, June 2009

7 Ibid, P.97

8 'NHRC, PSC officials among 1,257 law violators', Republica Daily, 11 June 2009, http://www.myrepublica.com/portal/index.php?action=news_details&news_id=6160

Commission. Despite the NHRC releasing on 11 June about this issue,⁹ these incidents contribute to a negative public image of the institution, limit the moral strength of the whole organization and damage its credibility and effectiveness.

The commissioners are publicly expressing their dissatisfaction over the transparency of the NHRC. Last year, one of the commissioners commented on the anomalies in the NHRC and also blamed the other commissioners for dereliction of duties regarding rights protection. Recently, another commissioner disclosed the signing of an agreement with UNDP without consulting other commissioners. The agreement, amounting to around 20,000 USD, aimed to strengthen the capacity of NHRC. Still the NHRC leadership was blamed for disregarding administrative procedure, and appealed for greater transparency for better effectiveness in its responsibility.

IV. Consultation and Cooperation with National and International Organizations/ NGOs

A. Consultation and Cooperation with National NGOs

There is limited collaboration between the Commission and national NGOs in terms of joint activities and initiatives. Only in a few matters—such as discussions on treaty reporting, internally displaced persons, transitional justice mechanisms and issues of impunity—has the NHRC established co-operation by inviting NGOs to its programmes. However, there are no consultative mechanisms that could facilitate regular discussions and communications with NGOs on the issues at national level.

The Interim Constitution and the draft NHRC Act provisioned that NHRC has to work jointly and in a coordinated manner with civil society to enhance awareness on human rights. However, there are very few instances of coordinated activities initiated by the Commission.

9 'NHRC officials submitted property details already', NHRC, 11 June 2009

10 Point 9, Guidelines for cooperation between the National Human Rights Commission (NHRC) and the Office of the High Commissioner for Human Rights in Nepal (OHCHR-Nepal), 20 February 2009

Currently, civil society organizations are working collectively among themselves to draft a report for the impending review of Nepal's human rights record by UN Human Rights Council (HRC) in January 2011 under the Universal Periodic Review (UPR) process. NHRC has also formed a working group on UPR coordinated by its spokesperson, Mr Gauri Pradhan. Despite several requests of the OHCHR-Nepal and CSOs for the joint initiatives on the UPR process, NHRC consulted only once with civil society organizations and has not shared its UPR report with civil society yet..

B. Consultation and Cooperation with Other Commissions

NHRC is a constitutional body. Being a watchdog for human rights, it has a prime responsibility to collaborate with other two statutory commissions dealing with major human rights issues--the National Women Commission and National Dalit Commission. For the first time NHRC worked jointly with two statutory bodies for the preparation and submission of the UPR reports, the initiation should be acknowledged. However, it has not been paying attention to the requests made by these two commissions. For instance, these two commissions are demanding their equal legal status with the NHRC complying with the Paris Principles. NHRC has always insisted on its own independence and financial autonomy. It has never drawn attention of the government towards granting equal status of all three commissions.

C. Consultation and Cooperation with International Organisations including OHCHR-Nepal

An agreement 20 February 2009 on guidelines for collaboration and cooperation in promoting and protecting the humans rights signed between OHCHR-Nepal and the NHRC was expected to end disputes regarding their respective working areas. The guidelines state that the OHCHR-Nepal will provide technical assistance related to building capacity , education, training and publication of educational and publicity materials of the NHRC. It has to be understood that the guidelines will remain valid as long as the agreement between Nepal Government and the OHCHR-Geneva remains in place.¹⁰

However, the NHRC has been complaining that it was not consulted when the government gave permission to the OHCHR-Nepal to carry out its activities in Nepal; and that the OHCHR-Nepal has interfered in its area of work. Some commissioners expressed their dissatisfaction over the extension of the tenure of the OHCHR saying “[t]he government has not consulted us and in the changed context the government had to make certain adjustments on the existing agreement with OHCHR if it decides to extend the term.”¹¹ Furthermore, one of the members of the NHRC accused OHCHR-Nepal of “playing games” to weaken the NHRC and trying to stay for a long time.¹² The commissioner says that OHCHR-Nepal should not continue further because its presence is no longer needed in the changed context and the NHRC as a constitutional body has gained enough strength after the dawn of democracy in 2006.

In a memorandum submitted by the NHRC to the Prime Minister on 26 of June 2009 argued that Nepal does not need the help of any international human rights organization, including OHCHR-Nepal, in order to do its constitutionally mandated work. This type of reasoning has been criticized in the human rights community. Many human rights organizations and defenders have regarded this statement as a ‘politically-motivated’ argument of the commissioner. If other organizations are not entitled to work for promotion and protection of human rights as mentioned by the NHRC memorandum, then any agency touching the human rights field including Courts, the Parliamentary Human Rights Committee, Dalit Commission, Women Commission, NGOs and UN Agencies should stop their activities.

The negative stance of the NHRC towards OHCHR office in Nepal manifests a non-cooperative attitude towards international agencies. NHRC’s dispute against OHCHR-Nepal is not only self-centric, but has also gives signals that it intends to bypass civil

11 UN rights office awaits extension, available at <http://www.kantipuronline.com/kolnews.php?&nid=188152>

12 OHCHR tenure over: NHRC: Commissioner says it has been weakening rights movement here, available at http://www.thehimalayantimes.com/fullstory.asp?file_name=aFanata0sgqzpc47Ra0a8a.axamal&folder=aHaoamW&Name=Home&dtSiteDate=20080712

society and other stakeholders. It should be noted that the NHRC did not consult civil society and human rights defenders prior to publicly denouncing the OHCHR office in Nepal. In this context, wider consultation has been neglected and disregarded by the NHRC, which is unjustifiable in that it resulted in hiding the truth.

V. Conclusion and Recommendations

NHRC, as a public institution, should always be alert, effective and accountable to the peoples. It can perform its work of promoting and protecting human rights more effectively only through transparency, cooperation and collaboration with NGOS, civil society and other national institutions.

Recommendations to government:

- Ensure independence and autonomy of the NHRC in new constitution;
- Urge parliament to approve the the NHRC bill without further delay;
- All agencies concerned must implement all NHRC recommendations;
- Give clear powers to the NHRC to directly refer cases to the Attorney General for prosecution;
- Allocate additional resources for the operation of the NHRC.

Recommendations to the NHRC:

- Lobby to guarantee for independence and autonomy in new constitution;
- Lobby for the approval of the pending amendment bill and for the implementation of NHRC recommendations;

- Engage extensively with civil society, victims' groups, human rights defenders, political parties, government bodies and the international community, including OHCHR-Nepal, to broaden efficiency;
- Create and strengthen internal mechanisms, and build capacity to effectively perform its multiple functions, especially in relation to facilitating the peace process and implementing NHRC recommendations;
- Engage with the Constituent Assembly to frame a 'human rights based' constitution.

Philippines: A Time of Great Irony

LIBERTAS¹

I. Introduction

The gruesome mass murder of 57 individuals, including journalists, women, lawyers, and supporters of an electoral candidate in the province of Maguindanao,² is one disturbing example of the pervading culture of impunity in the Philippines. Decades of complacency and co-optation of local authorities by the national leadership have resulted in the disregard of the rule of law and human rights.

Ironically, this incident happened in the context of an electoral exercise in a supposedly free and democratic country. The implications are clear: many citizens are still denied the right to genuine political participation, as elections become mere tools to legitimize the authority of local warlords.

More ironic still, the Commission on Human Rights of the Philippines (CHRP), once taunted as a 'toothless tiger', began to roar. Amidst the many incidents of human rights violation under

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2 On 23 November 2009, while on their way to file the certificate of candidacy for Esmael Mangudadatu, vice mayor of Buluan town, the 57 victims were kidnapped and brutally killed. Mangudadatu was challenging Datu Unsay mayor Andal Ampatuan, Jr., son of the incumbent Maguindanao governor Andal Ampatuan, Sr., in the gubernatorial election on 10 May 2010 elections. The 57 people killed included Mangudadatu's wife, his two sisters, journalists, lawyers, aides, and motorists who were witnesses or were mistakenly identified as part of the convoy.

the administration of President Gloria Macapagal-Arroyo, the Commission transformed itself into a “high profile watchdog.”³ While many had questioned the process by which she was appointed,⁴ the outspoken Chairperson Leila M. de Lima eventually gained the confidence of her critics. Yet while she reaps accolades for her achievements,⁵ some of her colleagues in the Commission are facing accusations of incompetence and absenteeism. What remains to be seen is whether a collegial body like the CHRP, with a bureaucracy of more than 680 personnel, can sustain its momentum and become effective in the long-term if its success is dependent on the popularity and initiative of its Chairperson.

A. Significant/Key Issues in 2009

Major disasters, both man-made and natural, rocked the Philippine archipelago in 2009. The year opened with an eruption of violence in the Southern Philippines following the collapse of peace talks between Government of the Republic of the Philippines (GRP) and Moro Islamic Liberation Front (MILF) in the latter part of 2008.⁶ The hostilities, which had continued through out the year except during a brief declaration of ceasefire,⁷ caused the displacement of up to a million people.⁸ But violence in Southern Philippines was

3 GMANews.TV, *Leila de Lima: GMANews.TV's Public Servant of the Year*, 31 December 2009, available at: <http://www.gmanews.tv/story/180559/leila-de-lima-gmanewstv-public-servant-of-the-year> [accessed on 10 January 2010].

4 Philippine Alliance of Human Rights Advocates, *Human rights groups express disappointment with the selection process of the CHR Chairperson*, 15 May 2008, available at <<http://www.philippinehumanrights.org/release/43.html>> [accessed on 10 June 2010].

5 *Supra* note 4. In 2009, a television station bestowed its first ever “Public Servant of the Year” on Chairperson de Lima “[f]or her courage and independent-mindedness in speaking out even against colleagues in government and for helping keep human rights on the public agenda with timely and forceful words.”

6 The peace talks between the GRP and MILF collapsed after the Supreme Court declared as unconstitutional the Memorandum of Agreement on Ancestral Domain (MOA-AD) which the parties were due to sign on 5 August 2008. As the culmination of negotiations between the GRP and the MILF, the MOA-AD proposed the creation of the Bangsamoro Juridical Entity (BJE), with defined territories. For more details on Supreme Court ruling, see *In the Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain*, G.R. Nos. 183591, 183752, 183893 & 183951, 14 October 2008.

7 In July, when the GRP declared the Suspension of the Military Operations (SOMO) and the Suspension of Military Action (SOMA).

not only confined to areas affected by the secessionist movement. The simmering rivalries between warring local clans resulted in a string of extrajudicial killings and abductions in Agusan del Sur.⁹ In Davao City, members of the so-called Davao Death Squad (DDS) were believed to have murdered 89 individuals from January to early December 2009.¹⁰

Meanwhile, operations against suspected communists also intensified as the military launched the last phase of its counter-insurgency program dubbed Oplan Bantay Laya (OBL).¹¹ The Alliance for the Advancement of People's Rights (KARAPATAN) claimed that OBL was responsible for at least 1,188 extrajudicial killings and 205 enforced disappearances of suspected communists from 2001 to 2009.¹² On 6 February 2010, the military arrested 43 health workers (collectively known as the "Morong 43") suspected of being communist sympathizers, in the Rizal province. The military allegedly arrested the health workers using defective warrants,¹³ and subjected them to physical and mental torture.¹⁴

A series of natural calamities hit the country in September and October causing the death of at least 858 individuals.¹⁵ Around

8 Internal Displacement Monitoring Centre (IDMC), *Global Overview of Trends and Developments in 2009 - Philippines*, 17 May 2010, available at: <http://www.unhcr.org/refworld/docid/4bf2526a4.html> [accessed 14 June 2010]

9 http://www.chr.gov.ph/MAIN%20PAGES/news/PR_26Jan10_PIAgusan.htm

10 Human Rights Watch, *World Report 2010 - Philippines*, 20 January 2010, available at: <http://www.unhcr.org/refworld/docid/4b586ce6c.html> [accessed 14 June 2010]. According to the report, extrajudicial killing attributed to the Davao Death Squad from 1998 to 2009 have reached 925. Majority of the victims were petty criminals.

11 For more comprehensive analysis on "Oplan Bantay Laya", please see KARAPATAN's 2009 Report on the Human Rights Situation in the Philippines entitled "OPLAN BANTAY LAYA: Blueprint for Terror and Impunity." Electronic copy of the document may be accessed at : <<http://www.karapatan.org/2009-HR-Report>> [accessed on 11 June 2010].

12 *Ibid.*

13 Merueñas, Mark, '*Morong 43*' lawyers appeal CA's junking of habeas corpus plea, GMA News.TV, 11 March 2010, available at: <http://www.gmanews.tv/story/185935/morong-43-lawyers-appeal-cas-junking-of-habeas-corporus-plea> [accessed 14 June 2010].

14 Remolino, Alexander Martin, *Int'l rights group speaks out on 'Morong 43'*, Asian Correspondent, 12 April 2010, available at: <http://us.asiancorrespondent.com/ReadArticle/int/-l-rights-group-speaks-out-on-/.htm> [accessed 15 June 2010].

15 On 26 September 2009, tropical storm "Ondoy" [international name: Ketsana] inundated 80% of Metro Manila and killed around 420 individuals. The following week, 2 October 2009, typhoon "Pepeng" [international name: Parma] ravaged Northern

230,000 homes were either partially or totally destroyed, affecting more than 400,000 families. The World Bank and other agencies, estimated that \$942.9 million was required to meet recovery needs, while \$3.48 billion was needed for reconstruction.¹⁶

As the election season began toward the end of the year, many sectors criticised the Commission on Elections (COMELEC)¹⁷ for denying accreditation to “Ang Ladlad” a group representing the Lesbian, Gay, Bisexual and Transgender (LGBT) community;¹⁸ the Disabled Pinoy Party (DPP);¹⁹ MIGRANTE, a group representing overseas Filipino workers; Alliance of Concerned Teachers (ACT); and Courage, a union of government employees.²⁰ However, COMELEC readily accredited groups closely associated with President Gloria Macapagal-Arroyo and her relatives.²¹ Then, in a series of controversial rulings just a few months before the elections, COMELEC ordered the removal of three provincial governors closely associated with opposition presidential candidate Benigno Simeon C. Aquino III.²²

Luzon, leaving 438 casualties. See GMANews.TV, *Combined death toll from Pepeng, Ondoy now at 858 – NDCC*, 20 October 2009, available at: <<http://www.gmanews.tv/story/175068/combined-death-toll-from-pepeng-ondoy-now-at-858-ndcc>>, [accessed 16 June 2010].

16 Integrated Regional Information Networks (IRIN), *Philippines: Thousands still displaced after Ketsana*, 16 February 2010, available at: <<http://www.unhcr.org/refworld/docid/4b7e651826.html>> [accessed 14 June 2010].

17 See for instance, Pangalangan, Raul C., *Excluding the disabled party-list group*, Philippine Daily Inquirer, 8 April 2010, available at: <<http://opinion.inquirer.net/inquireropinion/columns/view/20100408-263135/Excluding-the-disabled-party-list-group>> [accessed on 13 June 2010].

18 On 11 November 2009, the COMELEC Second Division denied the accreditation to Ang Ladlad LGBT Party-List (Ang Ladlad) on the ground that it is “advocating immoral doctrines.” On 17 December 2009, the COMELEC En Banc dismissed Ang Ladlad’s Motion for Reconsideration.

19 On 24 March 2010, COMELEC En Banc denied with finality DPP’s petition for accreditation on the ground that “it has no capacity to launch a nationwide campaign.” See *Comelec disqualifies disabled pinoy party-list*, 29 March 2010, available at: <<http://www.thepoc.net/breaking-news/elections-2010/5415-comelec-disqualifies-disabled-pinoy-party-list.html>> [accessed on 13 June 2010].

20 Crisostomo, Shiela, *ACT, Courage disqualified from partylist*, Philippine Star, 21 November 2009. Electronic copy of the article may be accessed at: <<http://philstar.com/Article.aspx?articleid=525326>> [accessed on 11 June 2010].

21 *Ibid.* Some of the questioned partylist groups include: Ang Galing Pinoy (nominees include presidential son and incumbent district representative Mikey Arroyo); Kasangga (nominees include the president’s sister-in-law, Maria Lourdes Arroyo);

While the election period officially started on 10 January 2010, around 90 incidents of election-related violence had already been reported by the end of 2009. Political analysts suggested this was due to the introduction of automated voting systems, given that politicians who feared they “could no longer manipulate poll results are more tempted to eliminate each other.”²⁴

The ‘Maguindanao Massacre’ was undoubtedly the most serious among the election-related violence reported so far. Considered the “single deadliest single attack on the press,”²⁵ the killing appeared to have been thoroughly planned.²⁶ More troubling however is the apparent complicity of state security forces in the attack.²⁷ Almost a thousand firearms and hundreds of thousands of rounds of ammunition were seized from the custody of the Ampatuan clan, the primary suspects to the mass murder. Many of the seized firearms and ammunitions turned out to be the property of the Armed Forces of the Philippines (AFP) and the Philippine National Police (PNP).²⁸

Buhay (nominees include evangelist Mike Velarde, a known Arroyo supporter); Bagong Henerasyon (nominees include Quezon City Councilor Bernadette Herrera- Dy); Batang Iwas Droga (nominees include Philippine Amusement and Gaming Corporation Chairman Efraim Genuino); and 1-Utak (nominees include Department of Energy Secretary Angelo Reyes. Meanwhile, militant Bagong Alyansang Makabayan (BAYAN) Secretary-General Renato Reyes Jr., questioned the following party list groups which he claimed to have government ties: Agbiag Timpuyo Ilocano (AGBIAG); Ahon Pinoy (AHON); Akbay Pinoy OFW-National (APOI); Aangat Ating Kabuhayan Filipinas (ANAK); Babae para sa Kaunlaran (Babae Ka); Bigkis Pinoy Movement (BIGKIS); Byaheng Pinoy Movement (Byaheng Pinoy); Kalahi Sectoral Party (KALAH); and League of Youth for Peace Advancement (LYPAD). See DateLine Philippines, *9 accredited party-list groups tied with Arroyo-Bayan*, 21 January 2010.

22 Pampanga Governor Amang Ed Panlilio, Isabela Governor Grace Padaca and Bulacan Governor Jonjon Mendoza.

23 Manny Mogato, Rising violence threatens 2010 elections, ABSCBN News, 27 January 2010, available at: <<http://www.abs-cbnnews.com/nation/01/27/10/rising-violence-threatens-2010-elections>>.

24 *Ibid.*

25 Committee to Protect Journalists, *Maguindanao death toll worst for press in recent history*, 25 November 2009, available at: <http://www.unhcr.org/refworld/docid/4b25fc17c.html> [accessed 14 June 2010]

26 Asian Human Rights Commission, *Philippines: How could the ‘Maguindanao massacre’ have been allowed to happen*, 27 November 2009, available at <<http://www.ahrchk.net/statements/mainfile.php/2009statements/2318/>> [accessed on 10 June 2010]. It has been noted among others, that the graves where the 57 dead bodies had been buried had already been excavated using a government-owned backhoe and that some reporters have already received information that they will be killed and buried if they persist in covering the filing of Mangudadatu’s certificate of candidacy.

The incident also revealed the government's willingness to circumvent the Constitution to conceal the ineptitude of the investigatory and prosecution services. Under extreme public pressure, following the failure of the police to immediately respond to the crime, President Arroyo placed the entire Maguindanao province under martial law on 4 December 2009, alleging "looming rebellion" in the area.²⁹ This suspended the writ of habeas corpus and enabled warrantless arrests and searches.³⁰ Many sectors questioned this decision as the Philippine Constitution restricts the declaration of martial law to cases of actual rebellion or invasion.³¹ Martial law was eventually lifted on 12 December 2009.

B. CHRP's Response to the Issues

Despite lacking prosecutorial or quasi-judicial functions, CHRP made use of its investigative power to bring human rights violations to the fore. It held public inquiries, fact-finding missions and special operations, particularly in cases

27 Asian Legal Resources Center, *PHILIPPINES: Council urged to ensure that justice is delivered concerning the Maguindanao Massacre*, 28 February 2010, available at: <http://www.alrc.net/doc/mainfile.php/alrc_st2010/600/> [accessed on 15 June 2010]. Of 197 indicted by the Department of Justice, 15 were members of the Ampatuan clan; 62 were policemen; four were soldiers and the remainder included members of several militia forces.

28 *Military summons officers on Ampatuan arms pilferage probe*, abs-cbnNews.com, 3 January 2010, available at: <<http://www.abs-cbnnews.com/nation/01/03/10/military-summons-officers-ampatuan-arms-pilferage-probe>> [accessed on 15 June 2010].

29 Proclamation 1959, 4 December 2009.

30 Samonte, Angelo, *Martial Law Lifted: State of emergency stays*, The Manila Times, 13 December 2009, available at <http://www.manilatimes.net/index.php/top-stories/7226-martial-law-lifted-state-of-emergency-stays> [accessed on 16 June 2010].

31 1987 Phil. Const., Art. VIII, sec. 18.

32 Draft CHRP 2009 Annual Report, p. 2. The Commission En Banc conducted public inquiries on 30-31 March 2009, 17 April 2009 and 22 May 2009 to extract information on the alleged extra-judicial killings perpetrated by members of the Davao Death Squad, and to determine the scope and magnitude of the killings, among others. A multi-agency task force was created to aid the Commission in its investigation.

33 *Ibid.* The investigation was spurred by the killing of a Catholic priest activist and a prominent politician in the island of Samar. Upon initial investigation into the killings, the Commission uncovered 56 different cases of murder from 2007 to the present, many of which were veiled in mystery and remained unsolved. The Commission conducted a full-blown public inquiry on 19 November 2009.

on the national interest, including: (a) Extra-Judicial Killings in Davao City Attributed or Attributable to the So-Called Davao Death Squad;³² (b) Extra-Judicial Killings in the Island of Samar;³³ (c) Maguindanao Massacre;³⁴ (d) Abduction and Killing of Rebelyn Pitao;³⁵ (e) Death of Three (3) Alleged Carnappers in NIA Road, Quezon City;³⁶ and (d) Illegal and Arbitray Arrest of the Failon Household.³⁷

34 *Ibid.* Aside from public inquiry, the Commission engaged the services of independent forensic experts to thresh out the truth regarding the massacre. The Commission is currently looking into the causes and effects of the 23 November killings and is monitoring the performance of government actors and non-state actors, including but not limited to the criminal justice processes.

35 *Id.*, p. 3. CHR Regional Office XI conducted a *motu proprio* investigation into the reported abduction and killing of Rebelyn Pitao, daughter of Leoncio Pitao, a New People's Army (NPA) Commander operating in the hinterlands of Paquibato District, Davao City. Unidentified gunmen in Davao City abducted Rebelyn, a young teacher, on 4 March 2009. Her body was found the following day floating in a river with several stab wounds on the chest. There was also a rope mark on her neck indicating that she was choked and her face was struck with a blunt hard object causing eye area to swell up. Leoncio Pitao, or "Kumander Parago", in his statement released to media, claimed that personnel from the Military Intelligence Group (MIG) were responsible for the abduction and murder of his daughter. However, Mayor Rodrigo Duterte stated during the regular meeting of the City Peace and Order Council that he is 70% sure that the perpetrators do not belong to the military.

36 *Ibid.* Three suspected car thieves were killed in an encounter with members of the Quezon City Police District (QCPD) Anti-Carnapping Group at the corner of EDSA and the National Irrigation Administration (NIA) Road in Quezon City. Quezon City Police District (QCPD) head, Chief Superintendent Magtanggol Gatdula, said that the encounter started when the suspects, on board a Honda Civic and a Toyota Revo, fired at police operatives during a car chase that started in Mandaluyong City. The chase ended at the corner of EDSA and the NIA Road. Concerns were raised, however, when a video footage of the operation showed one of the policemen still firing at a suspect who was already sprawled on the pavement. The CHR is investigating the incident.

37 *Id.*, pp. 3-4. This pertains to the arbitrary arrest of the househelpers and driver of Mr. Ted Failon as well as Pamela Arteche-Trinchera and Maximo Arteche on April 16, 2009. The police said they violated Presidential Decree 1829 on "obstruction of justice" because they allegedly prevented the police from investigating the death of Failon's wife, Trinidad Arteche Etong, who was killed by a gunshot wound to the head. The family said she committed suicide, but the police have not discounted foul play. Ted Failon, his family members, and household staff reportedly suffered mistreatment by the Quezon City Police Force.

38 *Id.*, pp. 14-17. The Commission issued Advisories on the following: On the Random Drug Testing of Secondary and Tertiary Students; Attempt of the Military to Gather Information on, and the Legal Offensives taken against Members of Gabriela, Karapatan, Bayan, KMU and other Organizations; Executive Order 778; Deployment Ban to Nigeria; Pasig City Ordinances on Mandatory Drug Testing; Early Voting; Radio Frequency Identification (RFID); Privatization of the Angat Hydro-Electric Power Plant (Angat-HEPP); Ang Ladlad's Right to Stand for Elections; and Protection During the Evacuation of the Area Threatened by Impending Mayon Volcano Eruption.

The Commission also issued several advisories to the government regarding its stand on national and local human rights issues.³⁸ When several natural disasters hit the country, the Commission also released an Advisory reminding the government to demonstrate its positive obligation to prepare, respond and rehabilitate when disasters occur.³⁹

The Commission also proactively launched a campaign for the right to political participation of vulnerable groups including youth, internally displaced persons, detainees, the elderly, indigenous peoples and persons with disabilities.⁴⁰ It filed a petition to COMELEC to establish special polling stations in detention facilities. The Commission also supported Ang Ladlad Partylist after COMELEC's decision to deny accreditation.

II. Independence

A. Law or Act

The CHRP originated as a Presidential Committee⁴¹ under the Executive Branch, when President Corazon C. Aquino assumed office in February 1986. It became an independent constitutional body under the 1987 Philippine Constitution,⁴² but was formally organized only in 1987 with the issuance of its legislative charter, Executive Order No. 163.

The Commission's powers and functions are constitutionally defined. Thus, Congress cannot diminish CHRP's powers and functions, although it may prescribe other duties and functions to Commission.⁴³

For two decades now, several bills have been filed in Congress seeking to enhance the Commission's independence through an amendment to its legislative charter. In September 2009, the

39 *Id.*, p. 16. Advisory on the Human Rights to be Safe from Natural Disasters

40 *Id.*, p. 29.

41 The Presidential Committee on Human Rights (PCHR) was created under Exec. Order No. 8 issued on 18 March 1986.

42 Ratified in a plebiscite on 2 February 1987.

43 1987 Phil. Const., Art. XIII, sec. 18 (11).

House of Representatives passed House Bill No. 6822,⁴⁴ on third reading. Among others, suggested reforms include the formation of a Nominations Committee to screen applicants prior to their appointment by the President;⁴⁵ the granting of full fiscal autonomy to the Commission;⁴⁶ provision for “standby prosecutorial powers” in cases of failure by the government prosecution body to act on human rights violations;⁴⁸ the power to preventively suspend government officers or employees;⁴⁹ the designation of Human Rights Attaches in Philippine Embassies or consulates to protect and promote the human rights of Filipinos living abroad; and elaboration on the scope of the Commission’s power to take preventive legal measures.⁵⁰

Unfortunately, the Senate failed to pass a counterpart bill until both chambers adjourned in June 2010. Thus, efforts to strengthen the Commission would again have to undergo the legislative mill from square one with the new Congress.

B. Relationship with Executive, Legislative, Judiciary and other specialized institutions in the country

CHRP has dynamic relations with Congress. Beyond reporting to Congress annually during budget deliberations, the Commission also submits its human rights legislative agenda, participates in committee hearings, and submits its position papers pending legislations.

The year 2009 is considered a milestone for human rights legislation with the successful passage of the following laws on which the Commission actively participated in the discussions: the Anti-Torture Act of 2009,⁵¹ the Philippine Act on Crimes against International Humanitarian Law, Genocide and Other Crimes against

44 The Bill is entitled “An Act Strengthening the Commission on Human Rights, and for Other Purposes,” or simply, the “Commission on Human Rights Act of 2009.”

45 HB No. 6822, secs. 9-10.

46 *Id.*, sec. 15.

47 *Id.*, sec. 26.

48 *Id.*, sec. 22.

49 *Id.*, sec. 39.

50 *Id.*, secs. 19-20.

51 Rep. Act No. 9745, passed on 27 July 2009.

Humanity;⁵² Anti-Child Pornography Law;⁵³ the Comprehensive Agrarian Reform Program (CARP) Extension Act;⁵⁴ and The Magna Carta for Women.⁵⁵ Unfortunately, the Commission failed to muster enough support from members of Congress for the passage of a new Charter, which would have provided the Commission with greater powers to fulfill the Commission's mandate.

Aside from collaborating with the Supreme Court on the issue of extrajudicial killing, the CHRP has intervened as *amicus curiae* in a petition filed by Ang Ladlad before the High Court questioning COMELEC's denial of its accreditation. The Supreme Court granted CHRP's intervention and eventually nullified the questioned COMELEC rulings.⁵⁶

As mentioned above, the Commission also actively engaged the COMELEC to guarantee the right to electoral participation. Acting on the Commission's petition to establish polling places for detainees, COMELEC issued a Resolution No. 8811 on 30 March 2010,⁵⁷ which eventually paved the way for qualified detainees to exercise their right of suffrage for the first time in the electoral history of the country.

C. Membership and Selection

The Philippine Constitution provides minimal qualifications of the five-member Commission: the Chairperson and the four members must be natural citizens of the Philippines and majority of them must be members of the Bar.⁵⁸ Executive Order No. 163 imposes additional qualifications: all of them must be at least thirty-five years of age at the time of their appointment, and must not have been candidates for any elective position in the election immediately preceding their appointment.⁵⁹

52 Rep. Act No. 9851, passed on 11 December 2009.

53 Rep. Act No. 9775, passed on 17 November 2009.

54 Rep. Act No. 9700, passed on 7 August 2009.

55 Rep. Act No. 9710, passed on 14 August 2009.

56 G.R. No. 190582, April 8, 2010.

57 Rules and Regulations on Detainee Voting in connection with the May 10 2010 national and local elections.

58 1987 Const., Art. IX-C, sec. 17 (2)..

The Commissioners work full time. To insulate them from any financial interests during their tenure, the Commissioners are prohibited from holding any other office or employment and from engaging in any professional practice or in the active management or control of any business. They are also prohibited from direct or indirect financial interest in any contract, franchise or privilege granted by the government, any of its subdivisions, agencies, or instrumentalities, including government-owned or -controlled corporations or their subsidiaries.⁶⁰

Neither the Constitution nor Executive Order No. 163 specifically require pluralism and gender equality in the appointment of the Commissioners. But as in previous Commissions, the current Commission is headed by a woman.⁶¹ However this is the first time that women comprise the majority of Commission members.⁶²

The selection process remains one of CHRP's glaring weaknesses. There is no fair and transparent process in place to allow civil society participation in the nomination and selection of Commissioners. Appointments are wholly at the discretion of the President,⁶³ and do not undergo any public hearing or public interview. The names under consideration are not even disclosed to the public prior to their appointment.

The appointment of the Chairperson came as a surprise to many, as she was known more as an election lawyer than a human rights defender. On the other hand, the other members of the Commission seem to have been appointed due to political considerations: one Commissioner was allegedly backed by the

59 Exec. Order No. 163, sec. 2

60 Exec. Order No. 163, sec. 2.

61 Mary Concepcion Bautista headed the First Commission from 1987-1992 and succeeded by Sedfrey Ordoñez from 1992-1995. The Second Commission was headed by Aurora Navarette-Recifa; while the third Commission was Headed by Purification C. Valera Quisumbing.

62 Aside from Chairperson De Lima, two other Commissioners are women: Cecilia Racquel V. Quisumbing, and Ma. Victoria V. Cardona.

63 In *Mary Concepcion Bautista v. Senator Jovito Salonga, et al.* (G.R. No. 86439, 13 April 1989), the Supreme Court ruled that the position of the Chairperson of the CHRP is not among those listed in Sec. 16, Art. VII of the 1987 Constitution, which needs the confirmation of the Commission on Appointments.

church; one by the son of the President; and one by her parents who were both high-ranking government officials. Although many hailed the appointment of a Regional Director as one of the Commissioners, it has been questioned whether he would have been appointed without the alleged backing of a military general. Needless to say, because of the manner of their appointment, the Commissioners are under constant public scrutiny.

The Chairperson and the four Commissioners are given a fixed term of seven years without reappointment.⁶⁴ The majority of them, however, will not be able to serve the full term due to the delay in taking up their positions.⁶⁵

The Commission is designed as a policy-making body. The Commissioners provide policy directives to the entire organization through resolutions. Meanwhile, the implementation of these policies and the daily running of the operation are carried out by civil servants, headed by the Executive Director. However, the Fourth Commission began to take on some of these daily management responsibilities with the adoption of the Focal Commissioner System.⁶⁶ Under this system, each Commissioner is tasked to supervise particular divisions and regional offices. As a result, the different regions are now managed by different Commissioners with little coordination on operational issues. The Commissioners also appropriated among themselves the management of foreign-funded projects.⁶⁷ This new system essentially erodes the functions of the Executive Director who has lost authority and central control over operations.

D. Resourcing

The CHRP has a total staffing of 680 permanent positions distributed nationwide among its central office, 15 regional offices, six sub-regional offices, and one desk office.⁶⁸ To augment its

64 Executive Order No. 163, sec. 2.

65 The term of office of the Third Commission ended on 5 May 2008. Chairperson de Lima and Commissioner Quisumbing were appointed on 7 May 2008; Commissioner Cardona was appointed on 5 June 2008; Commissioner de la Cruz was appointed on July 2008 and Commissioner Mamaug was appointed on April 2009.

66 Resolution CHR (IV) No. A2009-104, 1 September 2009.

67 Resolution CHR (IV) No. A2010-029, 7 February 2010.

manpower, staff are hired on a temporary basis to support offices with heavy workloads.⁶⁹

The state funds CHRP operations through annual appropriations passed by Congress. CHRP budget represents approximately 0.021% of the country's total appropriations. For 2009, the budget slightly increased to 255.278 million pesos (US\$5.673 million)⁷⁰ from 214.269 million pesos (US\$5.553 million) the previous year.

235.453 million pesos (US\$ 5.23), representing 92.23% of the CHRP's current budget, is earmarked for Programs (General Administration and Support, Support to Operations, and Operations) and can be used only for the activities indicated. For Operations, the appropriated amount must only be used for the following core functions of the Commission:

1. Investigation, on its own or on complaint by any party, of all forms of human rights violations involving civil and political rights, especially extra-judicial killings and enforced disappearances;
2. Provision for appropriate legal measures for the protection of human rights of all Filipinos, including recommendations to Congress for preventive and protective measures, as well as legal services to the underprivileged and vulnerable groups; and visitorial services in jails, prisons or detention facilities;
3. Development of continuing programs of research, education and information in collaboration with special institutions like schools, non-government organizations (NGOs) and people's organizations (POs), to enhance respect for the primacy of human rights including recommendations to Congress on measures for its promotion, and human rights training programs for the Executive, Legislative and Judicial branches of Government as well as the Police and Military;

68 Commission on Human Rights of the Philippines, Annual Report 2008, p. 42.

69 Ibid. In 2008, CHRP hired 28 such employees.

70 Rep. Act No. 9524, "The General Appropriations Act of 2009," available at <<http://www.dbm.gov.ph/index.php?id=989&pid=8&xid=28>> [accessed on 13 June 2010].

4. Assistance to victims of human rights violations.

The remaining 7.77% (19.825 million pesos or US\$ 0.44 million) is for locally-funded projects.⁷¹ However it should be noted that the Barangay Human Rights Action Center (BHRAC) flagship program has the lowest allocation of just 135,000 pesos (US\$ 3,000). With this budget, the Commission was supposed to inaugurate 41,939 Barangay Human Rights Action Officers (BHRAOs) throughout the archipelago.

The CHRP occasionally receives supplemental funding for program-specific activities, such as the investigation of extra-judicial killings.⁷² Other special projects of the Commission are sustained through funding assistance from international agencies.⁷³

All allocations, including those for the regional and sub-regional offices, pass through the CHRP Central Office. While the Philippine Constitution provides that approved annual appropriations to the CHRP be automatically and regularly released,⁷⁴ the Department of Budget and Management (DBM) introduces bureaucratic obstacles to the release of these appropriations. With the Supreme Court declaration that the CHRP has only limited fiscal autonomy,⁷⁵ the Commission on Audit (COA) issued a Memorandum stating that the CHRP should be treated as regular national agency.⁷⁶

The CHRP can appoint its own personnel, subject to Civil Service Rules. However, it has no authority to reclassify, upgrade, or create positions without approval of the DBM.⁷⁷

71 The following are the identified locally funded projects for 2009: (a) Strengthening of the Child Rights Center; (b) Strengthening of the Women's Human Rights; (c) Establishment of the Barangay Human Rights Action Centers in the barangay, municipal, city and provincial levels; (d) Upgrading of the Human Rights Resource Center; (e) Information Technology-Based Monitoring of Human Rights Conditions

72 See CHRP 2008 Annual Report, p. 42. For 2007, the Commission was granted 25 million pesos (US\$ 0.56 million) contingent fund for the investigation of extra-judicial killings.

73 Draft CHRP 2009 Annual Report, pp. 34-35.

74 1987 Phil. Const., Art. XIII, sec. 17 (4).

75 CHREA v. CHR, G.R. No. 155336, 21 July 2006.

76 CHR-AOM-013-2008-101, 25 September 2008.

77 CHREA v. CHR, G.R. No. 155336, 21 July 2006.

III. Effectiveness

A. Mandates and powers

CHRP has broad mandate to promote and protect human rights.

It can investigate on its own or on complaint by any party, all forms of human rights violations involving civil and political rights.⁷⁸ In the exercise of this investigative power, the Commission may adopt its own operational guidelines and rules of procedure,⁷⁹ and may cite for contempt anyone who refuses to obey its orders pursuant to the aforementioned operational guidelines and rules of procedure.⁸⁰ To aid the Commission in ferreting out the truth, it can grant immunity to a witness or to any person holding vital pieces of evidence.⁸¹

The Commission is given the power to provide legal measures for the protection of human rights and to provide for preventive measures and legal aid services to the underprivileged whose human rights have been violated or need protection.⁸² In 2009, the Commission served more than 1,229 clients under its regular legal aid and counseling services, including taking affidavits, rendering legal advice, referring complaints to other agencies, filing appropriate charges, and representation in the People's Law Enforcement Board (PLEB), Prosecutor's Office and Ombudsman for Military and Other Law Enforcement Agencies.⁸³ The Commission also granted a total

78 1987 Phil. Const., Art. XIII, sec. 18 (1).

79 *Id.*, sec. 18 (2).

80 *Ibid.* In *Simon v. CHR* (G.R. No. 100150, 5 January 1994), the Supreme Court ruled that Commission's contempt power "should be understood to apply only to violations of its adopted operational guidelines and rules of procedure essential to carry out its investigatorial power." On 20 September 2005, the CHRP promulgated Resolution CHR (III) No. A2005-131 entitled "Adopting the CHR Rules of Procedure on the Contempt Power of the Commission on Human Rights." At present, the Commission has not cited anyone for contempt.

81 *Id.*, sec. 18 (8). On 8 April 2010, the CHRP promulgated Resolution CHR (IV) No. A2010-058 strengthening its Witness Protection Program (WPP) which entitles a witness admitted to the program benefits including secure housing; food, clothing and other necessities for his/her daily sustenance; medical care as may be deemed necessary; education for a child witness; security escort to and from the place of hearing before any judicial, quasi-judicial or investigating body; and such other entitlements as may be provided. However, there is as yet no procedure for granting immunity to witnesses.

82 *Id.*, sec. 18 (3).

83 Draft CHRP 2009 Annual Report, p. 9.

of 2.569 million pesos (US\$ 0.057 million) financial assistance to 268 human rights victims and their families.⁸⁴

Pursuant to its visitorial powers over jails, prisons and detention facilities,⁸⁵ the Commission conducted 636 jail visitations and provided assistance to 638 prisoners. It recommended the release on parole of 36 prisoners and the commutation of the sentence of 50 others.⁸⁶

In accordance with its mandate to establish a continuing program for research, education and information to enhance the primacy of human rights,⁸⁷ CHR conducted seminars training and lectures for sectors including students, teachers, police and military, public

84 *Id.*, p. 11.

85 1987 Phil. Const., Art. XIII, sec. 18 (4).

86 Draft CHR 2009 Annual Report, p. 10.

87 1987 Phil. Const., Art. XIII, sec. 18 (5).

88 Draft CHR 2009 Annual Report p. 28. The Commission conducted a total of 937 information and education activities covering 410 seminars and training sessions, 292 lectures and 235 other information activities, for which a total of 58,231 participants were covered. A total of 23,736 information materials were distributed to the public in general and to participants of HR advocacy courses. These materials consisted of human rights posters (21), human rights flyers (5,125), human rights primers (422), handbooks/briefers on HR (381) and other information materials (17,787).

89 *Id.* p. 27. At the 75th Session of the Committee on the Elimination of All Forms of Discrimination, CHR provided information requested by the Committee along with its comments to the Philippine Government's Periodic Report. The Committee appreciated the extensive information provided by the CHR and commended its work as a human rights institution. The Committee adopted many of the recommendations from the CHR. Meanwhile, at the 10th Session of the UN Committee on Migrant Workers, the CHR presented recommendations on cases of Labor Deployment Policy, Coordination of Agencies Dealing with Migrant Workers, specifically on the imposition and withdrawal of deployment bans, Bilateral Agreements and Accession to the Convention and Rights to Suffrage. During the 42nd Session of the UN Committee Against Torture, the CHR shared its time with Congressman Erin Tanada to directly address and discuss with the Committee the long standing issue on the non-passage of a law criminalizing torture. As a result, CHR's independent report and recommendations were considered, admitted and finally adopted by the Committee in its Concluding Observations, Comments and Recommendations to the Philippine government. The UNCAT report provided international pressure that contributed in the passage of the Anti-Torture Law. For the 52nd Session of the UN Committee on the Rights of the Child, the Committee welcomed CHR's information on children in armed conflict and other child rights data. The Commission was likewise represented at the 53rd Session on the UN Committee on the Status of Women (CSW), and joined four (4) other NHRIs, and the Asia Pacific Forum (APF), in advocating for independent participation by NHRIs at CSW sessions. In a Philippine Side Event on "Equal Sharing of Responsibilities between Women and Men: the Philippine Experience," during the CSW 23 Session, the CHR Chairperson made a presentation on the "Rights Based Approach to Gender Equality."

officials and government employees, barangay and municipal officials, women's groups, inmates and prisoners, and NGOs.⁸⁸

Finally, in accordance with its mandate to monitor the Philippine Government's compliance with treaty obligations on human rights, the Commission attended the Sessions of four United Nations Treaty Monitoring Bodies to present independent reports on government's compliance with the human rights instruments on issues including discrimination, migrant workers, torture, and child rights.⁸⁹

B. Complaints Handling and Investigation

The Operations Manual on Investigation and Case Management Process (hereafter 'Operations Manual')⁹⁰ still guides the CHR in the conduct of its investigations, as it has not yet finalized its draft Omnibus Rules of Procedure.⁹¹

The Operations Manual defines two kinds of investigation: (1) human rights investigations, covering violations of civil and political rights;⁹² and (2) investigative monitoring, which

90 Last updated in 2001. The Operations Manual is a collection of CHR Resolutions outlining the procedures for investigation, monitoring and reporting of cases.

91 CHR 2008 Annual Report, p. 42.

92 CHR Resolution No. A96-005 defines the scope of CHR's jurisdiction to investigate violations of civil and political rights of persons within the Philippines as well as Filipinos residing abroad, to the following non-exclusive list:

"1. Rights of prisoners and detainees against physical, psychological and degrading punishment resulting in the commission of crimes against persons as provided in Title Eight of Republic Act No. 3815, as amended and related special laws;

2. Constitutional guarantees provided against the use of torture, force, violence, threats, intimidation, and other means that vitiate the free will of any person or force him to do anything or sign any document against his will;

3. Right to a fair and public trial as recognized under the Constitution, applicable laws and statutes and jurisprudence;

4. Right to life, without due process of law, where its commission is tantamount to summary execution and/or extrajudicial execution (salvaging);

5. Liberty of abode and of changing the same within the limits prescribed by law, except upon lawful order of the court, where the acts committed constitute hamletting, forced eviction/illegal demolition, or development aggression;

6. Right of people to be secure in their persons, houses and effects against unreasonable searches and seizures as defined in Articles 124, 125, 126, 127, 128, 129 and 130 of Title II and in Articles 269, 280, 282, 286, 287 of Title Nine of Republic Act No. 3815, as amended, and the related special penal laws, where said acts are

involves investigation or inquiry into the conditions affecting economic, social and cultural rights, especially of vulnerable sectors including children women, and indigenous cultural communities.⁹³ Investigative monitoring combines the elements of human rights investigation with 'monitoring', defined as the "process of systematically tracking activities of and actions by institutions, organizations or governmental bodies."⁹⁴ In practical terms, however, there seems to be no difference in the treatment of these two kinds of investigations, as complaints received in both are lumped together in the statistical data provided by the Commission.

Now in its 23rd year, the CHRP is still grappling with an obvious theoretical and conceptual confusion on the purposes and objectives of its investigative function.

The Operations Manual defines human rights investigation as "the process wherein one receives and analyzes evidence and makes findings of fact regarding human rights violations,"⁹⁵ anchored in "an application of treaty obligations and principles and standards governing international human rights laws."⁹⁶

committed in the course or by reason thereof or when involuntary or enforced disappearance as defined under applicable laws or international treaty obligations on human rights resulted or was the reason of the violations;

7. Rights of persons arrested, detained or under custodial investigation as well as the duties of the arresting, detaining, and investigating officers defined under Republic Act No. 7438;

8. Right of the people to peaceably assemble and petition the government for redress of grievances which are defined in Articles 131 under Title Two of Republic Act No. 3815, as amended, and the related special laws;

9. Right of the people to be free from involuntary servitude in relation to Section 18 (2) of Articles 272, 273, 274, of Title 9, Article 341 of Title XI of Republic Act No. 3815, as amended, and the related special laws;

10. Free exercise and enjoyment of religious profession and worship, without discrimination of religion in relation to offenses defined in Article 132 and 133 of Title Two of Republic Act No. 3815, as amended, and the related special laws, including offenses against the religious, such as the desecration of places of worship, graves, interruption of religious worships and other acts notoriously offensive to the feelings of the faithful."

93 CHRP Operations Manual on Investigation and Case Management Process (2001), p.10.

94 *Id.*, p. 26.

95 CHRP Operations Manual on Investigation and Case Management Process (2001), p.26.

96 *Ibid.*

By this definition, human rights investigation is not confined to a conclusion of liability based on existing domestic remedies. One of the functions of a human rights investigation is to propose remedial measures where none exists, or where the existing domestic remedies are clearly inadequate. This may be in a form of legislative or policy reforms proposal. In short, there can be finding of human rights violation even though no appropriate criminal or administrative remedy is available under domestic law.

Furthermore, a human rights investigation looks beyond the individual culpability of the alleged perpetrator. A resolution on a finding of a human rights violation should therefore point out the failure of the state to comply with its human rights obligations.

However, the Operations Manual effectively limits CHRP's investigative function based on existing criminal and administrative remedies.

For instance, the Operations Manual requires that the data in the complaint must satisfy the requirements of the Rules of Criminal Procedure, or the appropriate administrative or quasi-judicial bodies.⁹⁷ Thus, instead of using international standards in defining the reported human rights violation, the Operations Manual requires that the complaint state "the designation of the offense/charge given by the statute."⁹⁸ This shuts down a host of human rights violations recognized under international human rights instruments, which may have no equivalent designation under existing domestic criminal or administrative statutes. This also precludes investigation of human rights violations where the equivalent criminal or administrative offenses have already prescribed.

This limited framework persists through the investigation process, defined in the Operations Manual as "the determination of facts and circumstances surrounding the commission of a crime/offense and the identification of perpetrators thereof."⁹⁹ Again, this emphasises existing domestic remedies and individual culpability rather than applicable international human rights standards.

97 *Id.*, p. 16.

98 *Ibid.*

99 *Id.*, p. 25.

Lastly, the language used in the Operations Manual requiring that the resolution “must cite the provisions of laws/s and jurisprudence applicable thereto, to include international human rights treaties”¹⁰⁰ further evidences the subordination of the use of international standards in its investigation.

It is thus not surprising the many resolutions by the regional offices are not anchored in international human rights law. The majority of the resolutions do not make any reference to the international treaties and conventions to which the Philippines is a party. Analyzing 264 of 755 resolutions in 2009, an initial study by the Commission’s Strategic and Development Office (SPDO) revealed that of the 125 resolutions declaring human rights violations, only 82 cited international human rights instruments as the bases for assessing the facts.

C. Procedure for Investigation

1. Initiation of Action

The Commission takes cognizance of a case in four ways: (1) by a complaint directly filed with its regional office by the victim, family or friends of the victim, or any other concerned citizen or group; (2) in cases taken up by the Commission of its own accord – whether provoked by media or phoned-in reports; (3) in response to complaints received from the Barangay Human Rights Action Center (BHRAC); and (4) to investigate sectoral conditions.¹⁰¹

As the time of writing, complete data on the number of complaints received by the Commission from January-December 2009 was not available due to technical difficulties. However, initial data showed there were 1,831 complaints involving 939 victims and 1,179 perpetrators in 2009. The Commission expects these numbers to increase as soon as the data compilation is complete.¹⁰²

¹⁰⁰ *Id.*, p. 29.

¹⁰¹ *Id.*, p.13.

¹⁰² Draft CHRP 2009 Annual Report, p. 1.

**Table 1. Number of Complaints,
Perpetrators, Victims By Region
January – December 2009**

Region	Number of Complaints Received	Number of Victims	Number of Perpetrators
*NCR	7	7	18
I	82	89	89
II	40	42	54
III	193	161	225
*IV	NO REPORT		
V	123	155	221
VI	10	12	22
*VII	5	4	7
VIII	467	193	163
IX	770	86	172
X	25	29	28
XI	64	86	80
*XII	4	4	4
CARAGA	38	68	93
*CAR	3	3	3
TOTAL	1,831	939	1,179

**Data from the old Data Bank before the CHR migrated to MAREIS in July shows that from January-July 2009, NCR already had 64 complaints, Region IV (26), Region VII (17), Region XII (24), and CAR (13)*

As in previous years, data from Commission on Human Rights does not contain a breakdown of the nature of complaints for human rights violations, despite the shift to MAREIS.

2. Preliminary Review

Each regional office has an investigation and legal office. The investigator is tasked to make a preliminary review of the complaints to determine whether a human rights violation has occurred and, if so, whether the incident happened within the

territorial boundaries of the regional office. During preliminary review, the investigator is also required to determine the propriety of conducting mediation or conciliation.¹⁰³

3. Conciliation or Mediation

As a rule, CHRP investigators are encouraged to resort to conciliation or mediation for all complaints (whether violations of civil, political, economic, social, or cultural rights).¹⁰⁴ Complaints that go through conciliation or mediation proceedings may be resolved through payment of monetary compensation and/or a written or public apology; restoration or restitution of the subject matter of the action, and other forms of agreement or settlement not contrary to law or public policy.¹⁰⁵

At present, there seems to be confusion within the CHRP on the role of alternative dispute resolution in the context of human rights investigation. There are no existing guidelines on the reporting of cases successfully mediated or conciliated. Some of the cases amicably settled were listed as “closed or terminated” and some were reported as “archived.”¹⁰⁶

The CHRP is also unclear on the question of whether successful mediation or conciliation ‘erases’ the human rights violation that was committed, or whether dispute resolution should be viewed as an extension of the remedies available to the victim. The Commission has not made any clear policy statement regarding this matter.

103 CHRP Operations Manual on Investigation and Case Management Process (2001), p. 17. Conciliation is defined as “a mode of settlement whereby a third party (CHR) encourages disputants to discuss their differences and assists them in making their own solution and/or reaching an agreement.” Meanwhile, mediation is defined as “a more active mode whereby a third party (CHR) submits a proposal/s or recommendation/s for the settlement of a dispute. This is done usually when the disputants are unable to work out a solution or agreement.” *Id.*, p. 23.

104 *Id.*, p. 23.

105 *Ibid.*

106 Of the 264 resolutions studied, 20 were reported as successfully mediated; 16 of which were recorded as “closed or terminated” while 4 were declared as “archived.”

4. Investigation

An investigation is carried out: (1) when the complaint involves a heinous crime or violations punishable by more than one year's imprisonment; (2) when the complainant or respondent does not agree to submit their case to conciliation or mediation proceedings; (3) when the conciliation or mediation fails or when the parties are unable to reach an agreement; or (4) when signing a contract of settlement or agreement, the respondent abandons such agreement.¹⁰⁷

The Operations Manual does not spell out the procedure for conducting the investigation, although certain basic guidelines on conducting interviews and data gathering are outlined.¹⁰⁸ It has been observed that CHRIP investigators lack thorough knowledge of investigative techniques and usually rely solely on witness depositions to build a case.¹⁰⁹ Recently however, the Commission reinforced its forensics services to aid its investigations.¹¹⁰ It conducted exhumations/autopsies, two re-autopsies and forty-three medico-physical examinations including twenty nine cases of physical injuries and fourteen torture cases.¹¹¹

5. Documentation and Reporting

After the investigation is completed, the investigator forwards the complete record to the Legal Section for review, evaluation and drafting of the Resolution by an Attorney. The investigator is required to make an investigation report containing all the relevant facts of the case, including details of the investigation work and recommendations on the disposition of the cases on the basis of the evidence gathered.¹¹²

107 *Id.*, p. 27.

108 *Id.*, pp. 25-28.

109 Cortes, Damcelle, *From the Philippines: Forensic Investigation of Human Rights Abuses*, In Asia, 10 June 2009, available at <<http://asiafoundation.org/in-asia/2009/06/10/from-the-philippines-forensic-investigation-of-human-rights-abuses/>> [accessed 16 June 2010].

110 *Ibid.*, With support from the United States Agency for International Development and the Australian Agency for International Development, The Asia Foundation and the CHR organized a series of Forensic Trainings for 133 CHR investigators, medical doctors, regional directors, and lawyers.

111 Draft CHRIP 2009 Annual Report, p. 11.

112 CHRIP Operations Manual on Investigation and Case Management Process (2001), p. 29

6. Disposition of Cases

The Attorney or Legal Officer who reviews and evaluates the case prepares the resolution, taking into consideration the observations and recommendations of the investigator. The Operations Manual requires that the resolution be based on the merits of the case and must cite the provisions of law and jurisprudence applicable thereto, to include international human rights treaties. The resolution must also specify the proper disposition of the case: (1) for filing or endorsement in courts, prosecutor's office or administrative agency; (2) for closure/termination; or (3) for archiving.¹¹³ It should also be noted that the Operations Manual does not state the grounds for which a case may be closed, terminated, or archived.

Based on its 2009 Annual Report, the Commission resolved a total of 755 cases from January to December 2009. Of these, 228 (30.19%) were filed in courts and other administrative agencies or quasi-judicial bodies; 457 (60.52%) cases were listed as dismissed/closed/terminated; and 70 (9.27) cases had been archived.¹¹⁴

**Table 2. Number of Resolved Cases, By Region
January – December 2009**

REGION	Resolved for Filing and Monitoring	Total Closure/ Termination	Archiving	Total
NCR	20	17	1	38
I		8		8
II	26	3	3	32
III		131		131
IV	4	20	1	25
V	16	53		69
VI	34	43	11	88
VII	10	19	2	31

¹¹³ *Ibid.*

¹¹⁴ Draft CHRP 2009 Annual Report, p. 4.

VIII	31	48	30	109
IX	26	32	16	74
X	6	18		24
XI	19	51		70
XII	1	5		6
CAR	2	7		9
CARAGA	33	2	6	41
TOTAL	228	457	70	755

In 264 of 755 resolved cases in 2009, the SDPO found that many resolutions did not declare whether or not a human rights violation had been committed. More worryingly, however, many resolutions declaring that human rights violations had in fact been committed were then listed as closed/terminated or archived.

Table 3. Declaration of Human Rights Violations in Resolutions

Disposition	With HRV	No HRV	No Declaration	Total
Filing and/or Monitoring	62	-	15	77
Dismissed/ Closed Terminated	41	20	85	146
Archived	22	-	19	41
TOTAL	125	20	119	264

Furthermore, there seems to be no common understanding among the Regional Directors on the basis for reporting a case as dismissed/closed/terminated, or archived. Most of the grounds cited for dismissing, closing or terminating cases are also the cited reasons for archiving cases.

Table 4. Reasons for Dismissal/Closure or Termination

Dismissed/Closed/Terminated Cases	
Cited Reasons	Number of Resolutions
Lack of Evidence to Prosecute	35
Lack of Merit	24
Lack of interest of the Complainant	22
Pending in Court	31
Amicably Settled	16
Others	10
Total	146

Table 5. Reasons for Archiving

Archived Cases	
Cited Reasons	Number of Resolutions
Lack of Evidence to Prosecute	18
Unclear Identity of Suspects	11
Lack of Witness	6
Lack of Interest of the Complainant	2
Amicably Settled	4
Total	41

There is also some confusion regarding cases brought to the attention of the Commission but which were already taken cognizance of and are pending disposition by the courts or other agencies. The Operations Manual states that such cases should be considered for “monitoring.”¹¹⁵ Some Regional Directors interpreted this provision as precluding them from conducting independent investigations. Thus, some cases pending before courts or other agencies are reported as dismissed or terminated.

7. Filing and Monitoring

Resolved cases may be submitted to the Prosecutor’s Office for the filing of the appropriate case in court, or filed with the

115 *Ibid.*

administrative agencies/quasi-judicial bodies by the Attorney and/or Investigator, and/or any personnel authorized by the Regional Director. Thereafter, the case is monitored and a regular status report submitted to the Commission's Regional Director.¹¹⁶

The draft 2009 Annual Report of the Commission, however, does not contain any data on action taken by the Prosecution Office on the cases referred by the Commission for filing in court. There is also no report on actions taken by administrative or quasi-judicial bodies on cases filed by the Commission.

8. Motion for Reconsideration/Appeal

A party who feels aggrieved or not amenable to the resolution adopted by the Regional Office has the option to move for the case to be reconsidered before the Regional Office that rendered the decision, or to file an appeal directly with the Commission's Central Office within thirty days.¹¹⁷ However, the Commission's data does not indicate how many cases were appealed and how these cases were dealt with.

9. Internal Reporting

The Operations Manual requires the Regional Office to submit several types of report to the Central Office for record keeping purposes and to enable the Commission to speedily respond to human rights concerns.¹¹⁸ Many Regional Directors, however, have been remiss on their reporting obligations.

IV. Consultation and Cooperation with NGOs

The right of the people to participate at all levels of decision-making is at the heart of the country's democratic ideals and the Philippine Constitution specifically mandates the state to facilitate the creation of adequate consultation mechanisms.¹¹⁹ However, this right has not been operationalized in the CHRP's legislative charter.

¹¹⁶ *Id.*, p. 30.

¹¹⁷ *Ibid.*

¹¹⁸ *Id.*, pp. 30-33.

¹¹⁹ 1987 phil. Const., Art. XIII, sec. 15.

The CHRP has an NGO, Civil Society and Media Linkages Cooperation Office but operationally, this office is not involved in consultation for policy or program formulations; it is more of a public relations or media unit of the Commission. The post for Director of this Office is currently vacant.

Needless to state, compared to its predecessors, the current Commission has a better working relationship with civil society. It has worked and cooperated with the different ideological groups, the academe, and legal professional organizations, among others. The Commission has also extensively collaborated with the media to popularize its advocacy messages.

V. Conclusion and Recommendations

The proactive stance of the present Commission has allowed the Filipino people to aspire to a CHRP which is the protector and promoter of human rights. But to sustain this hope, the CHRP must act as a collective, and should not rely on the wave of support currently enjoyed by its Chairperson. Even acknowledging the exemplary performance of the Chairperson, there remain serious flaws in the selection process. The CHRP must be strengthened as an institution, rather than depend entirely on its leadership.

The Commission must also realize that as a collegial body, its main function is policy making, and not operational management. The Focal Commissioner System distracts the Commissioners from this main function. Indeed, analysis of the Commission's complaint-handling and investigation processes reveal a lack of coherent policies, which the Commission as a body should provide.

1. To enhance the independence of the CHP

To Congress:

- i. To pass the revised CHRP Charter containing clear provisions for:
 - a selection process for the nomination/application and appointment of the Chairperson and Commissioners that ensures pluralism, gender

- balance and civil society participation;
- b adoption of the rotational scheme of appointment;
- c the granting of full fiscal autonomy to the CHRP;

To the President:

- i. To appoint immediately whenever a vacancy in Commission occurs;
 - ii. To appoint members of the Commission based on merit, and not on any political consideration;
 - iii. To ensure transparent appointment process which allows civil society participation
2. To enhance the effectiveness of the CHRP

To Congress:

- i. To pass the revised CHRP Charter enhancing the investigative power of the Commission, including clarification on the extent of its power to provide legal measures and impose preventive measures such as the issuance of prohibitive, mandatory and protective writs;
- ii. To give additional funding to CHRP to enhance its investigative functions;
- iii. To provide the necessary legal framework and funds for the CHRP to fulfill its mandate to protect the rights of Filipinos living abroad;

To the CHRP

- i. For Commissioners to focus on the Commission's policy-making functions;
- ii. To immediately finalize and publish its Rules of Procedure in the Conduct of its Investigation;
- iii. To enhance its reporting mechanism to reflect accurate

data which can be the basis for policy formulation;

- iv. To conduct quantitative as well as qualitative analyses of the cases decided by the courts or the other administrative or quasi-judicial bodies which were referred by Commission for criminal/administrative action, so as to determine the strength and weaknesses in its investigation process.

Postscript

On 30 June 2010, Chairperson Leila de Lima resigned from the CHRP to serve as the Secretary of the Department of Justice under the administration of President Benigno C. Aquino III.

The NHRCK: Down-sized and Damaged Independence

Korean House for International Solidarity (KHIS)¹

I. General Overview

Since the new government came into power, the human rights situation of the Republic of Korea has been in retreat. With the new government placing the economic growth as a top priority and stressing upon economic efficiency, human rights are not seen as a major concern, and are perceived as an obstacle to economic development. In 2009, the economic, social and cultural rights as well as civil and political rights are confronted overall with a grave challenge.

The advent of the government prioritizing economic development has had negative impact on the enjoyment of the economic, social and cultural rights. The right to organise, bargain collectively and strike has been limited further; the right to health has been ignored all too easily; the right to housing has been neglected; and the right to social security has retrograded considerably. The human rights of socially vulnerable groups such as persons with disabilities, women, children and elderly have not improved and even partially deteriorated. The rights of migrant workers, marriage migrants, North Korean defectors and refugees in particular have retreated rapidly.

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The change in the political atmosphere has brought with it a serious threat to the enjoyment of civil and political rights. The Korean government has often ignored the respect for civil and political rights, even directly violating the enjoyment of these rights. Under the new government, police restricted the exercise of freedom of assembly and violently repressed peaceful protests. For instance, five deaths resulted in the police suppression of a protest demanding security of the right to housing and life. In addition, the decline in the harsh treatment of suspects in the investigation process has again increased, and the treatment of persons in custody has worsened. The governmental authorities have put pressure in NGOs criticising the suppression of human rights by threatening criminal punishment of human rights defenders. In particular, journalists critical of government policy have been fired, brought to criminal trial, or sued in civil suits. In 2009, the country's human rights situation is facing a serious crisis, particularly regarding the enjoyment of the freedom of expression, freedom of assembly and association, the right to be free from torture and cruel, inhumane and degrading treatment, and the right to privacy.

The crisis of the human rights situation in Korea has raised public expectations on the the National Human Rights Commission of Korea's (NHRCK) crucial role as a watchdog of government and as a guardian of human rights. The NHRCK has strived to pursue the purpose of the establishment and meet these expectations. For example in 2008, the Commission criticised the forced repression by the police candlelight protests and made a recommendation to the government requesting the improvement in this regard. The government was uncomfortable to such activity of the Commission and has tried to bring about the reduction of its function and activity.

In order to weaken the Commission, the government reduced the size of the organisation and staff members, appointed unqualified persons as Chairperson and Commissioners, and ignored the Commission's recommendations and opinions. Government has infringed and tried to wither the NHRCK's independence. As a result, the Commission has been weakened in its status as a human rights body. The relatively dwindled activity of the Commission has reduced its effectiveness in human rights protection and promotion, and also endangered its solidarity with the civil society.

II. Independence

National Human Rights Commission of Korea's (NHRCK) establishment and operation used to be looked upon as an exemplary of compliance with the Paris Principles relating to the Status of National Human Rights Institutions (NHRIs). This was possible because the NHRCK was established in pursuit to the National Human Rights Commission Act and the prior governments showed respect for independence of the NHRCK. However, the attitude of the new government has shown that it does not respect the independence of the NHRCK. Government's actions have proven that the National Human Rights Commission Act is not a perfect defense against encroachment of the Commission's mandate, and that, in reality, the government can find a variety of measures to violate the Commission's independence.

A. Law or Act

The NHRCK was established in 2001, in accordance with National Human Rights Commission Act. This Act was enacted through consultations and debates between the government and the civil society, and stipulated the independence of the NHRCK in Article 3. The Act includes penal provisions against certain conduct that obstruct the performance of the Commission's tasks, as well as the overall matters of the NHRCK ranging from its composition, operation, and mandates and the petition filing process.

Nonetheless, Article 18 of Act states that "matters necessary for the organisation of the Commission shall be prescribed by Presidential Decree." The current government referred to this article to take measures to downsize the organizational capacity and reduce the number of staff of the NHRCK. The article which has never been used to cause a single problem under the previous governments has turned into the "clawback clause" which endangers independence of the NHRI. In addition, the NHRCK's activities are not limited under national emergencies or exceptional circumstances. However, one can hardly expect the NHRCK Commissioners to act freely and independently in such a situation, as they have not been given exemption and privilege.

B. Relationship with the Executive, Legislature, Judiciary, and other specialised institutions in the country

Activities of the NHRCK have no legal limitations. No national institution can be exempt from its supervision or obstruct its activities unreasonably. Such obstruction can even be subject to legal punishment. Moreover, the NHRCK has a right to ask for consultations with civil society organisations as well as governmental institutions if necessary, while performing its duties. Yet, this right can be both positive and negative because it is a separate question whether governmental institutions respect and cooperate with the NHRCK.

Since the advent the new government, there has been a huge change in the relationship between the NHRCK and other governmental institutions. In particular, the executive body's interference in the affairs of the NHRCK such as appointing unqualified Chairperson and Commissioners, and downsizing the organisation has weakened independence of the Commission and has consequently broken the balance between the two. Some Commissioners even exercised their authority to prevent the Commission from engaging in the promotion and protection of human rights, or to force it to abandon supervisory activities over governmental organisations. Furthermore, unlike in the past, the latter's attitude vis-a-vis the Commission's activities can now be characterized as either uncooperative or negligent.

Relationship with the Executive Body

The NHRCK is an executive body, and is separated from high-ranking public officials from governmental organisations only in a narrow sense. However, there are occasions where people from governmental organisations in a wider sense, such as judges, public prosecutors or government supporters, get nominated. This leads to a possibility that the NHRCK can partially reflect interests of the government through certain Commissioners or Chairperson, it is not entirely controlled by those who used to be public officials.

Byung Chul Hyun, the current Chairperson of the NHRCK who was nominated by President Lee, denied independence of the NHRCK by saying, “the Commission belongs to the executive body.” Furthermore, the newly nominated Secretary is Ok Shin Kim a former judge who applied the unconstitutional and abusive National Security Act to classify certain civil society organisations as groups benefiting North Korea. The growing number of Chairperson and Commissioners directly nominated by the current government can only lead to the further weakening of the independence of the NHRCK.

Even though governmental agencies in to the executive branch are not legally bound by the recommendations of the NHRCK, there had been a customary practice of respecting these. However, such a custom has changed since the new government took over. In particular, recommendations of the NHRCK with regard to governmental institutions, which exercise authority over limitation of physical freedom, have been increasingly ignored. Altogether, private institutions are also showing an increased tendency to neglect the Commission’s recommendations. The NHRCK has no other means than to resort to the media to publicise such non-compliance.

Relationship with legislative and judicial bodies

The NHRCK annually reports its activities to the National Assembly of Korea and subjects itself to annual inspection of its budget execution. Although the Commission’s participation and consultation in the legislation process is not necessary, the Commission is entitled to review laws that can affect human rights and to make recommendations and opinions on these laws. The NHRCK has exercised this authority over the past, but its recommendations and opinions are increasingly losing power under the current government where the party in power also occupies a majority of the seats. The Commission expressed its concerns that the revised National Intelligence Service Act can violate human rights by the misuse of information gathering and introducing a law on cyber contempt can threaten freedom of speech.

The National Human Rights Commission Act empowers the Commission to present its opinions on de jure and de facto matters to the competent court, in the event of a trial significantly affects the protection and promotion of human rights. Under the current government the NHRCK has either failed to perform or given up this role of *amicus curiae*, guaranteed by law. The NHRCK did not even react to the government's massive sanctions against public teachers, lawsuits demanding indemnity against citizens, and accusations for defamation. It even renounced its power to express opinions in order to avoid influencing such trials. In particular, the Chairperson unilaterally closed a conference on a legal submission concerning an incident of police suppression resulting in the death of five protesters. Furthermore, it cannot be ascertained to what degree the legal statement of the NHRCK would still be considered by the relevant courts of Korea. What is certain is that Korean judges have established neither legal process nor practice of following or referring to recommendations of a National Human Rights institution.

C. Membership and Selection

Korea's National Human Rights Commission Act clarifies that a candidate Commissioner should "possess professional knowledge of and experience with human rights matters and have been recognized to be capable of fairly and independently performing duties for the protection and promotion of human rights." In addition, the Commission, composed of eleven Commissioners, includes four persons selected by the National Assembly, four persons nominated by president of the Republic of Korea, and three persons nominated by the Chief Justice of the Supreme Court. The Chairperson of the Commission is appointed by the President of the Republic of Korea. However, as the selection, nomination and appointment process is confidential and the civil society is not entitled to participate, a non-qualifying person may become Chairperson or a Commissioner.

The current government chose to appoint unqualified Commissioners and nominate as Chairperson, a person whose previous experience was only experienced in university

administration of a Cyber University and completely lacks professional knowledge and experience in the field of human rights. This experience has emphasised the need to institutionalise civil society's right to participation in the selection, nomination and appointment process through a public hearing, and to verify nominees' qualification.

The provisions on the composition of the NHRCK have a poor standard with regard to diversity. National Human Rights Commission Act of Korea stipulates that four of the 11 Commissioners should be women, and this standard has been respected. Nonetheless, the exclusion of other significant elements limits the consideration for diversity adequate for the Korean society. Although the standard with regard to representation of persons with disability has been applied to one of the Commissioners, there is no guarantee that this practice will continue in the future. Seven of the remaining ten include a former judge, prosecutors and professors of law, one a journalist, two from religious groups. The high proportion of judicial officials may lead the Commission to rely more on positive law as a yardstick for its decisions, instead of principles of human rights and self-regulation in relation to the legislative body. In effect, self-regulation of the Commission has drastically intensified under the current government. Lastly, the NHRCK does not have a distinct training and education program for Commissioners, which could have remedied the flaws in the appointment mechanism.

D. Resourcing of the NHRI

Independence and capacity of a national human rights institution (NHRI) is supported by its organisation, human resources and finances, etc. Weakening of the Korean Commission's independence under the current government was enforced by downsizing. Whereas the NHRCK can hire its own staff, their number and structure of the organisation are determined by presidential executive decree. The current government used this decree to reduce the number of the staff by more than 20%, from 208 to 164, and the number of bureaus from five to only three. As a result, despite the growing number of pending issues and

petitions, Commission's capacity necessary for managing them has remarkably decreased. The government justifies the downsizing in relation to its "slim government" plan. However this has been criticised that its true purpose was to of weaken the independence and capacity of the NHRCK since it was downsized by 20% while other governmental organisations such as the Ministry of Justice and the Ministry Defence have been reduced only by 0.02%.

The NHRCK does not have the right to plan its budget. While it is necessary to consult with heads of other institutions such as the National Assembly, Supreme Court, Constitutional Court, Board of Audit and inspection, and National Election Commission before curtailing their budget, there is no such provision with regard to the NHRCK. The Commission only submits and consults on a budget proposal to the Ministry of Finance and Planning who then drafts and submits a draft budget to the National Assembly, which passes the bill. The NHRCK's 2009 budget was approximately 19 million USD, half of which were labor costs and the rest was spent on projects.

III. Effectiveness

The NHRCK received a total of 6,985 cases in 2009, of which 75.6 percent (5,282 cases) of petitions were about human rights violations, while the rest were related to discriminatory acts and others. Investigating human rights violation cases in 2009, the NHRCK accepted 365, dismissed 1,637, rejected 2,973 and transferred 78. The NHRCK investigated 1,660 discrimination cases, of which 589 were dismissed and 880 rejected. Overall, the petition rejection rate is approximately 55%, of which 42% (33,276 cases) were human rights-related petitions concerning detention facilities and 22.3% (7,415 cases) were about the police. Rejection of petitions on discriminatory acts amounted to 40.2% (2,843) and those on provision or use of money and property amounted to 29.2% (2,060).

The NHRCK implemented five remedy measures and 235 normal/conciliation recommendations with regard to human rights-related petitions. It took no remedies but only gave 78 normal

recommendations with regard to petitions on discriminatory acts. It gave one recommendation with regard to legal systems and policies.

In contrast with 2008, when the current government came in power, there were seven recommendations and no single recommendation was received. Under the current government, effectiveness of the Commission's recommendations seems to continue to weaken due to the passive attitude of other governmental bodies.

The source of the Commission's enfeebled effectiveness was also found within the organization: it did not actively respond to serious threats or violations of human rights. The current government has been intimidating freedom of speech by prosecuting those who criticise it. It brought a civil action for defamation against Won Sun Park, a lawyer who criticised the National Intelligence Service of Korea for being involved in private investigations and for supporting private organisations. The Ministry of Food, Agriculture, Forestry and Fisheries asked the legislative body to use criminal penalties against journalists of the MBC, a private broadcasting corporation, who had pointed to the absurdity of US beef importations. Moreover, the Ministry of Education, Science and Technology took severe disciplinary action against teachers and public servants who had participated in a protest against the government policies. While threats and violations of human rights by governmental bodies or high-ranking public officials were prevalent, the NHRCK did not take appropriate action and often remained silent. The situation worsened since the resignation of the former Chairperson Kyung Hwan Ahn in July 2009, after severely criticising the government measures to the Commission, and the following inauguration of the current Chairperson who lacks understanding of human rights.

IV. Consultation and Cooperation with Civil Society

Under article 19 of National Human Rights Commission Act, the NHRCK has a duty to cooperate with organisations and individuals engaged in any activity for the protection and promotion of human rights. In effect, the NHRCK has been cooperating with

the civil society by undertaking cooperation projects and annual consultations. However, its overall performance of cooperation and consultation with the civil society has met with a difficulty since when the government started downsizing the Commission and appointing ineligible Commissioners and Chairperson.

In response, 86 civil society organizations organised the Action to Restore the National Human Rights Commission to its Place in Korea, to preserve the Commission's independence. In addition, the Korean Transgender Activist Group has called off a cooperation project that it had signed with the Commission at the beginning of 2009 and returned the project money. Also, 45 civil organisations issued a statement in protest against 'Korea National Human Rights Award' by NHRCK, which takes place during the commemoration of the Universal Declaration of Human Rights on 10 December.

The Commission was also criticised for neglecting its duty of consultation with the civil society. The NHRCK holds an annual consultation at the beginning of every year to evaluate its performance of the previous year and solicits advice on the following year's projects. Nevertheless, at the annual consultation in January 2010 the NHRCK omitted a considerable number of the evaluations and agendas requested by human rights organizations, putting into question its will to cooperate with the civil society.

Korean civil society has communicated the current situation with regard to the NHRCK to the international community by writing two letters to the International Coordination Committee (ICC) and submitting a written statement to the 13th session of the UN Human Rights Council. In addition, Action to Restore the National Human Rights Commission to its Place in Korea has led civil society in constantly urging the NHRCK and Korean government to abide by the Paris Principles.

V. Conclusion and Recommendations

The NHRCK is not performing its appropriate role amidst a worsening human rights crisis in Korea. In 2009 the government downsized the Commission and damaged its independence by selecting ineligible Chairperson and Commissioners. This

resulted in the Commission's self-regulation or negligence in expressing recommendations or opinions on human rights concerns on various governmental bodies. In response, civil society and human rights organisations have been intensifying their criticism toward the NHRCK and are in fact refusing to cooperate with the Commission.

The government must stop the further attempts to damage independence of the NHRCK, while the NHRCK must struggle to preserve its mandate. Legal and institutional revision is necessary to limit the government's control over the organisation and budget and to revise the nomination and appointment process of Commissioners through the introduction of confirmation hearings and nominee suggestion of diverse stakeholders.

Sri Lanka: Atrophy and Subversion of the Human Rights Commission

Law & Society Trust¹

I. Introduction

This report discusses the independence, accountability, effectiveness and transparency of the Human Rights Commission of Sri Lanka (HRCSL) in 2009 and early 2010. However, the dearth of information on and from the HRCSL – in terms of the absence of annual reports since 2007², information bulletins or newsletters, periodic data on the number of complaints received and disposed, non-accessibility of its inquiry reports and recommendations, and functional and dynamic website – makes its evaluation difficult.³

Sri Lanka's 26 year long war ended on 17 May 2009 amidst allegations of gross violations of international humanitarian law by both the government of Sri Lanka and the Liberation Tigers of

1 B. Skanthakumar, *Economic, Social and Cultural Rights programme, Law & Society Trust (LST), No. 3, Kynsey Terrace, Colombo 8, Sri Lanka. Email: lst@eureka.lk.* I am grateful to my colleague Ruki Fernando for substantive comments on an earlier draft.

2 The HRCSL presented an activity report on the year 2008 to the annual meeting of the Asia-Pacific Forum of National Human Rights Institutions in August 2009. However, this report was in draft, and has not subsequently been released in Sri Lanka, <http://www.asiapacificforum.net/about/annual-meetings/14th-jordan-2009>.

3 See B. Skanthakumar, "'Window-Dressing'? The National Human Rights Commission of Sri Lanka", *LST Review*, Vol. 20 (No. 262), August 2009, pp. 5-26, <http://www.lawandsocietytrust.org/web/images/PDF/HRCSL%20Report%202009.pdf>, to avoid duplication of information and analysis presented in the 2009 ANNI Report on *Performance and Establishment of National Human Rights Institutions in Asia*; and also Deepika Udagama, "HRC: Looking Back To Move Forward", *Peace Monitor*, Vol. 6, Issue 1 (May 2010), Centre for Policy Alternatives, Colombo 2010, pp. 16-21.

Tamil Eelam (LTTE).⁴ One year later, the island continued to be governed under a state of emergency (albeit partly relaxed from May 2010)⁵, some provisions of which are in breach of international standards⁶, while the draconian Prevention of Terrorism Act⁷ remained in force despite any clear and present threat to 'national security' (itself a nebulous concept) in the intervening period.

The year 2009 had begun in the context of state military offensives in the Vanni districts of the Northern Province resulting in the consequent displacement of hundreds of thousands of Tamil civilians and their subsequent use as 'human shields' by the LTTE.⁸ Shortages of food, water, shelter and medicine to civilians in LTTE-held areas were reported by relief agencies. By the end of May 2009, almost 280,000 Tamils who had previously lived under LTTE control and hence regarded of suspect affiliation, were interned in so-called 'welfare camps'⁹, and denied freedom of movement as well as unrestricted access to external agencies, family and friends. These restrictions were only lifted in December 2009.

On 8 January 2009, Lasantha Wickrematunge, editor-in-chief of the Sunday Leader newspaper was shot dead in broad daylight, and only metres away from the military cordon surrounding an air-force base to the south of Colombo. His assassination underscored the vulnerability of media workers and the severity of threats to

4 Although no conclusion on culpability is derived, for a catalogue of horrors see, US Department of State, *Report to Congress on Incidents During the Recent Conflict in Sri Lanka*, Washington D. C., 2009, <http://www.state.gov/documents/organization/131025.pdf>.

5 Civil Rights Movement, *Changes to Emergency Regulations: CRM examines recent amendments*, E 01/05/2010, Colombo, 15 May 2010.

6 International Commission of Jurists, *Sri Lanka: Emergency Law and International Standards*, Briefing Paper, Geneva, March 2009, <http://www.icj.org/IMG/SriLanka-BriefingPaper-Mar09-FINAL.pdf>.

7 For critique see, Bertram Bastiampillai, Rohan Edrisinha and N. Kandasamy (eds.), *Prevention of Terrorism Act: A Critical Analysis*, Centre for Human Rights and Development, Colombo 2009.

8 Human Rights Watch, *War on the Displaced: Sri Lankan Army and LTTE Abuses against Civilians in the Vanni*, New York, 20 February 2009, <http://www.hrw.org/en/reports/2009/02/19/war-displaced-0>.

9 UN Office for the Coordination of Humanitarian Affairs, *Sri Lanka – Vanni Emergency Situation Report #24*, Colombo, 2 July 2009, <http://ochaonline.un.org/srilanka/SituationReports/EmergencySituationReport/tabid/5487/language/en-US/Default.aspx>.

freedom of expression and dissent in Sri Lanka. Meanwhile, the failure of state authorities to apprehend his killers, or even unearth leads in the investigation, illustrates the impunity enjoyed in crimes of this nature.¹⁰

In its inquiry report into the Angulana case involving the torture and subsequent killing of two young men by the local police on 13 August 2009¹¹, the HRCSL recognised the prevalence of custodial torture and its institutionalisation in Sri Lanka: “Even where there has been a large number of court orders issued in cases of violating fundamental rights and where the Supreme Court had imposed heavy penalties and compensation to be paid by the perpetrator police officers personally, it has not made much of a difference.”¹²

The overall human rights situation in Sri Lanka in 2009 could be summarised as follows: “[t]he government was credibly accused of arbitrary arrests and detentions, poor prison conditions, denial of fair public trial, government corruption and lack of transparency, infringement of freedom of movement, harassment of journalists and lawyers critical of the government, and discrimination against minorities.”¹³

The Human Rights Commission of Sri Lanka has been in grave difficulty since the un-constitutional appointment of its members in 2006. Its crisis has since intensified, through the non-appointment of Commissioners, when the three-year term these members ended on 17 June 2009. Only the Chairman – who had been appointed in December 2006 following the death by natural causes of his predecessor – continued in office until the expiry of his term in December 2009. President Mahinda Rajapakse’s administration

10 Committee to Protect Journalists, *Sri Lanka: Failure to Investigate*, New York, 23 February 2009, <http://cpj.org/reports/2009/02/failure-to-investigate-sri-lankan-journalists-unde.php>.

11 Malik Gunatilleke and Damith Wickramasekera, “Double murder: Victims were whipped before being killed”, *Sunday Times*, 30 August 2009, http://sundaytimes.lk/090830/News/nws_21.html.

12 Susitha R. Fernando, “HRC says police torture continuing”, *Daily Mirror*, 9 February 2010, <http://www.dailymirror.lk/index.php/news/1532-hrc-says-police-torture-continuing.html>.

13 US Department of State, *2009 Country Reports on Human Rights Practices: Sri Lanka*, Washington D. C., 11 March 2010, p. 1, <http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136093.htm>

has manoeuvred to undermine and debilitate statutory institutions such as the National Police Commission and the Commission to Investigate Allegations of Bribery or Corruption through the stratagem of allowing members' current terms to run to the end, and thereafter not making fresh appointments.

This subordination of independent institutions to the Executive culminated in the announcement – following the landslide parliamentary victory of the ruling United Peoples Freedom Alliance on 8 April 2010 – of the Government's intention to amend the Constitution to permit direct appointments by the Executive to oversight bodies including the Human Rights Commission. These assaults on the independence and effectiveness of the HRCSL risk eroding beyond recuperation its legitimacy and relevance to the protection and promotion of the human rights of citizens.

In August 2009, the Asia-Pacific Forum on National Human Rights Institutions (APF) – of which the Sri Lankan Human Rights Commission had been full member – resolved at its 14th Annual Meeting in Amman, Jordan to henceforth follow the accreditation decisions of the International Coordinating Committee of National Institutions (ICC) for its own membership.¹⁴ In March 2009 the ICC's Sub-Committee on Accreditation (SCA) had concluded that the Human Rights Commission of Sri Lanka did not fully comply in law and in practice with the Paris Principles and therefore confirmed its previous downgrading in 2007 to 'B' status.¹⁵ Accordingly, the HRCSL has been relegated to an 'Associate Member' of the APF¹⁶; and stripped of voting rights in the regional organisation.

14 The Forum Councillors appear to have accepted the argument that the existence of two parallel accreditation procedures for an overlapping membership, "involves unnecessary and duplicative administrative work, with the possibility of inconsistent decisions" as indeed was the case with the Human Rights Commission of Sri Lanka between 2007 and 2009, see Andrew Byrnes, Andrea Durbach and Catherine Renshaw, "Joining the Club: the Asia Pacific Forum of National Human Rights Institutions, the Paris Principles, and the advancement of human rights protection in the region", *Australian Journal of Human Rights*, Vol. 14, No. 1 [2008], pp. 63-98 at p. 87.

15 Para. 3.2, *Report and Recommendations of the Session of the Sub-Committee on Accreditation*, Geneva, 26-30 March 2009, http://www.nhri.net/2009/SCA_REPORT_March%202009%20Session_%28English%29.pdf.

16 Para. 9, Asia Pacific Forum of National Human Rights Institutions Concluding Statement, August 2009, *LST Review*, Vol. 20 (Issue 262) August 2009, pp. 1-4 at p. 2, <http://www.asiapacificforum.net/about/annual-meetings/14th-jordan-2009>.

II. Independence

The Human Rights Commission of Sri Lanka was created in August 1996 and began operations in July of the following year.¹⁷ A landmark amendment¹⁸ to the Constitution of Sri Lanka was enacted in 2001 with the object of safeguarding the independence of statutory institutions from the Executive, through creation of the Constitutional Council that was required to approve the appointment and removal of members of Commissions – a power previously vested in the President. As the Human Rights Commission was among scheduled institutions listed in the 17th Amendment, it consequently attained Constitutional recognition.

However, these constitutional provisions were no obstacle in themselves to their subversion by the Executive.¹⁹ No new appointments were made to the Constitutional Council after March 2005 (during the previous President's term of office), and thereafter the President began making direct appointments to the statutory institutions, including to the Human Rights Commission in June 2006. A Parliamentary Select Committee on reforms to the 17th Amendment has been sitting for years but is perceived as a stalling mechanism on the part of Government.

Soon after the April 2010 general elections, the government emboldened by its near two-third majority in Parliament, announced a string of regressive constitutional changes, including the abolition of the Constitutional Council. These constitutional amendments have not been finalised and gazetted. However, one Cabinet Minister (and former Professor of Law) recently announced that the reform of the 17th Amendment would allow for the President to make direct appointments to scheduled

17 Mario Gomez, "Sri Lanka's New Human Rights Commission", *Human Rights Quarterly*, Vol. 20, No. 2 [1998], pp. 281-302; Abul Hasnat Monjurul Kabir, "Establishing National Human Rights Commissions in South Asia: A Critical Analysis of the Processes and the Prospects", *Asia-Pacific Journal on Human Rights and the Law*, Vol. 2, No. 1 [2001], pp. 1-53 at pp. 27-31.

18 *Seventeenth Amendment to the Constitution of the Democratic Socialist Republic of Sri Lanka*, 2001, http://hrli.alrc.net/pdf/17th_amendment.pdf.

19 Cyrene Siriwardhana, "Public Institutions and De-Politicisation: Rise and Fall of the 17th Amendment", *Sri Lanka: State of Human Rights 2007*, Law & Society Trust, Colombo 2008, pp. 237-261.

statutory institutions (including the Human Rights Commission), in consultation with the Prime Minister and the Speaker of the House.²⁰ Under the current constitutional and electoral system in Sri Lanka, all three office-holders will invariably be from the same governing political party.

Whereas the end of war and the quelling of armed separatism could have been an opportune moment to roll back the crippling of democratic institutions and evacuation of democratic values over the past few decades, what we have instead, as one human rights lawyer despaired, "... is constitutional reforms entrenching authoritarianism in the dark. Core to this is the throwing out of the Constitutional Council (CC) and the return to unfettered Presidential appointments with only a vague duty to 'consult' others before making the appointments to key offices as well as the constitutional commissions".²¹

The enabling legislation that created the Human Rights Commission provided that until the establishment of the Constitutional Council, the prescribed procedure for selection of its members is appointment by the President "... on the recommendation of the Prime Minister in consultation with the Speaker *and the Leader of the Opposition*"²² (emphasis added). The excision of the last-named removes the requirement for endorsement across the political divide. Hereafter, Commissioners and Chairpersons will be perceived as political appointees tied to the party in power; and the institution they lead will lack credibility as an independent body able and willing to secure accountability for citizens – especially known critics of the government – from those in power.

Aside from the appointment process, there is no prospect of transparency and consultation in the selection and composition of members.²³ The members chosen by the President for the

20 Political Editor, "After the show, a show-down with India", *Sunday Times*, 6 June 2010, <http://sundaytimes.lk/100606/Columns/political.html>.

21 Kishali Pinto-Jayawardena, "Focus on Rights: Bringing the moon down to earth", *Sunday Times*, 20 June 2010, <http://sundaytimes.lk/100620/Columns/focus.html>.

22 S. 3 (2), *Human Rights Commission of Sri Lanka Act*, No. 21 of 1996, http://www.idpsrilanka.lk/Doc/Related%20Articles/ArrestandDetRelatedLaws/1996_No_21_HRC_Act.pdf.

2006-2009 Commission comprised of three former judges and two lawyers, none of whom had a human rights background and all of whom served part-time. It is unlikely under the present dispensation that the new members will reflect the pluralism of civil society, and comprise recognised human rights defenders. Most likely, those individuals appointed will be in the mould of the 2006-9 Commission, and comprise of retired judicial officers, ex-bureaucrats, academics and professionals regarded as accommodative of and deferential to the Executive.

III. EFFECTIVENESS

Despite the non-appointment of members to the HRCSL, its staff continued to receive and record complaints from members of the public. Outwardly, all appears to be as before. The 10 regional offices and head office operate with 208 staff. The fact of existence of the HRCSL and its routine, even mechanical, functioning may partly explain the lack of outcry over its tragic fate. It is also a sign of the times: to aspire to no better and to anticipate even worse. People turn to the Human Rights Commission because they have nowhere else to go, outside of the labyrinthine and costly formal legal sem, not because of confidence in it.

As of August 2009, some 3,557 complaints²⁴ were recorded, although it is unclear whether these are only those received at the Colombo head office, and how many were accepted for inquiry. Most complaints relate, as since the inception of the HRCSL, to school admissions, promotions of public servants, and police conduct (no details are available on the specific nature of violations allegedly committed by the last). In the first quarter of 2010, some 1,492 complaints were recorded at the head office alone.²⁵ Seven months after the end of the war,

23 See ICC Sub-Committee on Accreditation, *General Observations* 2.1 and 2.2 (June 2009), <http://www.nhri.net/2009/General%20observations%20June%202009%20%28English%29.pdf>.

24 HRCSL Secretary Chandra Ellawala as quoted in Sandun A. Jayasekera, "HR Commission Paralyzed", *Daily Mirror*, 22 August 2009.

25 Mandana Ismail Abeywickrema, "HRC unable to make recommendations on current investigations", 2 May 2010, *Sunday Leader*, <http://www.thesundayleader.lk/2010/05/02/hrc-unable-to-make-recommendations-on-current-investigations/>.

between 1 January and 23 February 2010 the HRCSL received 17 complaints of disappearances mainly from the conflict-affected and Tamil-majority Northern and Eastern provinces.²⁶

Its chronic financial and infrastructural under-resourcing, under-staffing in particular grades and regional offices, and the indifference or obstruction of governmental authorities contributes to the large number of pending and unresolved complaints each year. For example, it is reported that between January to September 2009, 116 complaints were received by the Jaffna regional office. However, as of October 2009, only 11 cases had been disposed of while the remaining 105 were awaiting resolution.²⁷

The lethargic approach of some staff towards complainants and their grievances, and the reluctance of their superiors to use the full range of powers and authority vested in the Commission, is the other part of the problem.

In public consultations on the Human Rights Commission organised by the Law & Society Trust in several provinces in 2009, a common refrain of participants was the lack of timely action on complaints.²⁸ One teacher from the Southern province railed against an eight month delay in the issue of a recommendation on a school admission complaint, thereby adversely affecting the first year of education of the child concerned. Another participant from the Central province recounted his experience of the HRCSL's inaction in his complaint over non-promotion within the public service, apparently because the necessary documents were unavailable. The HRCSL had allegedly abandoned its inquiries without informing the complainant and without, in his belief, having taken efforts to obtain the requisite documentation.

While these accounts are anecdotal and could not be cross-checked with the HRCSL, the repetitiveness with which similar

26 Anuradha Nimini, "17 complaints of Disappearances", *Ravaya*, 28 February 2010 (in Sinhala).

27 US Department of State, 2009 *Country Reports on Human Rights Practices: Sri Lanka*, Washington D. C., 11 March 2010, p. 14, <http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136093.htm>.

28 Chandralal Majuwana, "Sri Lanka's Constitutional Institutions: Perspectives from the Provinces", *LST Review*, Vol. 20 (No. 266), December 2009, pp. 14-15.

experiences are shared by unrelated respondents from different backgrounds and in different parts of the island, indicate that at least the issues are genuine and the problems are systemic. If complaints of an administrative nature are managed in this manner by the HRCSL, then unsurprisingly citizens lose confidence in its capacity to respond to more serious human rights violations whose investigation necessarily involves confronting powerful state actors.

In the absence of Commissioners, the legality of the HRCSL's operations was a matter of debate over 2009 within the human rights community. All doubt was removed when the Presidential Secretariat through the Secretary to the President and in a letter dated 26 March 2010²⁹, informed the HRCSL that the national human rights institution lacked the lawful authority to exercise its functions in the absence of duly-appointed Commissioners.

This intervention followed the refusal of the Examinations Department of the Ministry of Education to submit itself to inquiry by the HRCSL following complaints lodged by aggrieved students. It is also significant that the clarification was received from within the Executive that is from a member of the President's inner circle, rather than from the Attorney-General whose role includes being legal counsel to Government. Subsequently, HRCSL Secretary Chandra Ellawala was to confirm to one newspaper that the "HRC is not in a position now to make recommendations to the authorities concerned to take action against rights abuses."³⁰

A case study of the HRCSL's handling of a serious human rights violation may serve to illustrate several problematic aspects of its functioning, ranging from deficiencies in its enabling law to the bureaucratic interpretation and performance of their duties of some of its staff.

On 2 February 2010, Sandya Ekmaligoda visited the HRCSL's head office in Colombo to lodge a complaint regarding the 'disappearance' of her husband. Prageeth Ekmaligoda is a political

29 Lalith Weeratunga, "Response to the Query of the Human Rights Commission", Ref No: CA/1/10, 26 March 2010 (in Sinhala). This is not a public document and is on file at the Law & Society Trust.

30 Kelum Bandara, "HRC in precarious state: UNP", *Daily Mirror*, 23 June 2010, <http://www.dailymirror.lk/print/index.php/news/news/13724.html>.

cartoonist and media worker, who had been abducted on 24 January 2010 (two days prior to the presidential election) en-route from his workplace to his home. A senior investigating officer was initially reluctant to accept the complaint explaining that it falls outside of the HRCSL's mandate³¹, as the right to life is not expressly protected in the Sri Lankan Constitution.

The HRCSL's enabling law restricts its scope to 'fundamental rights'³² alone, that is, those human rights that are entrenched in the Constitution and therefore justiciable, and not all human rights which Sri Lanka has undertaken to respect, protect and fulfil through international law.³³ Following argument by a lawyer accompanying Mrs Eknaligoda that the right to life has been judicially recognised³⁴ by the Supreme Court of Sri Lanka as an implied Constitutional right – the officer relented.³⁵

31 Nadia Fazlulhaq and Damith Wickramasekera, "State media personnel allege harassment", *Sunday Times*, 7 February 2010, http://sundaytimes.lk/100207/News/nws_75.html; and personal communication from Mrs Eknaligoda.

32 These rights are freedom of thought, conscience and religion; freedom from torture; right to equality; freedom from arbitrary arrest, detention and punishment, and prohibition of retroactive penal legislation; and freedom of speech, assembly, association, occupation and movement, Chapter III, *Constitution of the Democratic Socialist Republic of Sri Lanka 1978*, <http://www.priu.gov.lk/Cons/1978Constitution/1978ConstitutionWithoutAmendments.pdf>.

33 For instance, the UN Human Rights Committee has commented of Sri Lanka's adherence to the International Covenant on Civil and Political Rights: "... the Committee remains concerned that Sri Lanka's legal system still does not contain provisions which cover all of the substantive rights set forth in the Covenant, or all the necessary safeguards required to prevent the restriction of Covenant rights beyond the limits permissible under the Covenant. It regrets in particular that the right to life is not expressly mentioned as a fundamental right in chapter III of the Constitution of Sri Lanka...", Para. 7, *Concluding Observations of the Human Rights Committee: Sri Lanka*, CCPR/CO/79/LKA, 12 January 2003, <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/CCPR.CO.79.LKA.En?Opendocument>.

34 "Although the right to life is not expressly recognised as a fundamental right, that right is impliedly recognised in some of the provisions of Chapter III of the Constitution. In particular, Article 13 (4) provides that no person shall be punished *with death* or imprisonment except by order of a competent court ... Thus Article 13 (4), by necessary implication, recognises that a person has a right to life – at least in the sense of mere *existence*, as distinct from the *quality* of life – which he can be deprived of only under a court order" and "... Article 11 (read with Article 13(4)), recognises a right not to deprive of life – whether by way of punishment or otherwise – and, by necessary implication, a right to life. That right must be interpreted broadly, and the jurisdiction conferred by the Constitution on this Court for the sole purpose of protecting fundamental rights against executive action must be deemed to have conferred all that is reasonably necessary for this Court to

Although finally the complaint was recorded under Reference Number HRC/369/2010, the investigating officer pronounced the HRCSL unable to conduct an inquiry into the circumstances of his abduction. According to him the case fell squarely within the remit of the Criminal Investigation Department of the Police. Mrs Eknaligoda had, of course, made a police complaint soon after her husband's 'disappearance' and it was police inaction and her lack of confidence in the law enforcement agencies that had driven her to the Human Rights Commission.³⁶ The scope of the HRCSL's intervention was confined to ascertain whether Prageeth Eknaligoda is being held in a registered place of detention and his welfare in such a place. Subsequently, the only action being taken by the HRCSL appears to be the monitoring of police investigations. Prageeth Eknaligoda's whereabouts and safety remain unknown.

Another case study highlights a more responsive approach by the HRCSL. The main opposition presidential candidate and former army commander, Retired General Sarath Fonseka was forcibly removed from his office and taken into military custody on 8 February 2010.³⁷ Acting on a complaint from a human rights defender, the HRCSL visited Fonseka later that month at the naval camp where he is incarcerated to inspect the conditions at the place of detention and his treatment in custody.

protect those rights effectively ... ", per Fernando, J. in *Sriyani Silva v. Iddamaligoda, Officer-In-Charge, Police Station Paiyagala and Others* [2003] 2 Sri L. R. 63 at 75 and 77 respectively (emphasis in the original), http://www.lawnet.lk/docs/case_law/slr/HTML/2003SLR2V63.htm.

35 Incidentally, the complaint form assumed that the complainant was herself or himself the victim of the alleged or imminent fundamental rights violation, rather than a *bona fide* representative; and it made no provision for the record of serious human rights violations such as enforced disappearances or killings despite their prevalence in Sri Lanka since the early 1970s (personal communication from the lawyer accompanying Mrs Eknaligoda).

36 Reporters Without Borders, *Cartoonist kidnapped two months ago still missing*, 23 March 2010, <http://en.rsf.org/sri-lanka-cartoonist-kidnapped-two-months-23-03-2010,36823.html>.

37 Amnesty International, *Arrest of Sri Lankan Opposition Leader Escalates Post-Election Repression*, PRE01/039/2010, 8 February 2010, <http://www.amnesty.org/en/for-media/press-releases/arrest-sri-lankan-opposition-leader-escalates-post-election-repression-2>.

Following inspection and interview, the HRCSL prepared an ‘Observation Report’ which was submitted to the Defence Secretary, under whose authority the arrest and military law proceedings took place at the end of February.³⁸ Based on complaints from Fonseka, the HRCSL apparently recommended that the ventilation be improved; that he be granted access to his personal physician and enhanced medical care; and that visitation rights be extended to family members. It also made at least one more visit two weeks later to verify whether corrective action had been taken.³⁹

Fonseka’s conditions of detention did indeed improve, but political calculations over public unhappiness at the treatment of a “war hero” in the run-up to parliamentary elections in April, and the local and international media interest may have been given greater weight than the HRCSL’s report. Nevertheless, knowing the extreme hostility of the government to Fonseka, the HRCSL did not evade its responsibility towards his well-being. It even went one step further by endorsing Fonseka’s belief that the military investigation into the charges against him is unlikely to be impartial and fair. However, the government continues to pursue both military and civilian law proceedings on several counts against Fonseka. The measures taken by the HRCSL, while unexceptional for a national human rights institution, are noteworthy in view of its current dysfunction.

IV. Consultation and Cooperation with NGOS

The Human Rights Commission has continued to struggle in its relations with human rights non-governmental organisations (NGOs). In 2009, the HRCSL’s head office resumed dialogue with NGOs, and conducted meetings in Colombo on 22 January and 30 March, and once again on 9 June. Invitations to the discussions in January and March were given on the basis of personal contacts and not by public announcement. The meeting in June was with a smaller group of NGOs who had been nominated at the previous meeting

38 Sumaiya Rizvi, “HRCSL urges Ind. team to probe against Fonseka”, *Daily Mirror*, 1 March 2010, <http://www.dailymirror.lk/print/index.php/business/127-local/4844.html>.

39 Jamila Najmuddin, “HRC to review recommendations”, *Daily Mirror*, 4 March 2010, <http://www.dailymirror.lk/index.php/news/2007-hrc-submits-report-on-fonseka.html>.

to represent civil society organisations. Thereafter, there was no further structured interaction with civil society organisations in 2009. Prominent human rights defenders and long-standing advocacy organisations have been unrepresented at all these meetings.

Some human rights defenders have refused to engage with the 2006-9 Commission on the basis that to do otherwise would amount to condoning the unconstitutional appointment of its members. Others have expressed their apprehension that the HRCSL chooses to meet with NGOs only in advance of meetings and deliberations of the International Coordinating Committee of National Institutions for the Protection and Promotion of Human Rights (ICC) and the Asia-Pacific Forum of National Human Rights Institutions (APF); or alternatively in deference to donor organisations who press for it to abide by the injunction in the Paris Principles that “[i]n view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, to develop relations with the non-governmental organisations devoted to protecting and promoting human rights ...”⁴⁰.

On 26 March 2010, the Human Rights Commission organised a ‘civil society forum’ in Colombo, with groups representing various districts.⁴¹ This was a larger, broader, and more plural gathering than the meetings in the previous year, and included the Law & Society Trust. However, once again some human rights defenders stayed away, critical of the HRCSL’s lack of structured dialogue with civil society organisations, and lack of follow-up to issues raised in the previous meetings in 2009. For instance, the creation of a focal point for human rights defenders within the Commission last year is an important development. However, it has not been accompanied by statements and acts of solidarity with human rights defenders, media workers and dissenters under persecution, including their protection.

40 Para. 3(g), Methods of Operation, *Principles relating to the Status of National Institutions* (‘Paris Principles’), UN GAR 48/134 of 20 December 1993, <http://www2.ohchr.org/english/law/parisprinciples.htm>.

41 Networking civil society with the HRCSL is one of several planks of the United Nations Development Programme’s current phase of capacity-building support (August 2009 – December 2011) that also includes technical assistance to regional offices to handle complaints, conduct investigations, undertake monitoring visits and write reports.

The theme of the meeting was “Developing a practical action plan on how the civil society organisations can work together with Human Rights Commission”. The premise appeared to be that it was necessary to identify thematic issues and areas for collaboration as a means of fostering closer relationships between the HRCSL and human rights non-governmental organisations. Consequently the format of the discussion took the form of small group discussions tasked with presenting their respective action plans. More useful was the opportunity to hear updates on the activities of the HRCSL’s departments of Inquiries and Investigations, Monitoring and Review, and Education and Special Programmes, from their respective directors; as well as for dialogue with them and other HRC head office staff who were present.

Since then, and as of time of writing in June 2010, there have been no further meetings in Colombo, although similar forums have been conducted with regional offices of the HRCSL in some provinces.

In fact, there is no mystery to connecting civil society organisations with the HRCSL and vice-versa. If the national human rights institution is perceived as independent and effective, and if it acts as part of the human rights community and not as a cog in the state machinery, then civil society will naturally develop a bond of trust in it; and human rights defenders will turn to, and work with it.

V. Conclusion

The Secretary to the Human Rights Commission recently shared her ideas and plans for the institution in Sri Lanka’s post-war context. Chandra Ellawala affirmed the HRCSL’s intention to step up its monitoring of police stations and other places of detention, with a focus on preventing torture and ill-treatment. “We think it is very important to work with army personnel and police, in particular, to change the mentality of officers in these institutions...

42 “Chandra Ellawala, Sri Lanka HRC”, *APF Bulletin (Sydney)*, April 2010, <http://www.asiapacificforum.net/news/chandra-ellawala-sri-lanka-hrc.html>.

It is crucial that they understand human rights and also respect them in practice.”⁴² One priority in 2010 will be monitoring the care and protection of children in state-run orphanages and juvenile centres; another will be the rights of migrant workers. Ellawala also proposes to reach people in areas distant from its head and regional offices through mobile clinics and out-reach programmes.

These are important objectives. Meeting some of them requires more than human rights awareness-raising and re-education of law enforcement agents. In many cases, it also demands the accountability of public officials through legal prosecution for serious human rights violations including torture, enforced disappearance, and extra-judicial killings. It is unclear that the HRCSL recognises this; or that some of its staff are willing to discard their over-friendly relationship with police and prison officers and stand squarely with the victims of human rights abuse. In these and other respects, the HRCSL is an accomplice in its own subversion by the State; while its atrophy is symptomatic of the larger crisis of democratic institutions and values in Sri Lanka.

VI. Recommendations:

A. Recommendations to the Government of Sri Lanka

- Ensure reactivation of the Constitutional Council and speedy appointment of members to the Human Rights Commission in accordance with the Paris Principles;
- Ensure that a minimum of three from the five members are full-time, and that women’s representation is guaranteed;
- Ensure the financial independence of the Human Rights Commission from the Executive, and its adequate resourcing through doubling of its current level of funding to at least LKR200 million (US\$1.76 million);
- Ensure respect for the Human Rights Commission through non-obstruction of its inquiries and

investigations and speedy implementation of its recommendations;

- Ensure that the mandate of the Human Rights Commission encompasses all human rights through amendment of its enabling legislation.

B. Recommendations to the Human Rights Commission

- Be pro-active through inquiries into imminent human rights violations and suo moto ('own motion') actions;
- Be assertive in gaining access to all places in which detainees may be held, and enhance unannounced visits;
- Be victim-centred in the complaints-handling process;
- Be consistent in relationships with, and cooperate with human rights defenders including through sharing of information and joint actions;
- Be transparent and accountable through public dissemination of the number, nature and region of origin of complaints; publicise inquiry findings and recommendations, issue regular policy statements and reports on critical human rights concerns, and ensure timely release of the annual report in Sinhala, Tamil and English.

Impasse faced by Taiwan on Establishing the NHRI

The Taiwan Association for Human Rights (TAHR)¹

I. General Overview of the Year

A. Ratification of the ICCPR and ICESCR in 2009

Taiwan signed the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1967. 42 years later on 30 March 2009, the Taiwanese government ratified the two covenants without reservation and sent the ratification documents to the UN Secretary General for deposit. However, they were rejected since Taiwan is not a member of the UN.

In order to support the implementation of both covenants despite the lack of UN recognition, parliament passed the Implementation Law of the ICCPR and the ICESCR (hereafter the Implementation Law) on March 2009. Taiwan's President Ma Ying Jeou officially announced the ratification of both covenants and passage of the Implementation Law during the celebrations for the International Human Rights Day on 10 December 2009.

Several government obligations are prescribed by the Implementation Law, including the obligation to amend within two years all existing laws and regulations not yet in line with the ICCPR and ICESCR.

1 Prepared by Ms. Keira Yeh

The government published a report the day before the Implementation Law and covenants took effect. This report concluded that 227 regulations in various governmental sectors were found not to be in accordance with the covenants. Taiwanese NGOs held a press conference on the day the report was released, highlighting the numerous flaws in the government's investigation – specifically that the opinions gathered did not reflect the fundamental issues around human rights protection and promotion, and that several crucial issues such as the death penalty were omitted or intentionally mistranslated.

The NGOs made several recommendations to the government on priorities for implementation, including: training for administrators at all levels; the establishment of a system of regular reports; and the establishment of a National Human Rights Institution (NHRI) in line with international standards.

B. Little Progress After the Promise

After 10 years without any progress toward the establishment of an NHRI in Taiwan, NGOs hoped that the ratification of the two covenants would generate the necessary momentum for the government to take concrete steps towards an NHRI's establishment.

President Ma agreed that a high-level institution could provide a useful function and support the implementation of the covenants. However, the type of NHRI envisaged by President Ma is inconsistent with that which is envisioned by the NGOs.

President Ma first publicly mentioned this issue in his speech announcing the taking effect of the covenants and the Implementation Law, saying, "we understand that many people are calling for the establishment of a national commission for human rights. We are indeed considering how we can realize the requirements of international principles, while not undermining the national constitution."

After the covenants officially took effect, the President's Office announced in December that it would set up an advisory council which would recruit a group of experts and scholars to prepare

policy recommendations and carry out research into particular human rights issues. The advisory council would also supervise the implementation of the covenants and produce the written report stipulated by the Implementation Law.

NGOs immediately responded that the advisory council would not meet civil society expectations or indeed, international standards relating to the institution's independence from government. In other words, the body would not be an independent institution in accordance with the Paris Principles – instead, it would constitute a branch of the Executive, established to fulfill the duties set out in and regulated by the Implementation Law. An NHRI, by contrast, should function independently to promote and protect human rights to meet international standards, not serve government in a merely administrative capacity in its human rights work.

In fact, there has been very little progress since the government first stated its willingness to establish this advisory council. It has been reported by media that a regulation has been drafted providing for the establishment of the advisory council which should be promulgated in late June 2010. However at the time of writing, the government has not given any official confirmation of such plans.

II. Obstacles Impeding the Establishment of an NHRI in Taiwan

Taiwan NGOs began lobbying for an NHRI in Taiwan in 1999. Taiwan has experienced two changes of government in 2000 and 2008, and in both cases the new administration pledged its commitment to human rights. However, once in governance, both these administrations have had to struggle with political deadlock on the issue, largely because of the following points:

A. The Lack of Awareness and External Pressure

Taiwan, officially known as the Republic of China (ROC), withdrew its membership from the UN in 1961 and has since been isolated from the UN human rights system. One of the functions of an NHRI should be to serve as a bridge between the UN and the national

government, advocating for the implementation of international human rights standards within the domestic sphere. However, many NGOs believe that the government of Taiwan feels no rush in establishing an institution with such a function since it does not feel any external pressure to keep its domestic laws consistent with international principles. Taiwan remains outside the scope of treaty bodies, nor would the government feel the pressure of requests from UN Special Procedure mechanisms, for instance, for official visits to the country.

The present administration has therefore mistakenly characterized the proposed institution as something answering only domestic needs. It points to similar national human rights systems as precedents, such as independent foundations under the Executive Yuan to protect women's rights and victims from the past terror era, as well as many other taskforces in the government dealing with social welfare and protecting minorities. The establishment of an additional institution with an independent status parallel to constitutional bodies is even less likely given the current trend of downsizing government structures and cutting budgets.

B. Controversies over the NHRI's Quasi-Judicial Competence

According to the Paris Principles, an NHRI should hold quasi-judicial competence to investigate complaints of human rights violations. However, since the NHRI issue was first brought to the table, the Control Yuan (the ombudsman institution authorized by the constitution) has continuously opposed the establishment of an NHRI because it regards an NHRI as a threat to the constitutional power of the Control Yuan. The Control Yuan also asserts that such an institution could only be established by amending the constitution, otherwise it is unconstitutional.

The Control Yuan has continuously claimed that the mandate they are currently holding means that Taiwan does not need an additional human rights protection institution. However, as many NGOs have argued, the Control Yuan only deals with administrative misconducts committed by public officers, which barely scratches the surface of the numerous

human rights issues in the country. The Control Yuan has no mandate or capacity to tackle human rights promotion, nor does it carry out any activities relating to human rights education or research. Most significantly, there is a huge gap between the nature of the Control Yuan and that of an NHRI. Under the Paris Principles, an NHRI, for example, must be accessible and maintain a good working relationship with NGOs. This cannot be said of the Control Yuan.

NGOs have also proposed that the Control Yuan should provide a 'transformation plan' setting out a process by which it might develop to fulfill the full NHRI mandates. However, the Control Yuan didn't give any consideration to this proposal.

III. Civil Society Recommendations

Given that government sectors have been isolated from international fora for 40 years, civil society in Taiwan is effectively the only channel that can receive information, promulgate human rights knowledge and build relations with international and regional human rights groups.

NGOs in Taiwan also work with international and regional networks to continuously lobby politicians and administrators, giving policy recommendations at every available opportunity. In March 2010, the Asian NGOs Network for National Human Rights Institutions (ANNI) organized its first national training in Taiwan and held a dialogue with government representatives. During this occasion, the ANNI submitted the following recommendations to the representatives:

- Promptly establish the advisory council under the President's Office as planned, identifying the council as an interim body mandated to investigate the possible process by which Taiwan can establish an NHRI – recognizing Taiwan's urgent need to build human rights knowledge while maintaining the longer-term intention to mandate the institution with investigative powers;

- Invite international experts to Taiwan to conduct lectures, training and dialogue sessions with high-level officials; and in particular to consider the Asia-Pacific Forum (APF) programs helping countries in the region without an NHRI to establish one;
- Issue a state 'human rights action plan' separate from the periodical reports demanded by the Implementation Law of the ICCPR and ICESCR, setting out clear goals as well as the stages and measures to be taken to reach those goals.

Setbacks in Thai Democracy Impact NHRCT

Working Group on Justice for Peace (WGJP)¹

The situation concerning the National Human Rights Commission of Thailand in 2009 was dominated by the selection of the second set of Commissioners, who are the first set to be selected under the terms of the 2007 Constitution. The selection process failed to conform to the Paris Principles, with a resulting Commission whose members' qualifications fail to meet Constitutional requirements. The new Commission had only been in office since the second half the year, and much of that time was taken up in drafting a new Human Rights Commission Act which would integrate Constitutional changes in its mandate and in re-organizing the working structure of the Office of the Commission. Thus, the effectiveness of the new Commission was difficult to determine in 2009.

I. Independence

A. Questions of impartiality of outgoing NHRC

Questions about the pro-'yellow' bias of the outgoing Commissioners² with respect to the political polarization in Thailand³ continued into 2009.

1 Prepared by Ms. Puttanee Kangkun, Director

2 See 2009 ANNI Report.

The NHRC issued a report on the events of 7 Oct 2008 to the National Counter-Corruption Commission (NCCC) which was used by the latter as justification for bringing charges against the then Prime Minister and Deputy Prime Minister⁴. The NHRC report however failed to present any evidence that the government had ordered the use of lethal force, had been aware of the potential loss of life and serious injury at a time when they could have prevented further violence, or had been responsible for the choice of crowd-dispersal methods. The lack of evidence, however, did not prevent the NHRC from reaching ‘a damning verdict on the Somchai Wongsawat government’ even though the verdict was based on ‘conjecture rather than evidence’⁵. The NCCC, however, decided on 7 September 2009 to proceed with charges of with criminal malfeasance and forwarded the case to the Attorney-General’s Office to file charges at the Supreme Court’s Criminal Division for Political Position Holders. On the other hand the then Prime Minister Somchai Wongsawat argued that he had not

3 The dimensions of this polarization have shifted with time. Protests in 2006 against the alleged illegitimacy of the Thaksin Shinawatra government coalesced under the People’s Alliance for Democracy (PAD). The military coup of September that year instigated the formation of pro-democracy groups, under the United Front for Democracy against Dictatorship (UDD). The yellow-shirted PAD took on ultra-nationalist, royalist and anti-democratic characteristics and the red-shirted UDD was seen as pro-Thaksin. More recently in the prolonged demonstrations in 2010, the red shirts have used a discourse that projects their ranks as ‘phrai’, or commoners, versus yellow ‘amat’, or traditional establishment. While exceptions abound, the amat comprises the middle and upper classes, Bangkok and the South, the judiciary, military leadership, government bureaucracy and business leaders. The reds represent the working class and peasantry, and the North and Northeast. They see the establishment as controlling the levers of power in such a way as to deny rights and freedoms and operate a system of double standards.

4 The newly formed government of Somchai Wongsawat was constitutionally required to present a policy statement to Parliament, which was scheduled for 7 October 2008. In the morning of that day, the PAD organized a demonstration blocking all entrances to Parliament in order to prevent the presentation of the policy statement. Violence ensued when Police attempted to move the protesters to allow access for Members of Parliament and Senators. Particularly controversial in this incident was the use of China-made tear gas grenades, which were later found to contain explosive charges sufficient to cause death or serious injury if aimed directly at people. These caused one death and a number of injuries among protesters. A second death occurred when a car carrying explosive devices (presumably for use by the PAD) blew up killing a PAD guard who was a former military officer. A number of police officers were also injured in the violence, with one being run over repeatedly by a PAD supporter in a pick-up.

5 <http://www.nationmultimedia.com/home/2008/12/23/politics/NHRC-report-omits-role-of-politicians-in-Oct-7-blo-30091641.html>

been allowed to present exculpatory evidence and that he had been prevented from seeing documents used to justify the charges against him on the grounds that they concerned national security⁶. A flawed NHRC report was therefore used to justify what appear to be a politically-motivated prosecution that itself could have been a violation of human rights.

Another partisan action by the NHRC was outgoing NHRC Chair Saneh Chamarik's statement on February 2009 urging government to abandon a 'reconciliation bill' that would rescind the five-year political ban on all executives of political parties dissolved by the courts after the 2006 coup. The bill would have affected, among others, 111 members of the Thai Rak Thai party of former PM Thaksin Shinawatra, who were banned after a Constitutional Tribunal found on 30 May 2007 that two executive members of the party had committed an electoral offence. Dr Saneh remarked that '[u]sing a law that interferes with the justice system is worse than a military coup.'⁷ The difficulties with Dr Saneh's remark are (a) this matter had not been referred to the NHRC and did not directly involve any violation of human rights; (b) if the order to ban the 111 party executives can be argued to have violated these persons' human rights⁸, the bill would have corrected the violation; and (c) the 2006 military coup involved clear violations of human rights by negating the results of the right to vote and, in the immediate aftermath, by denying the rights to freedom of expression, movement, and peaceful assembly. It therefore seems that the NHRC Chair was making an unnecessary remark that denied the opportunity to redress a case of human rights violation and condoned activities that did violate

6 <http://enews.mcot.net/view.php?id=11700>

7 <http://www.nationmultimedia.com/home/2009/02/17/politics/Govt-dumps-opposition-s-amnesty-law-proposal-30095870.html>

8 The argument is based on the following considerations: (i) the punishment is collective, imposed on those found guilty of having committed the offence as well not guilty (ii) the Constitutional Tribunal that reached the verdict was an ad-hoc body hand-picked by the Council for Democratic Reform, the military junta that staged the 2006 coup against ex-PM Thaksin and his party, and therefore could not be viewed as impartial; (iii) there was no superior court to which an appeal against the verdict could be made; and (iv) the punishment is specified under Announcement No. 27 (Section 3) of the Council for Democratic Reform dated 30 September 2006, and the Constitutional Tribunal applied the law ex post facto, in that the alleged offence occurred at a time when the action was not an offence under the law. See Chaturon Chaisaeng '*Thai Democracy in Crisis: 27 Truths*', Chapter 2.

human rights. Because those whose human rights were denied were 'red' and those responsible for violating their rights were 'yellow', this appears to have coloured his thinking.⁹

B. Selection of New Commissioners

The selection of the new National Human Rights Commissioners in 2009 was seriously flawed in both process and results.

As noted in the 2009 ANNI Report, the military coup of 2006 and subsequent abrogation of the 1997 Constitution by the self-appointed military Council for Democratic Reform left the NHRC in something of a legal limbo since its existence had been mandated by the defunct 1997 constitution, which specified the number, qualifications and selection process of Commissioners, as well as the financing, powers and responsibilities of the Commission. The military government ordered the existing Commissioners (whose terms had expired in July 2007) to continue operating under the 1999 National Human Rights Commission Act until such time a new Constitution could be promulgated, a new selection procedure passed, a new set of Commissioners selected, and the 1999 Act amended.

However, even after the ratification of the 2007 Constitution, no action was taken in selecting new Commissioners, until an appeal was made to the Administrative Court in January 2009 that resulted in a ruling that forced the incumbent Commissioners to resign and a new set selected.

The present Constitution, ratified by referendum on 24 August 2007, introduced important changes in the selection procedure for National Human Rights Commissioners. The number of Commissioners was reduced from 11 to seven. The Selection Committee, formerly with 27 members representing the judiciary, political parties, academia, law professionals, human rights NGOs and the media, was reduced to just seven persons, five of whom were from the judiciary and two from political parties¹⁰. Whereas previously the Selection Committee

9 For a pungent criticism of Dr Saneh's comment by a Thai human rights activist, see the letter to *The Nation* on 19 February 2009 'Is a military coup better than judicial interference?' by Pokpong Lawansiri, available at <http://www.nationmultimedia.com/home/2009/02/19/opinion/Prisons-filled-with-young-offenders-given-no-chanc-30096051.html>.

proposed 22 names to the Senate for final selection by vote, the Selection Committee now submitted the final seven nominees who were to be approved on a simple yes-or-no vote, with any nominee receiving 50%-plus-one of the votes being approved.

There were fears that the selection process for a new set of commissioners would be problematic because of the drastic reduction of the numbers and the background of Selection Committee members. In recent years especially since the 2006 military coup, the Judiciary has been perceived as siding with the establishment against pro-democratic forces.

Fears about the selection process proved justified when, from 133 applicants, some of whom had long experience in various aspects of human rights work, the Selection Committee on 10 April 2009 chose seven nominees with very limited experience and in some cases no known experience in the field of human rights. The selection was made on the basis of written submissions only. Applicants were not interviewed by the Selection Committee.

The nominees appointed to the Commission were:

- Police General Vanchai Srinuwalnad, former assistant commissioner general of the Royal Thai Police with a background in criminal investigation;
- Parinya Sirisarakarn, former member of the military-appointed 2007 Constitution Drafting Assembly of Thailand, industrialist, and Vice Chairman of the Federation of Thai Industries in Nakhon Ratchasima Province whose only known previous connection with human rights was being named by the previous Commission as a violator of human rights¹¹;

10 One of the Selection Committee members is the Leader of the Opposition in the House of Representatives, an official position; at the time of the selection, there was no person appointed to this office, so the selection was effectively done by 5 members of the judiciary and the Leader of the House of Representatives, a member of the ruling party.

11 His salt-mining business was accused of polluting land that affected the ability of farmers to grow crops. Furthermore, the firm operated under a licence that had expired in 2002, but was allowed to continue extraction while a renewal application was pending. A 2007 NHRC report recommended to the relevant government agencies that the licence be revoked. It was not.

- Paibool Varahapaitoorn, former Secretary-General to the Office of the Constitutional Court and another former member of the military-appointed 2007 Constitution Drafting Assembly of Thailand;
- Visa Penjamano, former Inspector-General of the Ministry of Social Development and Human Security with a background in welfare for the youth, women, elderly and the disabled;
- Taejing Siripanich, medical doctor and founder and Secretary-General of the Don't Drive Drunk Foundation;
- Nirand Pithakwachara, medical doctor, former elected Senator for Ubon Ratchathani province, with a background in community mobilization;
- Professor Amara Pongsapich, former Dean of the Faculty of Political Science at Chulalongkorn University, a board member of a number of NGOs including some working on human rights, and a sub-committee member in the previous NHRC.

It seems quite clear that the qualifications of these seven Commissioners fail in the Constitutional requirement to be 'persons having apparent knowledge and experiences in the protection of rights and liberties of the people, having regard also to the participation of representatives from private organizations in the field of human rights'¹². Only two--Prof Amara and Dr Nirand--have experience in a broad range of social issues, some of which involve human rights. Ms Visa and Dr Taejing have experience in social and welfare issues which are at best only tangentially related to human rights. Pol Gen Vanchai and Mr Paibool, in the course of their duties, may by chance have been involved in cases with human rights dimensions. Mr Parinya appears to have no 'apparent knowledge and experiences in the protection of rights and liberties of the people' at all.

¹² Section 256, Constitution of the Kingdom of Thailand 2007, unofficial English translation available at [http://en.wikisource.org/wiki/Constitution_of_Thailand_\(2007\)/Chapter_11](http://en.wikisource.org/wiki/Constitution_of_Thailand_(2007)/Chapter_11).

The selection process and list of nominees met with widespread disapproval.¹³ A group of human rights defenders¹⁴ petitioned the Senate that the selection process had been unconstitutional since the Constitution forbade judges to be on the Selection Panel, which had in fact included judges, albeit retired; The petitioners also pointed out that the nominees failed to meet the constitutional qualifications of Commissioners. The petition was ignored.¹⁵

The list of nominees then went to a scrutinizing committee of the Senate for examination before a vote by the entire Senate. On 20 April 2009, the Senate formed the scrutiny committee and opened the process for public comments until 27 April, a mere seven-day window with less than two weeks' notice since the submission. Furthermore, invitations were initially announced to have been posted at the the Senate website. However, the website address was found to be invalid, with a "no page available" error message returning the search. When the Senate was informed of this shortcoming, the invitation web page appeared but was almost immediately removed. Also, it was not made clear how such comments could be delivered.¹⁶

During the scrutiny in the Senate committee, Commissioner Parinya apparently viewed international concern about human rights violations in Burma (Myanmar) as unwarranted interference in that country's domestic affairs. For the same reason, he said he would oppose any similar 'foreign interference' in the work of the NHRC

13 See examples available in the English-language press: Supalak Ganjanakhundee, 'Selection of new human rights commissioners is a disgrace', *The Nation*, 23 April 2009, available at <http://www.nationmultimedia.com/home/2009/04/23/politics/Selection-of-new-human-rights-commissioners-is-a-d-30101076.html>; and respected senior human rights defender and Magsaysay Award winner Thongbai Thongpao, 'NHRC selection is deeply flawed', *Bangkok Post*, 26 April 2009.

14 Petitioners included Dr Sriprapha Petcharamesree who was later selected as the representative of Thailand to the ASEAN Intergovernmental Commission on Human Rights.

15 'Faults in set-up of new NHRC', *The Nation*, 22 April 2009, available at <http://www.nationmultimedia.com/home/2009/04/22/national/-Faults-in-set-up-of-new-NHRC--30101003.html>.

16 Asian Human Rights Commission *An Open Letter to the Senate of Thailand by the Asian Human Rights Commission*, 25 April 2009, available at http://www.ahrc-thailand.net/index.php?option=com_content&task=view&id=294 and *Asian Human Rights Commission An Open Letter to the Senate of Thailand* by the Asian Human Rights Commission, 29 April 2009, available at http://www.ahrc-thailand.net/index.php?option=com_content&task=view&id=295

in Thailand. He further commented that the Falun Gong movement was a conspiracy by the United States' Central Intelligence Agency to embarrass the government of the People's Republic of China.

On 1 May 2009, the seven nominees were approved by vote¹⁷ of the full Senate¹⁸. There were immediate calls from human rights organizations for the new Commissioners to resign or submit themselves to a new selection process, because of the serious flaws in the selection process.¹⁹ After the Senate vote and before the Royal countersignature, a petition was presented to HM the King's Principal Private Secretary requesting a review of the nomination of Commissioner Parinya.²⁰ The selection of Commissioners did eventually receive Royal Assent.²¹

Apart from contravening Constitutional requirements, the selection process also failed to comply with the Paris Principles in that it does not reflect 'the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights' (Section 1). The Asian Human Rights Commission

17 The votes for each applicant were as follows: Taejing Siripanich, 128 votes for and two against; Nirand Pithakwachara, 109-20; Parinya Sirisarakarn, 76-42; Paibool Varahapaitoorn, 123-6; Pol Gen Vanchai Srinuwalnad 122-6; Visa Penjamano, 126-6; and Amara Pongsapich, 131-6. Prof Amara was later voted by the Commissioners to serve as Chair.

18 Under the 2007 Constitution, 76 Senators are elected on the basis of one per province and 74 are appointed by a five-person Senate Selection Committee dominated by members of the judiciary.

19 See for example Asian Human Rights Commission *To support human rights, NHRC should resign* 4 May 2009, available at http://www.ahrc-thailand.net/index.php?option=com_content&task=view&id=298; Human Rights Watch, Thailand: Replace Flawed Rights Panel: *Unqualified Candidates Were Selected by Secret and Illegal Process* 13 May 2009, available at <http://www.hrw.org/en/news/2009/05/13/thailand-replace-flawed-rights-panel>.

20 *Sulak Sivaraksa petitions King's Principal Private Secretary to examine complaints against nominated Human Rights Commissioner*, available at <http://www.prachatai.com/english/node/1254>

21 While The Royal Assent is normally considered a formality, an interesting precedent was set in June 2003 when a petition was submitted to the Constitutional Court that the procedure for appointing Jaruvan Maintika as Auditor-General had been improper. A successor was duly appointed but Jaruvan refused to leave her post, claiming that since she was appointed by Royal Command, it needed a Royal Command to dismiss her. The Royal Assent for the appointment of her successor was then withheld, and, under pressure from the palace, the nomination process was re-started with Jaruvan as the sole candidate.

called on the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights to downgrade the status of the NHRC.²²

The upshot of this saga is that Thailand is left with an unqualified NHRC that seems unlikely to be able to handle its enlarged mandate²³ and which cannot look forward to any high degree of cooperation from civil society. Furthermore, since the shortcomings in the selection process are the responsibility of those parts of Thai society seen to be within the establishment, it is also unlikely that the new Commissioners will be able to repair the damage done to the NHRC by the partisanship shown by the previous set of Commissioners in the latter part of their term of office.

II. Effectiveness

At the end of 2009, the NHRC of Thailand summarized the significant human rights issues of the year that could be considered as within its remit.²⁴

1. Community rights over natural resources. These have been routinely violated under neoliberal capitalism that allows capital to benefit from natural resources while resulting in the detrimental impact on the environment and lives of local people. Examples are Map Ta Phut Industrial Estate and a proposed metal smelting facility in Prachuab Khiri Khan;

22 *An Open Letter to the International Coordinating Committee of National Institutions for Human Rights by the Asian Human Rights Commission (AHR)*, 8 May 2009, available at http://www.ahrc-thailand.net/index.php?option=com_content&task=view&id=301. At present, the NHRC of Thailand retains an 'A' accreditation and is not due for reaccreditation until the second half of 2013. See International Coordinating Committee of NHRIs SubCommittee on Accreditation: Calendar for SubCommittee sessions, available at <http://www.ohchr.org/Documents/Countries/Calendar2009.pdf>

23 The 2007 Constitution gives to the NHRC additional powers to propose to the Constitutional and Administrative Courts complaints received and assessments of laws, regulations, orders, etc., that 'affect human rights and are inconsistent with the provisions of the Constitution' and to file lawsuits with the Court of Justice on behalf of victims of human rights abuses.

24 Summarized from the NHRC newsletter '*Mum Mong Sith*' (Rights Perspectives), Oct-Dec 2009, Vol 8, Issue 8

2. Economic, social and cultural rights. A train accident at Khao Tao, Prachuab Khiri Khan, raised questions on the safety of Thai infrastructure. There are also problems of labour wages and welfare as well as the issues of unfair contracts and severance that fails to follow the labour law;
3. Civil and political rights. The NHRC criticized the Thai security forces, particularly police and army, for continuing human rights violations such as torture and arbitrary arrest. The NHRC recommended organizational reform based on people's participation;
4. Rights under judicial system. The policing system is the main target of criticism as strongly in need of reform;
5. Rights of vulnerable people. In the case of the Rohingya boat refugees, the NHRC and human rights NGOs gave recommendations to the Thai government on how to deal with such situations but the government did not respond;
6. Unrest in the Southern Border Provinces. It has been said that the entire judicial system has been challenged and the authority of the security forces in tackling the violence has been questioned. Various recommendations from civil society have not been seriously considered by the security forces;
7. Asian Human Rights Mechanism. The NHRC states that an Asian mechanism is in place with the participation and support of four Asian countries with human rights commissions for more effective protection of human rights.

An interesting contrast can be made with the overview *"The Year 2009: Ten Steps Forward and Ten Steps Backward - Human Rights"* issued by the Union for Civil Liberty of Thailand²⁵ on Human Rights Day, 10 December 2009.

²⁵ Available at http://www.ahrc-thailand.net/index.php?option=com_content&task=view&id=364&Itemid=127

Among the important human rights issues that the NHRC report ignores are:

1. Resumption of use of the death penalty after a de facto moratorium of six years;
2. Censorship of the media, especially media controlled by people's organizations, those critical of the government, and those supporting the red-shirt movement. This was often achieved indirectly by use of the Computer Crimes Act and Section 113 of the Criminal Code dealing with *lèse majesté* offences;
3. Reckless use of inappropriate crowd control measures including the use of lethal force during the April 2009 protests;
4. Cavalier imposition of various forms of emergency legislation (such as Martial Law, the Internal Security Act and the Emergency Decree on Public Administration in Emergency Situations), all of which derogate important human rights and some of which provide impunity to state actors;
5. Apparent 'double standards' in judicial and administrative decisions where government opponents are brought to justice more often, more quickly and with harsher penalties than government supporters who have committed similar offences.

The significance of these omissions is confirmed by the fact that most of these issues (Numbers 2 through 5) resurfaced to become more serious in the first half of 2010.

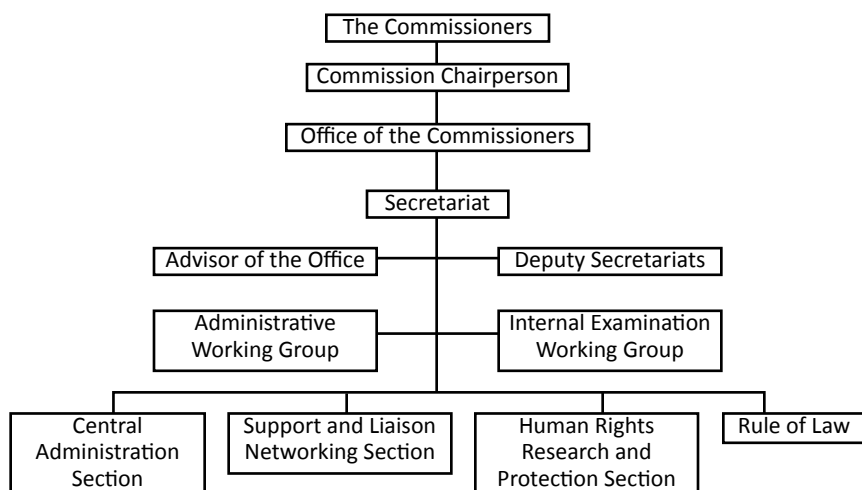
In 2009, civil society began scrutiny of the NHRC's performance. The 2009 ANNI report on Thailand led to an in-country discussion on the role and performance of the NHRC as well as the formation of a group called 'Shadow Human Rights Commissioners' that issued an opening statement on 10 December 2009 saying that many human rights victims are being left isolated, and commenting that the NHRC is still not able to play effective role on human

rights protection. The Shadow Commission announced it would continue to monitor the NHRC's performance.²⁶

A. Structure

The work of the NHRC is divided between the Commissioners, who set strategy and policy, and the administrative section. The latter is tasked (1) to carry out the logistical and administrative work of the Commission; (2) to receive complaints, conduct preliminary investigations and present findings to the Commissioners for consideration; 3) to support human rights education and dissemination of information; 4) to liaise with government agencies, civil society and other human rights organizations, and 5) to carry out other activities assigned by the Commissioners. The division of responsibilities between policy-making and executive functions is intended to avoid previous problems where Commissioners and senior administrators came into conflict during NHRC missions.

The NHRC structure is divided into four sections and two departments, with each section divided into working groups according to the announcement of the National Human Rights Commissions on 8 September 2005:



Article (in Thai) on the Shadow Human Rights Commissioners is available at <http://www.prachatai3.info/journal/2009/12/26929>

According to NHRC staff, the Commission has concluded that there were previously too many sub-committees (about 30) and that the workload of taking up individual complaints led to inefficient and ineffective results. The new set of Commissioners has therefore decided to have only four main sub-committees: on ICCPR issues, on ICESCR issues, on the judicial system and on the Southern Border Provinces. They will also deal with similar cases collectively rather than individually. However, these strategies have only just been introduced and the NHRC is still developing its work and administrative strategies.

The NHRC has produced more than 60 publications and media kits, covering a variety of issues, including ICCPR, ICESCR, women's rights, children's rights, community rights, rights to natural resources, and rights of vulnerable groups, minorities and displaced persons. The annual reports contain analyses of the situation and recommendations but are not widely distributed among the public.

The Commissioners are full time employees. There are 200 staff, with approximately half being permanent employees and the rest on temporary hire or term-limited contracts. The current budget allocation is approximately 150,000,000 THB representing an approximate 1% increase over the previous year.

B. Obstacles

The NHRC identified its status and the government implementation of its recommendations as the main obstacles to its work.

NHRCT is listed--along with Public Prosecutors and the National Economic and Social Council--as Constitutional Organizations under the 2007 Constitution. However, under the National Human Rights Commission Act 1999, the NHRC operates under the parliamentary administration, which limits the authority of the NHRC to hire a sufficient number of staff. Approximately 50% of staff are on temporary hire or time-limited contracts and therefore do not have full benefits according to the labour laws. This is tantamount to a violation of labour rights. The NHRC has drafted a bill to correct this which is pending at the Office of the Council of State.

The cabinet and government agencies do not take seriously the recommendations of the NHRC. Civil society faces the same obstacle. Each year the NHRC investigates numerous human rights cases and makes recommendations on significant cases, particularly those related to natural resources and community rights. However, there is no effective response from the government.

C. Summary of Complaints of Human Rights Violations

The following summary report on complaints of human rights violations covers the period from 1 October 2008-30 September 2009. These figures cannot be directly compared with the period covered by the immediately preceding report, from 1 January-31 December 2008, because of the partial overlap. The data from all tables closely resembles those for 2008. The last two tables have been newly created by the NHRCT to identify the status and the office of the accused persons. It is clear that state agencies are the most frequently accused of violations, with the police providing highest number of accused persons, a fact that is relevant to a recommendation from the NHRC on police reform.

Summary Statistics on Complaints of Human Rights Violations Received by the National Human Rights Commission, Thailand 1 October 2008 – 30 September 2009

Categorized by Age/Sex of Victims of Human Rights Violations

No.	Category	Number of cases	Percentage
1.	Children/Youth	18	2.60
2.	Male	261	37.66
3.	Female	127	18.33
4.	Elderly	14	2.02
5.	Group	273	39.39
6.	Others (unidentified)	2	0.29
	Total	695	100

Categorized by Key Description of Victims of Human Rights Violation

No.	Category	Number of cases	Percentage
1.	Disabled	2	0.31
2.	Foreigner	12	1.86
3.	Medical patient	8	1.24
4.	Public consumer	59	9.13
5.	Consumer	19	2.94
6.	Agriculturist	7	1.08
7.	Accused/Prisoner	121	18.73
8.	Government officer/ Employee	50	7.74
9.	Owner (of property)	90	13.93
10.	Victim of crime	124	19.20
11.	Family member	7	1.08
12.	Member of ethnic minority	10	1.55
13.	Community	89	13.78
14.	Worker/employer	48	7.43
15.	Other (unidentified)	49	7.59
	Total	695	100

Categorized by types of rights violated

No.	Category	Number of cases	Percentage
1.	Disabled	2	0.31
2.	Foreigner	12	1.86
3.	Medical patient	8	1.24
4.	Public consumer	59	9.13
5.	Consumer	19	2.94
6.	Agriculturist	7	1.08
7.	Accused/Prisoner	121	18.73
8.	Government officer/ Employee	50	7.74
9.	Owner (of property)	90	13.93
10.	Victim of crime	124	19.20
11.	Family member	7	1.08
12.	Member of ethnic minority	10	1.55
13.	Community	89	13.78

14.	Worker/employer	48	7.43
15.	Other (unidentified)	49	7.59
	Total	695	100

Categorized by location of complaints filed

No.	Regional	Number of Provinces	Number of cases
1.	Bangkok	1	159
2.	Central region	9	63
3.	East	8	56
4.	Upper Northeast	10	38
5.	Lower Northeast	9	67
6.	Upper North	9	106
7.	Lower North	8	38
8.	West	8	56
9.	Upper South	7	60
10.	Lower South	7	41
	Total	76	684

Note:

1. Localized Complaints (from 76 provinces): 684

2. National-level Complaints: 6

3. Complaints from foreign countries: 5

Total: 695

Categorized by status of the accused person

Civil Service Staff	58
Teacher	5
Parliament Staff	0
Police	96
Judicial Staff	5
Bangkok Municipal Staff	0
Local Government Staff	14
Military	13

IV. Recommendations

1. The selection process under the 2007 Constitution of the Kingdom of Thailand is in contravention of the Paris Principles and requires amendment. Reversion to the procedures set out in the 1997 Constitution would be an adequate remedy. Since numerous petitions to rescind the selection of the current set of Commissioners or calling on them to resign have failed, it seems futile to recommend any further action on this point.
2. A mechanism should be created to monitor implementation of NHRC recommendations to government agencies, with consideration given to a compensation procedure as a means of enforcement.
3. Publications of the NHRCT should be more widely distributed to both the public and concerned state agencies. The NHRC newsletter 'Mum Mong Sith' should be published on time and distributed widely.

