

2019 ANNI REPORT



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

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

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



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

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Layout and Printing:

Kornkanok Printing Ltd., Part.

ISBN: 978-616-7733-23-4

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This publication has been produced with the assistance of the European Union. The contents of this publication are the sole responsibility of ANNI members and FORUM-ASIA as the ANNI secretariat, and can in no way be taken to reflect the views of the European Union.

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Foreword

The Secretariat of the Asian NGO Network on National Human Rights Institutions (ANNI), The Asian Forum for Human Rights and Development (FORUM-ASIA), is pleased to present the publication of the 2019 ANNI Report on the Performance and Establishment of the National Human Rights Institutions in Asia. Member-organisations of ANNI have shown true commitment through their work and we would like to express our sincere gratitude and appreciation for all the collaborative work carried out for the amalgamation of this report. We would also like to extend our sincere appreciation to the national human rights institutions (NHRIs) that have contributed to the publication.

Following the true essence of the ANNI Report which has been polished over the past decade, this year's ANNI Report is based on country reports, with analysis of the performance of each country's NHRI or the progress made towards the possible establishment of an NHRI, during 2018 and the first quarter of 2019. The foundation of these country reports have been structured according to ANNI Reporting Guidelines that were consolidated, framed and discussed by the ANNI members at the 12th Regional Consultation of ANNI held in Kuala Lumpur, Malaysia in February 2019.

The 2019 ANNI Report includes in its analysis independence and effectiveness of the NHRIs, and the trend and level of engagement of the NHRIs with various stakeholders, including civil society and HRDs. Moreover this year's theme explores the role of NHRIs in democratic backsliding and contraction of civic spaces.

We hope this publication will continue to serve as a strategic advocacy tool to enhance the performance and effectiveness of NHRIs as public defenders and protectors of human rights on the ground.

FORUM-ASIA would like to acknowledge the contributions of all friends and colleagues to the publication of this annual report, namely: Ain o Salish Kendra and Human Rights Forum (Bangladesh), Action Committee for Democracy Development, Association of Human Rights Defenders and Promoters, Athan- Freedom of Expression Activist Organization, Burma Monitor (Research and Monitoring, Future Light Center, Genuine People's Servants, Generation Wave, Human Rights Education Network, Human Rights Foundation of Monland, Kachin Women's Association Thailand, Karen Human Rights Group, Karenni Human Rights Group, Loka Ahlinn, Metta Campaign – Mandalay, Myanmar People's Alliance (Shan State), Pa-O Youth Organization Progressive Voice, Smile Education and Development Foundation, Synergy, Ta'ang Women's Organization, The Seagull and Yangon Watch (Myanmar), G.Urantsooj and Sh.Sarankhukhuu (Mongolia), Na Hyun-pil (South Korea), Dr. Sakuntala Kadirgamar and Sahla Ilaham (Sri Lanka), Chalida Tajaroensuk (Thailand), Bijaya R. Gautam and Rajesh Mishra (Nepal), Ahmed Naaif Mohamed and Shahindha Ismail (Maldives), Haroon Baloch and Marvi Mumtaz (Pakistan), Song-Lih Huang, Yibee Huang, Yi-hsiang Shi and Eeling Chiu (Taiwan), Claudia Yip (Hong Kong), Dobby Chew Chuan Yang (Malaysia), Rajavelu K and Henri Tiphagne (India), Jose Pereira and Jose Moniz (Timor-Leste), Sekar Banjaran Aji, Lintang Setianti, Ardi Manto, Daniel Awigra, Falis Aga Triatama, Dimas Bagus Arya and Putri Kanesia (Indonesia).

This report would not have happened without the efforts of our editor, Elise Tillet-Dagousset who worked closely with the ANNI Secretariat. Our thanks are also due to Shanna Priangka Ramadhanti, NHRI Programme Associate, and Ankita Gupta, NHRI Programme Intern, for inputs and coordination throughout the publication. And special thanks to other colleagues who have been part of the process. Finally, we would like to acknowledge the financial support from the European Union in the publication of this report.

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

John Samuel

Executive Director

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

Secretariat of ANNI

Glossary

APF: Asia Pacific Forum of National Human Rights Institutions

CSO(s): Civil society organisation(s)

CY: Control Yuan

EOC: Equal Opportunities Commission

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

General Observations (GO): The SCA develops General Observations on interpretative issues regarding the Paris Principles

HRCM: Human Rights Commission of the Maldives

HRD: Human rights defenders

ICCPR: International Covenant on Civil and Political Rights

ICERD: International Convention on the Elimination of All Forms of Racial Discrimination

ICESCR: International Covenant on Economic, Social and Cultural Rights

INGO: International non-governmental organisation

HRCSL: Human Rights Commission of Sri Lanka

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

MNHRC: Myanmar National Human Rights Commission

NCHR: National Commission for Human Rights Pakistan

NGO(s): Non-governmental organisation(s)

NHRC: National human rights commission

NHRCI: National Human Rights Commission of India

NHRCB: The National Human Rights Commission of Bangladesh

NHRCK: National Human Rights Commission of Korea

NHRCM: National Human Rights Commission of Mongolia

NHRCN: The National Human Rights Commission of Nepal

NHRCT: National Human Rights Commission of Thailand

NHRI: National human rights institution

OP-CAT: Optional Protocol to the Convention against Torture

UN: United Nations

UNCAT: The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

UNCERD: UN Committee on the Elimination of Racial Discrimination

UPR: Universal Periodic Review

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

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

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

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

WHRD(s): Women human rights defender(s)

METHODOLOGY

This report is written by ANNI members situated in countries in which they are carrying out NHRI advocacy. The report is written on the basis of both first-hand experiences from the members' NHRI advocacy and in-depth interviews with NHRIs and stakeholders, as well as existing secondary sources. Some chapters are integrated with comments from the NHRI of that country, where the NHRI responded to the members contacting them and sending the report to them for their consideration. Where chapters do not have comments from the NHRI of that country, the NHRI did not respond or were not able to provide comments due to the time constraint.

ANNI Members in the Region :



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

Northeast Asia

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

Southeast Asia

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

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

South Asia

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

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

Middle East

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

*The area cannot be specified

REGIONAL OVERVIEW

ANNI Secretariat¹

Introduction

2018 was an eventful year for National Human Rights Institutions (NHRIs) and the human rights community. It marked the 25th anniversary of the adoption of the Paris Principles, the minimum international standards for the role and responsibilities of National Human Rights Institutions (NHRIs).² 25 years later, several challenges remain for NHRIs in Asia to truly protect and promote human rights. Challenges include structural problems such as functional deficiencies as well as a lack of adequate financial and human resources. However, in many instances the main barrier to NHRI's effective promotion and protection of human rights is a lack of independence and political will from governments. These challenges are elaborated on in the 2018 ANNI Report, in which civil society and human rights defenders (HRDs) assessed the performance of NHRIs in Asia against the Paris Principles and the Global Alliance of NHRIs' Sub Committee on Accreditation (GANHRI-SCA)'s General Observations.³

Apart from the commemoration of the adoption of the Paris Principles, the human rights community also commemorated the 70th anniversary of the Universal Declaration of Human Rights, the 20th anniversary of the UN Declaration on HRDs and the 5th anniversary of the adoption by the Human Rights Council Resolution on Women Human Rights Defenders (WHRDs).⁴

To celebrate these important international standards, NHRIs from all over the world gathered in Marrakech, Morocco in October 2018 to explore the roles and contributions that NHRIs can have in expanding civic space and promoting and protecting HRDs, with a specific focus on WHRDs. Through the adoption of the Marrakesh Declaration,⁵ NHRIs committed to exercise their mandate to expand civic space and promote and protect HRDs and WHRDs.

¹ Prepared by Shanna Priangka Ramadhanti (anni@forum-asia.org)

² UN General Assembly, Paris Principles relating to the Status of National Institutions, Resolution No. 48/134, 20 December 1993, available at:

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

³ Global Alliance of National Human Rights Institution Sub Committee on Accreditation (GANHRI-SCA), General Observations of the Sub-Committee on Accreditation, available at

https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf

⁴ UN General Assembly, Promotion of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms: protecting women human rights defenders, available at:

https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/181,

⁵ GANHRI, The Marrakech Declaration 2018, 'Expanding the civic space and promoting and protecting human rights defenders with a specific focus on women: The role of national human rights institutions,' available at:

https://nhri.ohchr.org/EN/ICC/InternationalConference/13IC/Background%20Information/Marrakech%20Declaration_EN_%2012102018%20-%20FINAL.pdf?Mobile=1&Source=%2FEN%2FICC%2FInternationalConference%2F13IC%2F%5Flayouts%2Fmobile%2Fview%2Easpx%3FList%3D3664a5c6%252D28ad%252D40c5%252Ddad02%252D86f7c75a3dab%26View%3Dd5961835%252DDefef%252D44eb%252Da336%252Dc6be1f0315df%26CurrentPage%3D1.

The Declaration provides concrete action points for NHRIs and relevant partners to collaboratively work to protect HRDs, WHRDs and NHRIs, to monitor civic space and threats to it, and to promote positive narrative on human rights. For example, the Declaration encourages NHRIs to monitor and report on the civic space, both online and offline, by collecting and analysing disaggregated data and statistics related to killings, fabricated legal charges, misuse of laws and other attacks against HRDs. Moreover, NHRIs are encouraged to establish national protection system, in consultation with HRDs, civil society organisations (CSOs) and others.

The commitments expressed by NHRIs in the Marrakesh Declaration are a positive step amidst growing trends of restrictions on civic space in the region. However, as much as civil society and HRDs/WHRDs appreciate it, the commitments taken in Marrakech will prove meaningless if NHRIs are not independent and effective. That is why, in light of the adoption of the Marrakech Declaration and the shrinking of civic and democratic spaces across Asia, this year's ANNI report will focus on assessing NHRIs' performance in promoting and protecting human rights in the context of democratic space and fundamental freedoms.

Democratic Space in the Region

Across the Asia region, we are witnessing a democratic backsliding and growing restrictions on people's fundamental freedoms. Authoritarianism, polarising politics, and religious fundamentalism are all on the rise. Both state and non-state actors are systematically attempting to undermine human rights, discredit HRDs and WHRDs, and restrict the space of critical and independent voices. Threats and abuse of power against dissent, as well as the adoption of laws and regulations that restrict the right to freedom of expression, peaceful assembly and association have become common practice in many countries across Asia.

One of the most common trends across the region is the adoption of an extensive web of legislations used to criminalise dissents and peaceful expression. In Myanmar, Section 66(d) of the 2013 Telecommunications Law has been aggressively used to curb critical voices online. In Bangladesh, the use of the Digital Security Act 2018 against HRDs, journalists, and political opponents has had a chilling effect on freedom of expression. Moreover, in Nepal, the Government introduced a Media Council Bill, which – if adopted - would enable authorities to take actions against media organisations if they violate press ethics as defined by the Government.

Another dramatic trend is the escalation in the number of cases of violence and attacks against HRDs. In Timor-Leste, Hong Kong, Bangladesh and Malaysia the police violently dispersed assemblies, attacking demonstrators and using excessive force or refrained from protecting peaceful demonstrators when attacked by non-state actors. In Indonesia, an environmental activist was victim of an arson attack, apparently as a result of his critics of mining businesses. Similarly in Thailand, pro-democracy activists are being the subjects of violence by thugs. Moreover, in India, HRDs and journalists are routinely threatened and harassed online for criticising corruption and communal violence, while hate speech against minorities by organised groups continue to escalate unchecked.

Governments are also restricting the operations of CSOs through laws that impose invasive registration and financial procedures, as well as restrict access to foreign funding. In India, the

Foreign Contributions Regulations (FCRA) Act gives wide discretionary powers to state authorities to allow, refuse or cancel the permit of a CSO to receive foreign funds. In recent years, the state authorities have used FCRA to silence organisations critical of government policies on human rights. In Pakistan, a similar Act is currently under consideration and 42 local organisations have had their licenses revoked by the authorities. The law risks legitimising non-governmental organisations (NGOs) surveillance and questioning on funding. It will also make pre-activity approvals from authorities mandatory. In Nepal and Mongolia the authorities have drafted NGO laws that also could restrict the activities of NGOs.

Restrictions on civic space have also taken place in the lead up to elections. For example, authorities cracked down on dissent and political opponents in the Maldives ahead of the presidential election in September 2018. In Malaysia in the lead up to the election, the government adopted draconian laws such as the Anti-Fake News Law 2018 to crack down on dissent and negative reports. In Thailand, the long awaited election instead of bringing back democracy has turned out to be a major blow to it. Ahead of the vote, the military junta dissolved one of the main opposition parties and continued to restrict fundamental freedoms.

Journalists also often bear the brunt of governments' crackdown on freedom of expression. For instance in Myanmar two *Reuters* journalists were jailed for more than 500 days after they revealed a massacre committed by the Army against ten Rohingya men. In Pakistan, media and journalists were suspended after airing speeches of the opposition party. Moreover in Mongolia, a journalist was sentenced to pay a fine of 2,000,000 tugriks (around \$750) because of the articles she had written about state corruption.

The restrictions on the democratic and civic space described in ANNI 2019 report reflect the broader global trend where in light of growing discontent towards corrupted and failing governments, authorities are further tightening their control over society by closing the space for critical voices, and undermining democratic institutions.

NHRIs' Role in Expanding Democratic and Civic Space

NHRIs as independent bodies established in compliance with the Paris Principles with a broad mandate to promote and protect human rights can play an important role in guarding civic space and in protecting HRDs. When performing optimally, independent and effective NHRIs are often seen as 'bridges' by linking several sectors such as authorities and civil society, and by acting as a link with the international human rights system.

In ANNI 2019 report a number of positive developments are acknowledged in particular in the role played by certain NHRIs in expanding civic space and protecting HRDs. For example the Human Rights Commission of Sri Lanka (HRCSL) has been vocal in combatting hate speech and tried to provide advices and comments on hate speech regulations. With a new leadership, the National Human Rights Commission of Korea (NHRCK) quickly responded to the #Metoo movement by forming and operating a special investigation team for sexual harassment and violence. In Malaysia, despite not having a specific HRD desk, Suruhan Jaya Hak Asasi Manusia (SUHAKAM) continued to provide timely support to HRDs through its physical presence by

deploying a monitoring team on the ground during public assemblies or by publishing press statement in cases of harassment of HRDs.

However, ANNI's assessment reveals that Asian NHRIs are still keener on implementing their promotion mandate, rather than their protection mandate despite the fact that they often are equipped with mechanisms to monitor, document, as well receive complaints and investigate cases of human rights violations. But even with such mandates, some NHRIs appear reluctant to condemn and hold their government accountable. This is particularly true in cases of restrictions on civic space and attacks on HRDs, as they are often perceived as too 'political' for NHRIs to intervene.

For example, the National Human Rights Commission of Bangladesh (NHRCB) has done little more than raise concerns or issue press statements in cases of journalists' killings or severe crackdown on peaceful protesters. Similarly in Myanmar, the Myanmar National Human Rights Commission (MNHRC) refused to call for the release of the two Reuters journalists and has adopted a dismissive attitudes towards peaceful protesters met with violence. In the Maldives, the Human Rights Commission of the Maldives (HRCM) was seen to be turning a blind eye on police impunity and the use of excessive force in dispersing protestors. The Commission's monitoring reports were also weak and did not reflect the reality on the ground. In India, despite a growing crackdown on HRDs, the National Human Rights Commission of India (NHRCI) has yet to review draconian laws such as the FCRA and in Thailand, the National Human Rights Commission of Thailand (NHRCT) remained totally silent in the face of broad restrictions on civil and political rights under the military junta.

In reality many NHRIs in the region are confronted with operational and practical impediments in implementing their mandate and performing their role meaningfully. There appears to be a recurring trend of governments actively trying to undermine the effective work and functioning of NHRIs. These attacks and reprisals may come in the form of amendments to the NHRIs' enabling law, restriction of their mandate and jurisdiction, imposition of arbitrary restrictions on funding, as well as recruitment of Commissioners who either refuse to criticise the authorities or seriously lack capacity in human rights. These have severely impeded the functional independence, effectiveness as well as credibility of many NHRIs.

Establishment of NHRIs: The Struggle Continues

In 2018, despite civil society's constant efforts no new NHRIs were established in the region. However, some developments and advocacy opportunities have emerged. In Taiwan, a draft bill on the establishment of an NHRI is pending in the Parliament. This is a significant development as it is the first time that the Government, the Parliament, and the Control Yuan hold the similar view that the NHRI should be set up as part of the CY. In Hong Kong, although the international community including UN Treaty Bodies repeated recommendations that Hong Kong should consider establishing an NHRI with a broad mandate covering all international human rights standards, the Government insists on claiming that the existing mechanisms are sufficient. Unfortunately, this is yet to be proven. However, while ongoing mass protests may postponed any significant legislative change, the police excessive use of force in responding to protesters might

galvanise support for the establishment of an independent human rights commission to investigate police misconduct.

Conclusion

Overwhelmingly, the assessments conducted by civil society and HRDs in this year's report show that NHRIs in the region largely fail at protecting people's civic space. While reasons for this failure might not entirely fall on NHRIs, it still appears NHRIs have not grasped the scale of the ongoing crackdown and have not matched the level of restrictions by their actions. NHRIs in the region appear too cautious in holding to account governments and security forces responsible for human rights violations. This could be partially attributed to fear that it would have negative repercussions on the institutions themselves. Civil society are well aware of the threats and challenges faced by the NHRI, however the very idea underlying the establishment of NHRIs is to ensure that they remain vigilant over those who hold and exercise powers so that their conduct conform to national and international human rights norms.

While expanding and protecting civic space might seem an insurmountable task, it will only be possible if it is done collectively. NHRIs should continue to cultivate and formalise their relationship with civil society and HRDs by closely and regularly collaborating and engaging with CSOs.

In conclusion, ANNI believes that if NHRIs fully uphold human rights principles and function independently and effectively, they would be able to fulfill social expectations and hold promises that their establishment creates. They would also be able to be a key ally and discerning partner in the expansion of civic space and protection of HRDs/WHRDs.

INDONESIA: THE STAGNANT STATE OF KOMNAS HAM IN A DYNAMIC POLITICAL YEAR

Institute for Policy Research and Advocacy (ELSAM), the Human Rights Working Group (HRWG), Imparsial (Indonesian Human Rights Monitor), and the Commission for Missing Persons and Victims of Violence (Komisi untuk Orang Hilang dan Korban Tindak Kekerasan or KontraS).¹

1. Introduction

This report covers the period from July 2018 to July 2019. It was prepared by a team made of the Institute for Policy Research and Advocacy (ELSAM), the Human Rights Working Group (HRWG), Imparsial (Indonesian Human Rights Monitor),² and the Commission for Missing Persons and Victims of Violence (*Komisi untuk Orang Hilang dan Korban Tindak Kekerasan* or KontraS). The report is based on research and interviews with a number of victims of human rights violations as well as Commissioners and staff of the Indonesian National Human Rights Commission (Komnas HAM), and media monitoring.

2. Overview

In 2018, Komnas HAM retained its “A” status accreditation by the Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation (GANHRI-SCA).³ The SCA however still made suggestions to Komnas HAM including:

- To give consideration to ensuring pluralism in the context of gender, ethnicity or minority status. This includes ensuring the equitable participation of women in the NHRI;
- To advocate for the formalisation and application of a permanent process that includes requirements to: (1) Publicise vacancies broadly; (2) Maximise the number of potential candidates from a wide range of societal groups and educational qualifications; (3) Promote broad consultation and/or participation in the application, screening, selection and appointment process; (4) Assess applicants on the basis of pre-determined, objective and publicly-available criteria; and (5) Select members to serve in their individual capacity rather than on behalf of the organisation they represent;
- To continue to advocate for legislative amendments to its Law to include a provision for functional immunity of its members; and
- To advocate for amendment of its enabling Law to allow it to independently determine the position duties responsibilities and organisational structure of the Secretariat General.

¹ Sekar Banjaran Aji and Lintang Setianti (ELSAM), Daniel Awigra (HRWG), Ardi Marto (Imparsial), Falis Aga Triatama, Dimas Bagus Arya and Putri Kanesia (KontraS). ELSAM’s Website is available at: <https://elsam.or.id/id/>; HRWG’s Website is available at: <http://hrwg.org>; Imparsial’s Website is available at: <http://www.imparsial.org>; KontraS’s Website is available at: <https://kontras.org/en/home-en/>.

² See Komnas HAM’s website available at: <https://www.komnasham.go.id/>

³ GANHRI Sub-Committee on Accreditation Report – March 2017, p.25, available at: <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20Final%20Report%20-%20March%202017-%20English.pdf>.

However, the high rating achieved by Komnas HAM was criticised by civil society groups because the institution has been in the limelight for internal alleged corruption.⁴

On 3 October 2017, the Parliament nominated seven new commissioners.⁵ The new Commission identified four main issues that it needed to address: severe human rights violations; agrarian issues; religious intolerance; and institutional governance of Komnas HAM. As the same time it de-established some of the previously existing special desks such as the minority desk, the freedom of religion and belief (*Kebebasan Beragama dan Berkeyakinan/KBB*) desk, and the Human Rights Defenders (HRD) desk.⁶ The Chairperson of the Commission stated that it was because all cases were equally prioritised by Komnas HAM and that the Commissioners should be able to handle all issues/cases of alleged human rights violations and gross human rights violations reported by the public.⁷

Komnas HAM also worked with other state institutions to restore public trust in the Commission including through thorough monitoring of the 2019 General Elections. A team was formed and visited 12 locations to monitor elections with foreign election monitors. Their findings showed that the election was carried out openly with no fraud⁸ and were useful in stemming attempts by the opposition to delegitimise the election results.⁹

In 2017 ANNI Report made five recommendations to the Government of Indonesia and five recommendation to Komnas HAM. However, these recommendations have only been partly fulfilled. For instance:

Amending the Mandate of Komnas HAM in Accordance with the Paris Principles

Komnas HAM's mandate cannot be amended without political commitment to change its enabling law: the Law Concerning Human Rights (No. 39 of 1999).¹⁰ However, until today, changes to the Law Concerning Human Rights have not been a priority of the House of Representatives of the Republic of Indonesia (*Dewan Perwakilan Rakyat* or DPR).

Strengthening the Capacity of Komnas HAM Staff and Commissioners

To this day, Komnas HAM has not changed its complaint services. However, a number of policies have been adopted and capacity building activities carried out in relation to Komnas HAM's

⁴ *The Jakarta Post*, 'KPK to Deepen Investigation into Komnas HAM Budget Case,' 2 November 2016, available at: <https://www.thejakartapost.com/news/2016/11/02/kpk-to-deepen-investigation-into-komnas-ham-budget-case.html>.

⁵ Liputan6.com, 'Komisi III DPR Sepakati 7 Nama Jadi Komisioner Baru Komnas HAM,' 3 October 2017, available at: https://www.liputan6.com/news/read/3116684/komisi-iii-dpr-sepakati-7-nama-jadi-komisioner-baru-komnas-ham?related=dable&utm_expid=.9Z4i5ypGQeGiS7w9arwTvQ.1&utm_referrer=https%3A%2F%2Fwww.google.co.m%2F.

⁶ Interview with the Chairperson of the National Human Rights Commission on 8 May 2019.

⁷ Ibid.

⁸ Ibid.

⁹ *The Jakarta Post*, 'Komnas HAM forms Election Monitoring Team,' 16 April 2019, available at: <https://www.thejakartapost.com/news/2019/04/16/komnas-ham-forms-election-monitoring-team.html>

¹⁰ Law Concerning Human Rights (No. 39 of 1999), available at: https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=55808&p_country=IDN&p_classification=01.05.

internal governance. For instance, Komnas HAM established a financial administration system with the Audit Board of Indonesia (*Badan Pemeriksa Keuangan* or BPK) and promoted online complaints in order to reach out to more people.¹¹

Adopt a Concrete Advocacy Strategy to Encourage the State to Resolve Past Cases of Gross Human Rights Violations, through an ad hoc Human Rights Court

When the Coordinating Minister for Political, Legal and Security Affairs - Wiranto - confirmed the formation of the National Harmony Council (*Dewan Kerukunan Nasional* or DKN) in March 2018 to resolve all cases of human rights violations from the past through non-judicial mechanisms, victims of past human rights violations and human rights organisations strongly opposed his proposal.¹² Both victims and other communities consider the formation of the DKN as a tactic for Wiranto – who stands accused of past gross human rights violations - to ‘wash hands’ and ‘escape’ accountability.

In a meeting initiated by President Jokowi to discuss the above initiatives, Komnas HAM stated that the formation of DKN was a political move by the President and that if he agreed to form a DKN, the Government should first acknowledge cases of gross human rights violations.¹³

A similar statement was also made by the Commission in relation to the establishment of a Legal Assistance Team on 8 May 2019 to handle cases that emerged after the 2019 general elections in a bid to discipline, secure, and uphold the country’s order following the elections.¹⁴ The Commission deemed the Legal Team to be unnecessary and worried that it could be used to curtail people’s freedom of opinion.¹⁵

Opening Intensive Communication with Victims of Human Rights Violations and Civil Society Groups

Communication between Komnas HAM and civil society is usually good. However, in February 2019, the Chairperson of the Commission was heavily criticised for his media statement regarding the steps taken by the West Sumatra Provincial Government in banning LGBT.¹⁶ The media quoted the Chairperson, Ahmad Taufan Damanik, as saying that persecution of LGBTs was not a human rights violations. This statement drew criticism from human rights and LGBT activists who

¹¹ Interview with the Chairperson of the National Human Rights Commission on 8 May 2019.

¹² Haris Prabowo, ‘Kontras Menolak Tegas Pembentukan DKN oleh Wiranto,’ 19 July 2019, available at: <https://tirto.id/kontras-menolak-tegas-wacana-pembentukan-dkn-oleh-wiranto-cPuG>.

¹³ Margareth S. Aritonang, Marguerite Afra Apiie and Ina Parlina, ‘Questions Linger on Wiranto’s DKN plan,’ 20 February 2017, available at: <https://www.thejakartapost.com/news/2017/02/20/questions-linger-wiranto-s-dkn-plan.html>.

¹⁴ Dewi Elvia Muthiariny, ‘Wiranto Officially Establishes Legal Aid Team,’ *Tempo*, 10 May 2019, available at: <https://en.tempo.co/read/1203929/wiranto-officially-establishes-legal-aid-team>.

¹⁵ Abba Gabrillin, ‘Catatan Komnas HAM soal Tim Asistensi Hukum Bentukan Wiranto,’ *Kompas*, 10 May 2019, available at: <https://nasional.kompas.com/read/2019/05/10/15372411/catatan-komnas-ham-soal-tim-asistensi-hukum-bentukan-wiranto>.

¹⁶ Miko Elfisha, ‘Ketua Komnas HAM Nilai Komitmen Sumber Larang Perilaku LGBT Tidak Langgar HAM,’ *AntaraNews*, 14 February 2018, available at: <https://www.antaraneews.com/berita/798214/ketua-komnas-ham-nilai-komitmen-sumbar-larang-perilaku-lgbt-tidak-langgar-ham>.

then went to the Office of Komnas HAM to clarify the matter. However, the Chairperson stated that he had never made the statement and that the media misunderstood him.¹⁷

Finally, following allegations of corruption, Komnas HAM established a new system of procurement of goods and services. An Administrative Rehabilitation Team was also formed in 2018 when the new Commissioner was selected. Furthermore, the Commission – with the help of external consultants from the Human Resources from the Institute of Public Administration (*Lembaga Administrasi Negara* or LAN) - carried out a performance evaluation of its staff. In 2018, as a consequence staff were repositioned and shifted within the Commission or to other ministries or institutions. By May 2019, the Commission had 123 new staff members who were *Calon Pegawai Negeri Sipil* (CPNS)¹⁸ and 100 staff as non-permanent employees. The new staff will assist the National Commission’s priority work on the process of digitising and structuring records to prevent file loss.

3. Komnas HAM’s Mandate to Promote and Protect Human Rights

Komnas HAM is an independent body, with a position equal to other government bodies. Komnas HAM was first established by Presidential Decree No. 50/1993.¹⁹ In 1999, Komnas HAM establishment was enshrined in law with the adoption of the Law No. 39/1999 Concerning Human Rights.²⁰ The law sets out the aims, functions, membership, principles, duties, and authority of Komnas HAM. Under this law, Komnas HAM has several functions such as assessing, researching, counselling, monitoring, and mediating cases of violations of human rights.²¹

Aside from the authority given in the Law Concerning Human Rights Komnas HAM is also authorised to conduct investigations into gross human rights violations under Law No. 26/2000 Establishing the Ad Hoc Human Rights Court.²² Under this law, Komnas HAM can establish an ad hoc team that includes Komnas HAM members and “*public constituents*” to investigate and monitor gross human rights violations.

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

Finally in Article 75 of the Law Concerning Human Rights, it is stated that the purpose of the National Human Rights Commission in addition to providing increased protection and enforcement of human rights is to promote human rights.

¹⁷ Interview with the Chairperson of the National Human Rights Commission on 8 May 2019.

¹⁸ Levelling status of staff usually known as Probationary Civil Servant.

¹⁹ Presidential Decree 50/1993, The National Human Rights Commission, available at: <https://www.hurights.or.jp/archives/database/nhri-law-indonesia.html>.

²⁰ Law Concerning Human Rights, Article 76.

²¹ Law Concerning Human Rights, Article 1(7).

²² Law No. 26/2000, Establishing the Ad Hoc Human Rights Court, Section 4, available at:

<https://policehumanrightsresources.org/content/uploads/2019/07/Law-26-2000-Act-on-the-Human-Rights-Courts-2000-Eng.pdf?x39143>

Past Human Rights Violations: Talangsari case, Lampung

On 20 February 2019, the Integrated Team for Handling Severe Human Rights Violations (hereinafter called the Integrated Team) initiated by the Coordinating Ministry for Politics, Law and Security (*Kementrian Koordinator Bidang Politik, Hukum* or *Kemenko Polhukam*) held a meeting with the local government and Talangsari residents to discuss the resolution of the Talangsari case of gross human rights violation dating from 1989.²³ This meeting was also attended by representatives of the East Lampung Regency DPRD and the Regency Government.²⁴

The meeting resulted in an agreement to resolve the case of gross human rights violations in Talangsari through a mechanism called the “*Peaceful Declaration on the Alleged Case of Gross Human Rights Violations in Talangsari Lampung*” (hereinafter referred to as the Peace Declaration).²⁵ However, the Peace Declaration was severely defective.

The Peace Declaration was based solely on unilateral statements from a group of people who claim to be the victims, and was mainly representative of the political elites’ interests while failing to include the Talangsari victims’ perspective. Talangsari victims were not actively involved to convey in advance their hopes and demands that should be fulfilled by the State.

In 2008, Komnas HAM had completed a pro justitia investigation for the Talangsari case. Thus, the Peace Declaration was delegitimising the results of the investigations carried out by Komnas HAM. As a consequence, the Talangsari people, accompanied by KontraS, filed a complaint with Komnas HAM on 4 March 2019.

Following the complaint, on 2 March 2019, Komnas HAM rejected the Peace Declaration through a press release.²⁶ Furthermore, it also refused to join the Integrated Team. The responses and actions taken by the Commission in this case reflect that Komnas HAM’s maintains its mandate in accordance with its founding law and Law 26/2000 relating to the establishment of an Ad Hoc Human Rights Court.

Violations of the Right to Freedom of Religion and Belief

Violations of the right to freedom of religion and belief (FoRB) remain a problem in Indonesia. Although there are a number of laws that guarantee FoRB such as the 1945 Constitution, the Law Concerning Human Rights, and the International Covenant on Civil and Political Rights, the state remains a frequent violator of FoRB.

²³ Arkhelaus W, ‘Jokowi Has No Commitment to Resolve Rights Case: Amnesty International,’ 19 October 2017, available at: <https://en.tempo.co/read/912463/jokowi-has-no-commitment-to-resolve-rights-cases-amnesty-intl>.

²⁴ DPRD is the acronym of Dewan Perwakilan Rakyat Daerah which means Provincial Region Assembly.

²⁵ *CNN Indonesia*, ‘KontraS: Deklarasi Damai Talangsari Delegitimasi Komnas HAM,’ *CNN Indonesia*, 5 March 2019, available at: <https://www.cnnindonesia.com/nasional/20190304182910-20-374454/kontras-deklarasi-damai-talangsari-delegitimasi-komnas-ham>.

²⁶ Felix Nathaniel, ‘Komnas HAM Anggap Deklarasi Damai Talangsari Tak Ada Dasar Hukum,’ *Tirto.id*, 2 March 2019, available at: <https://tirto.id/komnas-ham-anggap-deklarasi-damai-talangsari-tak-ada-dasar-hukum-difA>.

Through its monitoring of FoRB violations, the SETARA Institute found that in 2018 there were 160 incidents and 202 violations of ForB. Local governments being the main perpetrators of violations with 29 incidents. This is followed by the police, with 17 incidents.

As of March 2017, Komnas HAM received six complaints related to FoRB, while nine old cases had not been completed. The complaints mainly relate to violations that occurred in the regions with no follow-up from the local governments.

This is due to the many problematic regional regulations. Often, regional regulations only benefit or prioritize the majority group of people but do not provide equal access to services to minorities. Based on Komnas HAM data obtained from the Ministry of Home Affairs, there are at least 3,000 regional regulations whose contents are not in accordance with the laws issued by the central government, the majority of which relate to human rights.

Komnas HAM has an important role to play in providing input regarding government/regional government policies that are in conflict with human rights. Input from the Commission should be given more consideration by the local government, especially regarding policies that conflict with the most basic human rights of FoRB.

Another important function that Komnas HAM should be carrying out is mediating in the event of human rights violations and conducting education or training to state administrators and community members on ForB issues. The potential for violations could be prevented through socialisation, seminars or workshops for both the regional governments and the authorities and the public as a way to prevent further violations of ForB.

Cases of Torture

While Indonesia has ratified the International Convention against Torture (CAT) through Law Number 5 on 28 September 1998,²⁷ 21 years later there has been no significant change to the prevalence of torture in the country.²⁸ Indonesia has also still not ratified CAT's additional protocol (OPCAT).

However, in 2013, Komnas HAM's played an active role in the formation of the National Preventive Mechanism (NPM) against torture.²⁹ Indonesia's NPM is based on a Memorandum of

²⁷ Association for the Prevention of Torture, Indonesia and the Optional Protocol to the UN Convention against Torture (OPCAT), Briefing Note, August 2007, available at: https://lama.elsam.or.id/downloads/1265276007_Briefing_note OPCAT Indonesia August 2007 .pdf.

²⁸ A number of aspects that facilitate the perpetuation of torture in Indonesia are a weak anti-torture legal framework with no clear definition of torture and no punishment for perpetrators of torture, as well as weak preventive systems and institutions.

²⁹ The Memorandum of Understanding of Five State Institutions in the Context of Prevention of Torture and Other Cruel Inhumane Treatment or Punishment, or Lowering the Dignity in Places of Detention in Indonesia was made on 9 December 2013 as a temporary proposal to five state institutions to prevent torture and other Cruel Inhumane Treatment or Punishment, or Degrading Martabat by monitoring the situation of pen pens in Indonesia. The five institutions are the Indonesian National Human Rights Commission (Komnas HAM), the National Commission for the Prevention of Violence Against Women (*Komnas Perempuan*), the Indonesian Child Protection Commission (KPAI), the Ombudsman of the Republic of Indonesia and the Witness and Victim Protection Agency (LPSK) which will use a multiple-body mechanism.

Understanding between five state institutions including Komnas HAM. Yet, six years later progress have been slow. The five state institutions are currently still drafting the institutional framework to oversee the existence of NPM.³⁰ Komnas HAM, which is responsible for leading the initiative, must be more active and must involve the civil society so that the NPM can find more about the conditions of torture and its victims.

In addition, Komnas HAM did not give attention to a number of torture cases, such as the case of Dedy Hernawan in Bengkulu. On 13 December 2018 at around 5 pm West Indonesia Time, Dedy Hernawan was arrested by the Directorate of Drug Detective of the Bengkulu Regional Police, on charges of possession of methamphetamine. During the arrest, Dedy was handcuffed, then taken to the Bengkulu Regional Police Station by car.³¹

However, Dedy was not immediately taken to the Bengkulu Regional Police Office, but was first taken to a cottage on the Panjang beach and was forced by members of the Bengkulu Regional Police to admit to the possession of drugs found in Dedy's house. Because Dedy did not confess, he was beaten repeatedly by around ten police officers using bare hands and a wooden stick. After Dedy fell between three to five people continued to hit the left side of his body, feet and hands using the stick and also punched him in his right jaw. Some police members even hit his calf using a stick with nails.

Following this incident, Wuri, Dedy's wife, reported the case to the Bengkulu Provincial Police Provost (with letter number: STPL/4/III/2019/YANDUAN) and to Komnas HAM on 1 March 2019. However, until now Komnas HAM has taken no steps to address the case. Dedy is now on trial but the fact that his testimony was obtained under torture has not been brought up.³²

4. Democratic Space in Indonesia

General elections were held in Indonesia on 17 April 2019. For the first time in the country's history, the President, the Vice-President, members of the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat* or MPR), and members of local legislative bodies were elected on the same day with over 190 million eligible voters.

The presidential election, the fourth in the country's history, saw incumbent Indonesian President Joko Widodo, known as Jokowi, run for re-election against Former Army General Prabowo Subianto. The election was a rematch of the 2014-presidential election, in which Widodo defeated Prabowo.³³

On 21 May 2019, the General Election Commission (KPU) declared Jokowi victorious in the presidential election, with over 55% of the vote. In the early morning of 22 May 2019, supporters of Prabowo protested in Jakarta against Jokowi's victory. The protest turned into a riot which left

³⁰ Meetings conducted with both Komnas-HAM and other state institutions, such as LPSK.

³¹ Laporan, 'Berharap Masih Ada Keadilan Terhadap Korban Pelanggaran HAM,' 14 March 2019, available at: <https://www.lapor.go.id/laporan/detil/berharap-masih-ada-keadilan-terhadap-korban-pelanggaran-ham>.

³² Case number: No.66/Pid.sus/2019/PN.Bgl.

³³ BBC news, 'Indonesia election 2019: All you need to know,' 12 April 2019, available at <https://www.bbc.com/news/world-asia-47729119>.

eight people dead and over 600 injured.³⁴ According to Komnas HAM, it is carrying out an investigation into the incident.³⁵ However, the investigation has still not been completed because they the Commission still has to hear statements from several parties, namely several members of the police who were on duty at the time. Komnas HAM also revealed that there were still people missing during the action, namely those who participated and were involved in riots (clashes) with the police.

During the April 2019 elections, Komnas HAM conducted a number of monitoring activities. For each monitoring activity Komnas HAM gave its input to the election organisers, namely to the KPU and The Election Supervisory Board (*Badan Pengawas Pemilihan Umum* or Bawaslu). The purpose of the monitoring was to assess the quality of the results of the 2019 election as free from violations of the citizens' civic and political rights.

Komnas HAM also cooperated with the Indonesian National Police in order to prevent the spread of hate speech and hoaxes ahead of the election. According to the Commission, the police should not prioritise repressive instruments in dealing with dissemination of hate speech and hoaxes. Instead it recommends that law enforcement officials prioritise persuasive and preventive methods in handling hate speech. The Commission also noted that several cases handled by police should not have been dealt with in court as they fell within the realm of the right to freedom of expression.³⁶

Following the election, it also appeared that out of the more than 7 million election workers, 569 had died during the lengthy voting and counting process. Prabowo's campaign team claimed the deaths were linked to fraud that disadvantaged him. As of 9 May 2019, the KPU stated that the dead included 456 election officers, 91 supervisory agents and 22 police officers.³⁷ Therefore, the Commission also conducted an investigation into the death and concluded that there were no indications of irregularities in the deaths of the election officials, but suggested that if there were strong reasons to do so, an autopsy could be carried out in accordance with the health law to determine the main cause of death.³⁸ The autopsy must also be done with the consent of the victim's family.

Komnas HAM also recommended that there be a comprehensive evaluation of the electoral system because of the high levels of death and illness among organizers, especially KPPS, Voting Committee (*Panitia Pemungutan Suara* or PPS), District Election Committee (*Panitia Pemilihan*

³⁴Agustinus Beo Da Costa, 'Indonesia Should Probe Deaths of Election Staff-Parliament Deputy,' Reuters, 9 May 2019, available at: <https://uk.reuters.com/article/uk-indonesia-election/indonesia-should-probe-deaths-of-election-staff-parliament-deputy-idUKKCN1SF1AO>.

³⁵ *The Jakarta Post*, 'Komnas HAM forms election monitoring team,' 16 April 2019, available at: <https://www.thejakartapost.com/news/2019/04/16/komnas-ham-forms-election-monitoring-team.html>.

³⁶ *CNN Indonesia*, 'Komnas HAM Buka Hasil Investigasi Rusuh 22 Mei Akhir Juli,' 8 July 2019, available at: <https://www.cnnindonesia.com/nasional/20190708080144-12-410008/komnas-ham-buka-hasil-investigasi-rusuh-22-mei-akhir-juli>.

³⁷ Stephen Wright and Niniek Karmini, 'Indonesia Officially Awards Election to Jokowi,' *The Diplomat*, 21 May 2019, available at: <https://thediplomat.com/2019/05/indonesia-officially-awards-election-to-jokowi/>.

³⁸ *CNN Indonesia*, 'Komnas HAM Terjun Investigasi Ratusan Petugas KPPS Meninggal,' 9 May 2019, available at: <https://www.cnnindonesia.com/nasional/20190509173253-12-393498/komnas-ham-terjun-investigasi-ratusan-petugas-kpps-meninggal>

Kecamatan or PPK), Supervisors and Security Officers. According to the Commission both regulatory aspects regarding recruitment, age, workload, health insurance, eligibility of honorariums, and electoral logistics should be reviewed. The Commission suspected that there had been negligence from the election organisers that did not pay adequate attention to the factors mentioned above, resulting in a rather large number of victims.

5. Role of KOMNAS HAM in Addressing the Civil and Democratic Space in Indonesia

Violence against Human Rights Defenders (HRDs)

Data collected by KontraS reveal that between January and October 2018 there were 156 acts of violence against HRDs including prosecution, criminalization, and arbitrary arrests. Perpetrators of violence include the police in 86 cases, the Government in 46 cases, the private sector in 26 cases, community organisations in 14 cases and the military in 11 cases.³⁹

In addition, the report from the Institute for Policy Research and Advocacy (ELSAM) shows that from November 2017 to July 2018, the main perpetrator of violence and threat of violence against environmental HRDs were state actors in 88% of the cases including the police, the military, the Attorney General's Office, state officials, the court, tourism authorities, forest police, and municipal police (*Satuan Polisi Pamong Praja* or Satpol PP).⁴⁰

The Government does not seem concerned by the high rate of violence against HRDs. There are still no laws in Indonesia that regulates the protection of HRDs. Although in 2010 there were discussions regarding a draft Human Rights Defender Bill, the proposal was rejected in the Parliament on the grounds that it was not urgently necessary.

Komnas HAM itself had suggested an alternative, by including articles on HRDs in the draft revision of the Law Concerning Human Rights. It is unfortunate that the draft revision of Law however was not made a priority by the DPR. With the composition of the new Parliament, which will be inaugurated in October 2019, Komnas HAM should encourage discussions on the draft in the Parliament in order to encourage recognition of HRDs and their protection needs.

The following are a number of cases of reprisal against HRDs:

Heri Budiawan alias Budi Pego is a resident of Sumberagung Village, Pesanggaran Sub-District, Banyuwangi Regency who has actively objected gold mining activities carried out by PT Bumi Suksesindo (BSI) and PT Damai Suksesindo (DSI) in the Tumpang Pitu mountains.⁴¹ On 4 April 2017, Budi Pego coordinated a peaceful demonstration on Pancer Road in Sumberagung Village.

³⁹ KontraS, 'Tidak Ada Perlindungan HAM untuk Pembela Hak Asasi Manusia di Indonesia,' available at: <https://kontras.org/home/WPKONTRAS/wp-content/uploads/2018/09/Paper-Kondisi-Pembela-HAM-di-Indonesia.pdf>.

⁴⁰ ELSAM, Environmental Human Rights Defenders in Indonesia Threatened By State and Company, 25 September 2018, available at: <https://elsam.or.id/environmental-human-rights-defenders-in-indonesia-threatened-by-state-and-company/>.

⁴¹ Walhi Jatim, 'Siapa Elite Petinggi Tambang Tumpang Pitu dalam Lingkaran Timmes Pilpres 2019?' Press Release, November 2018, available at: <http://walhijatim.or.id/2018/10/siapa-elite-petinggi-tambang-tumpang-pitu-dalam-lingkar-timmes-pilpres-2019/>.

Following the protest, a PT BSI employee reported Budi Pego to the police for allegedly spreading the teachings of communism because a banner used reportedly had a hammer and sickle. According to Budi, he has never made such banner.

Another case is the case of Murdani, Executive Director of WALHI West Nusa Tenggara (NTB) whose residence was set on fire in an arson by an unknown person on 28 January 2018, at 3 am Central Indonesian Time. The fire could only be extinguished 45 minutes later, resulting in the destruction of his house and vehicle. Murdani argues that the arson is closely related to the activities of WALHI NTB who criticises mining activities in the province, and suspect that the burning was carried out by unscrupulous mining businesses.⁴²

Moreover, Murdani received threats because of his protests against development that ignored the environment. In Murdani case, Komnas HAM involvement was minimal. Although the Commission has issued National Human Rights Commission Regulation No. 5/2015 concerning Human Rights Defenders,⁴³ its protection of HRDs has not been maximized because the Law Concerning Human Rights does not specifically mandate the Commission to protect HRDs.

Professor Dr. Ir. Bambang Hero Saharjo, Professor in the Faculty of Forestry, Bogor Agricultural Institute (IPB) was also sued by PT JJP, a company that was convicted of forest fires on a basis of tort for having carried out acts against the law (PMH), due to his incriminating statements as an expert witness for the Director General of Law Enforcement of the Ministry of Environment and Forestry.⁴⁴ PT JJP was demanding that Bambang Hero be declared to have committed an unlawful act and that his statement be regarded as legally flawed and therefore null and void by law. The case is still ongoing. This forensic expert is the second environmental expert to be exposed to such a lawsuit. His colleague, also from IPB, Basuki Wasis, was sued by a mining company that was punished for damaging the environment.⁴⁵

In handling this case, Komnas HAM has been quite good at expressing its opinion in public to provide protection for Bambang Hero as an environmental defender, even if it has not been systematic. Although Komnas HAM's has a limited mandate the Commissioner's courage to speak out helped enlighten the public about the issue of the right to a decent environment as a part of human rights in general.

However, what is most concerning is the recent decision of Komnas HAM to abolish the HRD Desk. Komnas HAM should instead increase its commitment to the issue, rather than reducing it by removing the desk.

⁴² Fathul Rakhman and Indra Nugraha, 'Arson attack in Indonesia leaves activist shaken,' Mongabay, 1 February 2019, available at: <https://news.mongabay.com/2019/02/arson-attack-leaves-activist-in-indonesia-shaken/>.

⁴³ Ibid.

⁴⁴ Tempo.co, 'Kebakaran Hutan, PT Bumi Mekar Hijau Cuma bayar Rp 78 Miliar,' 30 Agustus 2016, available at: <https://bisnis.tempo.co/read/800226/kebakaran-hutan-pt-bumi-mekar-hijau-cuma-bayar-rp-78-miliar>.

⁴⁵ Muhammad Sidik Permana, 'IPB Bela Bambang Hero yang di Dugat Perusahaan Pembakaran,' Tempo.co, 9 October 2018, available at: <https://metro.tempo.co/read/1134639/ipb-bela-bambang-hero-yang-digugat-perusahaan-pembakar-hutan>.

Privacy Rights

The increasing use of technology in Indonesia, has a real impact on the enjoyment of human rights, especially the right to privacy and freedom of expression. However, at present, the data protection regulations are still scattered in 32 laws, and have therefore not been able to guarantee the entire rights of data owners. This inadequate regulatory regime causes citizens to lose control of their privacy rights including their personal data which is controlled by state institutions and business entities.

The legal vacuum has caused companies and state institutions to collect data on a large scale. An example is the case of misuse of personal data through the use of peer-to-peer lending financial technology in the form of loan application funds, also known as “Pinjol” (online loans). Collection of personal data that should be used for credit scoring or assessment of the feasibility of loans that can be given in digital form is misused by being given to third parties who collect payments by threatening and disseminating the user’s personal data such as its financial transactions and personal photos accessed from the creditor’s cell phone without permission.⁴⁶

On the Government side, the development of a single population identity system, which relies on electronic ID card (*e-KTP*), has placed the Government in the role of a manager of personal data with a very large number of variants. In addition, the synchronisation of the phone number of each individual, which was institutionalised through the SIM Card registration policy, makes the Government the largest personal data controller.⁴⁷ Smart city development in many areas has also led to the collection of personal data on a large scale, particularly with the installation of thousands of CCTV including some equipped with face recognition technology.⁴⁸

In this context, Komnas HAM should give more than just comments in the media such as calling on the Government to not prevent the spread of false news by intruding on people’s privacy or by calling on the Government to launch an initiative to reduce hoax.⁴⁹ The Commission should go further by conducting studies, research, monitoring and counselling to raise the issue of privacy rights and freedom of expression.

⁴⁶ Amal Nur, ‘Aplikasi Pinjaman Online Curi Data Gojek dan Tokopedia, Ini Faktanya’, Viva.co.id, 19 July 2019, available at: <https://www.viva.co.id/digital/digilife/1170341-aplikasi-pinjaman-online-curi-data-gojek-dan-tokopedia-ini-faktanya>.

⁴⁷ Coconuts Jakarta, ‘Prepaid SIM Card Owners in Indonesia Must Register Their Identities by February 2018 or Face Suspension,’ 12 October 2017, available at: <https://coconuts.co/jakarta/news/prepaid-sim-card-owners-indonesia-must-register-identities-february-2018-face-suspension/>.

⁴⁸ Gilang Kharisma, ‘Perkembangan Jakarta Smart City Setelah berjalan Selama Empat Tahun Lebih,’ Tech in Asia, 13 June 2019, available at: <https://id.techinasia.com/perkembangan-jakarta-smart-city>.

⁴⁹ Muhammad Radityo Priasmoro, ‘Komnas HAM: Patroli Siber Ganggu Hak Privasi Masyarakat,’ Liputan6.com, 24 June 2019 available at: https://www.liputan6.com/news/read/3996525/komnas-ham-patroli-siber-ganggu-hak-privasi-masyarakat?utm_expid=.9Z4i5ypGQeGiS7w9arwTvQ.0&utm_referrer=https%3A%2F%2Fwww.google.com%2F

6. Conclusion and Recommendations

Although improvements have been made Komnas HAM still has to achieve the important task of restoring public trust in the institution by showing that it is free of corruption and by restating its commitment to upholding human rights.

The 2019 General Election shows that Komnas HAM has not been maximally trying to monitor the potential for conflict and the vulnerable political situation that may arise. Although the Commission was proactive in providing input to the General Election Commission, it still failed to ensure that the criteria for the presidential candidates, vice presidential candidates, and also the legislature to be free from accusations of human rights violations was taken into account.

6.1 Recommendations:

To Komnas HAM:

- 1) Strengthen the capacity of Komnas HAM staff and commissioners;
- 2) Develop a concrete advocacy strategy to encourage the State to resolve cases of gross human rights violations from the past, through the ad hoc Human Rights Court;
- 3) Open intensive communication with victims of human rights violations and civil society groups in order to encourage the resolution of cases of human rights violations and cases of gross human rights violations;
- 4) Cooperate actively and effectively with other state institutions in order to encourage the resolution of cases of human rights violations;
- 5) Play a mediating role in the event of human rights violations and conduct education or training to state administrators and community members on FoRB;
- 6) Re-Establish an HRD desk and speak out about the issues they face in order to inform the public about HRD issue; and
- 7) Conduct studies, research, monitoring and counseling to raise the issue of privacy rights and freedom of expression.

To the Government and Parliament of Indonesia:

- 1) Amend the Act Concerning Human Rights to ensure full compliance with the Paris Principle;
- 2) Give due consideration to Komnas HAM as an independent and strategic state institution in guarding human rights;
- 3) Ensure that every Presidential policy and legislation in the DPR mainstreams human rights; and
- 4) Bridge the fundamental problems between the Komnas HAM and the Attorney General's Office which has resulted in no cases of past gross human rights violations being resolved through the ad hoc Human Rights Court.

MALAYSIA: WATCHDOG BOUND BY STATUS QUO

*Suara Rakyat Malaysia (SUARAM)*¹

1. Introduction

This report evaluates the efficacy of the Human Rights Commission of Malaysia (SUHAKAM)² in discharging its duty as the National Human Rights Institution (NHRI) of Malaysia. The chapter will examine SUHAKAM's performance throughout 2018 with a special focus on its role in addressing restrictions of civic space in Malaysia.

The chapter is based on SUARAM's observations through its engagement with SUHAKAM on human rights violations complaints and its participation in SUHAKAM's events and programmes; as well as on SUHAKAM's 2018 Annual Report.³ In addition, SUARAM sought feedback on this Chapter from SUHAKAM and received a written response on 29 May 2019, which has been reflected in this report.

2. Overview

2018 was a year of hope and tumult for Malaysia. In the lead up to the country's 14th General Election on 9 May 2018, state agencies restricted the right to expression and peaceful assembly. The Royal Malaysian Police obstructed rallies;⁴ human rights defenders (HRDs) and political activists were investigated and sometimes prosecuted for participating in peaceful assemblies; delivering speeches; or criticising political leaders.⁵

Following the elections' results, the political administration of Malaysia changed for the first time in the country's post-independence history to make way to a coalition called Pakatan Harapan.⁶ The coalition that ousted the Barisan Nasional administration – known for its restrictive policies – won the election on a platform of promises of human rights reform. While systemic change remains relatively distant, some immediate transformations have already been witnessed within the country.

The new government also promised greater independence and holistic reform to SUHAKAM's founding law in order to address the difficulties and limitations it experienced in the past.⁷ In July

¹ Dobby Chew Chuan Yang, Documentation and Monitoring Coordinator, monitoring@suaram.net

² Suruhanjaya Hak Asasi Manusia Malaysia, Website: <http://suhakam.org.my/>.

³ SUHAKAM, Annual Report 2018, 19 April 2018, available at: <https://drive.google.com/file/d/1fvvmlSqXJ2ysTdhRrYnSws6Bwz6FQiaG/view>.

⁴ The Royal Malaysian Police often claimed that a police permit was required; refused to accept notification submitted by protest organisers; and called organisers of an event for investigation under the Peaceful Assembly Act 2012. Details of violations of the right to peaceful assembly can be found at SUARAM's Annual Human Rights Report 2018, page 49, available at: <https://www.suaram.net/2019/05/29/suaram-annual-human-rights-report-2018/>.

⁵ SUARAM's Annual Human Rights Report 2018, page 36, available at: <https://www.suaram.net/2019/05/29/suaram-annual-human-rights-report-2018/>.

⁶ The new administration is a political coalition called Pakatan Harapan led by Mahathir Mohamad, the 4th Prime Minister of Malaysia who came out of retirement.

⁷ Rashvinjeet S. Bedi & Nurbaiti Hamdan, 'Suhakam concerned over cut in Government allocation', *The Star Online*, 20 April 2016, available at: <https://www.thestar.com.my/news/nation/2016/04/20/suhakam-concerned-over->

2018, the Prime Minister announced that SUHAKAM would be moved and placed under the Parliament's authority.⁸ However, there has yet to be any formal legislative reform to SUHAKAM's Act.⁹

In the 2017 ANNI Report, SUARAM made eight recommendations to the Government of Malaysia and six recommendations to SUHAKAM. However, recommendations to the Government have only been fulfilled in part by both the new and old administrations. For instance:

Table and Debate SUHAKAM's Annual Report in Parliament

Despite the change of administration, there has been no development in the tabling and debate of SUHAKAM's Annual Report in Parliament. SUHAKAM has been submitting its annual and special reports to the Parliament according to the SUHAKAM Act.¹⁰ However, even after three Parliamentary meetings,¹¹ none of SUHAKAM's annual reports, including its 2018 Annual Report, have been debated in the Parliament.

Create a Parliamentary Select Committee to Adopt and Monitor the Implementation of SUHAKAM's Recommendations

Six Parliament Special Select Committees (PSC) were formed in the new Parliament in 2018.¹² However, none of them officially oversees SUHAKAM in terms of the appointment of its Chairman and Commissioners, reporting, and funding. Until the proposed amendments to the SUHAKAM Act are passed, the PSCs do not have the legal mandate to oversee it. However, with the administration adopting the position that SUHAKAM will be under the purview of the Parliament and not the Executive, there is no impediment – on principle – to the Select Committees to take upon this responsibility. Three of the six PSCs formed could potentially oversee SUHAKAM, i.e. the PSC on Major Public Appointments; the PSC on Public Accounts; and the PSC on Human Rights and Gender Equality. To this day, the PSC are however not fully functional, as most of them have not held any public meetings or consultation.¹³

cut-in-government-allocation/, See also ANNI Report 2016, available at: <https://www.forum-asia.org/uploads/wp/2016/11/ANNI-Report-2016-Full-Report.pdf>.

⁸ *The Malaysian Insight*, 'MACC, EC and SUHAKAM placed under Parliament from today', 1 July 2018, available at: <https://www.themalaysianinsight.com/s/59111>.

⁹ Human Rights Commission of Malaysia Act 1999 [Act 597] ('SUHAKAM Act'), available at: <http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20597%20-%20Human%20Rights%20Commission%20of%20Malaysia%20Act%201999.pdf>.

¹⁰ SUHAKAM Act, Section 21.

¹¹ As of 11 July 2019.

¹² Fatimah Zainal, 'Parliament set to have six new standing committees', *The Star Online*, 4 December 2019, available at: <https://www.thestar.com.my/news/nation/2018/12/04/parliament-set-to-have-six-new-standing-committees/>.

¹³ It should be noted that the Parliament Select Committee on Rights and Gender Equality convened four meetings with SUHAKAM participating and engaging in three sessions.

Implement the Legal Reforms Proposed by SUHAKAM¹⁴ to Strengthen its Mandate & Repeal Section 5(5) of SUHAKAM Act.¹⁵

SUHAKAM met and presented a justification paper for the above-mentioned reforms to the Cabinet, which endorsed it in September 2018.¹⁶ SUHAKAM also met with the Attorney General and Solicitor General in November 2018 to discuss the proposed amendments to the SUHAKAM Act, who offered their support and assistance.¹⁷ In January 2019, SUHAKAM submitted its draft amendment bill, which is in line with the Paris Principles,¹⁸ to the Attorney General. The Prime Minister's Department has since been reviewing the proposed amendments. The timeline for this review remains unclear.

Ensure the Financial Independence of SUHAKAM in Law and in Practice

In November 2018, the executive announced that it is revisiting its budgeting process by adopting a zero-based budgeting approach where all agencies funded by the state will need to explain and justify all expenses instead of submitting their annual budget based on preceding years.¹⁹ The new zero-based budgeting and the old framework of operation, which place SUHAKAM under the executive, make it difficult to ascertain the future of SUHAKAM's adequate funding and financial independence.

Include SUHAKAM in Consultations on any Institutional or Legal Reform that may Impact Human Rights

In 2018, the Government consulted SUHAKAM more frequently on law reform initiatives. For instance, SUHAKAM made presentations to the Institutional Reform Committee (IRC)²⁰ in the months following the change of administration, and two former and current SUHAKAM Commissioners were appointed as members of the IRC.²¹ SUHAKAM has also been involved in consultations concerning proposed reforms to labour, anti-human trafficking and anti-discrimination laws.²²

¹⁴ For the list of suggested reforms proposed by SUHAKAM see: SUHAKAM, Annual Report 2018, p. 54.

¹⁵ SUHAKAM Act, Section 5(5) limits the number of Commissioners to 20.

¹⁶ SUHAKAM, Annual Report 2018, p. 53.

¹⁷ SUHAKAM, Annual Report 2018, p.54.

¹⁸ Paris Principles relating to the Status of National Institutions, adopted through UN General Assembly Resolution No. 48/134 on 20 December 1993, available at:

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

¹⁹ Martin Carvalho, Hemananthani Sivanandam, Rahimy Rahim, 'No more "Christmas shopping" for govt ministries as 'zero-based budget' adopted, says Guan Eng', *The Star Online*, 21 November 2018, available at:

<https://www.thestar.com.my/news/nation/2018/11/21/no-more-christmas-shopping-for-govt-ministries-say-guan-eng/>.

²⁰ A temporary working group of prominent lawyers, former judges and academics who were appointed by the new administration to make recommendations on human rights and institutional reforms to the new government.

²¹ Dato' KC Vohrah (2004-2006) and Datuk Mah Weng Kwai (2013-2016, 2019-present), who are former Court of Appeal judges. Datuk Mah was also appointed to the Judicial Appointment Commission (JAC) in September 2018.

²² Based on feedback and engagement with SUHAKAM

Open the Selection Process of the Commissioners to Public Scrutiny

Little to no change has been documented on this front. In June 2019, the *Yang-Dipertuan Agong*²³ appointed the latest set of SUHAKAM Commissioners for 2019-2022 on the advice of the Prime Minister in consultation with the Selection Committee, of which three members out of five were still appointed by the Prime Minister as currently provided under the Act.²⁴

However, the new batch of Commissioners did not include a special SUHAKAM Children's Commissioner despite the Deputy Prime Minister's announcement.²⁵ This latest process was also criticised for bypassing the Parliament Select Committee on Major Public Appointments,²⁶ which as highlighted above could have played an advisory role.

In any event, the two-month delay in the appointment of the new Commissioners was similar to the one observed in 2016.²⁷

3. SUHAKAM's Mandate to Promote and Protect Human Rights

Section 4 SUHAKAM's Act outlines the scope of SUHAKAM's functions, which include promoting human rights awareness and education; advising the government on legislative and administrative directives; making recommendations to the government on treaty ratification; and inquiring into complaints regarding infringement of human rights.

SUHAKAM's human rights work refers to the Universal Declaration of Human Rights (UDHR) "to the extent that it is not inconsistent with the Federal Constitution" of Malaysia.²⁸ In Malaysia, public sentiments on international treaties and human rights have often been associated with Western liberalism and seen as incompatible with Malaysia's culture and belief system.²⁹ SUHAKAM, despite provisions in its founding Act, SUHAKAM has advocated for treaty ratification and human rights protection.

For the purpose of this report we will evaluate three key areas of SUHAKAM's activities: (1) SUHAKAM's capacity to address complaints through its oversight mechanism;³⁰ (2) accessibility

²³ The Monarch representing the Federation of Malaysia. Malaysia maintains a system of rotation in selecting the Yang-Dipertuan Agong among 9 royal families

²⁴ SUHAKAM Act, Section 5(2) and Section 11A(c).

²⁵ Bernama, 'DPM: Govt to appoint Children's Commissioner', *News Straits Times*, 11 April 2019, available at: <https://www.nst.com.my/news/government-public-policy/2019/04/478467/dpm-govt-appoint-childrens-commissioner>.

²⁶ FMT Reporters, 'Appointment of Suhakam commissioners against spirit of PH manifesto, says Bersih', *Free Malaysia Today*, 27 June 2019, available at: <https://www.freemalaysiatoday.com/category/nation/2019/06/27/appointment-of-suhakam-commissioners-against-spirit-of-ph-manifesto-says-bersih/>.

²⁷ The Commissioners' previous term ended on 25 April 2019. See also: Danial Dzulkifli, 'Ex-Wisma Putra sec-gen is new Suhakam chairman', *Malay Mail Online*, 26 June 2019, available at: <https://www.malaymail.com/news/malaysia/2019/06/26/ex-wisma-putra-sec-gen-is-new-suhakam-chairman/1765814>.

²⁸ SUHAKAM Act, Section 4(4).

²⁹ A concept that was often endorsed by Malaysian leaders in the past. See: BBC World Service, 'Case Study: The Concept of Asian Values,' available at: http://www.bbc.co.uk/worldservice/people/features/ihavearightto/four_b/casestudy_art30.shtml.

³⁰ This also includes its power to conduct public inquiry.

of SUHAKAM to members of the public; (3) and SUHAKAM's engagement in the law reform process.

SUHAKAM's Capacity to Address Complaints through its Oversight Mechanism

In the cases documented by SUARAM, SUHAKAM's intervention in addressing complaints of human rights violations has helped deter further physical abuse of detainees, strengthened compliance by enforcement agencies with existing laws and regulations and in some cases, incited the police to act to correct the misconduct or its failings.

After receiving a complaint, SUHAKAM would usually send officers to visit the alleged victims of torture or other abuses and interview or record statement from the authorities. The Commission would usually do follow up after obtaining more information or after visiting a victim of human rights violations.³¹ SUHAKAM may get in touch with the family or the victim after their release to confirm that the violation has ceased. At the end of the investigation, SUHAKAM will prepare a full report of its findings and sets of recommendations to the authorities.

For instance, in July 2018, in the case of the kidnapping of M. Rajanthiran,³² the police was slow in collecting evidence and in taking action against alleged assailants. After a complaint was lodged with SUHAKAM by the family of the victim, the Commission begun an investigation and interviewed the other victims. The Royal Malaysian Police later stepped up its investigation and found new leads for the case. In June 2019, the police informed SUHAKAM that two individuals had been charged in court. SUHAKAM's investigation and intervention has seemingly jolted the police into action.

Another example from 2018 is the case of a minor who was sexually abused by a schoolteacher. The Royal Malaysian Police and the school authorities remained largely inactive after a complaint was filed. Therefore, SUARAM with the victim's family filed a complaint with SUHAKAM. After its investigation, SUHAKAM sent a correspondence to the Ministry of Education and held several meetings inquiring about the alleged perpetrator's background and actions taken by the Ministry to address the matter.³³ Following SUHAKAM's intervention it was found that the accused was charged for sexually abusing a minor.³⁴

For the past two years, SUHAKAM has conducted a public inquiry into the enforced disappearance of four social activists.³⁵ The inquiry, however, has faced a number of obstructions from the Royal Malaysian Police (one of the authorities under scrutiny in the inquiry). For example, in January 2018, the Police sent a letter requesting that SUHAKAM immediately ceased its investigation after

³¹ Human rights violations dealt with by SUHAKAM usually include cases of torture, abuses by enforcement agencies, and statelessness. For an outline of the type of cases addressed by SUHAKAM, please see SUHAKAM's Annual Report 2018, p. 68.

³² Faisal Asyraf, 'SUARAM: polis gagal siasat dakwaan pengawal keselamatan diculik', *MalaysiaKini*, 26 July 2018, available at: <https://www.malaysiakini.com/news/436061>.

³³ SUARAM's direct communication with SUHAKAM.

³⁴ Sarah Zulkifli, 'Ampang teacher charged with physical sexual assault against Standard 4 pupil,' *New Straits Times*, 30 July 2018, available at: <https://www.nst.com.my/news/crime-courts/2018/07/396064/ampang-teacher-charged-physical-sexual-assault-against-standard-4>.

³⁵ Esther Landau, 'Suhakam inquiry concludes police behind disappearance of Amri, Pastor Koh,' *New Straits Times*, 3 April 2019, available at: <https://www.nst.com.my/news/nation/2019/04/475685/suhakam-inquiry-concludes-police-behind-disappearance-amri-pastor-koh>.

it had arrested and charged a suspect.³⁶ The move appears to be a mere tactic to halt SUHAKAM's investigation since the Commission cannot investigate matters pending in court.³⁷ SUHAKAM initially ceased its investigation³⁸ but the inquiry was later resumed in December 2018³⁹ after SUHAKAM's inquiry panel heard submissions from the legal counsel of the family and the police and made a determination that the matter at court is different from the one of the public inquiry.⁴⁰

On 3 April 2019, the Commission released its findings stating that two of the social activists were the victims of enforced disappearances and that groups operating with the support of state agents had been involved in the abduction.⁴¹ Despite the detailed report, the Prime Minister first dismissed SUHAKAM's finding claiming it to be hearsay⁴² but following SUHAKAM's report, the Minister of Home Affairs set up a ministerial task force to investigate the case of the disappeared in August 2019. Yet, the taskforce has been criticised because of concerns regarding the impartiality of its members⁴³ and problematic terms of reference.⁴⁴

The government's initial response was disappointing. The lack of acknowledgement for SUHAKAM's inquiry and dismissive attitude towards the matter shows contempt for SUHAKAM's expertise and credibility as an NHRI.

Accessibility of SUHAKAM to Members of the Public

SUHAKAM is always open to members of the public to lodge complaints on human rights violations. Complaints can be lodged to the Commission physically at its office premises or via telephone or fax.⁴⁵ SUHAKAM also maintains an online complaint system, however, the online complaint mechanism is not necessarily user friendly.⁴⁶ SUHAKAM also operates booths to record complaints during its community outreach sessions. This is to compensate for communities who have limited physical access to SUHAKAM's office and its online complaint system.⁴⁷

³⁶ Victoria Brown, 'Man charged with extorting Pastor Koh's son now claims trial to kidnapping charges,' *The Star Online*, 16 January 2018, available at: <https://www.thestar.com.my/news/nation/2018/01/16/man-charged-with-extorting-pastor-kohs-son-now-claims-trial-to-kidnapping-charge/>.

³⁷ SUHAKAM's Act, Section 12.

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

³⁹ Ashley Tang, 'Inquiry into Raymond Koh's case resumes, Suhakam to call new witness,' *The Star Online*, 15 November 2018, available at: <https://www.thestar.com.my/news/nation/2018/11/15/inquiry-into-raymond-koh-case-resumes-suhakam-to-call-new-witness/>.

⁴⁰ Michael Murty, 'Pastor Koh inquiry to resume,' *Free Malaysia Today*, 16 May 2018, available at: <https://www.freemalaysiatoday.com/category/nation/2018/05/16/pastor-koh-inquiry-to-resume/>.

⁴¹ SUHAKAM, 'Public Inquiry into the Disappearance of Pastor Raymond Koh,' Final Decision, 3 April 2019, available at: <https://drive.google.com/file/d/1qQ9WAQzizsZDGwHsiYM-mFWnlkg2XJPU/view>.

⁴² *The Sun Daily*, 'SB's role in Pastor Koh's disappearance merely hearsay: Mahathir,' 3 April 2019, available at: <https://www.thesundaily.my/local/sb-s-role-in-pastor-koh-s-disappearance-merely-hearsay-mahathir-LF755386>.

⁴³ Jerry Chong, 'Malaysian Bar: Task force into disappearance must be impartial, independent,' *Malay Mail Online*, 11 July 2019, available at: <https://www.malaymail.com/news/malaysia/2019/07/11/malaysian-bar-task-force-into-disappearances-must-be-impartial-independent/1770533>.

⁴⁴ Rama Ramanathan, 'Amri's disappearance: Again I say, it's a Bogus Task Force,' *MalaysiaKini*, 2 August 2019, available at: <https://www.malaysiakini.com/news/486351>.

⁴⁵ See: <https://www.suhakam.org.my/contact-us/>.

⁴⁶ See: <http://aduan.suhakam.org.my/eApps/system/index.do>.

⁴⁷ Information provided by SUHAKAM.

The number of complaints received has increased over the years with roughly 700 cases in 2014 and 2015 to 1,180 cases in 2018. More than half of the cases received in 2018 are from Sabah with 548 cases received and 298 resolved.⁴⁸ Kuala Lumpur has 476 cases with 270 resolved, and 25 cases from Sarawak with 13 resolved. In Kuala Lumpur, a notable number of cases received relate to cases of arbitrary arrest, detention and torture whereas, in Sabah, a notable number of cases relate to issues of statelessness.

SUHAKAM also maintains a policy of engagement with all civil society groups⁴⁹ and often embark on collaborative projects and advocacy with civil society members. Recent examples include collaboration with Fortify Rights on the publication of a report on human trafficking⁵⁰ and joint advocacy with civil society partners for the ratification of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).⁵¹ Apart from these efforts, SUHAKAM has also received recommendations by civil society organisations (CSOs) on thematic research such as for its report on Transgender Persons in Kuala Lumpur and Selangor.⁵²

SUHAKAM's Engagement in the Law Reform Process

Lastly, SUHAKAM's ability to intervene and advocate in law reform processes has significantly changed after the 2018 elections. In the past, civil societies and SUHAKAM had limited space to engage in the law-making process, despite SUHAKAM's explicit mandate to do so.⁵³ As noted in previous ANNI reports over the years, the executive often used SUHAKAM simply as a rubber stamp agency.⁵⁴

However, following the change of administration in May 2018, SUHAKAM has been more involved with law reforms. This includes, for instance, participation in the technical meetings hosted by the Ministry of Home Affairs on security laws; submission by SUHAKAM to the IRC; and to the Governance, Integrity and Anti-Corruption Centre (GIACC);⁵⁵ and engagement with the National Human Resources Consultative Council. However, it is still too early to tell whether these engagements will be fruitful and lead to actual greater compliance with international human rights standards or whether the consultation and engagement will be used as a façade by the new administration.

The report must also note the developments that occurred in 2018 relating to international human rights treaties. Despite its initial commitments to ratify core international human rights treaties, the new administration has largely backtracked on its promises.

⁴⁸ A state in Borneo.

⁴⁹ In some cases, to the disagreement and concerns of mainstream human rights NGOs because of their concerns with SUHAKAM's engagement with self-proclaimed human rights groups with a track record of advocating against universally recognized human rights.

⁵⁰ SUHAKAM & Fortify Rights, 'Sold like Fish: crime against humanity, mass graves and human trafficking from Myanmar and Bangladesh to Malaysia from 2012 to 2015,' March 2019, available at: <https://www.fortifyrights.org/downloads/Fortify%20Rights-SUHAKAM%20-%20Sold%20Like%20Fish.pdf>.

⁵¹ ACT4CAT Coalition, a coalition advocating for the ratification of UNCAT which includes Amnesty International Malaysia, Bar Council Malaysia, SUARAM and Lawyers for Liberty.

⁵² SUHAKAM, 'Report on Transgender Person in KL and Selangor,' March 2019, available at: <https://drive.google.com/file/d/1wEJ2pVGheprNhqFquoQtMNV01nmfbK48/view?usp=sharing>.

⁵³ SUHAKAM's Act, Section 4(1)(b).

⁵⁴ ANNI Report 2018 and 2015 available at: <https://www.forum-asia.org/?p=27756> and http://www.burmapartnership.org/wp-content/uploads/2015/09/ANNI_Report_2015.pdf.

⁵⁵ For access to the submission, request can be made to SUHAKAM at humanrights@suhakam.org.my.

Throughout November and December 2018 strong public opposition led by political opponents from the Islamic Party of Malaysia and the former administration, Barisan Nasional, against the ratification of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), led the Pakatan Harapan administration to announce that it would not be ratifying ICERD.⁵⁶

At the height of the opposition, the advocates against ICERD organised a rally in Kuala Lumpur, which coincidentally fell on the same day SUHAKAM was planning to celebrate International Human Rights Day. SUHAKAM's celebration, which was supposed to be launched by the Prime Minister, was branded as a pro-ICERD event.⁵⁷ The Prime Minister therefore withdrew his support⁵⁸ and SUHAKAM was forced to postpone its celebration after the Royal Malaysian Police advised on potential security risk.⁵⁹

Similar opposition was also observed when the new administration ratified the Rome Statute. Following public debacle involving the royal institutions, the administration withdrew from the Rome Statute barely a month after signing on to the treaty.⁶⁰

In this political climate promoting human rights will remain a difficult mandate. It is unlikely that CSOs and SUHAKAM will be able to work around the politically driven sentiments against international human rights treaties.

4. Democratic and Civic Space in Malaysia

Although Malaysia has consistently held democratic elections every five years since its independence, democratic values have been systematically eroded during the 61 years under the Barisan Nasional administration. Between gerrymandering and the silencing of political opponents by using draconian laws to prosecute and/or disqualify them, there has been limited space to challenge the status quo.

Some aspects of the repressive environment have become such commonplace that civil societies and political activists tend to accept them as normal part of life. For example, at any public events, be in a human rights forum or a press conference, plainclothes policemen and intelligence officers from the Special Branch are systematically present to document the proceeding.

Repression and shrinking of democratic space tend to be tied to the election cycle with greater repression and restriction placed upon civil societies and political opponents as the election date draws closer. Protests movement critical of the government have however been targeted at all time.

⁵⁶ The Star Online, 'Govt not ratifying ICERD' 24 November 2018, available at:

<https://www.thestar.com.my/news/nation/2018/11/24/govt-not-ratifying-icerd-we-will-continue-to-defend-federal-constitution-says-pms-office>

⁵⁷ *The Star Online*, 'Dr M to launch human rights rally on same day as anti-Icerd rally,' 5 December 2018, available at: <https://www.thestar.com.my/news/nation/2018/12/05/pm-to-launch-suhakams-human-rights-rally-on-same-day-as-antiicerd-rally/>.

⁵⁸ Manirajan Ramasamy, 'Mahathir: Suhakam wants to accept ICERD, how can I go?' *New Straits Times*, 8 December 2018, available at: <https://www.nst.com.my/news/nation/2018/12/438565/mahathir-suhakam-wants-accept-icerd-how-can-i-go>.

⁵⁹ Martin Carvalho, Hanis Zainal, Jo Timbuong, 'Only anti-Icerd rally on today,' *The Star Online*, 8 December 2018, available at: <https://www.thestar.com.my/news/nation/2018/12/08/only-antiicerd-rally-on-today-suhakam-gathering-postponed-to-tomorrow-due-to-safety-risks/>.

⁶⁰ *The Star Online*, 'Malaysia withdraws from the Rome Statute', 5 April 2019, available at: <https://www.thestar.com.my/news/nation/2019/04/05/malaysia-withdraws-from-the-rome-statute/>.

For instance, following exposure of a massive corruption scandal involving former Prime Minister Najib Razak in 2015, civil societies and political opponents led a series of peaceful demonstrations against the administration, which resulted in a number of arrests and prosecutions of the organisers.⁶¹

The growing public criticism of the former repressive regime gave rise to a new style of repression by the administration. After 2016, the Barisan Nasional administration began deploying ‘non-state actors’ to challenge the popular peoples’ movement Bersih 2.0.⁶² Violence and threat of violence by the ‘red shirt’ led by Jamal Yunus, a division head of the United Malay National Organization (UMNO)⁶³ surfaced whenever there were perceived threats to the administration. Examples include the red shirt’s attempts to derail the Bersih convoy;⁶⁴ counter protest to Bersih 5⁶⁵ and a protest against an independent media.⁶⁶ In some cases, the red shirts went as far as to physically assault participants of Bersih.⁶⁷

Death threats were also made against civil society leaders during the height of the Bersih movement on WhatsApp.⁶⁸ Bersih chairperson, Maria Chin Abdullah also received a live bullet in her mail with a letter threatening to harm her and her family.⁶⁹

Community protests have also been met by oppressive and heavy-handed restrictions. Examples of this include a spontaneous protest in 2017 against animal abuse after a video of an individual beating and kicking a dog went viral. Despite the peaceful nature⁷⁰ of the protest, the Royal Malaysian Police attempted to forcefully disperse it.⁷¹ Similarly, when content producers protested against a local satellite channel that holds a monopoly in Malaysia, the police deployed riot police and demanded participants to disperse despite a prior agreement with the district police

⁶¹ Nicholas Cheng, ‘Hishammuddin Rais becomes fourth person to be arrested over rally,’ *The Star Online*, 1 August 2015, available at: <https://www.thestar.com.my/news/nation/2015/08/01/hisham-raised-arrested/>.

⁶² While the group is officially a non-state actor, its leadership and participants are often members and leaders of the former administration.

⁶³ The dominant party Barisan Nasional coalition with the most numbers of Member of Parliament.

⁶⁴ Anil Netto, ‘As Bersih 5 Convoy launched, Red Shirt mob harasses participant,’ Anilnetto.com, 1 October 2016, available at: <https://anilnetto.com/malaysian-politics/malaysian-elections/red-shirts-heckle-bersih-gathering-lumut>.

⁶⁵ *Malay Mail Online*, ‘Red Shirts gather to counter Bersih 5 rally,’ 19 November 2016, available at: <https://www.malaymail.com/news/malaysia/2016/11/19/red-shirts-gather-to-counter-bersih-5-rally/1253483>.

⁶⁶ Bernama, ‘Ex-Umno man fined over illegal red shirt rally at MalaysiaKini,’ *MalaysiaKini*, 25 May 2018, available at: <https://www.malaysiakini.com/news/426829>.

⁶⁷ Hani Shamira Shahrudin, ‘Police on the hunt for Red Shirt supporters in attack on two men in Bersih T-shirts,’ *New Straits Times*, 8 October 2016, available at: <https://www.nst.com.my/news/2016/10/179017/police-hunt-red-shirt-supporters-attack-two-men-bersih-t-shirts>.

⁶⁸ Minderjeet Kaur, ‘Death threat probe on Bersih chief submitted to AGC,’ *Free Malaysia Today*, 7 August 2017, available at: <https://www.freemalaysiatoday.com/category/nation/2017/08/07/death-threat-probe-on-bersih-chief-submitted-to-agc/>.

⁶⁹ Khairah N. Karim, ‘Maria Chin says she received death threat, bullet in the mail,’ *New Straits Times*, 29 November 2016, available at: <https://www.nst.com.my/news/2016/11/192939/maria-chin-says-she-received-death-threat-bullet-mail>.

⁷⁰ The protest took place at an open space around a housing area in the suburban area of Puchong, Selangor. See: Jerry Choong, ‘Animal lovers gather in support of man’s best friend,’ *Malay Mail Online*, 10 April 2017, available at: <https://www.malaymail.com/news/malaysia/2017/04/10/animal-lovers-gather-in-support-of-mans-best-friend/1352939>.

⁷¹ Melanie Abraham, ‘Group gathers to show support for abused guard dog ‘Furby’,’ *The Star Online*, 9 April 2017, available at: <https://www.thestar.com.my/news/nation/2017/04/09/group-gathers-to-show-support-for-abused-guard-dog-furby/>.

headquarters.⁷² Protests and barricades against the demolition of family homes and places of worship were also met with similarly harsh measures.⁷³

This trend continued until the defeat of the Barisan Nasional administration in the 14th General Election. Since, the change of administration in Malaysia on 9 May 2018 has so far put a halt on excesses of the past and substantially reduced incidences of politically motivated prosecution and harassment of critical voices by state-affiliated groups and entities.⁷⁴ The new administration also sought to reverse the Anti-Fake News Act 2018. Unfortunately, political opposition in the Senate thwarted the attempt.⁷⁵

However, repression of civic space continues to occur, albeit at a different level. Earlier examples of violence by non-state actors against protesters have, in some instances, continued. A notable incident occurred in March 2019 when student activists protested against a public event by former Prime Minister Najib Razak and were met with violence by political leaders of UMNO.⁷⁶ While the police initially failed to intervene⁷⁷ it later escorted the students to safety and four assailants were prosecuted.⁷⁸

On some 'sensitive' topic, such as those relating to the position of Islam within Malaysia and the Royal Institutions or monarch, state agencies such as the Royal Malaysian Police continue to act against members of the public. For instance, individuals perceived to insult the royal institutions or Islam are still investigated and prosecuted.⁷⁹ It should be noted that in the later, some ministries

⁷² Minderjeet Kaur, 'Group protests lack of local Indian content on Astro,' *Free Malaysia Today*, 2 September 2016, available at: <https://www.freemalaysiatoday.com/category/nation/2016/09/02/group-protests-lack-of-local-indian-content-on-astro/>.

⁷³ Rashvinjeet S. Bedi & Justin Ahmad Tarmizi, 'Nine arrested at protest against demolition of houses in Subang,' *The Star Online*, 4 October 2017, available at: <https://www.thestar.com.my/news/nation/2017/10/04/nine-arrested-at-protest-against-demolition-of-houses-in-subang/>.

⁷⁴ Human rights defenders continue to face prosecution. See: Tarrence Tan & Rahimy Rahim, 'Gobind to meet AG over Fahmi Reza's conviction,' *The Star Online*, 19 November 2018, available at: <https://www.thestar.com.my/news/nation/2018/11/19/gobind-to-meet-ag-over-fahmi-rezas-conviction/>.

⁷⁵ Reuters, 'Malaysia opposition blocks repeal of 'fake news' law in challenge to Mahathir,' 12 September 2018, available at: <https://www.reuters.com/article/us-malaysia-politics-fakenews/malaysia-opposition-blocks-repeal-of-fake-news-law-in-challenge-to-mahathir-idUSKCN1LS0WO>. Note that in Malaysia the law making process involves two chambers, the Dewan Rakyat (elected, Lower House) and the Senate (appointed members, Upper House). The Senate can reject a law and return it to the Dewan Rakyat once. The Dewan Rakyat would then be forced to respect a one year cooling off period before passing the law again.

⁷⁶ Nurbaiti Hamdan, 'Umno's Lokman, three others charged with assaulting UM student,' *The Star Online*, 28 March 2019, available at: <https://www.thestar.com.my/news/nation/2019/03/28/umnos-lokman-three-others-charged-with-assaulting-um-student/>.

⁷⁷ *The Star TV*, 'Najib's supporters manhandle students during protest,' 22 March 2019, available at: <https://www.thestartv.com/v/najib-s-supporters-manhandle-students-during-protest>.

⁷⁸ *The Star TV*, 'UM Students who were manhandled by Umno supporters say they had protested against PH, too,' 23 March 2019, available at: <https://www.youtube.com/watch?v=NwcqoxcpqqY>.

⁷⁹ Bernama, 'Former sales manager charged with insulting Agong on social media [NSTTV], *New Straits Times*, 11 February 2019, available at: <https://www.nst.com.my/news/crime-courts/2019/02/459187/former-sales-manager-charged-insulting-agong-social-media-nsttv>. See also: Nor Azizah Mokhtar, '3 ditahan, 1 diburu kes hina Islam, Nabi Muhammad SAW dan Saidatina Aisyah,' *Berita Harian*, 5 March 2019, available at: <https://www.bharian.com.my/berita/kes/2019/03/537515/3-ditahan-1-diburu-kes-hina-islam-nabi-muhammad-saw-dan-saidatina-aisyah>.

endorsed the ‘restriction.’⁸⁰ To further exacerbate the problem, HRDs speaking out on these issues often receive death and rape threats on social media through selected pages and groups.⁸¹

5. Role of SUHAKAM in Contraction of Civic Space

What is noteworthy is that at the time of shrinking civic space and greater polarisation of society, SUHAKAM has managed to play the role of an arbiter and neutral party. This was illustrated during the Universal Periodic Review (UPR) process, which Malaysia underwent in 2018. UPR advocacy usually involves two key coalitions. On one hand, the Coalition of Malaysian NGOs in the UPR Process (COMANGO) that is mostly comprised of human rights non-governmental organisations (NGOs) aligned to the universality of human rights and the UDHR. On the other hand, there is the Malaysian Alliance of Civil Society Organisation in the UPR Process (MACSA), which is made of NGOs aligned towards the more conservative interpretation of human rights and the Cairo Declaration of Human Rights.

At the time when SUHAKAM’s UPR submission was due, it called for a consultation with members from both coalitions. Despite the tacit animosity between both coalitions, SUHAKAM was able to get them to discuss and comment on SUHAKAM’s UPR submission. This resulted in SUHAKAM’s including a recommendation to protect LGBTIQ communities, an issue that was staunchly opposed by some present at the meeting.⁸²

SUHAKAM has also increased its engagement with community and CSOs.⁸³ For instance, SUHAKAM arranged dialogues between state authorities and affected communities in cases of human rights violations.⁸⁴ In the lead up to the 14th General Election, SUHAKAM was also among the few entities that managed to secure a formal meeting with ministries and civil societies; to invite government agencies to conferences alongside CSOs and to host a series of dialogue sessions with civil societies, members of Parliament, and government agencies to discuss Malaysia’s ratification of UNCAT.

The absence of a HRD desk was also not a hindrance to SUHAKAM’s capacity to support HRDs, especially in the pre-election period. SUHAKAM continued to provide timely support through physical presence by deploying a monitoring team on the ground during public assemblies or by publishing press statement in cases of harassment of HRDs.⁸⁵ However, the report notes that it is

⁸⁰ Reuters, ‘Malaysian jailed for 10 yrs for insulting Islam on social media,’ *New Straits Times*, 9 March 2019, available at: <https://www.nst.com.my/news/nation/2019/03/467536/malaysian-jailed-10-yrs-insulting-islam-social-media>.

⁸¹ Groups involved self-described as community groups based on their geographical location (i.e. district local news sources) but their contents are often fake news.

⁸² Azril Mohd Amin, ‘Manipulasi Gerakan LGBTIQ cemar hak kebebasan berhimpun,’ *Utusan Online*, 27 November 2016, available at: <http://www.utusan.com.my/rencana/utama/manipulasi-gerakan-lgbtq-cemar-hak-kebebasan-berhimpun-1.412671>.

⁸³ A full list of engagement by SUHAKAM and other stakeholder can be found in Appendix II and Appendix III of SUHAKAM’s Annual Report 2018.

⁸⁴ SUHAKAM in its response to SUARAM’s inquiry has shared the context of their work as an ‘arbitrator’ in these discussion, SUHAKAM efforts in these regards can be found in SUHAKAM’s Annual Report 2018, page 156, available at <https://drive.google.com/file/d/1fvvmlSqXJ2ysTdhRrYnSws6Bwz6FQiaG/view>

⁸⁵ SUHAKAM, ‘Protecting the right to FOE of Human Rights Defenders,’ 22 April 2019, available at: <https://www.suhakam.org.my/press-statement-no-14-of-2019-protecting-the-right-to-foe-of-human-rights-defenders/>. See also that SUHAKAM statements supporting HRDs can be found in the appendix of SUHAKAM’s Annual Reports.

difficult to measure the efficacy of SUHAKAM's action as it often comes alongside civil society advocacy.

SUHAKAM also actively called on the administration to pursue human rights reforms. For instance, SUHAKAM collaborated on a joint press conference with CSOs to call on the administration to act on juvenile detained without trial. Likewise, when the administration backtracked on its commitment to abolish the death penalty, SUHAKAM issued an immediate statement expressing its disagreement.⁸⁶

SUHAKAM also played an active role in combatting the political narratives of race and religion. When SUHAKAM's Human Rights Day celebration was accused of being a pro-ICERD event and was derailed by threat of violence, SUHAKAM persisted on having the celebration. SUHAKAM also pushed back against the rhetoric of race and religion in its press statements.⁸⁷

6. Conclusion and Recommendations

While the human rights situation in Malaysia is still tenuous, the premise of a 'reformist' administration has provided greater leeway and breathing room for civil societies to regain its footing and advocate for holistic reform to the ailing system of governance and human rights in Malaysia. An NHRI that operates in this environment naturally benefits from the friendlier environment and more amicable state institutions.

The positive environment experienced by Malaysia would undoubtedly mean a need for change within SUHAKAM. As noted in this report and previous ANNI reports, SUHAKAM has proven itself to be an exceptional mediator and potential host for dialogues between civil societies and state institutions. The greater acknowledgement for human rights and willingness to engage by state institutions with the public would undoubtedly diminish the role of SUHAKAM as a mediator.

However, this does not mean that SUHAKAM's role is now redundant. SUHAKAM as an NHRI still holds substantial power and influence as a statutory body. As an entity, SUHAKAM is acknowledged by various actors and stakeholders across Malaysia and could potentially be the binding agent necessary to bring detractors together for a common good.

Furthermore, irrespective of how human rights-centric a government can be, there will always be situations in which the state fails to uphold or protect human rights and the justice mechanism fails the victim. While SUHAKAM may have been a toothless tiger in the past when challenging human rights violations, the new environment is the perfect opportunity for SUHAKAM to develop its capacity, perhaps not to bite, but to shield and defend human rights to ensure that the dark days of repression are gradually expelled and kept as a chapter of Malaysia's history.

⁸⁶ SUHAKAM, 'Abolition of 11 offences under Death Penalty,' 16 March 2019, available at: <https://www.suhakam.org.my/press-statement-no-8-of-2019-abolition-of-11-offences-under-death-penalty/>.

⁸⁷ SUHAKAM, 'SUHAKAM's response to YB Dato' Sri Nazri Aziz's Statement,' 25 February 2019, available at: <https://www.suhakam.org.my/press-statement-no-5-of-2019-suhakams-response-to-yb-dato-sri-nazri-azizs-statement/>, and SUHAKAM, 'International Day for the Elimination of Racial Discrimination,' 21 March 2019, available at: <https://www.suhakam.org.my/press-statement-no-11-of-2019-international-day-for-the-elimination-of-racial-discrimination/>.

The improving human rights situation also suggests that it may be a time for reflection and new heading for SUHAKAM as an NHRI. The New Malaysia touted by Malaysia's political leadership is one fraught with unforeseen challenges and a need for a guiding hand in policymaking. SUHAKAM may no longer need to fight for its survival or struggle for an opportunity to be heard in this New Malaysia, but it certainly has a greater role to play to ensure human rights are the central pillar to policymaking.

6.1. Recommendations

To SUHAKAM:

- 1) Establish stakeholder groups based on thematic issues to complement and strengthen SUHAKAM's outreach effort to communities;
- 2) Engage civil society in developing a framework for the appointment of SUHAKAM Commissioners in line with the Paris Principle; and
- 3) Collaborate with ANNI to formalise and standardise a review process for SUHAKAM's function and performance annually.

To the Government of Malaysia:

- 1) Formalise and operationalise procedure and processes for the Parliament to directly engage with SUHAKAM on SUHAKAM's Annual Report and on human rights violations;
- 2) Table and debate SUHAKAM's Annual Report in Parliament;
- 3) Adopt and implement SUHAKAM's recommendations on its Founding Act;
- 4) Engage civil society and SUHAKAM in developing a framework for the appointment of SUHAKAM Commissioners; and
- 5) Ensure SUHAKAM has adequate and necessary funding to fulfil its mandate to promote and protect human rights.

MYANMAR: A LITTLE LESS CONVERSATION, A LITTLE MORE ACTION PLEASE

Action Committee for Democracy Development (ACDD), Association of Human Rights Defenders and Promoters (HRDP), Athan- Freedom of Expression Activist Organization, Burma Monitor (Research and Monitoring) (BM), Future Light Center (FLC), Genuine People’s Servants (GPS), Generation Wave (GW), Human Rights Education Network (HREN), Human Rights Foundation of Monland (HURFOM), Kachin Women’s Association Thailand (KWAT), Karen Human Rights Group (KHRG), Karenni Human Rights Group (KnHRG), Loka Ahlinn (Social Development Network), Metta Campaign – Mandalay, Myanmar People’s Alliance (Shan State), Pa-O Youth Organization (PYO), Progressive Voice (PV), Smile Education and Development Foundation (Smile), Synergy (Social Harmony Organization), Ta’ang Women’s Organization (TWO), The Seagull, Yangon Watch¹

1. Introduction

This report is based on desk and field research and covers the period of 2018 with key events from the first few months of 2019. Given the thematic focus of protection of human rights defenders (HRDs) and shrinking civil society’s space, the lead author participated in four consultations with HRDs and interviewed several HRDs in Myanmar, both male and female, to ensure their perspectives and insights on the Myanmar National Human Rights Commission (MNHRC) are reflected in this chapter as well as through its recommendations. They have not been named in this report to ensure their safety and security. The desk research consisted of document analysis of MNHRC statements, its founding law, its own capacity assessment, media reports, and reports by civil society. Several of the co-authors of this report are members of the Civil Society Organisations Working Group on MNHRC Reform, which was founded in early 2019.

2. Overview

The MNHRC was established by presidential decree in 2011² and its 2014 enabling law – the Myanmar National Human Rights Commission Law – set its formal mandate.³ It currently has 10 commissioners and has gone through one round of accreditation by the Global Alliance of National Human Rights Institutions’ (GANHRI) Sub Committee on Accreditation (SCA). It was awarded with ‘B’ status in November 2015.⁴ The SCA outlined seven areas of concern regarding the

¹ Progressive Voice as lead author. Contact email for this chapter : info@progressive-voice.org

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

³ The Myanmar National Human Rights Commission Law, 28 March 2014, Section 3, available at http://www.burmalibrary.org/docs23/2014-03-28-Myanmar_Human_Rights_Commission_Law-21-en.pdf.

⁴ International Coordination Committee of National Institutions for the Promotion and Protection of Human Rights, ‘Report and Recommendations of the Session of the Sub-Committee on Accreditation’, Section 2.3, 16-20 November, 2015, available at: <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20FINAL%20REPORT%20-%20NOVEMBER%202015-English.pdf>. At the time of this report, the Global Alliance of National Human Rights Institutions (GANHRI) was called the International Coordination Committee of National Institutions for the Promotion and Protection of Human Rights (ICC).

MNHRC's mandate and work, which explains why it did not receive the 'A' status that it had hoped for. These are:

- *Selection and Appointment* - The SCA noted that the selection process of the commissioners does not guarantee independence from either the executive or the all-powerful military. The Selection Board, which nominates members of the commission for the President's Office to choose from, comprises people in positions that are mostly aligned to either the government or the military. This includes a military appointee, the Minister of Home Affairs. It also does not adequately include civil society representatives, stipulating that civil society members of the Selection Board must be registered, and a problem in Myanmar where many rights-based CSOs are not registered due to restrictive legislation.
- *National Institutions Operating in Situations of Internal Unrest or Internal Armed Conflict* - The SCA noted how the MNHRC could do more to exercise its' mandate in the context of "human rights violations occurring as a result of situations of armed conflict between the government and different ethnic groups, as well as internal unrest between different ethnic and religious groups."⁵ This will continue to be a pressing issue as conflict between the ethnic armed organisation, the Arakan Army, and the Myanmar military has intensified in 2019, and several reports of extrajudicial killings by the Myanmar military are emerging.⁶
- *Pluralism* – The SCA noted the importance of a diverse MNHRC, in terms of both commissioners and staff. This is vital in a country as diverse as Myanmar with many religious and ethnic minorities are marginalised. The MNHRC currently does not have adequate gender balance, with two out of 10 commissioners who are female. For a period between October 2016 and April 2018 they had no female commissioners.
- *Adequate funding and financial independence* - The SCA recommended that the MNHRC's funding should be allocated as a separate budget line so as to give more independence from the President's Office. This has been reportedly addressed but not by law. However, civil society and the MNHRC itself continue to have concerns over adequate amount of funding for staffing and regional office.
- *Monitoring Places of Deprivation of Liberty* – The SCA noted that while the MNHRC can visit prisons, and detention centres, it cannot do so unannounced and recommends for this to change, as it would limit opportunities for detaining authorities to hide human rights violations and instead facilitate greater scrutiny.⁷
- *Interaction with the International Human Rights System* – The SCA encourages the MNHRC to cooperate with international human rights bodies independently of the Government. While the MNHRC has been active in engaging with several international human rights bodies and

⁵ Ibid.

⁶ Stephanie Nebehay, 'U.N Investigator Reports possible Fresh War Crimes in Myanmar,' *Reuters*. 3 July 2019, available at : <https://www.reuters.com/article/us-myanmar-rights-un/u-n-investigator-reports-possible-fresh-war-crimes-in-myanmar-idUSKCN1TX2JV>.

⁷ International Coordination Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation.'

processes, for example the Universal Periodic Review process, the SCA urged the MNHRC to ensure it engages with such mechanisms “in *their own right*.”⁸

- *Annual Report* – The SCA recommends that special reports are submitted to the Parliament, not just the President, and all reports are widely circulated and discussed in the Parliament.⁹

While the MNHRC has taken steps towards addressing some of these concerns such as in relation to advocating for more funding and financial independence, issues regarding a lack of pluralism, and how it operates in situations of internal unrest of armed conflict remain pertinent.

Civil society has been active in advocating for reform of the MNHRC, and its calls and criticisms reflect some of the recommendations made by the SCA. This includes an open letter to the President urging reform of the MNHRC signed by 142 CSOs in 2016.¹⁰ CSOs also shared their recommendations in a submission to GANHRI SCA on the accreditation process, and in previous ANNI reports.¹¹ At the launch of the 2018 ANNI report, which was co-authored by 12 CSOs, a press conference was held in Yangon where the MNHRC was accused of acting as a shield to cover abuses committed by the Myanmar military.¹² Furthermore, the CSO Working Group on MNHRC Reform was formed in early 2019, consisting of 24 Myanmar CSOs. It advocates for an independent and effective commission.

The background of the commissioners, two of whom are former military personnel, and their links with the old regime in other roles such as in the Foreign Service or as civil servants, has long hampered civil society’s trust in the commission. Given their background, many HRDs question if the commissioners have a human rights mindset and what previous experience of human rights qualifies them for this work.

The MNHRC also conducted its own capacity assessment process in 2018, with facilitators from the Asia Pacific Forum, the UN Development Programme and the Office of the UN High Commissioner for Human Rights.¹³ This process included interviews with the MNHRC commissioners, staff, other stakeholders such as MPs and CSOs and analysis of key documents.

⁸ Ibid.

⁹ Ibid.

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

¹¹ ANNI, ‘Return to Sender’ by 12 Myanmar civil society organisations, October 2018, available at: https://progressivevoicemyanmar.org/wp-content/uploads/2018/10/MNHRC_Report_English_Web.pdf; ‘Burma: All Shook Up,’ by Burma Partnership, Equality Myanmar, and Smile Education and Development Foundation, 18 September, 2015, available at: <http://www.burmapartnership.org/wp-content/uploads/2015/09/1-Burma-FINAL-04-August-2015.pdf> and ‘Suspicious Minds: The Myanmar National Human Rights Commission’s Trust Deficit’, by Action Committee for Democracy Development, Progressive Voice and Smile Education and Development Foundation, 29 September, 2017, available at: <https://progressivevoicemyanmar.org/2017/11/29/suspicious-minds-the-myanmar-national-human-rights-commissions-trust-deficit>.

¹² Ye Mon, ‘Human Rights Commission is a shield for military violations, say CSOs,’ *Frontier Myanmar*, 9 October, 2018, available at: <https://frontiermyanmar.net/en/human-rights-commission-is-a-shield-for-military-violations-say-csos>.

¹³ MNHRC, ‘Capacity Assessment Report,’ December 2018, available at: <http://www.mnhrc.org.mm/app/uploads/2019/03/MNHRC-CA-Report-design-01-Executive-Summary-2.pdf>.

This capacity assessment identified four ‘priority strategies’ for the MNHRC to focus on in the next three to five years:

- *Mandate and Leadership* – Building trust in the MNHRC as an independent NHRI.
- *Staff, Equipment & Resources* – Build a team of well-qualified, highly competent staff at all levels of the organisation.
- *Functions* – Increase the MNHRC’s capacity to effectively promote and protect human rights in every region and state.
- *Relationships and Cooperation* – Deepen the MNHRC’s capacity to cooperate and engage nationally, regionally and internationally.¹⁴

While the assessment is a useful tool in dealing with some of the low-hanging fruit, it does not address the deeper structural and political issues that are preventing the MNHRC from becoming a staunch ally of HRDs in Myanmar. If the assessment’s recommendations are implemented, the functioning of the commission may improve, but unless it is completely reinvigorated, such improvements would have a limited impact on the MNHRC’s ability to protect the most vulnerable and marginalised communities in Myanmar.

3. MNHRC’s Performance in Protecting and Promoting Human Rights

The work of the MNHRC itself is much more focused on promotion rather than protection. Although not limited by its enabling law, the leadership of the MNHRC has decided to focus disproportionately on ‘long-term’ human rights promotion, which comes at the expense of protection.

The MNHRC is cooperating with a prominent CSO to engage with communities in several states and regions, to give the MNHRC the opportunity to explain its mandate and for the public to air grievances and make complaints. This allows the MNHRC to explain its limitations on budget and why it cannot investigate many complaints. The commission has also worked to improve its outreach, including by being more active on Facebook.¹⁵ While popular worldwide, Facebook is particularly crucial in the dissemination of information in Myanmar due to its extremely wide user base. Furthermore, the same CSO that is helping the MNHRC give human rights talks has produced a leaflet in Myanmar language explaining the complaint procedure, which the MNHRC gave input on. These are positive steps that the MNHRC has taken and while challenges remain, including working with more CSOs, positive steps such as outreach with the public are to be encouraged.

Another positive step that the MNHRC has taken is regarding prison inspections. In 2018 they inspected 25 prisons, 22 labour camps, 32 police lock-ups, and 32 court lock-ups, an increase on previous years.¹⁶ They have worked closely with a CSO that focuses on political prisoners to make recommendations to the Parliament for prison law reform. It has also cooperated with international

¹⁴ Ibid.

¹⁵ See: <https://www.facebook.com/myanmarnhrc/>.

¹⁶ MNHRC, Statement by Myanmar National Human Rights Commission to mark the 70th Anniversary of Universal Declaration of Human Rights which falls on 10 December 2018, available at: <http://www.mnhrc.org.mm/en/statement1192018/>.

organisations such as the International Commission for Jurists on its submission of a national report on the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁷

While the MNHRC has focused on promotion, its protection work needs to improve. This will be expanded upon in the following sections but one of the stipulations in the enabling law that constrains the MNHRC is Article 37 which states that the commission shall not inquire into any complaint that involves current proceedings before the court.¹⁸ To acknowledge the complementarity of the commission and the court system and to broaden the powers of the MNHRC, Article 37 should be amended by law so that the commission, with authorization of the court, can inquire into matters pending before it. CSOs have noted how the MNHRC's hands are tied if there is a court case already in motion.

One of the main obstacles to the MNHRC's fulfilling its mandate to protect human rights is the background and current mindset of its commissioners. The MNHRC is keen to propagate the benefits of the human rights talks that it gives, extolling the benefits of its human rights promotion work. Yet, people who have attended such talks report of commissioners speaking out to defend and even promote the deeply illegitimate 2008 Constitution. This is a document, which entrenches the political power of the Myanmar military, an institution that has committed war crimes, the crime of genocide, and crimes against humanity. It also ensures that the military is the ultimate arbiter of the abuses that it itself commits.¹⁹ The defense of the 2008 Constitution is not the perspective of an institution working to protect the rights of the people of Myanmar. This echoes civil society complaints that the MNHRC is unable and/or unwilling to protect human rights if the violator is the Myanmar military.

This was illustrated in the context of the conflict between the Arakan Army and the Myanmar military. In May 2019, six Arakanese men, who were part of a mass detention of 275 men from one village, were shot and killed by the Myanmar military.²⁰ An initial statement by the MNHRC merely echoed the Myanmar military's narrative that the six men were shot in self-defense after they tried to grab the soldier's guns.²¹ The CSO Working Group on MNHRC Reform decried the MNHRC's lack of effective action with a statement urging an independent investigation.²² This created public pressure and the MNHRC *did* respond by investigating the case. Ultimately, the MNHRC continued to unquestioningly follow the military's narrative, and absolved the soldiers

¹⁷ Ibid.

¹⁸ The Myanmar National Human Rights Commission Law, 28 March 2014, Section 3.

¹⁹ UN Independent International Fact-Finding Mission on Myanmar, 'Myanmar – Tatmadaw Leaders Must be Investigated for Genocide, Crimes against Humanity, War Crimes – UN Report,' 27 August, 2018, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23475&LangID=E>.

²⁰ Human Rights Watch, 'Myanmar : Deaths in Army Custody Need Independent Inquiry,' 6 May, 2019, available at: <https://www.hrw.org/news/2019/05/06/myanmar-deaths-army-custody-need-independent-inquiry?fbclid=IwAR039bIlxpVrCbVBzuVqiY6s4Nizrssx6j2Dg6EcEiEfAeDnmQaFUTtK8i0>.

²¹ MNHRC, Statement of MNHRC, 3 May, 2019, available at: https://www.facebook.com/myanmarnhrc/?epa=SEARCH_BOX.

²² CSO Working Group on MNHRC Reform, 'MNHRC Must Take Stand on Extrajudicial Killings of Rakhine Villagers,' 14 May, 2019, available at: <https://progressivevoicemyanmar.org/2019/05/14/mnhrc-must-take-stand-on-extrajudicial-killings-of-rakhine-villagers/>.

of responsibility.²³ This is despite statements from villagers and witnesses who say that the military fired upon the villagers without provocation.²⁴

The MNHRC issued a similar statement to Parliament in May 2018, when two Kachin men who, according to witnesses, were arrested while tending to buffalo in January 2018, were later found buried after being executed by the Myanmar military.²⁵ A Kachin Independence Army (KIA) uniform had been put on one of the men. Despite medical reports that said they could have been tortured, the MNHRC explained that they were in fact KIA soldiers, and had been killed in battle, contradicting all reports and testimony from the people on the ground that they were merely civilians and that the Myanmar military had taken them away while they were in the fields.²⁶

These cases are emblematic of why trust with civil society is eroded. In Karen State in April 2018, a local Karen community leader and defender and promoter of indigenous peoples' rights, Saw Oh Moo, was murdered by the Myanmar military while travelling by motorbike in a ceasefire area to attend a meeting regarding humanitarian assistance to internally displaced persons.²⁷ Yet despite his murder, the violation of the ceasefire, and the impunity of the soldiers who committed the crime, the MNHRC has not made any statement or conducted any investigation. Karen CSOs did not file any complaint to the MNHRC, because they had little trust in the body to take substantive action.

Another major problem relates to the rights of the Rohingya. The MNHRC simply does not recognise the identity of the Rohingya and has expressed this in various forums.²⁸ This means that the MNHRC has never addressed this issue despite the most serious crimes being committed against the Rohingya and has instead sought to deflect criticism of the violence. This delegitimizes the MNHRC as a national human rights institution. The UN-mandated Fact-Finding Mission on Myanmar, which in its final report found that the Myanmar military leaders should be investigated and prosecuted for the crime of genocide for the wave of violence in late 2017 against the Rohingya, condemned the role of the MNHRC:

*“At no point during these six years, however, did the MNHRC call for or conduct a full, independent investigation of the alleged human rights violations committed by the security forces. Nor did it address the systemic discrimination against Rohingya, despite this falling within its mandate.”*²⁹

²³ Wai Mar Tun, Ye Tike, and Tin Aung Khine, 'Myanmar Human Rights Commission Backs Army's Story of Kyauktan Shootings,' *Radio Free Asia*, 13 June 2019, available at: <https://www.rfa.org/english/news/myanmar/story-06132019170639.html>.

²⁴ Ibid.

²⁵ Lawi Weng, 'Govt Rights Body Says Two Kachin Men Found Dead were KIA Fighters,' *The Irrawaddy*, 4 June 2018, available at:

<https://www.irrawaddy.com/news/burma/govt-rights-body-says-two-kachin-men-found-dead-were-kia-fighters.html>.

²⁶ Ibid.

²⁷ Karen Human Rights Group, 'A Karen Community Leader, Saw O Moo, Was Murdered by Tatmadaw forces in Hpapun District, April 2018,' 15 June 2018, available at: <https://khr.org/2018/06/18-3-nb1/karen-community-leader-saw-o-moo-was-murdered-tatmadaw-forces-hpapun-district-april>.

²⁸ For example the APF Biennial Conference, Bangkok, 30 November 2017.

²⁹ Report of the Independent International Fact-finding Mission on Myanmar, A/HRC/39/64, 27 August 2018, pp.408-409, available at:

<https://www.ohchr.org/en/hrbodies/hrc/myanmarFFM/Pages/ReportoftheMyanmarFFM.aspx>.

It is difficult to reconcile the current MNHRC and its role to promote and protect human rights with its rejection to condemn the most horrific human rights violations committed against ethnic minorities and its refusal to even recognise the identity of the Rohingya. It is an issue that the international community must also consider when it analyses its own engagement with the MNHRC. If the MNHRC is contributing to the state-sponsored persecution of the Rohingya by denying them their identity and downplaying abuses, is this an institution that the international community wants to continue providing ‘technical assistance’ to ?

4. Shrinking of Democratic Space in Myanmar

During 2018 and the first few months of 2019 democratic space in Myanmar has shrunk, threats to HRDs have increased, and respect for freedom of expression has declined.³⁰ Despite large prisoner amnesties in April and May 2019, which saw the release of over 23,000 prisoners, only 25 were political prisoners.³¹ According to the Assistance Association for Political Prisoners, which documents and monitors the amount of arrests and imprisonment of people on political grounds, as of July 2019 there are 466 people who are either in prison or are facing charges and awaiting trial.³² This is despite the presence of over 100 former political prisoners in the current National League for Democracy-led (NLD) Government.

Freedom of expression is severely restricted, and criticism of not just the military, but also the NLD Government, means people are vulnerable to being charged. Myanmar’s ranking in the World Press Freedom Index fell seven places in 2018.³³ Athan, a CSO that monitors freedom of expression has documented 47 cases of journalists facing trials since the NLD came to power.³⁴ One of the favorite tools the authorities use to criminalise critics is Article 66(d) of the Telecommunications Act. The Act, which excessively restricts freedom of expression online is used to charge media workers and others for posting criticism of the military or the government on social media. Ultrationalists and the powerful Buddhist nationalist group, Ma Ba Tha, have also used this law. For example, Ko Swe Win, an award-winning journalist, faced charges under Article 66(d). The criminal charges were filed against him after he shared a Facebook story that criticised the leading ultrationalist monk, Wirathu. After the charges were filed, he had to appear in court over 50 times in a case that was dragged out for over two years before charges were finally dropped in July 2019.³⁵

³⁰ 190 Myanmar Civil Society Organisations, Call from Myanmar Civil Society Organisations for World Press Freedom Day, 30 April, 2019, available at: https://drive.google.com/file/d/1JXjnkM6sTTAjeKN5bVvbqBsafHQB_2QU/view?fbclid=IwAR3tjo_TVAHt1IoeymIS_nvfyXoEspTEeY4ayKUkx3uoqamBGpCqyChZBr4.

³¹ Assistance Association for Political Prisoners, President’s Amnesty 16/2019 Released List on May 7, 2019, 7 May, 2019, available at: <https://aappb.org/2019/05/presidents-amnesty-16-2019-released-list-on-may-7-2019/>.

³² Assistance Association for Political Prisoners, President’s Amnesty 16/2019 Released List on May 7, 2019, 7 May, 2019, available at: <https://aappb.org/2019/05/presidents-amnesty-16-2019-released-list-on-may-7-2019/>.

³³ Athan, ‘The Number of Journalists Charged Under the Current Constitution,’ 23 April, 2019, available at : <https://www.facebook.com/athan.foe.myanmar/photos/a.215675215658218/428538974371840/?type=3&theater>.

³⁴ Athan, ‘The Number of Journalists Charged Under the Current Constitution,’ 23 April, 2019, available at <https://www.facebook.com/athan.foe.myanmar/photos/a.215675215658218/428538974371840/?type=3&theater>

³⁵ 77 Civil Society Organisations, ‘Myanmar Authorities Must Drop the Case against Ko Swe Win and Decriminalise Defamation,’ 7 March, 2019, available at:

Perhaps the most infamous case is that of Kyaw Soe Oo and Wa Lone, two *Reuters* journalists who were arrested under the Official Secrets Acts for having in possession documents that were supposedly top secret. As the court case showed, it was a sting operation by the police in order to entrap the two journalists, whose real crimes in the eyes of the authorities was their fearless reporting on the situation of the Rohingya in Rakhine State, and in particular, a massacre of ten Rohingya villagers in Inn Din Village. Despite international and local outcry, the journalists were sentenced to seven years imprisonment, and the Supreme Court rejected their appeal.³⁶ Both domestic and international pressure, including being awarded the Pulitzer Prize, eventually resulted in their release as part of the third Presidential prisoner's Amnesty on 7 May 2019.³⁷

It is not just freedom of expression that has taken a battering in the past few months. Freedom of assembly, exercised especially by the youth of Myanmar protesting the war and the suppression of ethnic rights, is also under attack. In May 2018 two protests related to the civil war in Myanmar, one in Myitkyina, Kachin State, and one in Yangon were held. In Myitkyina, 5,000 people, including many youth, demanded the safe passage of internally displaced peoples (IDPs) trapped by armed conflict in Kachin State and the delivery of humanitarian aid. In Yangon, the youth demanded an end to the war more broadly and for peace dialogue to be held. The protesters in Yangon were met by pro-military counter-protesters who tried to provoke confrontations and verbally and physically attacked them. The police did nothing to stop the violence and even seemed to be working together with the counter-protesters to then make arrests. Consequently at least 47 youth activists were charged for their roles in the two protests, most of whom under the deeply flawed Peaceful Assembly and Peaceful Procession Law. Some of these activists continue to attend court hearings to this day, while three Kachin activists were sentenced to six months in jail.³⁸

In January 2019, youth gathered to peacefully protest against a statue of General Aung San that the local authorities wished to erect in the Karenni State capital, Loikaw.³⁹ General Aung San (Aung San Suu Kyi's father) was one of the independence leaders of Burma and founders of the first Burmese military. He was assassinated in 1947. He comes from the largest ethnic group known as the Bamar, who have long dominated political and civilian institutions in Myanmar. These protests were a symbol of ethnic identity and of resistance to the perceived Burmanisation policies of the NLD Government. The protests, which began in mid-2018 and reignited in February 2019 resulted in dozens of arrests under Article 505(b) and 505(c) of the Penal Code and Articles 19 and 20 of the Peaceful Assembly and Peaceful Procession Law. The police also used force to disperse the peaceful protesters using rubber bullets.⁴⁰

<https://progressivevoicemyanmar.org/2019/03/07/myanmar-authorities-must-drop-the-case-against-ko-swe-win-and-decriminalise-defamation/>.

³⁶ Committee to Protect Journalists, 'Myanmar Court Rejects Appeal by Reuters' Wa Lone and Kyaw Soe Oo,' 22 April, 2019, available at: <https://cpj.org/2019/04/myanmar-court-rejects-reuters-journalists-appeal.php>.

³⁷ Ye Mon, 'Wa Lone, Kyaw Soe Oo among 6,520 Prisoners freed in Presidential Pardon,' *Frontier Myanmar*, 7 May, 2019, available at: <https://frontiermyanmar.net/en/wa-lone-kyaw-soe-oo-among-6520-prisoners-freed-in-presidential-pardon?fbclid=IwAR294eaDnnCG6rZ6mkaxhxoJMLFck1lqVeWyCj7GYD2cFQUUU33MoK-n-MI>.

³⁸ Progressive Voice, 'Time to Hear Our Voices: Freedom of Assembly and the Youth Peace Movement in Myanmar,' July 2018, available at: <https://progressivevoicemyanmar.org/2018/07/12/time-to-hear-our-voices-freedom-of-assembly-and-the-youth-peace-movement-in-myanmar/>.

³⁹ Progressive Voice, 'Ethnic Struggles Face Harsh Reality on Union Day, 13 February, 2019, available at: <https://progressivevoicemyanmar.org/2019/02/13/ethnic-struggles-face-harsh-reality-on-union-day/>.

⁴⁰ Ibid.

The trend of arrests and filing charges against youth activists is continuing in 2019. During New Year celebrations, five members of the Peacock Generation who performed a Thangyat – a satirical poetry slam traditionally performed during Myanmar’s April New Year holiday – were arrested, denied bail and sent to the notorious Insein Prison. Cases were filed against the Thangyat troupe members under Section 505(a) of the Penal Code for their performance criticizing the military. They also face charges under Article 66(d) of the Telecommunications Act for live streaming the performance on Facebook.⁴¹ In another case, ethnic Karen land rights activist, Naw Ohn Hla, was arrested under the Peaceful Assembly Procession and Peaceful Procession Law after protesting the loss of villagers’ land to a housing project.⁴² In a characteristic strategy used by the government to make life difficult for and deter activists, Naw Ohn Hla has been harassed by the police and called into court six times since her initial arrest.

While the above is not a comprehensive list of incidences where freedom of peaceful assembly or expression is being restricted, they point to a broader pattern of civic space shrinking. The authorities resort to numerous tactics to restrict civic space, including the adoption of restrictive laws, harassment and surveillance of HRDs. However, interviews with the HRDs reveal that criminalisation is the biggest threat they face.

The NLD Government has shown that it simply cannot handle criticism, and shows authoritarian tendencies, especially towards HRDs and CSOs that stand up for the marginalised. The biggest risk, however, is reserved for those who criticise the military as the case of the two *Reuters* journalists shows. In this context Myanmar needs a strong NHRI, willing to publicly side with HRDs, and show that it too can be a defender of human rights.

5. The Role of MNHRC in Democratic Backsliding and Contraction of Civic Space

While the MNHRC has taken a proactive role in the promotion of human rights, in regards to the protection of HRDs, more needs to be done. This section will analyse the response of the MNHRC to two of the emblematic cases outlined above – the arrest and trial of the two *Reuters* journalists – Wa Lone and Kyaw Soe Oo – and the youth peace movement demonstrations in May 2018 that resulted in at least 47 arrests.

Reuters Journalists

After the arrest of Kyaw Soe Oo and Wa Lone in December 2017, the MNHRC released a statement urging “*the authorities concerned to ensure that they enjoy human rights they are entitled to, including non-infliction of torture, provision of health care and allowing access to visits by family and lawyer during detention.*”⁴³

⁴¹ *The Irrawaddy*, ‘Five Members of Thangyat Troupe Jailed for Criticizing the Military’, 22 April, 2019, available at: https://www.irrawaddy.com/news/burma/five-members-of-thangyat-troupe-jailed-for-criticizing-military.html?fbclid=IwAR2Gtm1L9hk6xUO-KuwiF2utOf-amq1gGSLDuvjq4EtjVSS4JzDm_N8x10.

⁴² Karen News, ‘Land Right Activist Naw Ohn Hla Arrested Over Housing Protest in Myawaddy’, 25 April, 2019, available at: <http://karennews.org/2019/04/land-right-activist-naw-ohn-hla-arrested-over-housing-protest-in-myawaddy/>.

⁴³ MNHRC, ‘Statement by the Myanmar National Human Rights Commission on the arrest of two journalists’, 21 December 2017, available at: <http://www.mnhrc.org.mm/st-146300-2/>.

Following the court case of the two journalists at Yangon Northern District Court, the MNHRC then released a second statement upon their seven year sentencing, stating “*According to the Myanmar National Human Rights Commission Law, the Commission has no particular comment on the sentencing of the two journalists.*”⁴⁴ This reflects the problems outlined in Article 37 above. Given that the police set up the two journalists on orders from their superiors, and that this was a planned sting operation to stop them reporting on the atrocities against the Rohingya, the trial itself represents a grave miscarriage of justice. Any statement by the MNHRC should have, at the very least, pointed out the legitimacy of their work as journalists, and how the charges and subsequent trial and sentencing were a violation of their human rights including to freedom of expression and a fair trial. A stronger statement may have added it had the appearance of a politically targeted case against two people uncovering grave violations by the military. It was, however, simply a weak statement to a gross miscarriage of justice. This case reflects deeper problems within the MNHRC that it is still beholden to the all-powerful military, and that it lacks the political will and/or ability to publicly defend people such as Kyaw Soe Oo and Wa Lone.

Youth Peace Movement Protests

The youth peace movement, as outlined above, consisted of two main demonstrations in May 2018 – in Myitkyina, Kachin State, and Yangon - after which dozens of young activists were charged. Some of the activists filed a complaint with the MNHRC because of the violence they faced by counter-protesters and (in) action of the police. They wanted action taken against the pro-military thugs who tried to disrupt their peaceful demonstration. The activists met with the MNHRC several times and submitted evidence regarding the violence used by counter-protesters, including video footage. At one of the early meetings one of the commissioners asked accusatory questions at the young activists, including why they would protest against the military. After several meetings, the MNHRC did make a statement on its Facebook page, stating how they had received a complaint and investigated it. Eventually, the police opened a case against the counter protesters, eight months after the fact, but at the time of writing, this has not been concluded. Despite this, the HRDs involved in the complaint do not perceive that throughout the process, the MNHRC has been an effective actor in protecting their rights.

The above demonstrates that in key cases of HRDs being under attack and civil society space shrinking, the MNHRC will not publicly criticise or take substantive action against the security services. CSOs and HRDs that contributed to this report urged the MNHRC to do more than simply issue statements. Human rights talks and statements are not enough for them to feel like they have an ally they can trust in the MNHRC. This also reflects the mindset and background of the commissioners, who lack human rights expertise or understanding of the role of an HRD or rights-based civil society, and what they need.

The Marrakech Declaration, which was adopted by GANHRI in 2018, lays out concrete steps that the MNHRC could be doing to better promote and protect HRDs in Myanmar.⁴⁵ The MNHRC

⁴⁴ MNHRC, ‘Statement on the sentencing of journalists Ko Wa Lone and Ko Kyaw Soe Oo of Reuters News Agency,’ 4 September, 2018, available at: <http://www.mnhrc.org.mm/en/statement-on-the-sentencing-of-journalists-ko-wa-lone-and-ko-kyaw-soe-oo-of-reuters-news-agency-statement-no-92018/>.

⁴⁵ The Global Alliance for National Human Rights Institutions, ‘The Marrakech Declaration: Expanding the civic space and promoting and protecting human rights defenders, with a specific focus on women: The role of national

could publicly advance the narrative of the protection of HRDs, identify clearly - through a process of documentation and research - instances where policy and legislation is having an impact on HRDs and civic space and advocate for reform of problematic laws, report cases of reprisals against HRDs to relevant authorities, and promote avenues for justice for victims of human rights violations, including international accountability mechanisms. The MNHRC would do well to follow these steps.

6. Conclusion and Recommendations

The MNHRC's work to promote and protect human rights is hampered by two interlinked problems – commissioners who apparently lack the relevant human rights mindset and expertise, and the structural issues at the heart of the enabling law that means that the commissioner's selection process is not independent but aligned to the military and the government. Together these factors contribute to an institution that is still beholden to the most powerful actor in Myanmar: the military. The selection process means that commissioners are not independent, human rights minded, critical individuals that understand the real threats that HRDs face and who would publicly criticize and denounce the main perpetrators of human rights violations. Thus, it is vital that reform of the commission, both structurally and in terms of personnel, go hand in hand. Otherwise, the MNHRC will continue to release statements and give human rights talks, but won't tackle the fundamental problems that Myanmar faces. An independent and critical MNHRC will not be able to magically make Myanmar's human rights violations disappear, but it would be at least a stronger and much needed ally to the brave HRDs who risk their liberty to fight for the rights of all people in Myanmar.

6.1. Recommendations

To the Myanmar Government:

- 1) Propose amendments on reform of the MNHRC Law to:
 - a. Explicitly mandate the MNHRC to investigate human rights violations in conflict zones and to allow it unrestricted access to active conflict and ceasefire areas;
 - b. Expand the composition of the Selection Board to include civil society representatives from non-registered NGOs;
 - c. Establish a quota for different criteria to ensure pluralism, such as by specifying that at least a third of both the body's membership and staff are women and are from ethnic and religious minorities respectively, as well as from civil society with human rights experience;
 - d. Establish an independent mechanism for dismissal of Commissioners with clear procedural rules and criteria to determine if commissioners are unable to fulfill their mandate;
 - e. Ensure the selection process is transparent, follows due process, with a requirement to publicise the members of the Selection Board;

human rights institutions,' The International Conference of National Human Rights Institutions, October 2018, available at: https://nhri.ohchr.org/EN/ICC/InternationalConference/13IC/Background%20Information/Marrakech%20Declaration_EN_%2012102018%20-%20FINAL.pdf.

- f. Remove executive influence from the formation of the Selection Board including ensuring that the two parliament representatives of the Selection Board are selected by the Parliament itself rather than the President;
 - g. Set out procedures for nominating potential members of the MNHRC, which should include broad consultations with civil society;
 - h. Ensure staff recruitment procedures are open, transparent, and positions are advertised publicly;
 - i. Remove all clauses requiring prior notification to allow for unannounced visits to prisons, jails, detention centres and places of confinement;
 - j. Allow the MNHRC to initiate an investigation into a case if a case is under trial before any court or if a Myanmar court has “finally determined on a case;”
 - k. Set out procedures for the Selection Board for nominating potential members of the MNHRC, which should include broad consultations with civil society;
 - l. Give the MNHRC authority to take concrete action if the response provided by relevant ministries is not satisfactory or if there is no response at all;
 - m. Specifically stipulate that the funds for the MNHRC should be allocated through parliamentary vote;
 - n. Ensure that the budget is transparent and publicly available, for instance by adding a line in the national budget for the MNHRC budget; and
 - o. Ensure regular, wide and systematic publication of the MNHRC’s reports and findings;
- 2) Refrain from interfering in the MNHRC’s investigations and demonstrate the political will to respect and undertake recommendations from the Commission; and
 - 3) Amend the 2008 Constitution to bring the military under civilian control, end impunity and include the MNHRC as a constitutional body to enshrine its mandate of independence and impartiality to protect human rights.

To the Parliament:

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

To the MNHRC:

- 1) Interpret the MNHRC Law in a “*broad, liberal, purposive*”⁴⁶ manner that is more consistent with the Paris Principles;
- 2) Be more proactive in pressuring the Government and Parliament to reform the enabling MNHRC Law in accordance with the Paris Principles;
- 3) Actively encourage the Parliament to sign and ratify international conventions, especially the core international human rights treaties which Myanmar is still not a party to, and cooperate with international mechanisms and treaty bodies;
- 4) Review and implement the recommendations made by the GANHRI-SCA;

⁴⁶ GANHRI-SCA, Section 2.3.

- 5) Ensure that the work of the MNHRC adheres to international agreements relevant to NHRIs such as the Paris Principles, the Merida Declaration, Marrakech Declaration and the Belgrade Principles;⁴⁷
- 6) Take the initiative to seek out and act upon information about human rights abuse, rather than waiting for a complaint to be filed to the Commission;
- 7) Ensure discretion and confidentiality when sharing information between the Executive, Parliament, the Myanmar Military and branches of law enforcement to ensure that complainants and relevant witnesses are protected from reprisal;
- 8) Accompany human rights investigations and recommendations with public pressure to ensure that relevant parties, especially government ministries, respect and implement them;
- 9) Support programs that provide long-term, systematic support and rehabilitation for the victims of human rights violations;
- 10) Solicit assistance from civil society on how to deal with some aspects of human rights protection, including receiving complaints and carrying out investigations;
- 11) Open more branch offices in the rural areas with sufficient resources to educate marginalized, vulnerable, ethnic and religious minority communities about the MNHRC's mandates to protect and promote human rights;
- 12) Ensure all materials produced are translated into as many non-Myanmar ethnic languages as possible and are distributed widely to respective communities; and
- 13) Engage in more outreach activities with smaller CSOs and grassroots community based organisations.

To the International Donor Community:

- 1) Encourage the Parliament and the Government to reform the MNHRC Law in consultation with civil society;
- 2) Take into consideration the potential for the MNHRC as a screen for the Myanmar military's abuses when providing support and technical assistance; and
- 3) Support civil society's human rights work and their efforts to ensure the MNHRC becomes fully effective and in compliance with the Paris Principles, and all other declarations and principles relevant to NHRIs, including the Belgrade Principles, the Merida Declaration, and the Edinburgh Declaration.

⁴⁷ The Merida Declaration describes the role of NHRIs in implementing the Sustainable Development Goals and the Belgrade Principles and outlines how NHRIs and legislative bodies should work together.

THAILAND: NATIONAL HUMAN RIGHTS COMMISSION OF THAILAND IN DILEMMA

People Empowerment Foundation (PEF)¹

1. Introduction

This report studies and reflects on the performance of the National Human Rights Commission of Thailand (NHRCT)² and the challenges it faced during the period covering January 2018 until July 2019. This report seeks to keep the public informed about the work, problems and obstacles faced by NHRCT, to assess lessons learned and explore ways to improve human rights in the country.

This report was prepared by the People's Empowerment Foundation (PEF),³ which submitted a letter on 25 July 2019 to NHRCT requesting for a meeting on 31 July 2019 to discuss the findings of the report and to ask for relevant documents. The meeting however did not happen, and no documents were shared. PEF also submitted a letter on 31 July 2019 to the Constitutional Court requesting information concerning complaints filed by candidates to the position of NHRCT's Commissioner. No response has thus far been received. The report is therefore based on media reports, public interviews of the NHRCT Commissioners and findings by others allied organisations that have been monitoring the work of NHRCT.

The report is also based on the 'Progress Report of NHRCT for the Fiscal Year 2018'⁴ and NHRCT's '2018 Human Rights Assessment Report of Thailand'⁵ both of which were released on 11 July 2019.⁶ This report was first written in Thai and after being forwarded to the NHRCT for inputs, was translated into English.

2. Overview

Much of the work of the third batch of NHRCT Commissioners was carried out in the aftermath of the 2014 military coup amidst a lack of democracy and respect for human rights.⁷ The NHRCT Commissioners struggled in carrying out their mandate both because of an extremely unfavourable political environment and because of clashes of opinions and a lack of unity among its members.

¹Chalida Tajaroensuk, Executive Director, People's Empowerment Foundation (chalida.empowerment@gmail.com). Our deepest gratitude to Tawan Rattanaporn for his assistance on this report.

² NHRCT's Website is available at: <http://www.nhrc.or.th/AboutUs/The-Commission/Background-and-History.aspx?lang=en-US>.

³ PEF's Website is available at: <http://peoplesempowerment.org/>.

⁴ NHRCT, Annual Report 2018, available in Thai at: <http://library.nhrc.or.th/ulib/document/Fulltext/F10494.pdf>.

⁵ NHRCT, 2018 Human Rights Assessment Report of Thailand, available in Thai at: <http://library.nhrc.or.th/ulib/document/Fulltext/F10493.pdf>.

⁶ *Thailand Plus*, news available in Thai at: <https://www.thailandplus.tv/?p=72236>.

⁷ Forum Asia, Thailand: There Should Be No seat at the UN Security Council for a Non-Democratic Country with a Troubling Rights Record, 27 June 2016, available at: <https://www.forum-asia.org/?p=21099>; Thai Lawyers for Human Rights, 'Five years under NCPO, isn't that enough? Recommendations to eliminate the effects of the coup,' 18 July 2019, available at: <https://www.tlhr2014.com/?p=13035&lang=en>.

Moreover, under the current leadership, the NHRCT narrowly interpreted human rights principles and standards, using Thailand's domestic laws rather than international standards. Given the restrictive laws and policies adopted during the junta period, it has seriously limited the efficacy of NHRCT's investigation into the complaints received. Moreover, four of its seven members resigned between 2017 and July 2019.⁸ The most recent resignations were – according to the Commissioners – due to regulations imposed by NHRCT Chairman that undermined their performance, and because of internal divisions within the Commission.⁹ There are therefore – at the time of writing - only three Commissioners left. It has led to a decline of credibility of NHRCT, which appears less reliable to the public.

Despite meeting with NHRCT and presenting them with the findings of last year's ANNI report, NHRCT did not consider nor implement its recommendations. Some Commissioners felt that ANNI's report was an attempt to scrutinise the organisation. However, despite a lack of recognition of ANNI's work by NHRCT, PEF will continue to help Thai people understand the importance of a national human rights institution (NHRI) and to help promote it.

According to the Organic Law on the NHRC 2017, Section 26, Commissioners shall have the following power and duties:¹⁰

- Conduct investigation and fact-finding into cases of human rights violations without delay and propose and recommend to the relevant public and private agencies appropriate measures or guidelines to end and prevent further human rights violations and to provide remedy to the victims;
- Develop and publish a report on the state of human rights of the country and present it to the Parliament and the Cabinet;
- Propose to the Parliament, the Cabinet and relevant authorities measures or guidelines to promote and uphold human rights including any amendments to laws, regulations or orders to ensure their compliance with human rights;
- Clarify and report without delay the true facts in the case of incorrect or unfair reports on the situation regarding human rights of Thailand;
- Raise awareness among all sectors of society about the importance of human rights;
- Promote and support collaboration between the private and public sectors to conduct research and to disseminate knowledge as well as solutions to human rights and conflict issues and to ensure victims of human rights violations receive a remedy and support;
- Raise awareness among children, youth and the general public about the equal rights among all people and respect of human rights of persons who belong to different cultures, traditions, ways of life and religions;
- Promote collaboration and coordination among public agencies, NGOs and international human rights organisations; and

⁸ Mr. Surachet Satitniramai resigned on 5 April 2017; Mr. Chartchai Suthiklom resigned to become a member of the Office of the Public Sector Anti-Corruption Commission (PACC) on 1 June 2019, and on 31 June 2019, Commissioners Angkhana Neelapajit and Tuenjai Deetes resigned from their offices.

⁹ *Bangkok Post*, 'Sad day for human rights,' 1 August 2019, available at:

<https://www.bangkokpost.com/opinion/opinion/1722323/sad-day-for-human-rights>.

¹⁰ The Organic Law on the NHRC 2017, available in Thai at:

<http://www.ratchakitcha.soc.go.th/DATA/PDF/2560/A/123/1.PDF>.

- Recommend to the Cabinet when it is appropriate for Thailand to accede to or act in compliance with international treaties and conventions relating to the protection of human rights.

3. NHRCT and its Mandate to Protect and Promote Human Rights

Failed Selection of New Commissioners

After the selection by the Selection Committee¹¹ the Organic Law on the NHRC Section 14 requires that the candidates be approved by at least half of all members of the National Legislative Assembly (NLA). The first seven candidates recruited by the Selection Committee included Ms. Somsri Hananuntasuk, Mr. Jaturong Boonyarattanasoontorn, Mr. Boonthan Tansuthepverawongse, Mr. Phairote Pholphet, Mr. Surapong Kongchantuk, Ms. Pornprapai Ganjanarintr, and Ms. Pitikan Sitthidet. Except the latter two, the NLA rejected the other five candidates on 27 December 2018.¹²

Four of the candidates disqualified by the NLA filed a case with the Constitutional Court on 26 March 2019 to inquire about the vetting process and the secret vote conducted by the NLA, alleging that it was unconstitutional.¹³ They alleged that the voting patterns were so similar from one candidate to the other, that it raised questions as to whether someone had controlled the voting process. For instance some candidate received 10-15 positive vote and 135-155 negative votes.¹⁴

Furthermore, they alleged that the questions asked by the vetting committee on 24 October 2018 to candidates coming from civil society organisations (CSOs) focused on the support the candidates had gained from inside and outside the country and implied that they had been promoting hostility into society. The NLA members who asked the questions appeared to show contemptuous and dehumanising views toward the candidates. Also, the candidates were asked to present supporting evidence of the contrary in a very limited amount of time some however were threatened that if they failed to produce their documentary evidence in time, they should then admit to the accusations.

On 3 April 2019, the Constitutional Court dismissed the case, finding that it did not have sufficient legal grounds to prove an unconstitutional action by the NLA and that the case also did not follow court procedure which place the Constitutional court as a court of last resort.¹⁵

¹¹ The Organic Law on the NHRC 2017, Section 14.

¹² The National Assembly Radio and Television Broadcasting Station, 'NLA approved Ms Pitikan Sitthidet and Ms Pornprapai Ganjanarintr to be the next Commissioners', 27 December 2018, available in Thai at: <http://www.radioparliament.net/parliament/viewNews.php?nid=10381#.XCSp4FwzbIU>

¹³ *Manager Online*, '4 NHRCT candidates filed petition to constitutional court,' 26 March 2019, available in Thai at: <https://mgronline.com/politics/detail/9620000030246>.

¹⁴ The press statement by the four NHRCT candidates regarding the case filed with the Constitutional Court and their request for an inquiry into the selection and voting process by the NLA is available in Thai at *Prachatai*: <https://prachatai.com/journal/2019/04/81861>.

¹⁵ The Constitutional Court Decision is available in Thai at: http://www.constitutionalcourt.or.th/occ_web/download/article/article_20190425150545.pdf

Despite several meeting between December 2018 and August 2019, the Selection Committee failed to recruit all new seven Commissioners. After the first selection process that ended in December 2018, only two Commissioners were since approved by the NLA.¹⁶

New restrictive regulations

In 2018, NHRCT adopted 26 regulations to provide further clarification on certain provisions of its Organic Law.¹⁷ The regulations that were passed included the following:

- NHRCT Regulation on the Criteria and Methods for Conducting Human Rights Violation Investigation 2018;¹⁸
- Regulation on the Criteria and Methods for the Appointment and Execution of Duties of Members of the Subcommittees 2018;¹⁹ and
- NHRCT Regulation on the Procurement and Appointment of Experts as Secretaries and Assistant Secretaries of the NHRCT Chairperson and other Commissioners 2018.²⁰

These regulations have hindered the capacity of the NHRCT to effectively implement its mandate, specifically in handling and investigating complaints. Based on the Regulation on the Criteria and Methods for Conducting Human Rights Violation Investigation, a working group is now established to review cases received by the Commissioners. This working group consist of the Chairperson, the Secretary-General and other staffs of NHRCT. Its mandate is to consider whether or not a case should be taken up by the NHRCT. The establishment of the Working Group has led to many cases being dismissed and not taken up by the NHRCT, on the basis that the complainant should first refer the case directly to the relevant state. As a result the NHRCT has not conducting as many investigation as it should have.²¹

These new regulations have led to the resignation of Commissioners including Mr. Surachet Satitniramai, Ms. Angkhana Neelapaijit and Ms. Tuenjai Deetes who have found that they made it impossible for them to effectively carry out their mandate.²²

¹⁶ The National Assembly Radio and Television Broadcasting Station, 'NLA approved Ms Pitikan Sitthidet and Ms Pornprapai Ganjanarintr to be the next Commissioners,' 27 December 2018, available in Thai at: <http://www.radioparliament.net/parliament/viewNews.php?nId=10381#.XCSp4FwzbIU>.

¹⁷ Progress Report of NHRCT for the Fiscal Year 2018, p 146-147.

¹⁸ NHRCT, Regulation on the Criteria and Methods for Conducting Human Rights Violation Investigation, 2018, available in Thai at: <http://www.nhrc.or.th/getattachment/f589a249-0c02-4608-a114-66f27548c252/>.aspx>.

¹⁹ NHRCT, Regulation on the Criteria and Methods for the Appointment and Execution of Duties of Members of the Subcommittees, 2018, available in Thai at: <http://www.nhrc.or.th/getattachment/ba5dbd68-5d0d-4ebe-ac53-e4d1091d6550/>.aspx>.

²⁰ NHRCT, Regulation on the Procurement and Appointment of Experts as Secretaries and Assistant Secretaries of the NHRC Chairperson and other Commissioners, 2018, available in Thai at <http://www.nhrc.or.th/getattachment/26ea9de5-239e-4407-ab98-861f57ceef7/>.aspx>.

²¹ For more information on the internal conflicts within NHRCT please see in Thai <https://ilaw.or.th/node/5349> .

²² Ibid. See also *Prachathai*, 'Two human rights commissioners resign; say new regulations made them feel restricted,' 1 August 2019, available at: <https://prachatai.com/english/node/8156> .

Exclusion of CSOs

The NHRCT's Subcommittees previously carried out the initial inquiry and wrote an initial report in cases of human rights violations. The Subcommittees were composed of Commissioners and representatives from CSOs with relevant experience, hence making it a participatory working process. But the drafters of the new Organic Law on the NHRCT 2017 tried to make it impossible for civil society to be too actively involved in the operation of the NHRCT. Therefore, the new Law provides that Subcommittees can only be established when “*necessary*” and “*inevitable*.”²³

As a result, the incumbent NHRCT has not recruited civil society members as part of the subcommittees fearing it might violate the law.²⁴ Moreover, this contributes to the distancing of the NHRCT from civil society and a lack of confidence towards the Commission.

NHRCT's new mandate to “clarify incorrect and unfair reports” on human rights

Another provision of the Organic Law that undermines the NHRCT's impartiality and compliance with the Paris Principle is the requirement to “*clarify and report without delay the true facts in the case of incorrect or unfair reports on the situation regarding human rights of Thailand*”²⁵ This provision has been heavily criticised by civil society because it implies that the NHRCT will have to clarify human rights violations on behalf of the Government.

The NHRCT has investigated and provided clarification on the following reports:

- World Report 2018, Hidden Chains: Force Labor and Rights Abuses in Thailand's Fishing Industry by Human Rights Watch; and
- The United States Department of State's Human Rights Reports.

Four other reports on the state of human rights in Thailand were not addressed by NHRCT because it considered that there were just articles and not reports, included: Thailand's State of the World's Human Rights Report 2017-2018 by Amnesty International; Collapsed Rule of Law: The Consequences of Four Years under the National Council for Peace and Order for Human Rights and Thai Society by Thai Lawyers for Human Rights (TLHR) Internet Law Reform Dialogue by iLaw; and a statement by UN experts condemning the use of defamation law to judicially harass Human rights Defender Mr. Andy Hall.²⁶

Handling of Complaints

According to the Progress Report of NHRCT for the Fiscal Year 2018, NHRCT has received 232 complaints about human rights violations, most of which related to personal rights and freedoms (34.48%) and the situations in the deep south of Thailand (44.83 %). 445 cases have been subject to investigation and reports were made. There were 395 outstanding complaints from before 2018 and 50 in 2018.

²³ The Organic Law on the NHRC 2017, Section 29. See also *Prachathai*, 'Two human rights commissioners resign; say new regulations made them feel restricted,' available at: <https://prachatai.com/english/node/8156>

²⁴ Ibid.

²⁵ The Organic Law on the NHRC 2017, Section 26 (4).

²⁶ Ibid.

Some private and public agencies have tried to act as recommended by NHRCT while others tend to give more importance to following their own rules and standard of operation. The authorities acknowledge the recommendations that NHRCT sent them but often failed to report on the status of implementation.

Moreover, the investigations conducted by NHRCT have been unsatisfactory. The investigation outcome reports are not detailed and do not give much priority to the victims. As for the quality of the report, cases have been dismissed due to a narrow interpretation of human rights principles and standards based on restrictive national laws rather than international standards.

In conclusion, the NHRCT has been unable to protect and promote human rights independently and effectively due to restrictive provisions in its Organic Law; new obstructive operating regulations, and an unsupportive office environment due to the mind-set of certain NHRCT members. No matter how closely or not it complies with the Paris Principles, the NHRCT cannot be independent if it acts as a defender of the current political system. While independently minded members will find ways to work around limitations in the law, no law, no matter how strong, can embolden those who are not independently minded.²⁷

4. Thailand's Democratic Backsliding and the Role of the NHRCT

The incumbent NHRCT had to start working in the aftermath of the 2014 military coup, under pressure from the National Council for Peace and Order (NCPO), the junta governing body. In a context of severe restrictions on the rights to freedom of expression, association and peaceful assembly, many dissidents were arrested especially those who campaigned against the 2017 military-drafted Constitution, and those who took part in the “*People who want Election*” campaign. Many who participated in peaceful gatherings to demand prompt elections were tried in military courts for sedition charges, offences under the Public Assembly Act, and the NCPO ban on public gathering.²⁸ Laws promulgated or amended by the NCPO, including the 2017 Constitution, contain repressive provisions, and do not comply with international human rights law.²⁹ Consisting of vague terms, many of the laws have been subject to an interpretation that favours the junta.

Those who have been the most affected are human rights defenders (HRDs) who have risen up to criticise and campaign on the performance of the junta. They have become a target for the Government. They have been taken to court, ambushed and forced into exiles or even become victims of enforced disappearance.³⁰ Several academic conferences have been banned. Military

²⁷ Asia Pacific Forum, Fact Sheet 3: The Importance of Independence, available at: <https://www.asiapacificforum.net/support/what-are-nhris/independence/>.

²⁸ Thai Lawyers for Human Rights, ‘*Military files charges against 47 more of ‘We Want to Vote Movement,’*’ 1 June 2018, available at: <https://www.tlhr2014.com/?p=7648>.

²⁹ iLaw, A Conversation with Pravit Rojanaphruk about the Right to Converse – the NCPO is ‘camouflaging’ their repression, available at: <https://freedom.ilaw.or.th/en/blog/conversation-pravit-rojanaphruk-about-right-converse-%E2%80%93-ncpo-%E2%80%98camouflaging%E2%80%99-their-repression>.

³⁰ Human Rights Watch, ‘Thailand’s Failed Pledges to End ‘Disappearances,’ 29 August 2018, available at: <https://www.hrw.org/news/2018/08/29/thailands-failed-pledges-end-disappearances>.

officers have been dispatched to meeting venues to prevent them from happening.³¹ Individuals who signed public statements expressing academic freedom in opposition to the military intervention have had their names included in a watch list and have been identified as being hostile to the Government. Some of the said individuals faced administrative harassment following their involvement in the statement.³²

Thailand held its long-awaited General Election on 24 March 2019, almost five years since the military coup d'état of May 2014. Due to a restrictive environment and undemocratic rules relating to the formation of a government, ANFREL qualified the election as “*partly free, and not fair.*”³³ According to ANFREL “*All stages of the electoral process, from its inception to the announcement of results and beyond, were influenced to secure an electoral outcome that would not be too disruptive to the ruling establishment.*”³⁴

Elections took place in a restrictive context that favoured the junta and its allies. Military orders that authorise criminal prosecution for speech critical of the junta, its policies and actions, and the monarchy remained on the book. Some media were censored and opposition or critics of the Government had restricted access to them. The National Election Commission, which was unilaterally appointed by the junta’s handpicked National Legislative Assembly, seriously lacked independence.³⁵

The post-election period was also marked by controversy. The Election Commission was heavily criticised for a lack of transparency and delays around the vote counting process. It also published – after the election – a new formula for allocating party-list seats, significantly different from the one agreed prior to the election. The new formula effectively favoured the junta by allowing 10 pro-junta small parties to gain party-list parliamentary seat.³⁶

The controversial 2017 Constitution drafted under the junta creates a quasi-democratic state by limiting the power of the House of Representatives. Most notably it gives a junta-appointed Senate a five-year period to participate in the selection of the Prime Minister along with the members of House of Representatives.³⁷ On 16 July 2019, Prayuth Chan-o-cha was sworn in as elected Prime Minister along with 36 Cabinet members, 11 of which were closely affiliated with the NCPO.³⁸

³¹ Thai Lawyers for Human Rights, “‘An academic forum is not a military barrack’ Prosecution of peaceful expression at an academic conference,” 31 July 2018, available at: <https://www.tlhr2014.com/?p=8288&lang=en>.

³² Thai Lawyers for Human Rights, ‘Four international academics detained by Thai Immigration after signing a public statement during the Thai Studies Conference,’ 25 February 2019, available at: <https://www.tlhr2014.com/?p=11115&lang=en>

³³ ANFREL (Asian Network for Free Elections), ‘The 2019 Thai General Election: A Missed Opportunity for Democracy,’ p.15, available at: <https://anfrel.org/wp-content/uploads/2019/06/Thai-Report-2nd-edition.pdf>.

³⁴ Ibid, p. 2.

³⁵ Human Rights Watch, ‘Thailand: Structural Flaws Subvert Election,’ 19 March 2019, available at: <https://www.hrw.org/news/2019/03/19/thailand-structural-flaws-subvert-election>

³⁶ *Prachatai English*, ‘Weapon of math destruction at work in Thai politics,’ 15 May 2019, available at: <https://prachatai.com/english/node/8047>.

³⁷ 2017 Constitution, Article 272.

³⁸ iLaw, ‘Ending of NCPO – however continue under Prayuth 2.0,’ 10 July 2019, available in <https://www.ilaw.or.th/node/5327>

Despite the junta's success in managing to maintain its power over Thai politics after the election, crackdown on dissidents has continued, if not intensified. On 23 May 2019, the Constitutional Court voted to suspend Thanathorn Juangroongruangkit – leader of the Future Forward Party - from carrying out his duties as a Member of Parliament (MP) because he allegedly still held shares in a media company when he applied to run for office.³⁹ Thanathorn denies the charges. Thanathorn also faces previous additional politically motivated criminal cases.⁴⁰

The Government continues to hold on hostile attitude toward progressive voice while HRDs are still subjected to attack.⁴¹ In June and May 2019, men brutally physically assaulted a number of Thai political activists in Bangkok. Some of them suffered serious injuries as a consequence. Sirawith Seritiwat – the most prominent of them - was left unconscious. These recent attacks are a worrying indication that harassment, attacks on civil society, and culture of impunity will only continue even after the election.⁴²

In this context the NHRCT could barely do anything and play any role in investigating human rights violations or issuing recommendations to the NCPO. This is partly due to a lack of genuine understanding on the concept of human rights among the Commissioners, resulting in their failure to address critical human rights issues, especially civil and political rights. It is also due to the draconian power of the junta, which has almost totally wiped out human rights from Thailand. Only Commissioner Angkhana Neelapajit continued to speak out and criticise the performance of the Government in her own capacity, as the opinions made by the NHRCT have to be approved by all the Commission's members.⁴³

For instance, on 17 April 2019, Piyabutr Saengkanokkul, Secretary General of the Future Forward Party and acting Member of Parliament, was summoned to answer charges of defamation and violation under the Computer Crimes Act.⁴⁴ Angkhana Neelapajit, went to observe the proceedings at the police station. As a result, an official disciplinary inquiry was launched against her. She was accused of being politically partial.⁴⁵ The inquiry, however, concluded that no one at the NHRCT has the power to remove her from office. The power is vested in the National Anti-Corruption Commission (NACC).⁴⁶ Few months later, Angkhana, along another Commissioner, ended up resigning from the NHRCT anyway, because she felt she could not properly perform her mandate.

³⁹ *Bangkok Post*, 'Court suspends Thanathorn from MP,' 23 May 2019, available at:

<https://www.bangkokpost.com/thailand/politics/1682696/court-suspends-thanathorn-from-mp>.

⁴⁰ ASEAN Parliamentarians for Human Rights (APHR), 'Thailand: Regional MPs urge end to judicial harassment of opposition politician,' 27 May 2019, available at: <https://aseanmp.org/2019/05/27/thailand-judicial-harassment-thanathorn/>.

⁴¹ Human Rights Watch, 'Thailand: 3 Junta Critics Assaulted in Past Month,' 4 June 2019, available at:

<https://www.hrw.org/news/2019/06/04/thailand-3-junta-critics-assaulted-past-month>.

⁴² Human Rights Watch, 'Thailand: 3 Junta Critics Assaulted in Past Month,' 4 June 2019, available at:

<https://www.hrw.org/news/2019/06/04/thailand-3-junta-critics-assaulted-past-month>.

⁴³ The Organic Law on the NHRC 2017, Article 23.

⁴⁴ *Prachatai English*, 'Lawsuits against Future Forward proceed after Songkran,' 18 April 2019, available at:

<https://prachatai.com/english/node/8024>.

⁴⁵ Human Rights Watch, 'Thailand: Outspoken Rights Commissioner Harassed,' 1 May 2019, available at:

<https://www.hrw.org/news/2019/05/01/thailand-outspoken-rights-commissioner-harassed>.

⁴⁶ *Prachatai English*, 'NHRCT decides to not forward complaint about Commissioner Angkhana Neelapajit to NACC,' 14 June 2019, available at: <https://prachatai.com/english/node/8099>.

In response to the deterioration of Thailand's human rights situation, the international community has raised concerns with the Thai authorities. On 6 April 2019, Thanathorn Juangroongruangkit, was summoned by the police to answer charges relating to the alleged violation of Sections 116 and 189 of the Criminal Code.⁴⁷ Nine foreign embassies observed the questioning by the police. As a consequence, the Ministry of Foreign Affairs called a meeting with the foreign missions and expressed its concerns regarding alleged diplomatic interference. The United States of America and European Union diplomats, however, insisted that their trial observation complied with diplomatic standards and etiquette.

5. Conclusion and Recommendations

The long awaited election resulted into another blow to the democratic space in Thailand. The junta has successfully managed to maintain its power and repression on Thailand's democratic and civic spaces continue. Given such a volatile situation, an independent and effective NHRI is needed to be able to protect the rights of the people.

While it is clear that NHRCT is operating in a repressive and restricted environment, the NHRCT should still conduct itself with a heightened level of vigilance and independence in accordance to the actual purpose of its establishment. For this to happen, it is fundamental for the NHRCT to have independent minded Commissioners with a genuine knowledge of human rights in order to protect the democratic space of the country.

The aforementioned context will most likely have an impact on the review of the NHRCT's status by the Global Alliance of National Human Rights Institutions' (GANHRI) Sub Committee on Accreditation (SCA), which should take place in March 2020.⁴⁸ In October 2014, NHRCT was downgraded from A to B status based on five reasons:

- A lack of transparency in the selection process of its members;
- No laws to guarantee that the Commissioners can perform their duties genuinely, undependably and effectively in terms of its criticisms on human rights issues to command trust from the public;
- The NHRCT's failure to raise gross human rights violation issues timely;

⁴⁷ Section 116: *'Whoever makes an appearance to the public by words, writings or any other means which is not an act within the purpose of the Constitution or for expressing an honest opinion or criticism in order:*

1. *To bring about a change in the Laws of the Country or the Government by the use of force or violence;*
2. *To raise unrest and disaffection amongst the people in a manner likely to cause disturbance in the country;*

or

3. *To cause the people to transgress the laws of the Country,*

shall be punished with imprisonment not exceeding seven years.'

Section 189: *'Whoever assists the other person who commits or is alleged of having committed an offence which is not a petty offence so that such person may not be punished by giving him lodging, by hiding, or by assisting him by any means so that he may not be arrested, shall be punished with imprisonment not exceeding two years or fined not exceeding four thousand Baht, or both.'*

⁴⁸ Global Alliance of NHRIs, Sessions of the GANHRI Sub-Committee on Accreditation (SCA) for 2020, available at: <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Pages/2020-Sessions.aspx>.

- A lack of impartiality and independence among high-ranking officers of NHRCT who obviously took side with political factions while performing their duties; and
- NHRCT's failure to capitalise on the drafting of the new Constitution to advocate for the revision of the NHRCT Act to ensure its compliance with the Paris Principle.⁴⁹

It is evident that the NHRCT has not implemented the above-recommendations. This proves that there is no genuine political will in strengthening the NHRCT to be able to fully promote and especially protect human rights in the country. The Organic Law has only provided small improvements to the selection process, but many problems with the selection and appointment process remain as mentioned above. With little to no improvements within the NHRCT, it should be further downgraded.

ANNI report's recommendations have so far failed to attract attention from either the Government or NHRCT. In spite of that, PEF would like to respectfully propose the following recommendations

6.1 Recommendations

To the Thai Government and Parliament:

- 1) Give due consideration to the Paris Principles and recommendations made by NHRCT on the state of human rights in Thailand. Until now, NHRCT's recommendations to various state organs and the Parliament have simply been acknowledged. The Thai Government and the Parliament as well as state organs are thus to implement NHRCT's recommendations and opinions;
- 2) Withdraw all politically-motivated charges against dissidents and HRDs, and allow the legitimate exercise of the right to freedom of expression and peaceful assembly;
- 3) Repeal all repressive laws and legal provisions that restrict fundamental freedoms and the work of HRDs;
- 4) Refrain from intervening in the affairs of the NHRCT and instead respect its impartial and independent mandate; and
- 5) Adopt and implement the SCA recommendations and amend the NHRCT Organic Law accordingly.

To NHRCT:

- 1) Review and implement the recommendations made by GANHRI-SCA;
- 2) Advocate for guarantees of independence to be strengthened in the Organic Law;
- 3) Strengthen collaboration and coordination with civil society; and
- 4) Continue in developing its capacity to conduct effective human rights investigations.

⁴⁹ People's Empowerment Foundation, Report on the Monitoring of the establishment and Implementation by national human rights institutions 2015, the downgrading from A to B, pp. 31-32, available at: http://www.burmapartnership.org/wp-content/uploads/2015/09/ANNI_Report_2015.pdf.

To Donors:

- 1) Monitor the performance of NHRCT and support the production of ANNI's report and its distribution to the public; and
- 2) Raise public awareness about the NHRCT and its work to protect and uphold human rights of everyone.

TIMOR-LESTE: PDHJ MUST ADDRESS EXCESSIVE USE OF FORCE BY SECURITY FORCE

Judicial System Monitoring Programme (JSMP)¹

1. Introduction

This report was prepared by JSMP. It is based on JSMP and other local human rights NGO's observations. It also draws on information from the Human Rights Defender Network (RDDU) and an interview with the Secretary Executive² of Timor Leste's Office of the Ombudsman for Human Rights and Justice known as *the Provedor de Direitos Humanos e Justiça* (PDHJ).³ For the purpose of this report, JSMP monitored PDHJ's presentation of its 2018 Annual Report in the National Parliament's plenary session. The report also includes information from previous year obtained through interviews with the Former Deputy Provedor⁴ and relevant non-governmental organisations (NGOs).

JSMP also reviewed relevant literature including PDHJ 2018 Annual Report,⁵ the 2013 and 2018 reports and recommendations of the Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation (GANRHI-SCA) on PDHJ,⁶ and other relevant documents. This report covers the period going from 1st January 2018 to 31 May 2019.

2. Overview

The PDHJ has its mandate enrooted in the Constitution of the Republic of Timor-Leste (hereinafter Constitution),⁷ and Law No. 7/2004 which established PDHJ in 2004.⁸ It therefore has both a constitutional and legal mandate. The Constitution in Article 27 (1) provides that PDHJ “*shall be an independent organ in charge of examining and seeking to settle citizens' complaints against public bodies, certifying the conformity of acts with the law preventing and initiating the whole process to remedy injustice.*”

In October 2018, the SCA recommended that PDHJ be re-accredited a ‘status A’ based on the efforts it has undertaken to address the recommendations made by SCA in November 2013 and its activities

¹ This report was prepared by Jose Pereira, Legal Researcher (josep@jsmp.tl or zepereira@outlook.com) and Jose Moniz, Advocacy Officer (josem@jsmp.tl).

² Interview with Dr. Áureo Jose A. Xavio on 4 July 2019 at PDHJ's office.

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

⁴ Mr. Horacio de Almeida, Ex-deputy Provedor for Human Rights and Justice

⁵ PDHJ, Annual Report 2018, June 2019, available in Tetun version at: <http://pdhj.tl/wp-content/uploads/2014/06/RELATORIU-ANUAL-2018-2.pdf>.

⁶ GANHRI SCA, Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), 15-19 October 2018, p. 16-17, available at:

<https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20Report%20October%202018-Eng%20FINAL%20.pdf>

⁷ Constitution of the Republic of Timor-Leste, Article 27 (1), available at: http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution_RDTL_ENG.pdf

⁸ Law No. 7/2004 Approving the Statute of the Office of the Ombudsman for Human Rights and Justice, available at: <http://mj.gov.tl/jornal/lawsTL/RDTL-Law/RDTL-Laws/Law-2004-7.pdf>.

to protect and promote human rights, particularly its monitoring of places of detention.⁹ The SCA also made several remarks including encouraging PDHJ to:

- Continue to maintain systematic and formalised working relationship and cooperation with civil society organisations (CSOs) and to make the institution accessible to all citizens, including those who are geographically, politically or socially remote;
- Ensure pluralism and diversity in its staff and in the different societal groups it engages with;
- Continue advocating for the formalization of the PDHJ's selection criteria in its enabling law;
- Continue to advocate for an appropriate level of funding to enable it effectively fulfil its mandate, especially its protection activities, and in particular monitoring places of detention and;
- Amend its enabling law to ensure security of tenure of the Deputy Provedor.

On 5 November 2018, the National Parliament the National Parliament elected Ms. Jesuina M. F. Gomes as Provedora. JSMP is pleased with the election's outcome which is in line with recommendations made by JSMP to improve pluralism and gender representation within PDHJ's structure. Ms. Gomes is the first elected female to lead PDHJ.¹⁰ The selection of the Deputies was done on 28 February 2019 through a selection panel that chose Ms. Benicia Eriana Magno as Deputy Provedor for Human Rights and Mr. Miguel de Carvalho as the Deputy Provedor for Good Governance.¹¹ There are therefore two women and one man in the leadership of PDHJ. This is a serious improvement compared with previous years, where men dominated the leadership positions.

Overall, during the reporting period, PDHJ appropriately performed its mandate, in particular by providing capacity building on human rights prevention and protection to relevant state institutions, processing complaints from the public, providing recommendations to the relevant state institutions, monitoring places of detention and promoting civil society's participation in the selection process of the Deputy Provedor for which JSMP was again invited to take part in.¹²

However, PDHJ did not *fully* perform its mandate. For instance, it did not advocate for the amendment of repressive laws, such as the Law on Freedom of Assembly and Demonstration that opens the door to police's excessive use of force against protestors.

In addition, despite PDHJ providing trainings to the Police on human right protection and promotion, the number of human rights violations committed by the Police in Timor-Leste remains unchanged. The highest number of human rights violations recorded by RDDU and the PDHJ in its annual report is the use of excessive force by the Timor-Leste National Police (PNTL) and the Timor-Leste Army or Defence Force (F-FDTL).¹³

⁹ GANHRI SCA, Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), 15-19 October 2018, p. 16.

¹⁰ JSMP, 'JSMP congratulates that Ombudswoman-elect for Human Rights and Justice,' 6 November 2018, available at: <https://www.easttimorlawandjusticebulletin.com/2018/12/first-woman-ombudsman-in-timor-leste.html>.

¹¹ JSMP, 'PPN Husu Provedores Adjuntos Eleitu Servi Nasaun Ho Imparsial No Independente,' 28 February 2018, available at: <http://pdhj.tl/ppn-husu-provedores-adjuntos-eleitu-servi-nasaun-ho-imparsial-no-independente/>.

¹² Law No. 7/2004, Article 28.

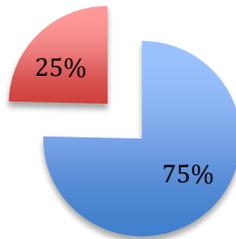
¹³ See RDDU Statement of the victims, available in Tetun at: <http://jsmp.tl/wp-content/uploads/Deklarasaun-vitima-sira-nia-Vitima-sira-nia-deklarasaun.pdf>; and RDDU Press Release of RDDU on police killing and injuring the young people, available in Tetun at: http://jsmp.tl/wp-content/uploads/Rede-Defens%C3%B3r-Direitus-Umanus_Kuluhun-de-BAIXO_18_03_19.pdf.

The RDDU, in the period of 2016 to 2018, collected information about 52 cases of human rights violations committed by the PNTL and the F-FDTL. In these cases victims had been beaten, or received cruel, inhuman or degrading treatment or punishment (CIDT) or shot – and in some cases killed. In 2018, 17 cases were recorded that constituted around 25% of the total number of human rights violations cases recorded for the period of 2016 to 2018.¹⁴

Graph 1: Number of cases of excessive use of force committed by PNTL & F-FDTL between 2016-18 and recorded by RDDU

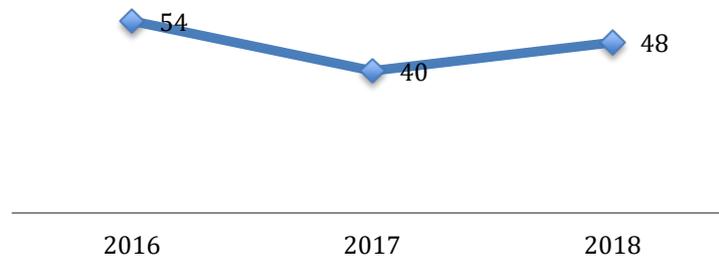
Number of cases of excessive use of force committed by PNTL & F-FDTL

■ 2016-2018 ■ 2018



Graph 2: Number of human rights violations committed by PNTL for the period 2016-2018 based on PDHJ Annual Reports

Number of HR violations committed by PNTL in period of 2016-2018



¹⁴ PDHJ, Annual Report 2016, p. 26, available at: <http://pdhj.tl/wp-content/uploads/2014/06/Relat%C3%B3riu-Anual-2016.pdf>; Annual Report 2017, p. 38, available at: <http://pdhj.tl/wp-content/uploads/2014/06/RELATORIU-ANUAL-2017.pdf>; and Annual Report 2018, p. 39, available at: <http://pdhj.tl/wp-content/uploads/2014/06/RELATORIU-ANUAL-2018-2.pdf>.

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

Mechanisms to Receive Complaints about Human Rights Violations

PDHJ has established several mechanisms to receive human rights violations. While some of these mechanisms function well, others do not.

Central and Branch Offices

In order to bring its services closer to the communities, PDHJ has established a central office and four branch offices. The central office is responsible for complaints from Dili and Liquisa municipalities; the Baucau branch office is responsible for complaints from Baucau, Lautem, Viqueque and Manatuto municipalities; the Maliana branch office is responsible for complaints from Bobonaro, Covalima and Ermera Municipalities; the Same branch office is responsible for complaints from Aileu, Ainaro and Manufahi municipalities. There is also a branch office for the autonomy region of Oecusse. According to PDHJ's annual reports, most of the complaints received by PDHJ were directly reported by the victims at one of PDHJ's offices. For instance, in 2018, 117 cases had been reported directly.¹⁵

Temporary Focal Points or Human Rights Monitoring Network¹⁶

Since its establishment, PDHJ has had Temporary Focal Points in each district to support monitoring and reporting of cases of human rights violations and to support members of community who want to lodge complaints. These focal points are volunteers. According to what Dr. Horacio de Almeida, Former Deputy Provedor, said in an interview in July 2016 this mechanism does not seem to function well.¹⁷ Because the temporary focal points are volunteers they need to prioritise their paid work over the work for PDHJ. To corroborate this assessment, PDHJ's 2018 Annual Report shows that no cases had been recorded by these volunteers.¹⁸

Complaint Box

Complaint boxes have been located in all offices. These complaint boxes are one of the mechanisms used by PDHJ to get closer to the people, especially for those without the means to reach its regional or central offices.¹⁹ However, due to limited information on the existence of these complaint boxes the number of complaints made through this mechanism is very low. In 2018 PDHJ had only received two complaints through the boxes.²⁰

¹⁵ PDHJ, Annual Report 2018, p. 31.

¹⁶ PDHJ, Strategic Plan 2011-2020, p. 7, available at: <http://pdhj.tl/wp-content/uploads/2013/11/SP-PDHJ-2011-2020-e.pdf>.

¹⁷ Interview with Dr. Horacio de Almeida, Deputy Ombudsman for Human Rights and Justice, 14 July 2016.

¹⁸ PDHJ, Annual Report 2018, p. 31, graph 7

¹⁹ Law No. 7/2004, Article 28.

²⁰ PDHJ, Annual Report 2018, p. 31, graph 7.

Free Landline and Online Complaints

Since PDHJ's establishment, a free landline has been available for the public to file complaints.²¹ If the complainants do not know or have the landline number, they can directly contact PDHJ personnel, including the Provedor and his deputies. The Provedor and his deputies, including the staff also share their personal contacts with the public so that people can easily file their complaints.²²

Online complaints can also be made through the official website of PDHJ.²³ However, due to technical problems with the website, some information is missing or not updated such as PDHJ's latest annual and thematic reports or the structure of the institution.²⁴

Complaint Handling Mechanism

PDHJ has the power to receive complaints and to investigate any matter falling under its competence, including by ordering a person to appear before it, accessing relevant facilities, premises, documents, equipment, goods or information, and visiting places of detention, treatment or care.²⁵

Article 3 of the Law No. 7/2004 states that PDHJ shall “*investigate all complaints relating, but not limited to acts or omissions which are contrary to the law or regulation; are unreasonable, unfair, oppressive or discriminatory; are inconsistent with the general course of a public entity or agency's functions; proceed from mistake of law or an arbitrary, erroneous or mistaken ascertainment of facts and are otherwise irregular and devoid of justification.*”

Article 24 of the same law also gives PDHJ the power to monitor and advise the Government and its agencies, to conduct inquiries into systematic or widespread violations of human rights, and to submit to the Government or Parliament recommendations and reports on human rights matters.

In 2018, PDHJ received 203 individual complaints.²⁶ It included 81 cases relating to human rights violations and 122 relating to issues of good governance. The number of cases relating to human rights violations seems to be relatively similar to the period of 2016 to 2018.

²¹ The number for the Central Office in Dili is (+670) 3331184.

²² Interview with Dr. Horacio de Almeida, Deputy Ombudsman for Human Rights and Justice, 14 July 2016.

²³ See PDHJ's Website at: <http://pdhj.tl/case-handling/make-a-complaint-online/?lang=en>.

²⁴ Interview with Deputy Ombudsman for Human Rights and Justice, Dr. Horacio de Almeida, 14 July 2016. See also as examples: <http://pdhj.tl/media-publications/annual-reports-budgets/?lang=en> and <http://pdhj.tl/case-handling/reporting-on-complaints/?lang=en> ; and <http://pdhj.tl/kona-ba-pdhj/meet-the-provedor/>.

²⁵ Law No. 7/2004, Article 28.

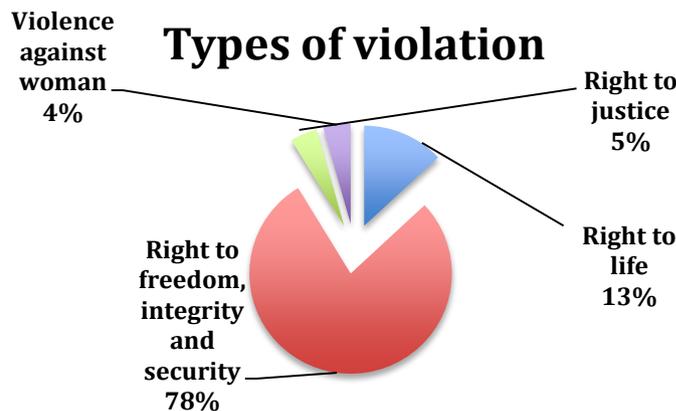
²⁶ PDHJ's Annual Report 2018, p. 30.

Graph 3: Number of Cases Relating to Alleged Human Rights Violations Received by PDHJ between 2016-18²⁷



Out of the 81 cases of human rights violations received by PDHJ, it decided to investigate 23 cases that fell within its mandate.²⁸ This included violations of the right to freedom, integrity and security (18 cases), the right to life (three cases), the right to access justice (one case) and one case of violence against woman.

Graph 4: Types of human rights violations received by PDHJ in 2018²⁹



²⁷ PDHH, Annual Report 2018, p. 34

²⁸ PDHJ, Annual Report 2018, p. 38.

²⁹ PDHJ, Annual Report 2018, p. 37.

The PDHJ developed a manual to handle complaints.³⁰ Once the Investigation Division receives a complaint it prepares a preliminary assessment report, which will be presented to the Complaint Management Committee (CMC) that is presided by the Provedor. The CMC will then decide on a series of measure. It can for instance:

- Open an investigation;
- Open an investigation and then refer the case to the relevant state institution, and in particular the Public Prosecution if the complaint also constitutes a crime;
- Start a mediation and conciliation or monitoring;
- Close the complaint and fully refer it to the Public Prosecution if the case does not constitute a human rights violation; or
- Delay the decision.

According to PDHJ's 2018 Annual Report, from the 81 cases of human rights violations received:

- In 23 cases an investigation was opened;
- 23 cases were referred for public prosecution and relevant state institutions;
- Two cases were mediated;
- One case is under monitoring;
- Four cases were closed because no human rights violations were found;
- 16 cases were closed and referred to the Public Prosecutor;
- In one case the decision was delayed; and
- In nine cases a preliminary assessment had not been conducted yet.³¹

If the CMC decides to investigate a case, then it is sent to the Investigation Division that will release its finding in a report. In 2018, the PDHJ's Investigation Division produced:

- 15 finding reports,
- 30 reports where the Division found there were no human rights violation; and
- 70 short reports about actions taken to address less complex cases of human rights violations.

From these reports, the PDHJ sent 81 recommendations to different state institutions:

- 48 recommendations to the PNTL;
- Seven to the Ministry of Health;
- Six to the Ministry of Inhabitant Planning Service and Environment;
- Six to the Ministry of Education;
- Five to the Ministry of State Administration;
- Four to the Ministry of Agriculture and Fishery;
- Three to the Ministry of Defence and Security;
- One to the Commission of Public Employment; and
- One to the Public Prosecutor.³²

³⁰ PDHJ, Annual Report 2018, p. 35.

³¹ PDHJ, Annual Report 2018, p. 32-33.

³² PDHJ, Annual Report 2018, p. 38.

Once it has formulated recommendations, PDHJ uses its high level meetings with officials of relevant ministries and state institutions or organs to ensure its recommendations are addressed when it has not received any information within the sixty day time-limit set in its founding Law.³³ In order to ensure the implementation of its recommendations by the relevant state institutions, in 2016 the PDHJ also established a follow-up mechanism with some officers in charge of following-up on recommendations directed at state institutions. This mechanism started functioning in 2017.³⁴ This was one of the recommendations made in several ANNI annual reports.³⁵ This department is well staffed and functions well. According to PDHJ 2018 Annual Report, the department was able to record the outcome of the implementation of 26 recommendations. For instance, the PNTL reported it had implemented 10 of the 12 recommendations included in PDHJ's final reports. But there is no detailed information in PDHJ 2018 Annual Report on what measures were actually taken by the PNTL in order to implement the recommendations. According to the Executive Secretary of PDHJ most of the measures that the PNTL took was the suspension from the duties; rotations or transfer of officers to other locations.³⁶

On 2 July 2019, PDHJ presented its 2018 Annual Report to the National Parliament.³⁷ The discussion, held in plenary session, was the occasion for members of Parliament (MPs) to ask questions on the actions taken by PDHJ to address the cases of ambulant sellers, the treatment of prisoners and in particular their right to food, and their activities to raise awareness about human rights within the Police.³⁸ These discussions within the Parliament are also a useful tool for PDHJ to highlight and follow-up when state institutions have not responded to its recommendations.³⁹

Direct Monitoring

PDHJ also conducted field monitoring. It has done so during military and police joint operations, public demonstrations, national elections, in places of detention and during expropriation. According to PDHJ's 2018 Annual Report, PDHJ produced six thematic reports based on its monitoring with 19 recommendations including on school feeding program; prisons; detention cells in police stations; public services in charge of identity card within the Ministry of Justice; and the integrated municipal development plan and national pre-election of the Special Region of Oecusse.⁴⁰

³³ Law No. 7/2004, Article 47(3) states that the organ to which a recommendation is addressed must, within sixty days, inform the PDHJ of the extent to which the recommendation has been acted upon or implemented.

³⁴ PDHJ, Strategic Plan for 2011-2020, p. 10 and information provided by Mr. Aureo Jose A. Xavio, the Executive Secretary of the PDHJ.

³⁵ ANNI, 2013 Report, Point 6 of recommendation to PDHJ, available at: <http://jsmp.tl/wp-content/uploads/2014/10/ANNI-annual-report-2013.pdf>; ANNI, 2014 Report, point 5 of recommendation to PDHJ, available at: <http://jsmp.tl/wp-content/uploads/2014/10/ANNI-Annual-Report-20141.pdf>; and ANNI, 2015 Report, point 6 of recommendation to PDHJ, available at: http://www.burmapartnership.org/wp-content/uploads/2015/09/ANNI_Report_2015.pdf.

³⁶ PDHJ, Annual Report 2018, p. 41-46 and information from Mr. Aureo Jose A. Savio.

³⁷ Law No. 7/2004, Articles 34 and 46.

³⁸ Information obtained through JSMP's monitoring of the 2 July 2019 plenary session of the National Parliament.

³⁹ Law No. 7/2004, Article 47(4).

⁴⁰ PDHJ, Annual Report 2018, p. 44-45.

The PDHJ also conducted urgent monitoring during the national pre-election and in cases of eviction and produced thematic reports based on its findings.⁴¹ On 5 April 2019 PDHJ made a press conference to present the result of its monitoring as well as several recommendations relating to the behaviour of PNTL when addressing the peaceful demonstration organized by the Timor Leste Social Movement and ambulant sellers on 2 April 2019. During the demonstration some protesters were injured after the PNTL used tear gas.⁴²

Regarding monitoring in places of detention, PDHJ's did not specify how many places of detention and prisons they visited in its 2018 Annual Report. However, they shared their findings and in particular their concerns regarding the bad conditions in detention where there is no sufficient food and where some detainees do not have access to legal assistance.⁴³ The prisons also do not have separated spaces for adult, juveniles and female prisoners.⁴⁴ The PDHJ wrote thematic reports with specific recommendations to relevant state institutions to solve the identified problems. Unfortunately, these thematic reports are not available on PDHJ's website.

Support the government's engagement with UN bodies

PDHJ also has the mandate to make recommendations on the ratification of, or accession to, international human rights instruments, and monitor the implementation of those instruments; to advise the Government on its reporting obligations within the framework of international human rights instruments; to contribute to the reports that Timor-Leste is required to submit to UN bodies and committees, and to regional institutions; and to express an independent opinion on the Government's reports, etc.⁴⁵ In the past, PDHJ has been actively involved in writing Universal Periodic Review (UPR) reports and shadow reports together with CSOs.

Cooperation with CSOs

After its establishment PDHJ created a consultative council including members of CSOs. This council was to advise on PDHJ's performance of its duties. The council or any other similar mechanism has, however, not been used in years. It should be reactivated in order to strengthen cooperation and consultation between PDHJ and civil society.⁴⁶

Despite the absence of a functioning consultative committee, CSOs often receive complaints from the public, which they can refer to PDHJ. CSOs – as well as journalists - sometimes directly report instances of human rights violations to PDHJ.⁴⁷

The PDHJ is also considering establishing a relationship with private lawyers and public defenders.⁴⁸ The objective is for lawyers or defenders to refer cases of human rights violations to

⁴¹ PDHJ, Annual Report 2018, p. 57-59.

⁴² Complete information available at: <http://pdhj.tl/pdhj-halo-monitorizasaun-ba-atuasaun-pntl-hasoru-vendedores-ambulante/>.

⁴³ PDHJ, Annual Report 2018, p. 53-55.

⁴⁴ PDHJ, Annual Report 2018, p. 47-49.

⁴⁵ Law No. 7/2004, Article 25.

⁴⁶ Interview with Deputy Director of Fundasaun Mahein, João de Almeida, 12 July 2016.

⁴⁷ Interview with Dr. Horacio de Almeida, Deputy Ombudsman for Human Rights and Justice, 14 July 2016.

⁴⁸ Ibid. See also official website of Public Defender available at: <http://defensoria.gov.tl/>.

PDHJ. This mechanism will be useful as it is sometimes difficult for the public to distinguish between penal cases and cases of human rights violations.

4. Democratic Space in Timor-Leste

Timor-Leste became a democratic state following its independence in 2002. It has ratified all international legal instruments on human rights protection and promotion. The Constitution of the Republic of Timor-Leste also guarantees and protects human rights.⁴⁹

In 2018, a major political event took place in Timor-Leste when on 26 January the President dissolved the National Parliament and called for early election on 12 May. The President's decision came as the country was embroiled in a political deadlock or stalemate following the 2017 parliamentary election where the government failed to have its program and budget approved in Parliament. In May, the pre-elections took place in a peaceful, free and democratic manner without any major violence and human rights violations.⁵⁰

The National Parliament actively promotes public participation in decision-making and in the legislative process. For instance, in April 2019 the Parliament adopted Resolution No. 7/2019 which established a program called "*voice of people*." This program has three pillars namely "*the debate of citizen, participative budget and right to petition*."⁵¹

Even though, Timor-Leste is a free and democratic country, restrictions on the right to freedom of peaceful assembly remain enshrined in law. Article 5 of Law No. 1/2006 on the Right to Freedom of Assembly⁵² requires a minimum distance of 100 meters between a public assembly and public buildings. However, in Dili - the capital of Timor Leste - public buildings are less than 100 m from one another. The Police are allowed to disperse any assembly that is in violation of this provision⁵³ and often resort to excessive force to do so.⁵⁴

In addition, police also uses excessive of force when preventing ambulant sellers from selling goods on the side of the roads and also when dispersing peaceful demonstrators. For instance, in some cases the police destroyed all of the sellers' goods.⁵⁵ The police also used excessive force when street vendors and ambulant sellers, with the support of social movement, conducted a peaceful protest against the local government's policy to prohibit the selling of goods at street sides and in public places;

⁴⁹ See Chapter II of the Constitution on personal rights, liberties and guaranties.

⁵⁰ European Union, Election Expert Mission to Timor Leste, April/May 2018, p. 14: https://reliefweb.int/sites/reliefweb.int/files/resources/final_report_eem_timor_2018_-_english.pdf.

⁵¹ The Parliament resolution is available in Portuguese at: http://www.mj.gov.tl/jornal/public/docs/2019/serie_1/SERIE_I_NO_17.pdf.

⁵² The law is available in Portuguese in the Journal of the Republic, p. 1124, available at: http://www.mj.gov.tl/jornal/public/docs/2006/serie_1/serie1_no2.pdf.

⁵³ Law No. 1/2006, Article 7.

⁵⁴ US State Department of State, 2018 Country Reports on Human Rights Practices: Timor-Leste, Section 1, available at: <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/timor-leste/>.

⁵⁵ PDHJ, 'PDHJ Halo Monitorizasaun Ba Atuasaun PNTL Hasaru Vendedores Ambulante,' 5 April 2019, available at: <http://pdhj.tl/pdhj-halo-monitorizasaun-ba-atuasaun-pntl-hasoru-vendedores-ambulante/>.

also the protest of university students against the decision of the National Parliament to buy new cars for Members of the Parliaments (MPs).⁵⁶

The Police also used excessive force for policing communities.⁵⁷ Article 34 of the Law No. 5/2017 relating to some martial art gangs that are sometimes involve in killings or arsons, gives power to the PNTL to check, search and seize any suspicious place and car without any prior authorization from a court.⁵⁸ For instance, on 4 July 2019, members of one martial art gang attacked another and left two people dead and three injured in Leorema village of Liquisa Municipality.⁵⁹ This situation has led the PNTL and F-FDTL on 26 July 2019 to say that they were ready to violate human rights if certain martial art gangs continued to destabilise peace and stability.⁶⁰ Article 36 of the law authorises the PNTL to use fire or to shoot in cases of self-defence, as an ultimate solution to avoid the escape of a suspect. On the ground, the Police have misused these provisions by using excessive force, and injuring or sometimes killing ordinary people.⁶¹

5. Role of PDHJ in Addressing the Democratic and Civic Space

As mentioned above, PDHJ can monitor, review and make recommendations on draft laws and other regulations and policies to ensure their consistency with international human rights law and standards.⁶² PDHJ should have therefore used its mandate to advocate amending laws that are not fully consistent with international legal instruments such as the Law on the Freedom of Assembly, the Law on the Use of Firearms or Shooting and the Law on Media or Social Communication, particularly its Article 11 which restrict media freedom.⁶³ According to JSMP's observation and based on its interview with the Former Deputy Provedor on Human Rights,⁶⁴ it appears that the PDHJ has not yet fully executed this mandate due to financial constraints and a lack of qualified human resources.

The PDHJ also has the power to request the Supreme Court of Justice to review the constitutionality of legislative measures as well as to declare unconstitutional any legislative measure that is contrary to the Constitution.⁶⁵ However, since its establishment PDHJ has never

⁵⁶ See the statement of Timor-Leste NGO Forum (FongTil) available at:

<https://www.easttimorlawandjusticebulletin.com/2018/11/timor-leste-legal-news-headlines-13-14.html>.

⁵⁷ Helen Davidson, 'Timor Leste: drunk police officer's alleged killing of three teenagers sparks protests,' *The Guardian*, 20 November 2018, available at: <https://www.theguardian.com/world/2018/nov/20/timor-leste-drunk-police-officers-alleged-killing-of-three-teenagers-sparks-protests>.

⁵⁸ Law on Legal Arrangement Concerning the Practice of Martial Arts, Rituals, Cold Steel Weapons and Rama Ambon, in *Journal of the Republic*, p. 613, available at:

http://www.mj.gov.tl/jornal/public/docs/2017/serie_1/SERIE_I_NO_15.pdf.

⁵⁹ *Independente*, 'Police and Military launch joint crack-down on martial arts gangs,' 7 August 2019, p. 4, available at: https://www.guideposttimor.com/daily_news.pdf.

⁶⁰ See related article entitle "F-FDTL and PNTL ready to violate human rights:

https://www.guideposttimor.com/daily_news.pdf

⁶¹ East Timor Law and Justice Bulletin, 'Police murder three citizens as East Timor enters new crisis', 22 November 2018, available at: <https://www.easttimorlawandjusticebulletin.com/2018/11/police-murder-three-citizens-as-east.html>.

⁶² Law No. 7/2004 amended by the Law No. 8/2009, Article 24 d) and e).

⁶³ Law No. 5/2014 on media is available in Portuguese at:

http://www.mj.gov.tl/jornal/public/docs/2014/serie_1/SERIE_I_NO_39.pdf.

⁶⁴ Interview with Dr. Horacio de Almeida, Deputy Ombudsman for Human Rights and Justice, 14 July 2016.

⁶⁵ Constitution of the Republic of Timor-Leste, Articles 150 and 151.

referred any legislative measures to the Supreme Court of Justice. According to the Deputy Provedor, PDHJ has not exercised its mandate in that regard due to a lack of in-house expert and legal knowledge.⁶⁶ However, the budget of the PDHJ in 2018 was \$1,129,354, less than 30% of the budget of 2017⁶⁷ and in 2018 it had 116 staffs (40 women and 70 men). The total number of public employees is 92 people and the number of contracted employers is 24.⁶⁸ This is a significant staff number, it is therefore questioning that none of them is qualified to conduct legal analysis of any draft or existing law.

Regarding the cases of human rights violations, particularly the excessive use of force, PDHJ has in many occasions taken immediate actions.⁶⁹ For instance, when the police and civil security services of Dili municipality dispersed street vendors and ambulant sellers⁷⁰ or when it dispersed protests by university students,⁷¹ the PDHJ directly intervened and conducted mediation.⁷²

In addition, PDHJ has been conducting trainings for PNL and F-FDTL members on human rights protection and promotion as a prevention measure. According to PDHJ 2018 Annual Report, 333 PNL and 97 F-FDTL members took part in the training.⁷³ However, the police and military sometimes still resort to excessive force. The PDHJ should therefore consider evaluating and reviewing its materials, and audience in order to have greater impact.

6. Conclusion and Recommendations

PDHJ has overall been performing its duties to protect and promote human rights as provided in the Paris Principles, Timor-Leste's Constitution and laws, although there are still improvements to be made.

Under the Constitution and founding Law, PDHJ has a sufficient and broad set of powers and competences to protect and promote human rights. However, the main limitations that PDHJ faces in fully implementing its mandate are related to human and financial resources including facilities.

Despite these limitations, PDHJ has tried to make use of its constitutional and legal competencies and powers and has implemented some of the previous ANNI recommendations, including by making more effort to call or request for reviews of unconstitutionality in cases of human rights violating legislation.

⁶⁶ Interview with Dr. Horacio de Almeida, Deputy Ombudsman for Human Rights and Justice, 14 July 2016.

⁶⁷ PDHJ, Annual Report 2018, p. 81-82.

⁶⁸ PDHJ, Annual Report 2018, p. 73-74.

⁶⁹ Ibid.

⁷⁰ See relevant information available in Tetun at: <http://pdhj.tl/pdhj-halo-monitorizasaun-ba-atuasaun-pntl-hasoru-vendedores-ambulante/>.

⁷¹ Reuters, 'East Timor police fire tear gas during student protests,' 21 August 2017, available at: <https://www.reuters.com/article/us-timor-protests-idUSKCN1B11R9>.

⁷² See relevant information available in Tetun at: <http://www.tatoli.tl/2019/07/12/pdhj-sei-promove-mediasaun-entre-vendedor-no-autoridade-munisipal-dili/>.

⁷³ PDHJ, Annual Report 2018, p. 15-19.

6.1 Recommendations

To the National Parliament:

- 1) Continue to consider and discuss PDHJ's Annual Report, particularly the recommendations addressed to state institutions that have committed human rights violations but did not implement PDHJ's recommendations, and hold these state institutions to account;
- 2) Consider allocating and approving a sufficient state budget to PDHJ in order to allow the full implementation of its strategic plan for 2011-2020, and enable it to recruit more qualified staff to perform investigations and legislative analysis; and
- 3) Review the laws that are not consistent with international human rights law and standards and in particular amend Law No. 1/2006 on the Freedom of Assembly and Demonstration to ensure it complies with the above mentioned laws and standards.

To the PNTL and F-FDTL:

- 1) Implement all recommendations made by PDHJ regarding human rights violations committed by PNTL or other public institutions;
- 2) Refrain from using excessive force to address problems in communities and peaceful public demonstrations; and
- 3) Promote capacity building in human rights protection and promotion, and professionalism in order to ensure respect for human rights by all state agents.

To PDHJ:

- 1) Be more proactive in protecting and promoting human rights not only through monitoring and publishing reports, but also by making public statements or declarations against any action of state institutions or organs contrary to the Constitution and laws, and that violate human rights;
- 2) Seriously address the issue of the excessive force used by police and Army forces in order to ensure these state institutions refrain from committing human rights violations;
- 3) Include in its budget proposal a sufficient amount to be allocated for the recruitment of experts in the area of legislative analysis and investigation in order for PDHJ to fully use its constitutional and legal mandates;
- 4) Recommend and advocate for the amendment of existing laws that contradict international human rights law and standards and in particular Law No. 1/2006 on the Freedom of Assembly and Demonstration;
- 5) Evaluate and review the materials and audience of its trainings on human rights protection and promotion to PNTL in order to improve it;
- 6) Continue to provide training to PNTL, particularly to the commanders so that they can train their members and give order to protect and promote human rights in order to decrease the number of cases of human rights violations, especially cases of excessive use of force; and
- 7) Continue to strengthen cooperation with civil society through using the consultative council in order to share information on human rights development and also on the protection and promotion of human rights and justice.

BANGLADESH: NEARING A DECADE- QUEST FOR AN INDEPENDENT AND EFFECTIVE NHRC CONTINUES

Ain o Salish Kendra (ASK) and Human Rights Forum Bangladesh (HRFB)¹

1. Introduction

This report was jointly prepared by Ain o Salish Kendra (ASK) and the Human Rights Forum Bangladesh (HRFB), a coalition of 20 human rights and development organisations based in Bangladesh. Findings of the report rely on the authors' own experiences of interacting with the National Human Rights Commission of Bangladesh (Commission),² as well as civil society organisations (CSOs) and local and national level human rights defenders (HRDs). Information was also collected from relevant human rights reports and publications, and the Commission's website.³

This report is a critical assessment of the Commission's work in 2018, as well as the first five months of 2019. In particular, it assesses the role of the Commission in the context of Bangladesh's democratic backsliding and the contraction of civic space.

In 2018, the Commission made progress on a number of fronts. Among others, it opened and activated a 'hotline' number to receive complaints and provide information to the general public;⁴ received approval to appoint more staffs to conduct investigation; recruited new staffs from more diverse gender, ethnic, and religious backgrounds and opened two new offices, one in Cox Bazaar in 2018, and one in Gopalganj in June, 2019.

It also actively participated in Bangladesh's Universal Periodic Review (UPR) review session in May 2018 and later shared with the Government an analysis of the recommendations it had noted or was considering with a view to get the government to accept key UPR recommendations such as: the ratification of the Optional Protocol to the Convention against Torture (OP-CAT).⁵

The Commission also assisted in drafting several National Action Plans (NAPs) including the Government's National Action Plan on persons with disabilities, adopted in December 2018. However, the Commission does not have a robust mechanism to monitor the status of implementation of the laws and Action Plans it provided assistance to.

The Commission is yet to take a stronger stand for the protection of civil and political rights and to actively address human rights violations committed by state security agencies. Time and again, the Commission has not adequately used its broad mandate to act on cases of Enforced

¹ The Bangladesh Chapter of ANNI report 2019 is jointly developed by Ain o Salish Kendra (ASK, website: <http://www.askbd.org/ask/>) and Human Rights Forum Bangladesh (HRFB).

² Interviews were conducted with the Commission's Chairperson as well as their staffs.

³ Available at: <http://www.nhrc.org.bd/>.

⁴ The hotline number is: 16108.

⁵ NHRC, 'Analysis of 3rd UPR Cycle Recommendation,' available at:

https://nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/notices/e611ea00_e831_4008_8622_bc1e19ca624b/UPR%20-%20Analysis%20of%203rd%20Cycle%20Recommendations.pdf

Disappearances (EDs), Extrajudicial Killings (EJKs), torture, restrictions on freedom of expression, peaceful assembly and association; and impunity.

2. Overview

Civil society in Bangladesh highly expected that after almost a decade of operations the Commission would have become a strong institution that protects human rights. Unfortunately, this expectation remains unfulfilled.

The National Human Rights Commission Act, 2009 (NHRC Act) gives the Commission a broad mandate to protect, promote, and ensure human rights.⁶ To fulfil this aim the Commission can, for instance, investigate complaints; visit jails, hospital and places of police custody; conduct research on human rights issues; raise awareness about human rights; and provide trainings.⁷

However, the Global Alliance of National Human Rights Institutions (GANHRI) Sub Committee on Accreditation (SCA), in its 2011 and 2015 review, identified a number of shortcomings in the NHRC Act, and therefore only accorded a ‘B’ status to the Commission.⁸ They are:

- An inadequate definition of human rights;
- A lack of transparency in the selection process of members;
- A lack of complete freedom in financial matters; and
- A limited mandate in matters of investigating allegations of rights violation committed by security forces.

In March 2018, during Bangladesh’s review by the UN Committee on Economic, Social and Cultural Rights, the Committee expressed concern about the Commission’s lack of independence and in particular: the Commission’s B status; its limited mandate to work on economic, social and cultural rights; its lack of adequate freedom, especially in addressing financial matters; as well as concerns regarding human resource shortage.⁹ The Committee went on to recommend reviewing the NHRC Act in order to expand the Commission’s jurisdiction.

However, these shortcomings are yet to be addressed. According to the Commission it prepared a review of the Act in 2013,¹⁰ and subsequently sent a letter to the Ministry of Law, Justice and Parliamentary Affairs on 11 February 2015, specifically asking for the amendment of Section 7 of

⁶ National Human Rights Commission Act, Act No. 53, 14 July 2009 (NHRC Act), available at: <http://nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/npfblock/NHRC%20Act%20English.pdf>

⁷ NHRC Act, Section 12.

⁸ 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 (SCA)’, Geneva, 23 – 27 May 2011, p. 7, available at: [https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20REPORT%20MAY%202011%20-%20FINAL%20\(with%20annexes\).pdf](https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20REPORT%20MAY%202011%20-%20FINAL%20(with%20annexes).pdf).

⁹ Committee on Economic, Social and Cultural Rights (CESCR), Concluding observations, E/C.12/BGD/CO/1, 18 April 2018, Section C, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/BGD/CO/1&Lang=En

¹⁰ ANNI Report, 2015, available at: <http://www.askbd.org/ask/2015/08/31/bangladesh-failing-fulfil-commitments/>.

the NHRC Act, which relates to the selection committee of its members. However, the Commission did not conduct rigorous advocacy with the Government to amend the whole law in the following years.

The way the Commission's budget is allocated also continues to restrict its autonomy, as it does not fall within the purview of the Parliament.¹¹ It is, however, noteworthy that the Commission's budget has significantly increased in the last three years. While back in 2015-2016, the budget allocated to the Commission was around 40 million taka (43,096,000), in 2018-19 the budget was above 60 million taka (60,760,000); amounting to about a 41% increase.¹²

3. Commission's Performance in Promoting and Protecting Human Rights

Complaints Handling

While it is possible to file a complaint with the Commission online, and through the newly created hotline number, it remains difficult to know the status of the complaint once filed. The only option for a complainant to find information about the status of his/her complaint is to contact the responsible person within the Commission.

In many instances, following a complaint the Commission takes very limited actions. For instance, it issues a public statement or sends notices and reminders to the Home Ministry and other relevant ministries to address the human rights violation in question. However it fails to carry out any effective follow-up with the relevant authorities on the information received by the Commission and to use all its powers under the NHRC Act to ensure accountability (See Section below on Democratic Space for more information).

In 2018, ASK sent a total of 51 letters to the Commission, requesting that it looked closely at specific human rights violations, such as abduction by Law Enforcement Agencies (LEAs), EDs, EJKs through crossfire under the anti-drug drive, journalist harassment, death in jail and police custody, and allegations of torture. ASK received a total of 154 letters from the Commission, responding to 37 of those letters, providing update on the issues. Based on the Commission's responses it appears that, at most, it sent notices and letters to the relevant authorities, asking for the inquiry/investigation reports on such incidences. When the authorities failed to send them the report, the Commission proceeded to sending another letter/notice reminding them to send the report with an extended deadline. Very rarely did the Commission receive reports from the relevant authorities or decided to investigate the matter *suo moto*.

In one positive outcome, however, in 2019, an innocent man was released from jail after three years in detention, following a complaint to the Commission. Jaha Alam is a 32-year-old man who was wrongfully arrested in January 2016 following charges filed by the Anti-Corruption Commission (ACC) for misappropriating important amounts of money from the Sonali Bank. According to the Commission, Jaha Alam's brother filed a complaint on 28 January 2018.¹³ The

¹¹ ANNI Report, 2018, 130-149, available at: https://www.forum-asia.org/uploads/wp/2018/12/2018_ANNI-Report_FINAL.pdf.

¹² Information provided by the Commission.

¹³ *Daily Sun*, 'NHRC stands up for Jaha Alam,' 7 May 2019, available at: <https://www.daily-sun.com/printversion/details/390406/2019/05/07/NHRC-stands-up-for-Jaha-Alam->.

Commission Chairperson¹⁴ therefore immediately visited Jaha Alam in Kashimpur jail and investigated the case. It found that the allegation of wrongful imprisonment was true and subsequently sent its findings to the ACC on 24 May 2018 and also met with the ACC's Chairman.¹⁵ The Commission also provided free legal aid to Jaha Alam. In February 2019, following high media attention and the Commission's intervention, the ACC acknowledged its mistake and the High Court finally ordered Jaha Alam's release.¹⁶ He was acquitted from all the allegations.

Another incident that received the Commission's special attention is the case of Khadija Akhter, a 12 years old domestic help, who was abused by her employers and rescued on 6 December 2013 by the police. Following the news, the Children Charity Bangladesh Foundation approached the Commission seeking appropriate action against police for not filing a criminal case against her employer. The Commission initially asked the Police the reasons why they did not file a case against the employer. In the Police's report, it was mentioned that no action was taken primarily because Khadija was admitted in the hospital for 'skin problems' only and that Khadija's father did not bring any charge against the employer.¹⁷

After the Charity pointed out to the Commission that the Police report did not contain any medical reports, the Commission approached Dhaka Medical College Hospital for Khadija's medical reports. It showed that Khadija had multiple injuries and a swelling in her right leg; she also had dermatitis and was under-nourished. She also had a healed cut mark on her tongue. It was mentioned in the report that her medical treatment lasted for more than two weeks. The Commission therefore sent a notice to the Home Ministry on 5 August 2014 questing an investigation into the police's conduct and for due action to be taken.¹⁸ Although the notice was sent to the Ministry of Home Affairs for a total of 18 times, the Commission has not received any responses.¹⁹

The Commission could have, however, taken additional steps to ensure justice for Khadija.²⁰ Yet, it only expressed concerns on human rights issues and sent letters and notices to relevant authority requesting for reports. Despite its wide mandate, it has yet to undertake interventions in order to ensure compensation, rehabilitation, and sufficient measures to prevent the repetition of such incidents, or file writ-petitions on behalf of victims to the High Court.

¹⁴ Please note that at the time of writing the Chairperson was Kazi Reazul Haque who changed on 1 July 2019. Therefore when the author refers to the Chairperson, he refers to the Chairperson in place before 1 July 2019.

¹⁵ Information provided by the Commission.

¹⁶ Star Online Report, 'Nat'l rights boss thanks media for Jaha Alam's release' *The Daily Star*, 6 February 2019, available at: <https://www.thedailystar.net/country/national-human-rights-commission-chairman-thanks-media-for-jaha-alam-release-1698259>.

¹⁷ Bishakha Devnath, 'Immense power, little application', *The Daily Star*, 29 June 2019, available at: <https://www.thedailystar.net/frontpage/nhrc-report-immense-power-little-application-1763932>.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ It could have, for instance, approached the High Court Division under Section 19(1)(b) of the NHRC Act on the lack of response from the Home Ministry; provided legal support to her; or sought compensation for her.

Finally, it is important to note that on 16 June, the Commission finalised its draft rules on mediation, which will govern the appointment of a mediator or councillor.²¹

Human Rights Violations by LEAs

According to statistics compiled by ASK, a total of 632 persons were killed by LEAs either in custody, shout outs, encounters, gunfight, or crossfire between January 2018 and May 2019.²² Another 43 persons were allegedly victims of EDs.²³ Despite the high number of allegations of EJKs and EDs, the Commission continues to claim that the NHRC Act²⁴ only grants it the power to ask for reports from the authorities but not the power to independently investigate cases.²⁵ However, civil society and lawyers all disagree with this interpretation and rather advises the Commission to exercise the full range of its powers and functions.²⁶

In May 2014, the Commission made two very important recommendations to the Government to combat EJKs and EDs: (1) to halt operations of LEAs in civilian clothes; and (2) to have at least two witnesses during police interventions and arrests.²⁷ In 2016, the Commission also expressed its concerns over the lack of response of relevant authorities to its letter of inquiry to the Home Ministry about allegations of human rights abuses by the police.²⁸ However, no effective implementation of the recommendations is yet visible.

According to the Commission, a total of 665 complaints were lodged in 2016, of which 186 were disposed (27.97%).²⁹ In 2017, a total of 644 complaints were lodged, of which 356 were disposed

²¹ Bishakha Devnath, 'NHRC sitting on draft rules for a decade' *The Daily Star*, 29 June 2019, available at: <https://www.thedailystar.net/frontpage/news/nhrc-sitting-draft-rules-decade-1763917>.

²² ASK, 'Death by Law Enforcement Agencies: January-December 2018,' available at: <http://www.askbd.org/ask/2019/01/14/death-law-enforcement-agencies-january-december-2018/> and 'Death by Law Enforcement Agencies: January-May 2019,' available at: <http://www.askbd.org/ask/2019/06/17/death-by-law-enforcement-agencies-january-may-2019/>.

²³ In the year 2018 alone, 34 were allegedly abducted, 15 have been shown arrested while two were released after abduction. ASK, 'Enforced Disappearance: January-December 2018,' available at: <http://www.askbd.org/ask/2019/01/14/enforced-disappearance-january-december-2018/>. From January to May 2019, among the nine individuals that were allegedly abducted, one has been shown arrested while two were released after abduction. 'Enforced Disappearance: January-May 2019,' available at: <http://www.askbd.org/ask/2019/06/17/enforced-disappearance-january-may-2019/>.

²⁴ NHRC Act, Section 18.

²⁵ Staff Correspondent, 'Extrajudicial Killings: 437 victims in 10 months,' *The Daily Star*, 21 November 2018, available at: <https://www.thedailystar.net/country/437-extra-judicial-killings-in-bangladesh-in-2018-ask-1663150>.

²⁶ ASK, 'National Human Rights Commission, Bangladesh: Existing Challenges and Expectations of Civil Society,' December 2018, p. 19, available at: <https://www.askbd.org/ask/2019/02/13/nhrc-existing-challenges-expectation-civil-society/>.

²⁷ Ahmad Sayeed, 'Failing to fulfill commitments,' *The Daily Star*, 5 March 2016, available at: <https://www.thedailystar.net/op-ed/politics/failing-fulfill-commitments-786586>.

²⁸ The Commission has sent a total of 185 letters to the Home Ministry between 2012 and 2017. 154 concerned allegations against security forces. Of these, 32 cases involved custodial deaths and torture, 25 involved disappearances, 112 involved extra-judicial killings, and some involved various allegations of harassment. See, *The New Nation*, 'Home Ministry Silent on Specific Allegations,' 25 December 2017, available at: <http://thedailynewnation.com/news/158995/home-ministry-silent-on-specific-allegations.html>.

²⁹ Besides, 27 additional complaints were lodged *suo moto* by the Commission itself. 12 of such were on torture of which only three were disposed and nine remained pending. National Human Rights Commission of Bangladesh, Annual Report, 2016, p. 36, available at:

(55.28%).³⁰ In 2018, a total of 728 complaints were lodged, of which 589 were disposed (80.91%).³¹ In comparison to 2016, this shows a 52.94% increase in the amount of complaints disposed.

The table below shows an excerpt of a table in the Commission’s Annual Report 2018 only focusing on human rights violations committed by LEAs:³²

Table 1 Complaints received by the Commission in 2018 relating to violations by LEAs

Type of Complaint	Disposed	Under Consideration	Total
Death in Custody	0	7	7
Torture in Custody	1	4	5
Extrajudicial Killings	4	9	13
Allegations against LEAs	34	12	46

It appears that although the Commission did succeed in responding to more cases in 2018 than 2017 and 2016, it remained very limited when it came to complaints against LEA. All the seven complaints of death in custody are still pending. Only one out of five complaints relating to torture was solved and only four out of 13 complaints relating to EJK were disposed. The table mentions that 34 out of 46 allegations against the LEA were solved. However, it provides no information regarding the type of violations. Therefore, it appears that the 52.94% increase in the number of complaints dealt with by the Commission, is not reflected among the complaints made against the LEAs.

Furthermore, although the rate of responses did increase, the effectiveness of such response is questionable. In most cases the Commission classifies a case as solved/disposed when the Government replied that no evidence had been found of any involvement of LEAs into human rights violations or that the investigation is still pending/under consideration. In an interview with the Commission’s Chairperson, he shared that only in a handful of cases, did the authorities state that steps had been taken against those responsible. When asked whether the Commission had raised this concern with the relevant authority, he replied that they did in different meetings.

http://nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/cb8edec9_5aee_4b04_bf2a_229d9cd226a0/Annual%20Report%202016.pdf.

³⁰ National Human Rights Commission of Bangladesh, Annual Report, 2017, p. 24, available at: http://nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/cb8edec9_5aee_4b04_bf2a_229d9cd226a0/Annual%20Report%20English%202017-compressed.pdf.

³¹ National Human Rights Commission of Bangladesh, Annual Report, 2018, pp. 21-22, available at: http://nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/cb8edec9_5aee_4b04_bf2a_229d9cd226a0/Annual%20Report-2018%20English.pdf.

³² National Human Rights Commission of Bangladesh, Annual Report, 2016, p. 36.

The new government's 'Zero Tolerance' policy on drugs, offers a sad illustration of the Commission's limited willingness to investigate and seek accountability in cases involving the state security forces. According to statistics compiled by ASK, a total of 369 persons were killed during the anti-narcotics drive from 15 May 2018 to 31 May 2019.³³ Though LEAs have time and again insisted that these deaths were the result of 'crossfire', news reports and families of the victims have always claimed differently.³⁴

Following the death of nine drug dealers on 22 May 2018, the Commission's Chairperson emphasised that while the drug dealers must be brought under legal proceedings, and given exemplary punishment, the drives must be conducted in line with human rights principles and existing laws of the land.³⁵ On 28 May 2018, the Commission also submitted a demi-official (DO) letter to the Minister of Home Affairs, requesting that the human rights of the suspect/accused were ensured during such drives, and that the LEAs must avoid the use of excessive force.³⁶

On 28 May 2018, the Commission also sent guidelines to the Home Minister for the LEAs to follow during the anti-drug drives.³⁷ The guidelines for instance recommend that arrested persons should not be taken along during drug raids; that an executive magistrate should be asked to accompany the police during the raids; and that if an unwanted death takes place, investigation is carried out and the responsible person held accountable. However, the Commission did not follow up on whether the Government actually directed LEAs to follow these guidelines.

Another example is the killing on 26 May 2018, in Teknaf, of Counsellor Ekramul Haque (46) in 'crossfire' with the Rapid Action Battalion (RAB). On 29 May in a press conference, Ekramul's family released four audio clips that contained several voices, gunshots, and screams. At the press conference, Ekramul's wife alleged that her husband's killing was instead pre-planned. Speaking about this incident, the Commission's Chairperson told the media that all extra-judicial killings by LEAs, in the name of 'crossfire' during the anti-narcotics drive or any other operation in the country, must end immediately.³⁸ He added that there should be a fair investigation into Ekramul's murder. On the afternoon of 24 June, the Chairperson met Ekramul's mother and told her that the Commission was trying to investigate the killing and ensure justice. More than a year later, the Commission has, however, not issued any follow-up information or activities. To this day, the killers of Ekramul have not been brought to account.

³³ Documentation Unit, ASK (Collected from national dailies and its own sources).

³⁴ Staff Correspondent, 'Extrajudicial Killings: 437 victims in 10 months,' *The Daily Star*, 21 November 2018, available at: <http://www.askbd.org/ask/2018/05/30/119-people-succumbed-death-crossfire-15-days-anti-drug-drive-ask-expresses-grave-concern-condemnation/>.

³⁵ *The Daily Star*, 'ENSURE ACCOUNTABILITY: What they think of ongoing drives,' 28 May 2018, available at: <https://www.thedailystar.net/frontpage/what-they-think-1582501>.

³⁶ The letter from the Commission to the Ministry is available in Bangla at: http://nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/4f3b9623_eb4d_4d8d_842c_a33c549669aa/DO%20MOHA%2028-May-2018%2016-25-44.pdf. See also Asia-Pacific Forum, 'Uphold human rights in anti-drug push, NHRC urges,' 4 June 2018, available at: <https://www.asiapacificforum.net/news/uphold-human-rights-anti-drug-push-nhrc-urges/> and; *Prothom Alo*, 29 May 2018, available at: <https://www.prothomalo.com/bangladesh/article/1498686/>.

³⁷ The Commission's letter is available in Bangla at: <http://nhrc.org.bd/site/notices/b6647353-72ef-40de-9e28-5d2780387bbb/>.

³⁸ *Times of Bangla*, 3 June 2018, available at: <https://www.timesofbangla.com/satkahon/16528>.

The case of the arrest of Shahidul Alam, a renowned photographer and social activist, by plainclothes officers in the early hours of 6 August 2018 offers another example. Shahidul Alam was later charged under the controversial Section 57 of the Information and Communication Technology Act, 2013 (ICT Act), which prohibits the publication of fake, obscene or defaming information in an electronic form.³⁹ In court, Shahidul Alam alleged that he had been tortured in custody by the Detective Branch Police (DB).⁴⁰ His partner informed the Commission by letter that Shahidul had been mentally and physically tortured while in custody, to the extent that he was bleeding. According to the Commission, it sent a written recommendation to the Home Ministry asking it to direct the authorities to follow the Constitution, existing laws, and the guidelines (on arrest and remand) given by the High Court.⁴¹ However, the Commission did not issue any public comments.

A more recent example is the disappearance of Michael Chakma, top leader of the United People's Democratic Front (UPDF) based in Chittagong Hill Tracts who is also the central General Secretary of the United Workers' Democratic Front (UWDF). Michael Chakma has been missing since 9 April 2019. He was last heard of when he was on his way to Dhaka from Kanchpur in Narayanganj.⁴² ASK requested the Commission to send a letter to the Home Ministry, asking it to take necessary steps to 'rescue' the missing leader. On 5 May 2019, the Commission sent a letter to the Public Security Division of the Ministry asking it to provide a report by 20 May on the actions it has taken to rescue him.⁴³

Victim's Compensation

The Commission can recommend to the Government the allocation of compensation to victims of human rights violations.⁴⁴ It is commendable that the Commission has committed to help Jaha Alam in getting compensation from the State.⁴⁵ However, this is something the Commission should have also done in other incidents, such as in the case of Khadija Akhter or that of Limon Hossain, a youth shot in the leg by RAB in 2011. In that case, the Commission did not provide him with any legal support in his case against RAB, neither did he receive any assistance from them seeking compensation.⁴⁶

³⁹ ICT Act, Section 57, available at: <http://www.icnl.org/research/library/files/Bangladesh/comm2006.pdf>.

⁴⁰ Staff Correspondent, 'Tortured in custody,' *The Daily Star*, 7 August 2018, available at: <https://www.thedailystar.net/city/whereabouts-shahidul-alam-still-unknown-family-1616650>.

⁴¹ *Samakal*, 8 August 2018, available at: <http://samakal.com/todays-print-edition/tp-khobor/article/18081705/>.

⁴² Tribune Desk, 'UPDF organizer Michael Chakma 'missing' for 6 days,' *Dhaka Tribune*, 15 April 2019, available at: <https://www.dhakatribune.com/bangladesh/nation/2019/04/15/updf-organizer-michael-chakma-missing-for-6-days>.

⁴³ Staff Correspondent, 'NHRC asks home ministry to find out Michael Chakma,' *New Age Bangladesh*, 7 May 2019, available at: <http://www.newagebd.net/article/71714/nhrc-asks-home-ministry-to-find-out-michael-chakma>.

⁴⁴ NHRC Act, Section 19 (1).

⁴⁵ Star Online Report, 'Nat'l rights boss thanks media for Jaha Alam's release,' *The Daily Star*, 6 February 2019, available at: <https://www.thedailystar.net/country/national-human-rights-commission-chairman-thanks-media-for-jaha-alam-release-1698259>; and *The Daily Sun*, 'NHRC stands up for Jaha Alam,' 7 May 2019, available at: <https://www.daily-sun.com/printversion/details/390406/2019/05/07/NHRC-stands-up-for-Jaha-Alam>.

⁴⁶ Bishakha Devnath, 'Immense power, little application,' *The Daily Star*, 29 June 2019, available at: <https://www.thedailystar.net/frontpage/nhrc-report-immense-power-little-application-1763932>.

Interaction with the Judiciary

In March 2019, the High Court Division of the Supreme Court noted that the Commission had failed to use its mandate in the prominent case of torture of 12 years old Khadija Akhter. According to the NHRC Act, the Commission may submit a petition before the High Court Division of the Supreme Court on behalf of an aggrieved person.⁴⁷ However, in the case of Khadija Akhter the Commission only repeatedly sent letters to the Home Ministry but failed to take any further action such as approaching the court for requesting compensation.⁴⁸

Publication of Findings and Reports

Finally, the Commission has continued to fail to publicly share important information and analysis on the human rights situation of the country. 30 March is the due date for the Commission to submit its Annual Report to the President.⁴⁹ However, the Commission is consistently late in submitting it.⁵⁰ The Commission submitted its Annual Report 2017 in February 2019,⁵¹ almost a year later. Moreover, the 2017 report does not include the issues that are still pending with different government institutions.⁵² While the Annual Report mentions the Commission's activities it also does not contain any analyses and recommendations on the country's human rights situation, nor any justification on the reasons why it could not address certain issues.⁵³

4. Democratic Space in Bangladesh

The year 2018 was a particularly eventful year for Bangladesh. In December the 11th National Parliamentary Election of Bangladesh was held. Since the announcement of the election, opposition parties have been blocked from carrying out political activities, by for instance being prevented from participating in election campaigning, or through alleged fabricated mass arrests.⁵⁴ According to the main opposition party's lawyers hundreds of thousands of opposition party members were named in police reports and subsequently arrested.⁵⁵ Lawyers argued that these mass arrests were politically motivated with a view to prevent opposition members from

⁴⁷ NHRC Act 2009, Section 19(b).

⁴⁸ Star Online Report, 'NHRC not discharging legal responsibilities over torture on Khadija: HC,' 6 March 2019, available at: <https://www.thedailystar.net/city/news/nhrc-not-discharging-legal-responsibility-over-torture-househelp-khadija-hc-1711372>.

⁴⁹ NHRC Act 2009, Section 22(2).

⁵⁰ *Daily Sun*, 'NHRC submits annual report to president,' 17 February 2019, available at: <https://www.daily-sun.com/post/372515/2019/02/20/NHRC-submits-annual-report-to-president>.

⁵¹ Ibid.

⁵² National Human Rights Commission of Bangladesh, Annual Report 2017.

⁵³ ASK, 'National Human Rights Commission, Bangladesh: Existing Challenges and Expectations of Civil Society,' December 2018, available at: <https://www.askbd.org/ask/2019/02/13/nhrc-existing-challenges-expectation-civil-society/>.

⁵⁴ Arafatul Islam, 'Bangladesh election: what you need to know,' *Deutsche Welle*, 21 December 2018, available at: <https://www.dw.com/en/bangladesh-election-what-you-need-to-know/a-46830140>.

⁵⁵ Tribune Desk, 'Oppositions decry large scale arrests ahead of polls,' *Dhaka Tribune*, 20 December 2018, available at: <https://www.dhakatribune.com/bangladesh/election/2018/12/20/oppositions-decry-large-scale-arrests-ahead-of-polls>.

participating in the election campaigns.⁵⁶ Election results were also marred by allegations of vote rigging⁵⁷ and irregularities.⁵⁸

The overall civic space in Bangladesh has continued to shrink to the extent that not only journalists, but civil society actors as well, refrain from strongly voicing out criticism in fear of being attacked by both state and non-state actors. This fear is rooted in the enactment and misuse of repressive laws, and brutal attacks on bloggers, publishers and free thinkers by militant groups. For instance, a total of 244 journalists were harassed from January 2018 to April 2019.⁵⁹ According to the World Press Freedom Index 2019, Bangladesh has fallen four ranks from its stance in the previous year.⁶⁰ The reasons cited include the attack on journalists during the 11th National Parliamentary Election, blocking of websites during the election, the arrest of Shahidul Alam as has been mentioned above, and the enactment of the Digital Security Act 2018 (DSA).

For instance, in June 2018, writer-publisher, Shahjahan Bachchu, was shot to death. According to his daughter he had been receiving threats before his killing. It is suspected that religious extremists killed him because of his writings.⁶¹ In another case, in July 2018, a former leader of Bangladesh Chhatra League (BCL),⁶² Awami League, filed a case against Assistant Professor Maidul Islam, under Section 57 of the ICT Act for posting derogatory remarks about the Prime Minister on Facebook. He was sent to Chittagong Central Jail on 24 September 2018 but was later released on bail on 30 October 2018.⁶³

The year 2018 was also spiked with multiple events of people taking to the streets to demand their rights. Sadly, law-enforcing agencies have often responded by resorting to excessive force. For instance, in April 2018, university students and job seekers began a movement to reform the quota

⁵⁶ PulackGhatak, 'Bangladesh: Thousands of Opposition Members Arrested, Activists Say,' *Benar News*, 9 October 2018, available at: <https://www.benarnews.org/english/news/bengali/opposition-arrests-10092018173451.html>.

⁵⁷ Bilkis Irani, 'Bobby Hajjaj: Vote rigging at EVM polling centres,' *Dhaka Tribune*, 30 December 2018, available at: <https://www.dhakatribune.com/bangladesh/election/2018/12/30/bobby-hajjaj-vote-rigging-at-evm-polling-centres>.

⁵⁸ Opposition parties said that many of their polling agents were absent or not allowed in the polling centres, or kicked out. Allegations of stuffing ballot boxes with paper the night before the Election Day, was also raised. Bilkis Irani, 'IAB: Vote rigging, irregularities in the election,' *Dhaka Tribune*, 30 December 2018, available at: <https://www.dhakatribune.com/bangladesh/election/2018/12/30/iab-vote-rigging-irregularities-in-the-election>.

⁵⁹ ASK, 'Journalist Harassment: January-December 2018,' available at: <http://www.askbd.org/ask/2019/01/14/journalist-harassment-january-december-2018/>; ASK, 'Journalist Harassment: January-April 2019,' available at: <http://www.askbd.org/ask/2019/05/15/journalist-harassment-january-april-2019/>.

⁶⁰ Reporters without Borders, 'Tougher politics, more press freedom violations,' available at: <https://rsf.org/en/bangladesh>.

⁶¹ Star Correspondent, 'Assailants shoot publisher dead in Munshiganj,' *The Daily Star*, 12 June 2018, available at: <https://www.thedailystar.net/frontpage/ex-cpb-leader-shot-dead-munshiganj-1589782>.

⁶² The student wing of the ruling party.

⁶³ Initially, The High Court Division granted Professor Maidul Islam bail for eight weeks. However, when he went back to court to ask for a bail extension, the lower court denied it. He was therefore incarcerated. In addition, the Professor had received threats from BCL who requested he be removed from his job, following's the Professor Facebook comment in support of the quota reform protesters. See ASK, 'Maidul Islam, Assistant Professor, University of Chittagong, sent to Prison: Ain o Salish Kendra (ASK) Expresses Grave Concern and Protests,' 27 September 2018, available at: <http://www.askbd.org/ask/2018/10/01/maidul-islam-professor-university-chittagong-sent-prison-ain-o-salish-kendra-ask-expresses-grave-concern-protests> ; Anwar Hussain, 'CU teacher Maidul Islam freed on bail,' *Dhaka Tribune*, 30 October 2018, available at: <https://www.dhakatribune.com/bangladesh/court/2018/10/30/cu-teacher-maidul-islam-freed-on-bail>.

system for government jobs. During their peaceful protests, they were attacked and beaten up by LEAs and BCL activists.⁶⁴ On 11 April, the Prime Minister announced the end of the governmental jobs quotas, leading the protesters to temporarily suspend their movement.

However, since no official gazette was published following the Prime Minister's speech, students took to the streets again in June 2018 and were once again attacked by BCL activists in different parts of the country.⁶⁵ The police and BCL cadres also harassed academics and parents who joined the peaceful protests.⁶⁶ Several quota reform leaders were arrested and charged with vandalism and other criminal offences in June 2018.⁶⁷ Later, in August, several of them were released on bail from the Dhaka Central Jail in Keraniganj.⁶⁸

Another protest movement started after a bus in Kurmitola area, whilst racing with another bus, crashed into a group of students on 29 July 2018. Two students were killed on the spot, and nine were injured. In response to this incident, the students' friends took to the streets to spread awareness about road safety and to demand that the driver responsible for the accident be arrested.⁶⁹ The students garnered a lot of support for their movement throughout the country.

However, on 2 August 2018, the situation turned sour after the Police used tear-gas against them.⁷⁰ On 4 August 2018, a group of young men wearing helmets attacked students on the road. According to reports published in the media, around 150 students were brutally injured during the

⁶⁴ BCL cadres beat up students who supported the Quota Reform Movement late at night in their dormitories. There were also allegations that the University of Dhaka (DU) administration forced 20 students to leave Sufia Kamal Hall in the middle of the night.

⁶⁵ Rafikul Islam, 'Chhatra League activists attack quota reformists' rally,' *Dhaka Tribune*, 15 July 2018, available at: <https://www.dhakatribune.com/bangladesh/dhaka/2018/07/15/chhatra-league-activists-attack-quota-reformists-rally>.

⁶⁶ Mahadi Al Hasnat, 'DU teacher assaulted by police at guardian and civil society's demo,' *Dhaka Tribune*, 3 July 2018, available at: <https://www.dhakatribune.com/bangladesh/dhaka/2018/07/03/du-teacher-assaulted-by-police-at-guardian-and-civil-society-s-demo>. Many protesters, who were injured, alleged that they were forced to leave the hospitals they went to for treatment. Star Online Report, 'Hurt quota movement leader forced to leave hospital, family alleges,' *The Daily Star*, 2 July 2018, available at: <https://www.thedailystar.net/city/hurt-quota-reform-movement-leader-forced-leave-hospital-family-alleges-1598662>. At the same time, female students who had taken part in the protests were harassed with obscene comments and remarks on social media. One female protester claimed that the BCL members handed her over to the police. She was kept at the police station the whole night and harassed in different ways. Staff Correspondent, 'Every moment felt like hell,' *The Daily Star*, 6 July 2018, available at: <https://www.thedailystar.net/frontpage/it-was-second-hell-1600765>.

⁶⁷ Fahim Reza Shovon and Ashif Islam Shaon, 'Police arrest another quota reform movement leader,' *Dhaka Tribune*, 12 July 2018, available at: <https://www.dhakatribune.com/bangladesh/dhaka/2018/07/12/quota-reform-leader-detained-by-police>; and Muntakim Saad, 'Quota reform leaders reeling under lawsuits,' *The Daily Star*, 4 June 2019, available at: <https://www.thedailystar.net/country/bangladesh-quota-reform-movement-leaders-under-pressure-of-cases-1753396>.

⁶⁸ Senior Correspondent, 'Quota reform protests: Rashed, Rafuk, Suhel and seven other protesters released on bail,' *Dhaka Tribune*, 21 August 2018, available at: <https://bdnews24.com/bangladesh/2018/08/21/quota-reform-protests-rashed-faruk-suhel-and-seven-other-protesters-released-on-bail>.

⁶⁹ Mahadi Al Hasnat, 'Road Safety in Bangladesh: Causes and Remedies,' *Dhaka Tribune*, 19 October 2018, available at: <https://www.dhakatribune.com/special-supplement/2018/10/19/road-safety-in-bangladesh-causes-and-remedies>.

⁷⁰ Liza Roy, 'Bangladesh: road safety protests expose rotten establishment,' *In Defence of Marxism*, 10 August 2018, available at: <https://www.marxist.com/bangladesh-road-safety-protests-expose-rotten-establishment.htm>.

attack.⁷¹ Many female students and female journalists were harassed, journalists were forced to delete their footage and photographs, or their cameras and recorders were broken.⁷² According to the students, the police, instead of protecting them, took the side of the attackers.⁷³

5. Role of the Commission in Addressing the Democratic Backsliding and Contraction of Civic Space

In Bangladesh, the Government focuses more on economic development rather than on addressing issues involving state security forces such as cases of EDs, EJKs, torture, and restrictions on the right to freedom of expression, peaceful assembly and association. In most cases, the Government claims that the allegations are baseless and deliberate in order to spread rumours and instigate violence, or damage the Government's image. If the Commission were effectively addressing such cases, it would help the Government understand that these cases are a concern not only for human rights activists but for the Commission as well. Unfortunately, the Commission is yet to effectively make use of this opportunity.

The Commission is empowered to investigate allegations of torture, either following a complaint or in *suo moto*, and to visit prisons.⁷⁴

Right to Freedom of Expression

In March 2019, rights activist Sultana Kamal, historian Muntassir Mamoon and war crimes researcher Shahriar Kabir were threatened with their lives in the Magazine 'Lone Wolf' published by a militant group.⁷⁵ Following the publication, the Commission issued a statement condemning the death threats, and labelling them as an "*act of cowardice*."⁷⁶ The Commission's Chairperson said that threatening human rights activists is equivalent to threatening development and human rights itself. He urged the authorities to take the matter seriously, and asked the Government to ensure adequate security for them and to bring the authors of the threats to justice as soon as possible.

⁷¹ Staff Correspondent, 'BCL in its element,' *The Daily Star*, 5 August 2018, available at: <https://www.thedailystar.net/city/bcl-ruling-party-men-attack-student-protest-road-safety-jigatola-dhanmondi-dhaka-1615828>.

⁷² Staff Correspondent, 'Journalists attacked while covering protests in Bangladesh,' *New Age Bangladesh*, 6 August 2018, available at: <http://www.newagebd.net/article/47707/journalists-attacked-while-covering-protests-in-bangladesh>.

⁷³ Staff Correspondent, 'Pounced again,' *The Daily Star*, 6 August 2018, available at: <https://www.thedailystar.net/city/students-take-streets-science-lab-intersection-dhaka-safe-roads-demand-contral-traffic-for-8th-day-1616215>.

⁷⁴ Office of the High Commissioner for Human Rights (OHCHR), 'Committee Against Torture Examines the Situation in Bangladesh,' 30 July 2019, available at:

<https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=24866&LangID=E>

⁷⁵ An auto-proclaimed Islamist militant group. Staff Correspondent, 'Noted citizens concerned over death threats to 3 dignitaries,' *The Daily Star*, 7 May 2019, available at: <https://www.thedailystar.net/city/news/noted-citizens-concerned-over-death-threats-3-dignitaries-1740004>; and Muruzzaman Labu, 'Militants target Bangladesh, India for Lone Wolf attacks,' *Bangla Tribune*, 30 April 2019, available at:

<http://en.banglatribune.com/others/news/43581/%E2%80%98Militants-target-Bangladesh-India-for-Lone-Wolf>.

⁷⁶ Staff Correspondent, 'NHRC condemns death threats to 3 noted citizens,' *The Daily Star*, 13 May 2019, available at: <https://www.thedailystar.net/city/news/nhrc-condemns-death-threats-3-noted-citizens-1742842>.

According to information provided by the Commission during interviews, the Commission also recently signed a Memorandum of Understanding with Article19,⁷⁷ in order to respond to increasing concerns regarding freedom of expression. On 5 May 2018, it formed a separate Committee on the right to freedom of expression.⁷⁸ However, the role and activity of the new Committee still remains unclear as neither the news of its formation, nor its activity or contact personnel has been published on the Commission's website.

In October 2018, the Commission also participated in the 13th International Conference of GANHRI in Morocco and joined the Marrakech Declaration on “*Expanding the civic space and promoting and protecting human rights defenders, with a specific focus on women: The role of national human rights institutions.*”⁷⁹ The Commission was invited to be a part of the drafting team convened by GANHRI for the preparation of the Declaration on the rights of HRDs. However, the authors of this report are not aware of the Commission either sharing the declaration at the national level or taking any visible initiatives in line with the declaration. According to the Commission, it has drafted a guideline HRDs with the help of the Human Rights Programme of UNDP.

In September 2018, the Parliament passed the DSA, which journalists and human rights organisations strongly opposed because of the excessively repressive provisions the Act contains that could be used to further curtail freedom of expression and detain government critics.⁸⁰ Prior to the adoption of the Act, the Commission had called upon the Government to have a dialogue with the media.⁸¹ It also highlighted civil society's concern regarding Section 32 of DSA.⁸² However, even though it is part of the Commission's mandate to review draft laws, policies, and guidelines, and to analyse their conformity with international standards, it never submitted any detailed recommendations on the draft DSA to the Government.⁸³

⁷⁷ An organisation that works for the rights to Freedom of Expression. See Article 19's website at: <https://www.article19.org/>.

⁷⁸ Kazi Reazul Hoque, 'National Human Rights Commission: Promoting Human Rights in the Country,' *Daily Sun*, 19 March 2019, available at: <https://www.daily-sun.com/printversion/details/378646/2019/03/19/National-Human-Rights-Commission:-Promoting-Human-Rights-in-the-Country>.

⁷⁹ GANHRI, 13th International Conference. The Conference's website is available at: <https://nhri.ohchr.org/EN/ICC/InternationalConference/13IC/Pages/default.aspx>.

⁸⁰ Sun Online desk, 'HRW criticises Digital Security Act,' *Daily Sun*, 26 September 2018, available at: <https://www.daily-sun.com/post/338727/2018/09/26/HRW-criticises-Digital-Security-Act>; Staff Correspondent, 'Free speech will cease to exist,' *The Daily Star*, 30 September 2018, available at: <https://www.thedailystar.net/city/news/digital-security-act-abolish-freedom-expression-shahdeen-malik-1640332> ; and Rock Ronald Rozario and Stephan Uttom, 'Bangladesh's digital security act: old wine in new bottle?' *UNA news*, 2 October 2018, available at: <https://www.ucanews.com/news/bangladeshs-digital-security-act-old-wine-in-new-bottle/83471>. See also: Article19, 'Bangladesh: Draft Digital Security Act,' April 2019, available at: <https://www.article19.org/data/files/medialibrary/38368/Analysis-Bangladesh-Cybercrime-Act.pdf>.

⁸¹ Staff Correspondent, 'Some sections of Digital Security Act might be scrapped Daily Sun,' 4 May 2018, available at: <https://www.daily-sun.com/post/306428/2018/05/04/Some-sections-of-Digital-Security-Act-might-be-scrapped>.

⁸² Digital Security Act 2018, Section 32: Breaching Government Secret Offence, available at: <https://www.cirt.gov.bd/wp-content/uploads/2018/12/Digital-Security-Act-2018-English-version.pdf>.

⁸³ NHRC Act, 2009, Section 12(g).

The Commission has yet to play any significant role in amending the many laws that violate human rights law and standards. Over the years, a number of laws have been passed and drafts created,⁸⁴ which stand in contradiction with Bangladesh's Constitution and human rights obligations. However, the Commission never provided recommendations to the Government.

Right to Freedom of Peaceful Assembly

During the quota reform protest movement the Commission initially issued a statement condemning the police attacks and calling upon the Government to resolve the issue through dialogue.⁸⁵ However, the Commission did not raise any concerns relating to the excessive use of force by LEAs to disperse the protests. The Commission also did not say anything about the arrest of the protests leaders. Furthermore, the Commission also failed to make any recommendations to the relevant authorities to comply with international human rights standards relating to the right to peaceful assembly.

In response to the road safety movement the Commission, on 3 August 2018, stated through a press release that the students' demands should be fulfilled as soon as possible.⁸⁶ The Commission Chairperson said: "*Anarchy in the transportation sector must be addressed. Road accidents are seriously hampering the rights of the citizens. This needs to be stopped. The Commission calls upon the Government to put an end to anarchy in the sector, including an end to corruption, misuse of power, excess of cars without fitness certificates or route permits, drivers' incompetence, inefficiency and carelessness.*"⁸⁷ The Commission also condemned attacks on journalists who were performing their professional duties during the protests.

However, the Commission did not go any further than the statement. It did not investigate the attacks on journalists or students. It did not even talk to the victims, or do a follow-up on what actions had been taken against those who had carried out those attacks. Many individuals and students were detained,⁸⁸ but the Commission did not play an effective role in addressing these matters.

⁸⁴ For example: Anti Terrorism (Amendment) Act, 2013; Information and Communication Technology (Amendment) Act 2013; Foreign Donations (Voluntary Activities) Regulation Law 2016; National Broadcasting law 2016 (draft); Press Council Act; Bangladesh Liberation War History Distortion Crime Act (draft); Civil Service Act 2018.

⁸⁵ Star Online Report, 'Quota reform: NHRC condemns attack on students,' *The Daily Star*, 9 April 2018, available at: <https://www.thedailystar.net/country/bangladesh-public-service-quota-reformation-national-human-rights-commission-condemns-attack-on-students-1560361>.

⁸⁶ National Human Rights Commission of Bangladesh, Press Release, 'Road Accident,' 3 August 2018, available at: http://nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/press_release/79eb587c_f8a6_4451_8ebe_318174c73897/PR_Road%20Accident.pdf.

⁸⁷ NTV Online, 4 August 2018, available at: <https://www.ntvbd.com/bangladesh/208801/>.

⁸⁸ Star Report, 'Spreading Rumour': Four held, 16 others sued,' *The Daily Star*, 7 August 2018, available at: <https://www.thedailystar.net/city/student-protest-3-more-arrested-spreading-rumors-social-media-1616656>; and Staff Correspondent, 'Spreading Rumours': 3 more students held under sec 57,' *The Daily Star*, 16 August 2018, available at: <https://www.thedailystar.net/news/city/protest-for-road-safety-cid-arrests-2-students-spreading-rumours-1621078>.

Role of the Commission during the 11th Parliamentary Election

The Commission formed a ‘Control Room’ to receive complaints of human rights violations during the election.⁸⁹ However, despite serious allegation of irregularities, the Commission Chairperson opined in a press conference a day after the election that “*All (parties) took part in the election. Voters had been able to vote for the candidates of their choice. So, the election was free, fair and neutral.*”⁹⁰ He claimed that there was no allegation of any casualty and violation of human rights during the election although media reports that 14 people were killed in election related violence.

The Commission received a total of 52 allegations of threat and obstruction of voters, of which it informed the Election Commission.⁹¹ The Chairperson’s statement saying that there were no incidents of human rights violations during the election seems to indicate that he considers the 52 allegations as not amounting to violations of the right to vote.

On the night of the election, a woman was gang-raped in Subarnachar at Noakhali allegedly by supporters of the ruling party because she had not voted for their suggested candidate.⁹² The victim and her husband repeatedly told the media and other representatives of CSOs that she was attacked as she voted for the party of her choice.

The Commission formed an inquiry committee, which conducted an investigation into the allegation. However, the committee found no linkage between voting and the rape. It stated “*there is no proof that the accused are Awami League supporters or that she was raped and assaulted by the Awami League supporters.*”⁹³ The report was severely criticised and rejected by several human rights organisations and the Commission was accused of failing to play its due role.⁹⁴ The Commission later tried to clarify its position by claiming that the opinion is not of the Commission but rather that of the inquiry committee; however, such an explanation does not address concerns raised by CSOs.⁹⁵

6. Conclusion and Recommendations

The Commission still does not fully act according to its statutory mandate. The Commission’s actions are mostly limited to issuing press statements or providing comments to journalists, raising

⁸⁹ Staff Correspondent, ‘Ensure voting rights of minority community,’ *Daily Sun*, 27 December 2018, available at: <https://www.daily-sun.com/printversion/details/359865/2018/12/27/Ensure-voting-rights-of-minority-community>.

⁹⁰ UNB News, ‘Election was inclusive, fair and neutral, says NHRC chairman,’ *United News of Bangladesh*, 1 January 2019, available at: <https://unb.com.bd/category/bangladesh/election-was-inclusive-fair-and-neutral-says-nhrc-chairman/9664>.

⁹¹ Ibid.

⁹² Star Correspondent, ‘Mother of four ‘gang-raped by AL men,’ *The Daily Star*, 1 January 2019, available at: <https://www.thedailystar.net/backpage/news/mother-four-gang-raped-al-men-1681405>.

⁹³ Star Report, ‘Subarnachar rape ‘not linked to polls,’ *The Daily Star*, 14 January 2019, available at: <https://www.thedailystar.net/country/noakhali-woman-gang-rape-not-linked-voting-national-human-rights-commission-1687024>.

⁹⁴ Star Report, ‘Subarnachar Rape: Human rights bodies reject NHRC report,’ *The Daily Star*, 17 January 2019, available at: <https://www.thedailystar.net/backpage/noakhali-subarnachar-gang-rape-human-rights-bodies-reject-nhrc-report-1688614>.

⁹⁵ Tamanna Hoq Riti, ‘Some questions on the role of NHRC,’ *The Daily Star*, 28 January 2019, available at: <https://www.thedailystar.net/opinion/human-rights/news/some-questions-the-role-nhrc-1693654>.

concerns by sending letters/notices to relevant authority and organising large-scale events that have little to nothing related to ensuring justice for the victims of human rights violations.

The Commission always claims that despite limited human, financial and technical resources, they are trying to do their best as per their mandate. However, CSOs and media question whether the Commission is either not absolutely aware or understands its power and jurisdiction, or it is unwilling to cause discomfort to the Government. The Commission has not adequately raised its concerns over the shrinking democratic and civic space in the country and made no specific recommendations for the Government to take affirmative steps to create an enabling environment for the people.

Considering the number of human rights violations occurring in Bangladesh and the Commission's resource constraints, human rights activists do not expect that the Commission will be able to work on each and every human rights issue. However, they do expect that it will play a strong role in addressing major human rights issues and in ensuring government's accountability. Most importantly, the Commission should act in a way so that people will have faith again in it.

Nearing a decade, it is high time for the Commission to work strongly to overcome the challenges it has been facing as well as to engage in discussions with the Government to take immediate and effective steps to ensure the establishment of an environment where the Commission can play its due role of promoting and protecting the human rights of the citizens of Bangladesh.

6.1 Recommendations

To the Government of Bangladesh:

- 1) Take immediate steps to amend the NHRC Act, 2009 to bring it in line with international human rights standards and the Paris Principles, especially in ensuring representation of civil society members in the selection process of the Commission's members and clearly establishing the Commission's mandate to investigate allegations of rights violation against members of law enforcement and security agencies;
- 2) Ensure the Commission's financial independence, and allocate it with an adequate budget through a separate line item in the national budget;
- 3) Institutionalise the selection process for the Commission in accordance with the Paris Principles:
 - a) A policy should be adopted to lay out clearly how candidates may express their interest in becoming a member, how members should be selected based on their competencies, and how the Selection Committee can work independently;
 - b) A provision may also be incorporated regarding public advertisement or an open discussion on the selection process.
- 4) Respond to the Commission's recommendations, statements, and criticisms and take immediate steps to inform ministries, departments, and state organs about the Commission's mandate; and
- 5) Approve the draft rules on mediation sent by the Commission.

To the Commission:

- 1) Make representations toward the Government to amend the NHRC Act 2009;
- 2) Establish an HRD desk and work to promote and protect their rights;
- 3) Dedicate more activities towards the protection of human rights than the promotion of human rights;
- 4) Interpret the NHRC Act, 2009, Section 18 broadly and in line with the spirit of the Act to conduct fact-finding about LEAs actions;
- 5) Bring the Commission's recommendations to the notice of the Government, and continue to make representations towards the Government until the implementation of those recommendations;
- 6) Adopt a robust monitoring mechanism on the status of implementation of the Action Plans where the Commission provided its assistance;
- 7) Undertake a national inquiry or public hearing on persistent human rights violations such as EJKs, EDs, custodial torture and death, and violations of the right to freedom of expression;
- 8) Ensure its own financial independence, transparency, and accountability through the following steps:
 - a) Seek to influence with the Government to get direct financial allocation in the National Budget;
 - b) Ensure full financial transparency through publication of the records of its fund allocation and expenditures;
 - c) Conduct yearly inspection of its expenditure and publicly publish it;
 - d) Prioritise the opening of offices in divisional cities, and also devise plans and strategies in order to reach out to all divisions;
- 9) Develop sufficient and specialised investigation/fact-finding team within the commission to investigate allegations of human rights violations;
- 10) Establish separate cell to hear and receive complaints from socially excluded group i.e. gender diverse community, indigenous people and to take necessary steps promptly to protect them;
- 11) Undertake or intervene in constitutional litigation before the High Court Division on rights issues;
- 12) Make recommendations to the Government regarding the compliance of draft bills and existing laws with international human rights law and standards;
- 13) Monitor how the state complies with its international human rights obligations and send recommendations to the Government about adopting a comprehensive National Action Plan to fulfil these obligations;
- 14) Conduct research, study, survey, and evaluation of human rights issues and send corresponding recommendations to the Government;
- 15) Submit annual reports within the stipulated time and incorporate the unresolved issues in the report; i.e. along with the recommendations that the Commission provides to the concerned government authority, and progress made towards their implementation;
- 16) Provide human rights training to the LEAs and other state institutions;
- 17) Increase the number of preventive visits to the prison; and
- 18) Share and discuss its Annual Report in the Parliament.

To the International Community:

- 1) The Asia Pacific Forum of National Human Rights Institutions (APF) and the GANHRI should regularly monitor the performance of the Commission and recommend it act in compliance with the Paris Principles.

INDIA: NHRCI- BROKEN PROMISES, FALLING CREDIBILITY

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

1. Introduction

This report was prepared by AiNNI. It aims to assess how the National Human Rights Commission of India (NHRCI)² performed in the implementation of its mandate in 2018 with a specific focus on civil and political rights. Information for this report was collected through desk research in the form of news and information existing in the public domain and also through information requested through the Right to Information Act. Cases relating to human rights defenders (HRDs) were collected from Human Rights Defender's Alert - India which sent several complaints relating to cases of HRDs to NHRCI.

2. Overview

NHRCI was initially due for its accreditation before the Sub-Committee on Accreditation (SCA) of the Global Alliance of National Human Rights Institutions (GANHRI) in November 2016. However, after considering the status, performance and compliance of NHRCI, the SCA decided to 'defer' the accreditation process of NHRCI to November 2017.³

In 2017, the SCA report welcomed the proposed amendment to the NHRCI's enabling law i.e the Protection of Human Rights Act, 1993 (PHRA)⁴ and accredited it with an A grade status.⁵ On 3 April 2018, the Indian Cabinet adopted the draft Protection of Human Rights Act (Amendment) Bill.⁶ There had, however, been no prior consultation with the public or civil society. It is also unclear whether the NHRCI proposed amendments and if so whether they were in line with the recommendations of the SCA as stated in its 2017 report. On 22 July 2019, the amendment bill was unanimously adopted by the Parliament.⁷ The present amendments however do not cover all the recommendations and concerns raised by the SCA in its 2017 report.

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² The NHRCI Website is available at: <http://nhrc.nic.in/>

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

⁴ The Protection of Human Rights Act, 1993 (with Amendment Act, 2006), [Hereinafter PHRA], available at: <http://nhrc.nic.in/acts-and-rules/protection-human-rights-act-1993-amendment-act-2006>.

⁵ GANHRI Sub-Committee on Accreditation Report – November 2017, p. 18, available at: <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20Report%20November%202017%20-%20ENG.pdf>.

⁶ Government of India Ministry of Corporate Affairs, Cabinet approves the Protection of Human Rights (Amendments) Bill, 2018, 4 April 2018, available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=178411>.

⁷ Government of India Ministry of Home Affairs, Parliament Passes the Protection of Human Rights (Amendment) Bill, 2019 unanimously, 22 July 2019, available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=192090>.

The NHRCI only has one female member and out of the 468 staff positions in the NHRCI, only 92 (or 20%) are women.⁸ The SCA therefore recommends that amendments to the PHRA require gender balance in the composition of the Commission. The SCA also recommended that the NHRCI guarantees the representation of diverse communities such as Dalits and other religious and ethnic minorities within the Commission.⁹ However, not one member of the NHRCI currently belongs to the Dalits, or religious and ethnic minorities and other socially disadvantaged groups.

Furthermore, the SCA also expressed concerns regarding the preponderance of members of the judiciary in the composition of the NHRCI. The SCA noted that the qualification for the Chairperson, who needs to be a former Chief Justice of the Supreme Court “*severely restricts the potential pool of candidates.*”¹⁰ In addition, the Supreme Court of India presently has only three women judges and no judges from the Dalit or ethnic minority communities. Therefore with the present provisions of PHRA there is no chance for a woman or a Dalit or a person from an ethnic minority of becoming the Chairperson of NHRCI,

It is concerning that no changes nor progress have been made by NHRCI nor the Government of India in this regard. At a time when there has been continuous and targeted attacks on religious minorities in India, the lack of diverse representation in the NHRCI is of serious concern. Given the alarming increase in violence against women, the lack of equal gender representation within NHRCI is also of serious concerns.

The SCA in its report also noted its concern about the appointment process of the NHRCI as not consultative nor transparent: “*The SCA continues to be of the view that the selection process currently enshrined in the Act is not sufficiently broad and transparent. In particular, it does not: - require the advertisement of vacancies; establish clear and uniform criteria upon which all parties assess the merit of eligible applicants; and specify the process for achieving broad consultation and/or participation in the application, screening, selection and appointment process.*”¹¹

In 2019 again two persons were appointed as members of the NHRCI without a transparent and consultative process, or public call for applications. Mr. Prafulla Chandra Pant, a former Judge of the Supreme Court of India,¹² was appointed based on Section 2(b) of the PHRA. Yet, the vacancy was not advertised and there was no information available in the public domain whether other serving or former judges of the Supreme Court were considered during the appointment process.

Dr. Dnyaneshwar Manohar Mulay was also appointed as mandated by Section 2(d) of the PHRA which provides for the appointment of persons having knowledge or practical experience in human rights. Though a wide range of persons could have been considered for the appointment, the vacancy was not advertised publicly.

⁸ GANHRI Sub-Committee on Accreditation Report – November 2017, p. 18.

⁹ Ibid.

¹⁰ GANHRI Sub-Committee on Accreditation Report – November 2017, p.18.

¹¹ GANHRI Sub-Committee on Accreditation Report – November 2017, p.19.

¹² The bio of Justice Shri Prafulla Chandra Pant is available at: <http://nhrc.nic.in/about-us/composition-of-commission/bio-data-justice-prafulla-chandra-pant>.

3. NHRCI's Mandate to Promote and Protect Human Rights

The mandate, role, and power of the NHRCI are clearly provided in the 1993 PHRA. As per Section 12 of PHRA, the NHRCI has the powers to take action into any human rights violation either through a complaint from the victim or on behalf of the victim by a complainant. It also has powers to initiate actions on human rights violations, through its suo motu powers; to intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court; and to review the safeguards for protection of human rights under any existing law or the Constitution. The NHRCI also can study international treaties and instruments and make necessary recommendations for their effective implementation. It also should disseminate knowledge about human rights and encourage the work of non-governmental organisations working towards the promotion and protection of human rights.

NHRCI's Review of Laws

The NHRI has never used its powers to make recommendations regarding human rights safeguards in national legislation despite repeated calls to amend the Foreign Contribution Regulation Act, 2010 (FCRA).¹³ The FCRA has been used by the Government to restrict the work of civil society organisations (CSOs) and HRDs.¹⁴ The NHRCI has, however, not used its powers under Section 12 of PHRA to review the FCRA and recommend amendments to the Government.

The NHRCI was asked by the Supreme Court of India in January 2017¹⁵ to submit its response regarding the anti-torture law in the country. However, there is no public information about NHRCI's response to the Supreme Court.

NHRCI's Complaints Handling

NHRCI used to rely on what it called 'Practice Directions' to handle complaints. These Practice Directions were issued in addition to the NHRCI's Procedural Regulation in order to enhance their effective functioning. They were introduced during the Chairmanship of Justice (Retd.) M.N. Venkatachalaiah. As per information received from NHRCI under a Right to Information Act request, 17 'Practice Directions' were issued since 1997. The last one was in 2002. None has therefore been adopted in the past 17 years. In addition, these practice directions have not only not been implemented but but even knowledge that they exist seems to have been lost to many of the new staff including those occupying high positions.

¹³ Maina Kai, (Former) UN Special Rapporteur on the Rights to Freedom of Association and Peaceful Assembly, Analysis on international law, standards, and principles applicable to the Foreign Contributions Regulation Act 2010 and Foreign Contributions Regulations Rules 2011, 20 April 2016, available at: <https://www.ohchr.org/Documents/Issues/FAssociation/InfoNoteIndia.pdf>.

¹⁴ *The Hindu*, 'Time to Repeal the FCRA,' available at: <https://www.thehindu.com/opinion/lead/Time-to-repeal-the-FCRA/article16946222.ece>.

¹⁵ *The Times of India*, 'Supreme Court seeks NHRC's reply on anti-custodial torture law,' 10 January 2017, available at: <https://timesofindia.indiatimes.com/india/supreme-court-seeks-nhrCs-reply-on-anti-custodial-torture-law/articleshow/56432105.cms>.

As per the ‘National Human Rights Commission (Procedure) Regulations, 1994,’ the NHRCI had the possibility to seat in a ‘full bench’ to hear victims who had the possibility of being legally represented. This practice also seems to have been lost despite being requested in certain cases.

The present status of complaints handling is that, the complaints which are initially received by the NHRCI are being scrutinised by consultants who are hired on a part-time basis and are not regularly involved with the NHRCI. They are involved in initial scrutiny of complaints and also to draft the orders.

NHRCI’s Powers to Investigate

The NHRCI Investigation Division and its Special Rapporteurs are mandated to visit places of alleged human rights violations. However a major issue with the perceived independence of the NHRCI’s investigation division stems from the fact that staff members are seconded from the public service, including at the highest level (Director General of Investigation and also the Secretary General of the Commission). As noted by the SCA in 2017, “*it brings into question its capacity to function independently.*” In addition the SCA added concerns about the NHRCI’s practice of “*having police officers and former police officers involved in the investigation of human rights violations, particularly in circumstances where the alleged perpetrators are the police.*”¹⁶

Despite these concerns, in December 2017 the Government appointed Mr. Gurbachan Singh as the Director General of Investigation of the NHRCI, who previously served as the Special Director of the Police’ Intelligence Bureau.¹⁷ In January 2019, Mr. Prabhat Singh was appointed at this post. He was previously serving as Special Director of the Central Reserve Police Force (CRPF), the largest para-military organisation in India. Several complaints about human rights violations by security personnel including by CRPF personnel are currently pending before the Chhattisgarh High Court,¹⁸ other Indian courts and the NHRCI.

The NHRCI can also appoint Special Rapporteurs (SRs). They are independent from the NHRCI and work on its behalf within the scope of guidelines provided on either a region-specific mandate or on thematic issues.¹⁹ On almost all occasions, SRs were senior bureaucrats, police officials, or former senior retired staff of the NHRCI.

One concern with the SRs is that in some cases the NHRCI does not act upon their recommendations. For example, in May 2017, Ms. S Jalaja, NHRCI’s SR for the West Zone, called for an independent medical examination of Dr. G. N. Saibaba, a well-known intellectual and academic currently sentenced to life imprisonment under the Unlawful Activities Prevention Act and detained in solitary confinement. In April 2019, United Nations (UN) experts also called for

¹⁶ GANHRI Sub-Committee on Accreditation Report – November 2017, p.19.

¹⁷ The New Indian Express, ‘IPS officer Gurbachan Singh appointed DG (Investigation), NHRC,’ 27 December 2017, available at: <http://www.newindianexpress.com/pti-news/2017/dec/27/ips-officer-gurbachan-singh-appointed-dg-investigation-nhrc-1738216.html>.

¹⁸ The Wire, ‘After NHRC Report, Chhattisgarh High Court Pulls Up Security Forces for Bastar Sexual Violence,’ 17 February 2017, available at: <https://thewire.in/109760/after-nhrc-report-chhattisgarh-high-court-pulls-up-security-forces-for-sexual-violence-in-bastar/>.

¹⁹ NHRCI, File No. A-12029/02/2018/Estt/11522, 27 November 2018, available at: http://nhrc.nic.in/sites/default/files/engagement_Spl_rapp_27112018.pdf.

his immediate release stating that his “*health problems require immediate and sustained medical attention and are reaching a point of being life-threatening.*”²⁰ However, in spite of the recommendation coming from the NHRCI’s own SR, who also was a former Joint Secretary of the NHRCI for a considerable period of time, the NHRCI never acted upon the recommendations.

Another major concern regarding the NHRCI’s handling of complaints and investigation is its lack of witness protection program. Mr. Akram Akhtar Chaudhary is one of the petitioners on a complaint to the NHRCI about a large number of extra-judicial killings allegedly committed by police personnel in the state of Uttar Pradesh.²¹ Following the complaint, on 30 August 2018, he was threatened on the phone by two individuals claiming to be from the office of the Superintendent of Police, who also went to his house and threatened his family.²² The police officials were in plain clothes, with no identification badges, in violation of the rules of the police manual.

Similarly, on 5 July 2018, Mr. Rajiv Yadav, a HRD and journalist who is also one of the complainants in the above-mentioned case was also harassed and intimidated by the police personnel who threatened of filing a false case against him.²³ This is a clear pattern of harassment and intimidation of complainants and HRDs working closely with the victim families on the ground.

In January 2019, four UN experts expressed serious concerns about reports that family members of victims and HRDs working on the abovementioned extra judicial cases in Uttar Pradesh have been harassed, subjected to death threats from police and had false criminal cases brought against them in apparent attempts to intimidate them.²⁴

In the case of Mr. Rajiv Yadav, the NHRCI sent an investigation team to collect his statement on the threat he had received. However, even though it has been nearly a year since the incident happened, no substantive protection has been provided for him nor did the NHRCI issued any statement.

²⁰ UN Office of the High Commissioner for Human Rights, ‘India: UN experts call for release of human rights defender Saibaba,’ 30 April 2019, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24534&LangID=E>.

²¹ NHRCI Case Number: 10824/24/0/2018-AFE.

²² Human Rights Defenders Alert – India, ‘HRD Alert - India – Urgent Appeal for Action – Uttar Pradesh: Case Ref: - 10824/24/0/2018-AFE, harassment and intimidation of human rights defender Mr. Akram Akhtar Chaudhary,’ 4 September 2018, available at: <http://hrdaindia.org/wp-content/uploads/2018/09/HRD-Alert-India-Urgent-Appeal-for-Action-North-Uttar-Pradesh-harassment-and-intimidation-of-human-rights-defender-Mr.-Akram-Akhtar-Chaudhary.pdf>.

²³ Human Rights Defenders Alert – India, ‘HRD Alert - India – Urgent Appeal for Action – Uttar Pradesh: Case Ref: - 10824/24/0/2018-AFE, harassment and intimidation of human rights defender Mr. Rajeev Yadav,’ 18 July 2018, available at: <http://hrdaindia.org/wp-content/uploads/2018/07/HRD-Alert-India-Urgent-Appeal-for-Action-North-Uttar-Pradesh-Case-Ref-10824-24-0-2018-AFE-harassment-and-intimidation-of-human-rights-defender-Mr.-Rajeev-Yadav.pdf>.

²⁴ UN Office of the High Commissioner for Human Rights, ‘India: UN experts alarmed by alleged police killings in Uttar Pradesh,’ 11 January 2019, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24066&LangID=E>.

NHRCI's Intervention in Courts

On 22 May 2018, 14 persons were shot by the police in Thoothukudi, Tamil Nadu while they were protesting against a copper smelter plant due to concerns about environmental and health hazards.²⁵ Two persons died as a consequence. After the incident, the Government ordered the closure of the plant. However, Sterlite Industries – the company operating the plant – appealed the decision with the National Green Tribunal (NGT) seeking permission to operate. The NGT allowed the company to reopen and the order was challenged in the Supreme Court by the Government of Tamilnadu. Following an order from the Supreme Court, the case is now being tried before a special division bench of the Madras High Court. In the meantime, following a petition filed by an attorney the Delhi High Court ordered the NHRCI to initiate an investigation into the alleged shooting incident. However, to date the investigation report hasn't been made public or handed over to the petitioners and the NHRCI, despite the level of violence and the polluting nature of the industry, failed to intervene in the proceedings in the NGT or the Supreme Court of India or now finally before the Madras High Court.

4. Shrinking Democratic and Civic Space in India

The current political climate in India is fostering an aggressive and intolerant public sphere wherein existing democratic space is fast shrinking.

The present Indian government led by the right-wing party: Bharatiya Janatha Party (BJP) and its affiliated organisations such as Rashtriya Swayamsevak Sangh (RSS) and its other allies – have orchestrated a discourse that alleges that those who are working to ensure justice and dignity for victims of past and ongoing human rights violations and abuses, for already-marginalised, discriminated and struggling populations and communities, questioning the State, its policies and actions, constitute a serious threat to the '*national interest*.'²⁶ Instead of accepting critical voices as partners, an attitude of open and aggressive hostility has been adopted towards them by the State and its various agencies. This has gone hand in hand with a systematic dilution of laws and practices meant to ensure justice for already-marginalised communities.

Over the past five years, the right to freedom of expression, association and peaceful assembly of not just HRDs but also of writers, artists and certain sections of the media have been severely curtailed or threatened. India is now ranked 140 out of 180 countries in the World Press Freedom Index.²⁷ According to the 2017 Global Impunity Index by the Committee to Protect Journalists (CPJ), India features on the list of countries having high impunity for the killers of journalists.²⁸ The data recorded by the Committee against Assault on Journalists in India (CAAJ) shows that between 2014 and 2018, 17 journalists were killed, 21 charged with fabricated cases and 44 faced threats personally and online.²⁹

²⁵ *The Hindu*, 'The Hindu explains sterlite protests,' available at: <https://www.thehindu.com/news/national/tamil-nadu/the-hindu-explains-sterlite-protests/article23969542.ece>.

²⁶ *The New Indian Express*, 'Nationalism, in national interest,' 4 January 2018, available at:

<http://www.newindianexpress.com/opinions/2018/jan/04/nationalism-in-national-interest-1744113.html>.

²⁷ Reporters without Borders, 'Data of press freedom ranking 2019,' available at: https://rsf.org/en/ranking_table.

²⁸ Committee to Protect Journalists, 'Getting away with murder,' available at:

<https://cpj.org/reports/2018/10/impunity-index-getting-away-with-murder-killed-justice.php>.

²⁹ Committee against Assault on Journalists, Webpage available at: <https://www.caaajindia.org>.

Between 2014 and 2018, HRDA has documented and intervened in 402 cases of attacks on HRDs across the country.³⁰ HRDs are being profiled, harassed, intimidated, ill-treated and subjected to hateful abuse in the media.³¹ Some have been arbitrarily arrested or detained,³² or had cases filed against them, their offices raided and files confiscated,³³ and in extreme cases, some have been tortured, disappeared or even killed.³⁴ Women, Dalit and religious minorities HRDs are the most vulnerable. In 36% of the cases in which HRDA intervened, HRDs has been charged under fabricated cases and in 11% had been killed.

According to a 2017 report by Global Witness, India experienced a three-fold increase in land rights defenders murdered and has been placed fourth in Global Witness's global ranking.³⁵ According to the Commonwealth Human Rights Initiative (CHRI), between 2014 and 2018, 49 "right to information" activists were killed, 68 were assaulted and 66 were harassed or threatened.³⁶ Between 2014 and 2018, on three specific instances, HRDs were barred from travelling outside India and from engaging with the UN and other international bodies.³⁷ Several activists were barred from entering India on grounds of involvement in NGO activities.³⁸

In addition, organisations possessing valid licenses under the FCRA, have come under severe systematic attack from the Indian government. Between 5 May and 9 June 2015, the Ministry of Home Affairs (MHA) cancelled the registration of 4,470 CSOs for violating the FCRA. This action was followed by the cancellation of the licenses of 9,000 CSOs in April 2016. In August 2017, the

³⁰ More information can be found on the Website of Human Rights Defenders Alert – India, available at: <http://hrdaindia.org/>.

³¹ Human Rights Defenders Alert – India Urgent Appeal for Action - New Delhi: False accusations made against lawyer and human rights defender Adv.Sudha Bharadwaj, Mr. Gautam Navlakha and other human rights defenders and lawyers, 6 July 2018, available at: <http://hrdaindia.org/wp-content/uploads/2018/07/HRDA-UA-North-New-Delhi-False-accusations-made-against-lawyer-and-HRD-Adv.-Sudha-Bharadwaj-Mr.-Gautam-Navlakha-and-other-HRDs-Lawyers.pdf>

³² Human Rights Defenders Alert – India, Raids and arbitrary arrests of human rights defenders (activists and advocates) in New Delhi, Mumbai, Goa, Hyderabad and Ranchi by personnel of Maharashtra Police, 28 August 2018, available at: <http://hrdaindia.org/wp-content/uploads/2018/08/HRDA-UA-Raids-and-Arrests-August-28-2018.pdf>

³³ Human Rights Defenders Alert – India, HRD Alert - India - Urgent Appeal for Action – Intimidation and Harassment of Fr Stan Swamy by Maharashtra Police in Ranchi, Namkum Jharkhand, 13 June 2019, available at: <http://hrdaindia.org/wp-content/uploads/2019/06/HRDA-UA-East-Jharkhand-Stan-Swamy.pdf>.

³⁴ Human Rights Defenders Alert – India, HRD Alert - India - Urgent Appeal for Action - New Delhi: False accusations made against lawyer and human rights defender Adv.Sudha Bharadwaj, Mr. Gautam Navlakha and other human rights defenders and lawyers, 6 July 2018, available at: <http://hrdaindia.org/wp-content/uploads/2018/10/HRDA-UA-North-Himachal-Pradesh-Kedar-Singh-Jindan.pdf>.

³⁵ Global Witness, 2017 Defenders Annual Report, available at: <https://www.globalwitness.org/en/campaigns/environmental-activists/defenders-annual-report/>

³⁶ Commonwealth Human Rights Initiative, Hall of Shame – Mapping Attacks on RTI Users,' available at: <http://attacksonrtiusers.org>.

³⁷ The Wire, 'Kashmiri Human Rights Activist Headed for UN Meet Detained at Delhi Airport,' 15 September 2016, available at: <https://thewire.in/66062/kashmiri-human-rights-activist-headed-for-un-meet-detained-at-delhi-airport/?fromNewsdog=1>.

³⁸ Firstpost, 'Greenpeace activist Pillai was 'offloaded' under 'etc' criteria of MHA order,' 22 January 2015, available at: <https://www.firstpost.com/india/greenpeace-activist-pillai-offloaded-etc-criteria-mha-order-2059343.html>.

MHA website says that the FCRA licenses of more than 11,000 organisations were cancelled since the organisations did not renew their licences.³⁹

In a recent case, known as the Bhima Koregaon case, on 28 August 2018, the Pune Police launched simultaneous raids at the homes of several HRDs including activists, priests, writers and lawyers in Mumbai, New Delhi, Ranchi, Goa and Hyderabad. Following the raids, the police arrested activists Sudha Bharadwaj, Vernon Gonsalves, Arun Ferreira and Varavara Rao and also attempted to arrest Gautam Navalakha. The HRDs have been falsely accused of allegedly plotting to assassinate Prime Minister Narendra Modi, allegedly inciting the violence during Elgar Parishad, an annual event to commemorate the 1818 battle of Bhima Koregaon, held every year on 1 January. These HRDs were branded as Maoists and members of the banned Communist Party of India. The police in this case have largely relied upon letters and emails allegedly exchanged between the arrested persons and some underground Naxalite operatives.⁴⁰ Earlier in June 2018, five other HRDs were also arrested in relation to the same case after simultaneous raids and searches in multiple cities. All the arrested HRDs were charged under the draconian Unlawful Activities Prevention Act (UAPA) and are currently in pre-trial detention.⁴¹

On 2 January 2019, Section 144⁴² of the Criminal Procedure Code (CrPC) was used by the police in Guwahati, Assam to quell protests against the Government and the Citizenship Amendment Bill, 2016 in Assam.⁴³ On 9 January 2019 renowned intellectual Dr. Hiren Gohain, senior journalist Manjit Mahanta, and social activist Akhil Gogoi, were charged with sedition for their criticism of the Bill. Several other HRDs also face charges in other north-eastern Indian states and on many occasions peaceful assemblies against the proposed amendments were met with violent police actions.⁴⁴

A dangerous discourse is being legitimised by both State and several non-State actors, portraying critics of the Government as threats to the nation. Recent events have established a larger atmosphere of violence leading to several choosing silence over dissent.

³⁹ The Hindu, 'FCRA licences of 20,000 NGOs cancelled since 2014,' available at: <https://www.thehindu.com/news/national/FCRA-licenses-of-20000-NGOs-cancelled-since-2014/article16950063.ece>.

⁴⁰ The Wire, 'A Year Later, Rights Activists Accused in Bhima Koregaon Case Struggle for Bail,' 6 June 2019, available at: <https://thewire.in/rights/bhima-koregaon-activists-arrests-bail>.

⁴¹ Human Rights Defenders Alert – India, HRD Alert – India –Urgent Appeal for Action–Maharashtra: Arbitrary searches conducted at houses of Dalit activists and advocates across Mumbai, Nagpur, Pune and New Delhi by personnel of Maharashtra Police, 20 April 2018, available at: <http://hrdindia.org/wp-content/uploads/2018/04/HRDA-UA-South-Maharashtra-Dalit-activists-Arbitrary-searches-conducted-at-houses-of-Dalit-activists-and-advocates-across-Mumbai-Nagpur-Pune-and-New-Delhi.pdf>.

⁴² Section 144 prohibits an assembly of more than four persons in an area.

⁴³ India Today, 'Citizenship Bill protests continue in Assam, Section 144 imposed in Guwahati,' 10 January 2019, available at: <https://www.indiatoday.in/india/story/assam-citizenship-bill-protests-akhil-gogoi-sedition-section-144-1428376-2019-01-10>.

⁴⁴ The Wire, 'Assam: Hiren Gohain, Akhil Gogoi Charged With Sedition for Opposing Citizenship Bill,' 10 January 2019, available at: <https://thewire.in/rights/assam-hiren-gohain-akhil-gogoi-charged-with-sedition-for-opposing-citizenship-bill>.

5. Role of NHRCI in Democratic Backsliding and Contraction of Civic Space

Within the ambit of the PHRA, the NHRCI has significant powers to protect the democratic and civic space and HRDs in India. However, Indian civil society has repeatedly expressed⁴⁵ concerns over the NHRCI's reluctance in this regard.

Under Section 12 of the PHRA the NHRCI can intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court; visit any jail or other institution under the control of the State Government where persons are detained; review the safeguards provided by or under the Constitution or any law; and encourage the efforts of non-governmental organisations (NGOs) and institutions working in the field of human rights.

HRDA, in several cases, had requested the NHRCI to exercise its power under Section 12 (b) to intervene in court proceedings, however, NHRCI decided otherwise. For instance, in the above mentioned case of the arrest of HRDs in Bhima Koregaon, the NHRCI declined to intervene despite being asked to by the civil society.

Another example is the case of the CPSC's registration. In 2016, the MHA refused to renew CPSC's registration on the basis of '*field agency*' reports. CPSC's challenged the non-renewal before the Delhi High Court through a writ petition which remains pending. Till date, CPSC has had no access to the '*field agency*' reports. The counter affidavit filed by the MHA before the Delhi High Court, alleges that Mr. Henri Tiphagne, Executive Director of People's Watch, a program unit of CPSC "*was found to be providing material and information to UN Special Rapporteurs, the US Embassy and the British High Commission officials.*" It also refers to the CPSC's activities as "*undesirable and detrimental to national interest.*"

CPSC's FCRA non-renewal was also challenged before the NHRCI. HRDA and the 7th Asian Human Rights Defenders Forum, Colombo (AHRDF) filed two petitions with the NHRCI in November 2016. On 16 November 2016 the NHRCI issued a notice⁴⁶ to the MHA seeking their response regarding the non-renewal of CPSC's FCRA and questioning the legal analysis of FCRA made by former UN Special Rapporteur on the Rights to Freedom of Assembly and Association Mr. Maina Kiai.⁴⁷ The MHA issued a first response in December 2016 that the NHRCI considered inadequate. The NHRCI therefore requested a more detailed answer. In March 2017, the MHA issued a second response following which no other action was ever taken. To date, the matter continues to be pending in the NHRCI as the NHRCI has decided to wait for the judgement of the Supreme Court in another FCRA matter, which has no connection with CPSC's case.

Similarly, there is a long standing demand by civil society that the NHRCI should review laws like the FCRA, UAPA, National Security Act (NSA), and others under Section 12 (d) of the PHRA.

⁴⁵ ANNI Report 2017.

⁴⁶ NHRCI, 'NHRC issues notice to the Union Home Ministry on allegations of draconian approach over renewal of FCRA license to NGOs of Human Rights Defenders,' 16 November 2016, available at: <http://nhrc.nic.in/press-release/nhrc-issues-notice-union-home-ministry-allegations-draconian-approach-over-renewal>.

⁴⁷ Maina Kai, (Former) UN Special Rapporteur on the Rights to Freedom of Association and Peaceful Assembly, Analysis on international law, standards, and principles applicable to the Foreign Contributions Regulation Act 2010 and Foreign Contributions Regulations Rules 2011, 20 April 2016.

NHRCI used to provide recommendations on laws but this practice has been put to a complete halt. These laws are often misused to target HRDs and stifle dissent and an independent review by the NHRCI would immensely contribute towards India's adherence to international human rights laws and standards.

The NHRCI has taken steps to establish a Focal Point on HRDs. There is, however, no Special Rapporteur on HRDs. The Focal Point is a junior officer in the law department and possesses no special powers to protect HRDs. At present, the focal point has only the powers to receive complaints and bring them to the attention of the NHRCI Chairperson and members. Further, the focal point possess no expertise and experience in HRD protection. Therefore, the establishment of the Focal Point appears to be a token gesture rather than a genuine attempt at protecting HRDs. In 2011, the UN Special Rapporteur on the situation of Human Rights Defenders, also called on the NHRCI to establish a diverse dedicated team of HRDs possessing expertise and experience in HRD protection that would be headed by a member of the NHRCI.⁴⁸

6. Recommendations

To the Government of India:

- 1) Respect the UN Declaration on HRDs by ensuring their protection, developing a national protection policy for HRDs and drafting a domestic law for the protection of HRDs;
- 2) Amend the PHRA after adequate national consultations with experts and civil society to ensure that the NHRCI fully complies with the Paris Principles including by ensuring that the appointment of NHRCI members is guided by defined criteria, such as their contribution to human rights. Publicly announce the vacancies so as to allow all people to apply;
- 3) Increase the total number of members of the NHRCI by at least five times, to ensure that NHRCI has the capacity to fully implement its mandate;
- 4) Ensure that all members of NHRCI have experience and expertise in human rights, and reflect the plurality of civil society;
- 5) Shorten the notice period for respondents from the present six to eight weeks to one week or ten days so that period of duration of a complaint overall is reduced; and
- 6) Table NHRCI's annual reports in the Parliament immediately after they are received.

Recommendations to NHRCI:

- 1) Initiate amendments to the PHRA to ensure NHRCI fully complies with the Paris Principles and implement the recommendations of the SCA of GANHRI of 2008, 2012, 2016 and 2017;
- 2) Call for the repeal of the provisions of the PHRA that requires that the Secretary General and Director of Investigations be seconded from the Government, and instead require that an open, merit-based selection process is established;
- 3) Put an end to the practice of having police officers and former police officers involved in the investigation of human rights violations, particularly in circumstances where the alleged perpetrators are the police;

⁴⁸ Margaret Sekaggya, Report of the Special Rapporteur on the situation of human rights defenders, 6 February 2012, available at: <https://www.ohchr.org/Documents/Issues/Defenders/A-HRC-19-55-Add1.pdf>.

- 4) Appoint Special investigation teams and SRs to look into cases of human rights violations and ensure they are not only selected among State agencies or former staff members of the NHRCI;
- 5) Ensure that complainants or a victims can access information about the stage of hearing of a his/her complaint including by considering establishing case lists;
- 6) Give complainants and victims the space to record their statements, including through video conferencing, instead of solely relying on State agencies for investigation;
- 7) Consider using sms/whatsapp and other online communication tools for urgent complaints-related communications;
- 8) Where appropriate, recommend criminal prosecution of those found responsible of human rights violations;
- 9) Take into consideration all measures detailed in the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power including measures of non-repetition of the violation and delivery of apology to the victim;
- 10) Establish a system of victims and witness protection;
- 11) Ensure that the Core Group on NGO's and HRDs of the NHRCI meets four-times a year;
- 12) Periodically publish NHRCI's annual reports within a fixed time after completion of the calendar year. Given the Government's delay in tabling it in Parliament, NHRCI should share its annual report through its website;
- 13) Appoint a member of the Commission with strong expertise relating to the situation of HRDs as its Focal Point on HRDs;
- 14) Undertake independent investigation using the services of its SRs, members of NHRCI Core Group of NGOs and HRDs and Special Investigation teams in all complaints submitted to the Focal Point on HRDs;
- 15) Conduct regular regional visits to meet with HRDs in difficulty or at risk, undertake trial observations of cases of HRDs, publicly condemn violations against HRDs, and call for the respect of the UN Declaration on HRDs;
- 16) Advocate for the adoption of a national law on the protection of HRDs, with an emphasis on W/HRDs, developed in full and meaningful consultation with civil society and on the basis of technical advice from relevant UN entities;
- 17) Develop a comprehensive, adequately resourced, well-advertised national and state protection programme for HRDs at the central and state levels and in conjunction with the respective State Human Rights Commissions (SHRCs) and other National/State Human Rights Institutions (N/SHRIs)⁴⁹;
- 18) Seek intervention in the Supreme Court of India with regard to the petition filed by Mr. Manohar asking for reforms of the NHRCI [W.P. No 162/2014] to advocate for immediate compliance with the Paris Principles; and
- 19) Conduct a legal analysis of the FCRA and make recommendations to the Government to bring it into line with international human rights standards.

⁴⁹ In addition to the NHRCI, India has several other thematic National Human Rights Institutions working on womens rights, child rights, scheduled castes, scheduled tribes, right to information, minorities, persons with disabilities, manual scavengers as well as at the state level collectively referred to as N/SHRIs.

To the Asia Pacific Forum of NHRIs (APF) and GANHRI:

- 1) Carefully review the SCA 2017 report on the NHRCI and initiate appropriate actions towards ensuring that NHRCI complies with the Paris Principles and recommendations made in the SCA reports of 2011, 2016 and 2017.



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

NATIONAL SECRETARIAT

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18 July, 2019

To,
The Members of Parliament in Lok Sabha and Rajya Sabha,

Greetings from AiNNI¹!

We write to you today to share our views, express our concerns and propose certain recommendations for your kind consideration on the proposed amendments to the Protection of Human Rights Act, 1993 (1993), hereinafter mentioned as the Act. The amendments were introduced in the Lok Sabha (the Protection of Human Rights (Amendment) Bill, 2018, hereinafter mentioned as the Bill), by the Minister of State for Home Affairs, Mr. G. Kishan Reddy, on July 8, 2019. It is now listed to be tabled again on July 19, 2019. The same Bill was earlier introduced in the Lok Sabha on August 9, 2018 but lapsed.

The 1993 Act as brought about in 1994, seeks to strive for better protection of human rights and matters connected therewith or incidental thereto. The Bill essentially attempts to change the composition, criteria and tenure of Chairperson and Members at national (National Human Rights Commission, hereinafter mentioned as the NHRC) and at state level (State Human Rights Commission, hereinafter mentioned as the SHRC). The Bill raises serious questions and doubts over government's intent towards ensuring NHRC and SHRCs are autonomous and independent as required according to the United Nations Paris Principles (hereinafter mentioned as the Principles).

There were no consultations held with the concerned stakeholders – non-governmental organisations and the Indian civil society, neither by the NHRC, any SHRC nor the Ministry of Home Affairs (hereinafter mentioned as the Ministry). It is also not clear if the amendments were discussed by the Ministry with the NHRC or SHRCs and their position on the Bill is not available in public domain. The proposed amendments, do not only flout the Principles but are

¹ All India Network of NGOs and Individuals working with National and State Human Rights Institutions (AiNNI) is a national forum of individuals and organisations to monitor and strengthen the functioning of human rights institutions like the National Human Rights Commission, the National Commission for Women, the National Commission for Minorities, the National Commission for Protection of Child Rights, the National Commission for Scheduled Castes, the National Commission for Scheduled Tribes, the Central Information Commission, the Central Commissioner for Persons with Disabilities and their state counterparts for their full compliance to the Paris Principles and their founding law. AiNNI is also a member of the Asian NGO Network of NHRIs (ANNI) based in Bangkok and has consistently contributed to ANNI's annual research and publication. AiNNI has also submitted periodic reports concerning NHRC's accreditation by SCA of GANHRI.

contradictory to the [2011](#), [2016](#) & [2017](#) NRHC review reports of the Sub-Committee on Accreditation (SCA) of the Global Alliance of NHRIs (GANHRI).

AiNNI hereby submits this memorandum to all the Members of Parliament of Lok Sabha and Rajya Sabha and with all humility and sincerity urge that this Bill is not considered in its current form. AiNNI requests that an independent committee (inclusive of representation from the civil society) to set up by the NHRC and SHRCs to propose amendments to the Act, within a specific time frame, which through the Ministry is tabled in the Parliament.

1. Summary of the Bill:

1.1. Composition of the NHRC:

- The Bill seeks to amend Section 3(2)(a) of the Act to provide that a former Judge of the Supreme Court could also be eligible for the post of the NHRC Chairperson, as against the current provision limited to a former Chief Justice of Supreme Court.
- The Bill seeks to amend Section 3(2)(d) of the Act to provide that the number of members of the commission is increased from two to three, at least one of which shall be a woman.
- The Bill seeks to amend Section 3(3) of the Act to provide that the deemed membership is extended to the Chairpersons of the National Commission for Backward Classes, the National Commission of Protection of Child Rights and the Commissioner for Persons with Disabilities, for the discharge of functions specified in clauses (b) to (j) of Section 12 of the Act.

1.2. Composition of the SHRC:

- The Bill seeks to amend Section 21(2)(a) of the Act to provide that a retired judge of the High Court could also be eligible for the post of the SHRC Chairperson, as against the current provision limited to a former Chief Justice of a High Court.

1.3. Tenure of Chairperson and Members of the NHRC:

- The Bill seeks to amend Sections 6(1) and 6(2) of the Act to provide reducing the tenure of the Chairperson and Members of the NHRC from five to three years.
- The Bill seeks to amend Sections 6(1) to provide for the re-appointment of the NHRC Chairperson, similar to the re-appointment of Members under Sections 6(2) of the Act.

1.4. Tenure of Chairperson and Members of the SHRC:

- The Bill seeks to amend Sections 24(1) and 24(2) of the Act to provide reducing the tenure of the Chairperson and Members of the SHRC from five to three years.
- The Bill also provides for the re-appointment of the SHRC Chairperson, similar to the re-appointment of Members under Sections 24(2) of the Act.

1.5 Powers of the Secretary General

- The Bill seeks to amend Section 3(4) of the Act to allow the Secretary-General (Chief Executive Officer) of the NHRC to exercise all administrative and financial powers (except judicial functions and power to make regulations under Section 40B), subject to the control of the NHRC Chairperson. According to Section 3(4) of the Act, the Secretary-General discharges all administrative and financial powers (except judicial functions and power to make regulations under Section 40B), as may be delegated by the NHRC (Full Commission) or the Chairperson.

- The Bill doesn't refer to Section 21(3) of the Act – Secretary of the SHRCs. According to this section, the Secretary (Chief Executive Officer) of the SHRC shall exercise such powers and discharge such functions of the State Commission as it may delegate to him.

2. AiNNI's Submission on the Bill

On a close perusal of the amendments proposed in the Bill, in light of earlier propositions, AiNNI is of the view that, if the Bill is adopted in its original form, it shall have serious repercussions on the independence, autonomy and effective functioning of the NHRC and SHRCs. The Bill, both in letter and spirit, shows no coherence to the Principles and is rather seen to curb the structure and functioning of the NHRC and SHRCs. Therefore, we categorically put forth the issues and concerns pertaining to the Bill and recommendations for your consideration.

2.1 Deemed Membership of NHRC & SHRC

- 2.1.1** The deemed membership has been extended to Chairpersons of the National Commission for Backward Classes, the National Commission of Protection of Child Rights and the Commissioner for Persons with Disabilities. However, the fact cannot be ignored that these newly added as well as the previous commissions, who enjoy the deemed membership to the NHRC, are often headed by those having close association with the political party in power. This can seriously influence the working of the NHRC as the deemed members are required to discharge of functions specified in clauses (b) to (j) of Section 12 of the Act.
- 2.1.2** The deemed membership of the NHRC provided under Section 3(3) of the Act is the cover used to respond to the pluralism requirements under the Principles. However, if one has to rely on the experiences and facts concerning deemed members' contribution in the discharge of functions specified in clauses (b) to (j) of Section 12 of the Act, this concept needs a complete relook.
- 2.1.3** According to the data collected by AiNNI for the period 2011-15, the Statutory Commission meetings (NHRC + Deemed Members) were held once in 2011 (July 14, 2011), twice in 2012 (February 7, 2012 and December 7, 2012), no meeting in 2013, once in 2014 (February 4, 2014) and once in 2015 (February 3, 2015).
- 2.1.4** In the meeting held on February 7, 2012, Chairpersons of National Commission for Women, National Commission for Schedule Castes and National Commission for Schedule Tribes were absent. In the meeting held on December 7, 2012, all chairpersons (deemed members) were absent. In the meeting held on February 4, 2014, all Chairpersons of all other commissions were absent. In the meeting held on February 3, 2015, Chairpersons of National Commission for Women and National Commission for Schedule Tribes were absent.
- 2.1.5** From the above information, only five Statutory Commission meetings were held between the period 2011-15 with stark absenteeism pattern. The meetings of the Statutory Commission and their minutes suggest clearly that they continue not to be adequately involved in discussions on the focus, priorities and core business of the NHRC's non-judicial functions.
- 2.1.6** In the light of the above, AiNNI is of the view that the Section 3(3) of the Act needs a careful examination. This shouldn't be used to justify adherence only to the pluralism requirements under the Principles. Concerns over political appointments in the commissions falling under the deemed members are real and their possible active presence in the NHRC is of immense concern. Further, on grounds of ignoring the concerns over political appointments, the deemed membership mechanism has been

immensely ineffective in discharging functions specified in clauses (b) to (j) of Section 12 of the Act.

- 2.1.7** AiNNI believes adherence to pluralism according to the Principles is significant to ensure representation from all diverse sections of the society. Measures should be taken to amend Section 3(2)(d) of the Act to drastically increase the number of Members in the NHRC to ensure larger representation from diverse communities based on linguistic, region, religion, caste, tribe, ethnicity and gender. At least half of all Members of the NHRC should be women. Similar amendments are also sought in Section 21 (2)(c) pertaining to the SHRCs.

2.2 Amending the Criteria of Appointment for NHRC and SHRC Chairpersons

- 2.2.1** The Protection of Human Rights (Amendment) Bill, 2005, proposed similar amendments to Section 3(2)(a) and Section 21(2)(a) of the Act, i.e. eligibility criteria for Chairperson of NHRC and SHRC respectively. This 2005 bill was referred to the Parliamentary Standing Committee on Home Affairs (hereinafter mentioned as the Committee) headed by Ms. Sushma Swaraj, a former BJP legislator and Union Minister for External Affairs. The Committee rejected amendments to Section 3(2)(a) and Section 21(2)(a) of the Act.
- 2.2.2** The only difference between the 2005 bill and the current Bill, pertaining to amendments to Section 3(2)(a) and Section 21(2)(a) of the Act, is that the former provided for an additional criterion of eligibility for the posts of NHRC and SHRC Chairpersons. The 2005 bill proposed a judge with three years of service in the Supreme Court to be eligible for the NHRC Chairperson and a judge with five years of service in the High Court to be eligible for the SHRC Chairperson. The present Bill has no reference to any such criteria.
- 2.2.3** AiNNI is of the view that if the post of the Chairpersons at the NHRC and SHRC are to be headed by a former member of the judiciary, the current provisions of Section 3(2)(a) and Section 21(2)(a) of the Act remain.
The Bill dilutes the eminence of the NHRC and SHRCs, permitting further space for the government to have unfettered discretion in appointments. This will also devoid the NHRC and SHRCs of the required institutional status, experience and expertise. An amendment broadening the criteria for appointment of the NHRC and SHRCs Chairpersons will open up a wide bracket of choices for the government, which will, in turn, have the potential of resulting in an unhealthy competition among the members of the serving judiciary and politicisation of the same.
- 2.2.4** Allowing a judge of the Supreme Court or a High Court as the Chairperson of NHRC or SHRC respectively, might allow breeding of internal conflict on grounds of seniority between the appointed Chairperson and Member appointed according to Section 3(2)(b) and Section 21(2)(b). This we fear might severely obstruct the day to day functioning of the NHRC and SHRCs and hamper institutions' dignity.
- 2.2.5** Amendments to Section 3(2)(a) and Section 21(2)(a) of the Act without amending Section 4 (1) and Section 22 (1) of the Act, and in the absence of a comprehensive, objective and transparent appointment process will raise serious questions on the independence and autonomy of not just the NHRC and SHRCs but also allow vulnerability of the judiciary. Unlike, the current appointment committee, where major membership comes from the ruling party, there must be an independent committee, where members have no political affiliations and ample accreditation to their name. The current appointment committee has representation from the ruling party and the opposition, in a 4:2 ratio. With a selection panel, consisting solely of politicians, it is highly recommended that the least step towards an accountable mechanism would be

laying down a categorical process of appointment. With a voluminous history and an unprecedented rise in human rights violation allegations against the state, this only caters an apparent conflict of interest.

- 2.2.6** To translate the Principles of transparency and participation, India should look at best international practices, including but not limited to open invitations, nominations, and public consultations. Any amendments made to the Act should be in complete coherence with the mandate set out and the Principles, striving towards an autonomous and independent body, not to make it another tool in the hands of the government throttling any mechanism of checks and balances.

2.3 Amending Tenure of Chairperson and Members of NHRC and SHRCs

- 2.3.1** Reduction of tenure of NHRC and SHRC Chairpersons and Members from five to three years, and with a possibility of them being reappointed, will significantly constraint the work and approach of the Chairpersons and Members. This will eventually lead to a greater government control. For the Chairpersons and Members to have a second term, it would be a non-negotiable that they satisfy the government, which eventually determines the outcome of the appointment committee.
- 2.3.2** A three-year tenure falls very much within the tenure of a government and can be easily used as an alternate to the cumbersome process of removal under Section 5 and Section 23 of the Act.
- 2.3.3** A three-year tenure is an exceedingly short duration to understand the system and make effective implementation therein. By the time a Chairperson and Member grasp the understanding and working of the NHRC or SHRC, and take actions to implement the Act, her/his tenure will be nearing completion. This will lead to a decrease in efficiency and productivity of the NHRC and SHRCs, with new members coming in at frequent intervals.
- 2.3.4** Amendment to Sections 6(1) and partially for 6(2) of the Act is short-sighted. The Chairperson of the NHRC (a former Chief Justice of the Supreme Court) appointed under Section 3(2)(a) of the Act and a Member of the NHRC (a former judge of the Supreme Court) are minimum 65 years of age at the time of the appointment. Given this, none of them can have another full term after having served their first term.

2.4 Increasing the Strength of the NHRC

- 2.4.1** The amendment seeks to increase the number of Members in the NHRC from four to five. Given the huge volume of cases the NHRC deals with annually, averaging significantly over 1 Lakh, an addition one member will make no difference. NHRC with just five Members and a Chairperson will continue to be highly inadequate to be serving a population, as large as that of India.
- 2.4.2** This also affects the principles of pluralism and diversity as enshrined in the Principles. Measures should be taken to amend Section 3(2)(d) of the Act to drastically increase the number of Members in the NHRC to ensure larger representation from diverse communities based on linguistic, region, religion, caste, tribe, ethnicity and gender.
- 2.4.3** It is worth noticing that a change in the strength, by increasing number of Members from four to five, has only been proposed for the NHRC and not the SHRC.

2.5 Representation of Women in NHRC

- 2.5.1 A call for representation of women in NHRC was also made in the report submitted by the advisory committee on amendments to the Protection of Human Rights Act, 1993². However, this wasn't adopted in the amendment undertaken in 2006. The provision has been re-introduced in the said bill.
- 2.5.2 While it may appear to be progressive by providing for representation of women in the NHRC by increasing the number of members from two to three, it is merely symbolic. In 25 years of the NHRC, only three women have served as its Members and none as its Chairperson.
- 2.5.3 A token representation of women in the NHRC by amending Section 3(2)(d) is against the spirit of the Principles. If the government is concerned about unequal representation of women in the NHRC and SHRCs, it should bring amendment to the effect that at least half of the total strength (Chairperson + Members) of the NHRC and SHRCs are women.
- 2.5.4 It appears just as an amendment to appease the SCA of GANHRI on the Principles requiring equality and pluralism in the NHRC. This can be proved from that fact given that there is no mention of amendments to ensure women representation in the SHRCs.

2.6 Powers of the Secretary-General

- 2.6.1 Section 3(4) of the PHRA, 1993 has previously also undergone a change via the 2006 amendment. In the 1993 Act, it read as follows: "*(4) There shall be a Secretary-General who shall be the Chief Executive Officer of the Commission and shall exercise such powers and discharge such functions of the Commission as it may delegate to him.*" However, later via the 2006 Amendment to the 1993 Act, it was revised to add the words – "*(except judicial functions and the power to make regulations under section 40B) as may be delegated to him by the Commission or the Chairperson, as the case may be.*"
- 2.6.2 Here, the shift is evident – while originally, the Secretary-General could be delegated powers by the Commission only, the 2006 amendment act extended it to both the Commission as well as the Chairperson. The present bill is a further attempt, to dilute the powers of the Commission and weaken its structure, by taking away power to regulate the functions of the Secretary-General from the Commission and resting it solely with the Chairperson. This may open floodgates for wide discretion on the part of the Chairperson, resting on him unfettered and unguided powers, especially in the context of proposed amendments to Section 3(2)(a). As the Chief Executive Officer of the Commission, the Secretary General should be acting under the control of the full commission, in coherence with its mandate.

3. Conclusion & Recommendations:

AiNNI requests Hon'ble Members of Parliament in the Lok Sabha and the Rajya Sabha that instead of moving towards a blind acceptance of the amendments proposed in the bill, the same must be cautiously thought through, allowing the NHRC and SHRCs to serve their mandate to the fullest. It is imperative to mention here that on April 12, 2017, the then UN High Commissioner for Human Rights had addressed a letter to the then Union Minister of External

² **Report of the Advisory Committee on amendments to The Protection of Human Rights Act dated October 1999:** It recommended that while the commission continues to be 5 membered, there shall be two judicial and three non-judicial members. Among the non-judicial members, it proposed to have at least one women member.

Affairs, expressing concern over the working of NHRC. In his letter, the UN High Commissioner had stated the following:

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

In addition to the above recommendations of the UN High Commissioner and concerns raised through this memorandum, AiNNI wishes to point out to Section 30 of the Act pertaining to Human Rights Courts and Section 31 of the Act pertaining to Special Public Prosecutor in the Human Rights Courts. In several states these courts and special public prosecutors have been appointed, however, in the absence of notifying the offences to be tried by the human rights courts, this provision continues to remain on paper despite almost 26 years of enactment of this Act.

In order to enhance the working of the NHRC and SHRCs in line with the Principles, adherence to the recommendations of the SCA of GANHRI in 2011, 2016 and 2017, and other best practices relating to human rights institutions across the world, the following are AiNNI's recommendations regarding the changes proposed in the Bill:

- a. Re-examine, the powers and functions of deemed members at the NHRC.
- b. If NHRC and SHRCs are to be chaired by a member of the judiciary, it should be no one other than the Chief Justice of India or Chief Justice of the High Court respectively.
- c. The Appointing Committee of the NHRC should be guided by defined criteria especially the contribution to human rights made by each of the eligible former Chief Justices of the Supreme Court of India when selecting the Chairperson of the NHRC.
- d. The Appointing Committee should take into consideration the contributions to human rights made by each of the eligible candidates being considered for the post of Member of the NHRC, along with other defined criteria. The vacancy should be filled through a public announcement and call for applications.
- e. There should be no delay in filling vacancies; and prospective members should be identified in good time to ensure that no vacancy arises.
- f. The total number of members of the NHRC should be increased by at least 5 times more, with experience and expertise in human rights, and drawn from different competencies including the plurality of civil society.
- g. Maintain the five-year tenure of Chairperson and Members at NHRC and SHRC.
- h. Removal of the provision for reappointment of Chairperson and Members at NHRC and SHRC.

- i. Representation of women members in the commission be at least be 50% of the constitution of the NHRC. A similar provision be made for at least 50% membership of women to SHRC.
- j. The functions of Secretary-General of the NHRC shouldn't be solely to the control of the Chairperson but to the Commission.
- k. Table NHRC annual reports in the Parliament and hold discussions on the same. Once tabled, these reports should be made publicly available on NHRC's website.

In the growing milieu of hate and intolerance in the country, it is of utmost importance that we protect our human rights institutions by exhibiting the utmost respect and sincere regards to our international obligations and constitutional values. The enactment of the 1993 Act, was in itself a commendable step, which should be preserved by undertaking critical legislative review of the same. To conclude, AiNNI believes that the first step for reforms in the NHRC and SHRCs are through amendment of Section 4 and Section 22 of the Act, pertaining to the Appointment Committee. In case of the NHRC, the composition of the appointment committee would be in the ratio of 4:2 in most cases, 3:3 in rare cases or 5:1 as experienced in the past five years with the absence of Leader of Opposition in Lok Sabha. Till government's representation in the appointment committee is in majority, NHRC and SHRCs will seldom be independent as required according to the Principles.

NEPAL: INTERFACE BETWEEN THE STATE AND CIVIL SOCIETY

Informal Sector Service Center (INSEC)¹

1. Introduction

This report assesses the role of the National Human Rights Commission of Nepal (NHRCN)² in particular in the context of the country's shrinking civic and democratic space. The report focuses on various draft laws that were presented by the Government in Parliament that restrict the civic space and examines the role of NHRCN in this context. The report is predominantly based on information gathered by the Informal Sector Service Centre (INSEC),³ annual reports of the NHRCN, previous ANNI reports and a brief study of the Constitution of Nepal.

2. Overview

The NHRCN was established in 2000 with the motto of “*Dignity, Equality and Justice for all.*” It became a constitutional body in 2007 with Nepal's Interim Constitution and was kept as is in the 2015 Constitution.⁴ The National Human Rights Commission Act, of 2012 (NHRC Act) regulates it.⁵

The Commission is responsible for conducting inspections and monitoring of agencies of the Government of Nepal, public institutions, companies and persons for the protection of human rights.⁶ It can provide necessary suggestions to the agency or person found to be violating human rights. The Commission can also conduct investigations – with the permission of the court – in cases of human rights violations and receive human rights violation complaints.⁷ Section 249 of the Constitution of Nepal “*It shall be the duty of the National Human Rights Commission to ensure the respect, protection and promotion of human rights and their effective implementation.*”

In October 2014, the International Coordinating Committee of the NHRI's Sub-committee on Accreditation (GANHRI-SCA) began a special review⁸ of the NHRCN from November 2012-October 2014, on the basis of information provided by civil society and stakeholders. The review was concluded in 2014. The NHRCN retained status “A”⁹ but the SCA raised concerns that the

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² See NHRCN's Website available at: <https://www.nhrcnepal.org/>

³ See INSEC'S Website available at: <http://inseconline.org/en/about-us/>.

⁴ Constitution of Nepal, 2015, Part 25, available at:

https://www.mohp.gov.np/downloads/Constitution%20of%20Nepal%202072_full_english.pdf.

⁵ National Human Rights Commission Act, 2068, 21 January 2012, [Hereinafter: NHRC Act, 2012], available at:

http://www.nhrcnepal.org/nhrc_new/doc/newsletter/National+Human+Rights+Commission+Act.pdf.

⁶ NHRC Act, 2012, Article 4.

⁷ NHRC Act, 2012, Article 10.

⁸ The special review was due to concerns raised by the SCA relating to (1) complaints within the jurisdiction of the Army Act, (2) the selection and appointment process of the commission's members, (3) the commission's financial autonomy and (4) its staffing.

⁹ GANHRI, Chart of the Status of National Institutions, Accreditation Status as of 26 May 2017, available at:

http://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf.

selection and appointment process of its members was not clear, transparent, or participatory; that the NHRCN lacked financial autonomy; and that it was unable to hire and retain sufficient staff.¹⁰

The Commission has therefore constantly watched as to whether the state has been fulfilling its duty of protecting and promoting human rights.¹¹ As in previous years, the Commission has conducted a number of activities including: received human rights violation complaints; investigated and monitored the human rights situation; provided training; conducted meetings and interaction programs (such as by broadcasting human rights issues through mass media); reviewed human rights laws; prepared a Universal Periodic Review (UPR) report and published reports. When needed, the Commission has also coordinated with the office of the President, the Nepal Government, political parties, national and international non-governmental organisations (NGOs) and members of civil society.

However, the Commission does not enjoy support as anticipated from Governmental agencies. The budget being provided by the state to run need-based programs has also been curtailed. In addition, while the Commission has revised its previous organisational structures after the country adopted a new federal set up, the Government has not yet approved it not has the NRCH Act been revised. The Government has also not approved the NHRCN's proposal to amend the terms and conditions and facilities for NHRC staffs. These delayed answers from the Government have directly affected the performance of the Commission and career growth of its staffs.

The overall human rights situation of the country is not satisfactory and the Government is not fully implementing the rights guaranteed under the 2015 Constitution. On 10 February 2019, the mandate of the two transitional justice mechanisms: the Truth and Reconciliation Commission (TRC) and Commission for Investigation of Enforced Disappearance People (CIEDP) formed four years ago to investigate incidents from the conflict expired. None of them had completed their task. However, due to local and international pressure, the Government extended their mandate for another year.

While the victims of the conflict were very hopeful when these commissions were established they now doubt they will be able to deliver justice. The apparent abysmal performance of the commissions was due to a lack of cooperation by the Government, which neither streamlined the legal provisions nor provided sufficient funds and logistics support to them.¹² The question now is whom these commissions are meant to serve if the victims of the conflict have disowned them. It is important to note that the TRC Act gives the NHRCN the role of monitoring the implementation of the recommendations made in the TRC and CIEDP reports.

¹⁰ 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 (SCA)', 27-31 October 2014, available at: <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20OCTOBER%202014%20FINAL%20REPORT%20-%20ENGLISH.pdf>.

¹¹ As per the e-mail of NHRCN received by INSEC on 8 August 2019.

¹² Renee Jeffery, 'Nepal's Truth and Reconciliation Commission limps on,' Lowy Institute, 12 February 2019, available at: <https://www.lowyinstitute.org/the-interpreter/nepal-truth-and-reconciliation-commission-limps>.

Civil, political economic, social, and cultural rights, as well as the rights of minority groups, have not seen much improvement in their implementation. The general life of the people is still difficult in particular for those victims of labor exploitation abroad. The number of cases of domestic violence is growing and the situation of the victims of floods and the earthquake is yet to be addressed. Caste-based discrimination remains prevalent, and people still lack access to health facility. It is necessary that the State give special consideration to the situation of marginalised communities, indigenous nationalities, persons with physical disability, Dalits, women, senior citizens and migrant workers. It has not, so far. As a result, the rights of these groups and communities have not been safeguarded.¹³

Nepal's Criminal Code does not criminalise torture and enforced disappearance. This is despite the fact that Nepal became a party to the Convention against Torture (CAT) in 1991. As a result, the TRC and CIEDP will not be able to make appropriate recommendations against perpetrators of human rights violators in cases of torture and enforced disappearances. On 5 February 2018, the NHRCN urged the Government to criminalize torture and enforced disappearance, in an eleven-point recommendation that it issued on transitional justice.¹⁴ Bills to criminalize torture and enforced disappearance are currently under discussion in Parliament but are yet to be adopted.

However, as the NHRCN has pointed out in a submission to the Universal Periodic Review (UPR), the bill imposes a 90 days statutory limitation for cases of alleged torture to be filed, which is contrary to the CAT's stipulation. No such limitations should be imposed, and the definition of torture used in the draft bill is not in line with the CAT's definition.¹⁵

3. NHRI and Its Mandate to Protect and Promote Human Rights

The Commission is a main actor for the protection and promotion of human rights of the people. NHRCN is to fulfill the hopes and aspirations of the people for dignity, equality and justice. Its main objective is *“to ensure the respect, protection and promotion as well as effective implementation of human rights.”*¹⁶

To fulfill this objective the Commission has the power to investigate cases of alleged violation of human rights and bring them to the attention of the authorities concerned and it issues recommendations and guidelines for the strengthening of the protection of persons deprived of their liberty. It may also conduct investigations following petition by an aggrieved person or it can even investigate or inquire about the incident of violation of human rights of its own discretion.

¹³ Human Rights Watch, World Report 2019, Nepal, available at: <https://www.hrw.org/world-report/2019/country-chapters/nepal>.

¹⁴ NHRCN, 'The Present Situation of Transitional Justice in Nepal: Commission's View,' 5 February 2018, available at:

http://www.nhrcnepal.org/nhrc_new/doc/newsletter/Press%20Release%20Commissions%20view%20on%20Transitional%20Justice%2010-22.pdf.

¹⁵ The NHRCN, Nepal Joint Submission for The Second Universal Periodic Review of Nepal, 22 March 2015, p.8, available

at:http://www.nhrcnepal.org/nhrc_new/doc/newsletter/NHRI%20Nepal%20joint%20Submission%20for%202nd%20UPR%20Review-2015.pdf.

¹⁶ NHRC Act, 2012, Preamble.

Similarly, it may initiate or conduct training and sensitizing programs for members of law enforcement agencies and awareness campaigns for the general population.¹⁷

As per the constitution and the NHRC Act, the Commission can receive complaints “*in case of violation of human rights or abetment thereof*” from “*the victim himself or herself or anyone on behalf of him or her.*”¹⁸ In some cases, it can even receive complaint on a *Suo Muto* basis by receiving information from the media. In cases of complaints received by the NHRCN that relate to the conflict era, NHRCN can share all the information with TRC and CIEDP, except the victims and witnesses’ statements.

Upon receipt of complaints, the Commission carries out investigation and monitoring and forwards it for legal action when necessary. There are written guidelines on the procedures to handle complaints. The investigator after conducting the investigation of the complaints must submit its report to the NHRCN. The Commission may then seek expert services, conduct public hearing or summon witnesses. But the NHRC Act is silent about the time period within which an initial response is required from the authorities against which the complaint is lodged. The Act also provides that if victim needs compensation or reparation, the Commission can do so.¹⁹

There are also no proper guidelines provided regarding the NHRCN’s involvement in the judicial proceedings such as *amicus curiae*. However it may collect evidence from court records with the preliminary consent of the court.

In 2018, NHRCN received 152 complaints and it has completed the investigation on another 350 complaints that carried forward from the previous year.²⁰ The complaints related to civil and political rights; economic, social and cultural rights; women's rights; child rights; caste-based discrimination; involuntary disappearance; rights of migrant workers and their families; other rights such as rights of senior citizens, rights of refugees, human trafficking and environmental rights.

The Commission also conducted 463 monitoring events,²¹ 11 of which were carried out in coordination and collaboration with other governmental offices and human rights organisations. The Government offices that collaborated with NHRCN included the District Administration Office, District Police Office, Office of Women and Children, and District Child Welfare Committee, among others. Similarly, the Commission also worked with various non-governmental organisations including Women’s Rehabilitation Center-Nepal (WOREC-Nepal), KIRDARC Nepal and Save the Children, among others.²²

In 2018, NHRCN also carried 350 investigations including on the right to life, the right to be free from torture and involuntary disappearance, women's Rights and child rights.

¹⁷ NHRC Act, 2012, Article 4.

¹⁸ NHRC Act, 2012, Article 10.

¹⁹ NHRC Act, 2012, Article 16.

²⁰ NHRCN, Annual Report Synopsis, FY. (2017-18), p. 6, available at:

http://www.nhrcnepal.org/nhrc_new/doc/newsletter/Annual_Report_Synopsis_Eng_FY_2017_18.pdf.

²¹ NHRCN, Annual Report Synopsis, FY. (2017-18), p. 8.

²² NHRCN, Annual Report Synopsis, FY. (2017-18), p. 11.

Most investigated cases relate to the armed conflict where plaintiffs have complained of deprivation of civil and political rights or violation of their human rights such as torture and enforced disappearance.²³

A total of 335 complaints were settled during this fiscal year (92 cases related to complaints and 13 others related to policy issues). Out of them, 105 recommendations were made on these complaints, 164 complaints have been dismissed or put on hold, 32 complaints were repealed, while one case is in the process of settlement. 33 cases were resent to the respective offices, suggesting them to resubmit, by completing all procedures.²⁴

The major lacking of the Commission however is that in many cases it has failed to publish its fact-finding reports. As per NHRCN source, several fact-finding reports from inquiries undertaken by the NHRCN remain yet to be completed due to investigative procedural limitations and a lack of field experts.²⁵ For example, NHRCN has conducted a fact-finding mission in 2017 on the killing of alleged drug dealer Prabin Khatri of Kushunti Lalitpur during a so-called ‘police encounter’ but none of the findings were made public.

On November 2018, the NHRCN has also published a research report on the situation of migrant workers with a special focus on fair and responsible recruitment and access to justice. The NHRCN also included 17 points recommendations to the Government²⁶

The Commission has also conducted 324 human rights promotional activities with the motto of “*Human Rights in each household: A base for peace and development.*”²⁷ In 2019, January, the Commission also presented a report on human rights to the legislature in order to address Nepal’s political turmoil, implementation of recommendations, ending impunity, respecting rule of law, creating peace and good governance and delivering justice to conflict victims and to provide the Commission with adequate resources.

4. Nepal’s Democratic Backsliding and Contraction of Civic Space

Civic space is shrinking across Asia due to increased restrictions on peoples’ right to participation in the civic and political life of their country. Globally, the democratic space for civil society is under threat. In this context, the CSOs in Nepal are experiencing similar hardship and the space for them to operate is shrinking in violation of peoples’ rights to freedom of association, opinion and expression.

The history of civic space in Nepal is one of constant struggle for freedom, autonomy and justice. After the 1990’s multiparty movement in Nepal that brought an end to absolute monarchy and the beginning of constitutional democracy. Since then Nepal has achieved a significant improvement

²³ NHRCN, Annual Report Synopsis, FY. (2017-18), p. 15.

²⁴ NHRCN, Annual Report Synopsis, FY. (2017-18), p. 25.

²⁵ As per the e-mail received by INSEC from NHRCN on 8 August 2019.

²⁶ As per the email received from NHRCN on 8 August 2019.

²⁷ NHRCN, Annual Report Synopsis, FY. (2017-18), p. 8.

in the field of human rights. Nepal's Constitution has allowed citizens to engage in peaceful action for the promotion of the common good.²⁸

However, there is a growing concern and fear among the civil society that the legal environment for civil society to operate is shrinking. The human rights and civic space in Nepal started to deteriorate under the incumbent Government, which came into power in 2017.

Concerns on Proposed Amendment to the NHRCN Act

The Government has drafted a bill to amend the NHRC Act of 2012, which curtails the rights of NHRCN. This bill is set to be registered in the federal Parliament.

Three years ago, the NHRCN drafted a new bill to bring the NHRC Act in line with the new Constitution. The Bill proposed that the NHRCN recommends to the Cabinet action against human rights violators, which would then be implemented by the Attorney General. However, the current version states that the NHRCN should make recommendations to the Attorney General who would hold the discretionary power to decide whether to move the case forward or not. This could defeat the NHRCN's purpose of holding human rights violators to account especially when authorities themselves are involved in cases of human rights violations. Because the Attorney General is the Government's legal counsel, he may not prosecute these cases. This is a serious concern as it would disempower the Commission's protection mandate and potentially enhance a culture of impunity within the country.²⁹

According to Article 18 of the proposed bill, the NHRCN would also have to seek consent from the Finance Ministry to accept additional financial resources. Such requirement may pose a threat to the independence of the Commission, as it provides room for the Government to interfere in its financial autonomy.

Moreover, the amendment bill has dismissed Article 26 (b) of NHRC Act 2012, which provides the legal basis for the creation of the regional and sub-regional offices of NHRCN. If adopted, this will reduce the NHRCN's resources and hinder the implementation of the Commission's mandate in the country. The lack of provincial and contact offices will prevent victims of human rights violations and their families from timely reporting to NHRCN and seeking assistance.

As stipulated in the Belgrade Principles on the Relationship between National Human Rights Institutions (NHRIs) and Parliaments, the Parliament should scrutinise the proposed amendments to the founding law of an NHRI with a view to ensure the independence and effective functioning of the institution.³⁰ The civil society of Nepal and activists have been constantly raising their voices saying that these proposed amendments will limit the jurisdiction, autonomy and independence of the NHRCN, turning it into the puppet of the Government.

²⁸Constitution of Nepal, Article 50, available at:

https://www.mohp.gov.np/downloads/Constitution%20of%20Nepal%202072_full_english.pdf

²⁹ Ram Kumar Kamat, 'Bid to render national human rights body toothless,' *The Himalayan Times*, 15 April 2019, available at: <https://thehimalayantimes.com/nepal/bid-to-render-national-rights-body-toothless/>.

³⁰ Belgrade Principles on the Relationship between National Human Rights Institutions (NHRIs) and Parliaments, 22-23 February 2012, available at: <https://www.forum-asia.org/uploads/wp/2017/01/Belgrade-Principles-Final.pdf>.

Introduction of National Integrity Policy

The Government has introduced the National Integrity and Ethics Policy in 2018, which aims to restrict International NGOs (INGOs) and NGOs.³¹ The integrity policy itself is not a bad policy as it normally aims to promote integrity and transparency. But the Government's intention is to restrict INGOs and NGOs. The international community has also drawn the attention on this policy.³²

The proposed policy states the following points:

- INGOs cannot forward any reports to headquarters or donors without first submitting them to, and securing approval from, the Government.
- NGOs must report foreign individuals or agencies involved in '*activities against Nepal, Nepali civilisation or social harmony*' to the authorities.
- I/NGOs and foreigners are barred from '*levelling unwarranted charges against Nepal ... and spreading hatred.*'
- Security agencies under the Home Ministry will monitor foreigners to check if they are working against the '*national interest.*'
- Nepali officials meeting foreign diplomats should not work against Nepal's '*national interest*' and should maintain secrecy.
- Foreign embassies cannot disburse development aid directly.

The policy also has ambiguous provision that can be used to shut down I/ NGOs or foreign aid agency and creates administrative hurdles and places restrictions on their activities with the intent of contracting democratic space for civil society.

For example, Section 9.2.3 deals with regulations on the activities and conduct of NGOs and INGOs. Sub- Section 2 states that NGOs seeking foreign funds should seek consent from the Ministry of Finance stating the reasons for seeking funds and the amount. Such permission was never required before. Similarly, in Sub-Section 6 it is stated that if an NGO has prepared any report or bills or any other details for any INGOs, those should be submitted to the concerned state agency. Sub-section 7 stipulates that only a fixed percentage of funds can be spent for administrative purposes, while Sub-Section 8 states that NGOs will be scrapped if they fail to renew their registration within three months from the time given.

Section 9.2.4 deals with the code of conduct for INGOs and Sub-Section 1 provides that each INGO must get prior approval for their annual activities and budget. Sub-Section 6 stipulates that an INGO should not influence or lobby or create pressure for law making or policymaking. Sub-Section 8 says an INGO should not make and send to its originating country any materials with inappropriate allegations against Nepal, or that causes humiliation or hatred or disharmony. Sub-

³¹ <https://thehimalayantimes.com/nepal/opmcm-drafts-national-integrity-policy/>

³²OHCHR, Submission to mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on freedom of religion or belief, OL NPL 1/2018, 1 July 2018, available at: <https://www.ohchr.org/Documents/Issues/Opinion/Legislation/NPL-1-2018.pdf>.

Section 11 says an INGO should not send any report to its country without permission of the Nepal Government. Sub-Section 14 stipulates that it should not work against the civilisation, culture, social relation and harmony of Nepal.

All these provisions have a clear intention to control the human rights activities in Nepal, which is a matter of serious concern. The shrinking of civic space for a civil society will undermine the ability of citizens to effectively advance human rights, hold the government accountable, and serve vulnerable communities.

The Introduction of Nepal Media Council Bill and Mass Communication Bill:

The Government registered the Bills relating to the Nepal Media Council in May 2019. The bill proposes to impose a heavy fine if any of the media house, publisher, editor or journalist publishes news or articles “*tarnishing the image of any individual.*” This bill contradicts the spirit of press freedom and right to free expression provisioned by in Nepal’s Constitution.

Another bill on Mass Communications proposes to confiscate media equipment, and impose fines up to 10 million Nepal rupee and 15-years imprisonment if a media person is found to be publishing content “*undermining national sovereignty and integrity.*” This would allow the Government to use this provision to take action against any media personnel it dislikes. Human rights activists and media personnel consider this bill to violate the right to freedom of expression.

Bill Regarding Information Technology:

Another controversial bill is the Information Technology Bill put forth by the incumbent Government in February 2019 and that violates the freedom of speech and opinion under the pretext of regulating social media platforms. Earlier, the Government also put forth another bill, the Federal Civil Service Bill, which attempts to restrict civil servants from sharing their views on social media or sharing any information and views with media that contradict the Government’s policies and action.³³

Authority to Register, Monitor I/NGOs Activities:

In a draft law prepared by the Nepal Law Commission, the Government in 2018 proposed to establish a separate Government organisation responsible for registering I/NGOs with a view to effectively monitor their activities in Nepal. Many NGO activists fear that the authority is likely to deny registration or grant approval to those organisations that works on human rights and in

³³ *The Kathmandu Post*, ‘Nepal government’s new Information Technology bill draws battle lines against free speech,’ 15 February 2019, available at: <https://kathmandupost.com/national/2019/02/15/nepal-governments-new-information-technology-bill-draws-battle-lines-against-free-speech>.

particular the right to freedom of expression and association and/or who carry out lobby and advocacy activities for policies and laws changes.

In addition NGOs operating in Nepal also have to deal with a serious lack of understanding on the role of civil society by the Government of Nepal, burdensome registration requirements, and restrictions on access to resources.

In response to the Government's bills recently introduced in the Parliament, the civil society, media and human rights organisations have organised protests and are calling upon the international community to lobby the Government of Nepal to abide to its Constitution and its international obligations.

The people who suffer the most from the shrinking civic space are those from marginalised communities, Dalit, Janjati and indigenous people. Civic space is primarily about the exercise of people's freedoms and rights in the public sphere. A vibrant civic space is what makes democracy work within a society and ensures a democratic and accountable state.

5. Role of the NHRCN in the Democratic Backsliding and Contraction of Civic Space

NHRIs can potentially play an important role in the protection of civil society actors. They are able to retain their independence and can forge close relationship with domestic CSOs and report on human rights violations, thereby helping to leverage domestic and international pressure.³⁴

The NHRC Act explicitly mandates the NHRCN to review the implementation status of the international human rights treaties of which Nepal is a state party and to make recommendations to the Government to take necessary action for their effective implementation.³⁵ Nepal has ratified the International Convention on Civil and Political Rights (ICCPR) in 1991 and therefore has an obligation to respect, protect and fulfill all human rights enunciated in the ICCPR. The NHCRN can constantly exert pressure on the Government if such rights are violated. In situation of democratic backsliding and contraction of civic space, the Commission must play a vital role to overcome such challenges. NHRCN has monitored the situation and provided suggestions and directions on the basis of its finding after gathering information from CSOs.³⁶

The Commission should have exerted more pressure on the Government and concerned agencies to amend the weak provisions of the NHRC Act, to ensure it can maintain a record of the human rights violators and strengthen the enforcement of its recommendations. It would definitely increase the effectiveness of its role in the drafting of human rights friendly legislation, and the implementation of its recommendations (at all three levels—local and federal) including the ratification of the Rome Statute of the International Criminal Court, and of the International Convention for the Protection of All Persons from Enforced Disappearances. It shall also take initiative to support the state in meeting its obligation as party to various conventions and treaties and enforcing the recommendations made to Nepal in the UPR.

³⁴ ODIHR (2014), pp. 126-127. Pegram (2011), p. 18.

³⁵ NHRC Act, 2012, Article 6(4).

³⁶As per the e-mail received by INSEC from NHRCN on 8 August 2019

6. Conclusion and Recommendations

The civil society and media sectors in Nepal are vibrant, which is a credit to the country's commitment to democracy and recent history of a relatively permissive civic space. While media and CSOs have contributed a significant amount to progress in Nepal, there is a growing sense of fear that the legal environment for civil society and the media is becoming restrictive. One of the major concerns is the Government's attempts at amending the NHRC Act 2012.

The new Constitution in Nepal, promulgated in 2015, provides a unique opportunity to pursue legal reforms that will allow the media and civil society sectors to continue their contributions to the country and protect their independence. The country has now adopted a federal system. Governments are formed at three levels. In this context, NHRCN must provide expert services to provincial and local governments to formulate human rights friendly laws.

For the Commission to also function effectively it must further coordinate and collaborate with the Parliament, Government, Constitutional bodies, political parties, CSOs, NGOs and stakeholders (citizen) and strengthen its relations with national, regional and international organisations working in the human rights sector as well as donors.

Thus, being a national organisation, the Commission needs to learn the lessons from its past while moving ahead focusing on the Constitution, laws to amend and its strategic plan.

6.1 Recommendations

To the Government of Nepal:

- 1) Conduct comprehensive discussion with civil society and concerned stakeholders before amending the NHRCN Act;
- 2) Implement recommendations made by the NHRCN;
- 3) Immediately amend the laws regarding transitional justice mechanisms and provide justice to the victims because justice delayed is justice denied;
- 4) Learn to work closely with CSOs;
- 5) Abide by its international and national obligations to protect and promote human rights;
- 6) Safeguard the autonomy and jurisdiction of the NHRCN; and
- 7) Withdraw the proposed NHRC Amendment Act or amend the law as per the Paris Principles.

To the International Community:

- 1) Put pressure on the Government to adopt human rights friendly laws;
- 2) Draw the attention of the Government on human rights issues; and
- 3) Build the capacity of the NHRCN.

Recommendation to the Donor Community:

- 1) Support the NHRCN in its capacity development; and
- 2) Invest in a program where findings of investigations on grave human rights violations can be made public.

PAKISTAN: SHRINKING CIVIC SPACE IN PAKISTAN- NCHR ON THE BALL BUT DIFFICULTIES REMAIN

*Bytes for All (B4A)*¹

1. Introduction

In this year ANNI report Bytes for All (B4A) focuses on the performance of the National Commission for Human Rights (NCHR) of Pakistan² and assesses its role in the promotion of human rights in the current changing political environment and its impact on the country's democratic and civic spaces.

Apart from secondary sources, including newspapers, published reports and other literature, B4A sought inputs from representatives of the NCHR through one-on-one interviews such as with the NCHR's former chairperson,³ in order to present a more attentive, balanced and unbiased analysis.

2. Overview

The NCHR was established in May 2015, almost three years' after the adoption of its founding Act.⁴ Ever since its formation and the appointment of its first commissioners and chairperson, the NCHR has been facing administrative and financial issues.⁵ In 2018, the NCHR had still not yet applied to the Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation (GANHRI-SCA). Though according to the Secretary of the NCHR efforts to complete the application were underway and would be completed soon.⁶

Seeking approvals from the Ministry of Human Rights (MoHR) remains one of the biggest issues of the NCHR in carrying out its work. Officials of the Commission complain that bureaucratic bottlenecks exist at every level. The Commission even has to seek permissions for internal matters such as for recruitment. Similarly, some permissions and approvals are still needed for the NCHR to carry out different sorts of visits, undermining its independence.

In 2018, the MoHR received at least 4,996 cases of human rights violations from the Islamabad Capital Territory alone⁷ via the newly launched online - Pakistan Citizen Portal - through which

¹ Haroon Baloch, Program Manager (haroon@bytesforall.pk) and Marvi Mumtaz, Research Assistant at Bytes for All, Pakistan co-authored this report. B4A website is available at: www.bytesforall.pk.

² The NHRC's Website is available at: <https://nchr.gov.pk/>.

³ Two interviews with NCHR official including top bureaucracy took place on 30 May 2019.

⁴ National Commission for Human Rights Act 2012, Act No. XVI of 2012, The Gazette of Pakistan, 5 June 2012, [Hereinafter the NHCR Act], available at: http://www.senate.gov.pk/uploads/documents/1358919417_548.pdf.

⁵ ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia, 'Pakistan: Handicapped NCHR struggles for progressive realization of its mandate', 2018, [Hereinafter ANNI Report 2018], available at: https://www.forum-asia.org/uploads/wp/2018/12/2018_ANNI-Report_FINAL.pdf.

⁶ Interview with NCHR official on 30 May 2019.

⁷ F .Hashmi, '4996 cases of HR violations received in Islamabad', *Urdu Point*, 7 May 2019, available at: <https://www.urdupoint.com/en/pakistan/4996-cases-of-hr-violations-received-in-islam-615164.html>.

complaints can be lodged against different public departments.⁸ According to the media, MoHR's official document mentions that 289 complaints were referred to the NCHR.⁹ This shows that the MoHR has started acknowledging the mandate of the NCHR of probing human rights violation complaints and cases. However, MoHR still interferes in the latter's independence by requesting numerous approvals and limiting its funds.

Indeed, while the NCHR is an independent and advisory body accountable to the Parliament, not the Government, the MoHR approves its budget.¹⁰ Unfortunately, a lack of understanding between the Commission and the Government has led to issues with its budget allocations. The Commission faced constant financial constraints owing to the limited budget designed by the government in coordination with the MoHR. For instance, the Government failed to account for realistic functioning costs and applied cuts to the projected fiscal allocations required by the NCHR for a progressive implementation of its constitutional mandate. In fiscal year 2018, the former Chairperson and members of the Commission also expressed their displeasure over the decision to handover to an external body the design of their budget.¹¹ They deemed that the Commission is best placed to design its budget, as only they can understand the administrative and financial constraints they face. According to the Commission, a budget deficit of almost Rs. 27 million still exists and will have a visible impact on their work throughout the fiscal year 2019-20.¹²

While the financial constraint is a major issue that hinders the performance of the NCHR, according to the Commission, the absence of competent human rights and technical experts is a far bigger problem. Officials said that the staffing of the administration lacks the necessary training and skillset to report on human rights treaties, conduct research and undertake fact-finding missions. In addition, the current staff even if trained on special subject matters and reporting techniques is not bound to stay with the Commission. In case of their transfers to other departments, the Commission has to begin from scratch, looking for experts and investing in their capacity again.

As the Commission lacks qualified staff, it also lacks a framework to address the changes in the country's political realm and civic space. It is unfortunate that even after four years of performance the NCHR continues to face financial and human resources issues – as well as administrative impediments - that prevent it from fully implementing its mandate and promoting human rights.

The Commission formed in 2015 has come to an end in May 2019. With the new Commissioners currently in the process of being appointed, some transitional time will have an impact on the performance and the responses of the NHRC to human rights violations.

⁸ *Express Tribune*, 'PM launches Pakistan Citizen Portal to address public complaints', available at: <https://tribune.com.pk/story/1835999/1-pm-launches-pakistan-citizens-portal-address-public-complaints/>.

⁹ F.Hashmi, '4996 cases of HR violations received in Islamabad', *Urdu Point*, 7 May 2019, available at: <https://www.urdupoint.com/en/pakistan/4996-cases-of-hr-violations-received-in-islam-615164.html>.

¹⁰ NCHR Act, Article 27.

¹¹ ANNI Report 2018.

¹² Interview NCHR Official, 30 May 2019.

3. NCHR and its Mandate to Promote and Protect Human Rights

Articles 14 and 15 of the NCHR Act limit the powers the Commission can exercise in cases of human rights violations allegedly committed by intelligence agencies or the armed forces. This restricts the means available to hold perpetrators of human rights violations accountable.¹³ In the majority of cases of enforced disappearances, intelligence agencies have been allegedly involved.

For instance, there is a pending *suo moto* case in which the Supreme Court required that the Government provide details about the number of missing persons in the country.¹⁴ As a consequence, in January 2018, the Commission of the Inquiry on Enforced Disappearances (COIOED) presented a report to the Supreme Court and the National Assembly's Standing Committee on Human Rights detailing the aggregated data on enforced disappearances. According to the report, 1,532 cases of enforced disappearances were still pending. Another illustration is the case of four social media activists and bloggers who were also disappeared in 2017 for three weeks and subjected to torture. After their release, they all blamed military agencies.¹⁵

Despite this the NCHR has a strong mandate¹⁶ to hold perpetrators accountable on many other human rights issues occurring across Pakistan such as: cases of child sexual abuse, honor killing, persecution of religious minorities including forced conversions of Hindu and Christian, enforced disappearances of human rights and political activists, and the silencing of mainstream media and prominent journalists.¹⁷

Fact-Finding

The NCHR carried out meaningful fact-finding missions in several high profile cases. For instance, following the case of Zainab, a seven-year-old girl from the city of Kasur who was raped and murdered in January 2018, commissioners visited the area.¹⁸ Based on its fact-finding mission the NCHR released a report that found numerous cases of child rape and murders. The report presented policy level recommendations including to reform the criminal justice system in order to speed up and strengthen investigations and to reform the child protection system. As a result of the communication from the NCHR's Chairperson, the Prosecutor General issued a recommendation to expedite the investigation.¹⁹

¹³ Human Rights Watch, “‘We Can Torture, Kill, or Keep You for Years’” Enforced Disappearances by Pakistan Security Forces in Balochistan,’ 28 July 2011, available at: <https://www.hrw.org/report/2011/07/28/we-can-torture-kill-or-keep-you-years/enforced-disappearances-pakistan-security>; Amnesty International, ‘Pakistan: Enduring Enforced Disappearance,’ 27 March 2019, available at: <https://www.amnesty.org/en/latest/research/2019/03/pakistan-enduring-enforced-disappearances/>.

¹⁴ Nasir Iqbal, ‘SC seeks report on number of missing persons,’ *Dawn*, 13 January 2015, available at: <https://www.dawn.com/news/1156658>.

¹⁵ BBC News, ‘Pakistan activist Waqass Goraya: The state tortured me,’ 9 March 2017, available at: <https://www.bbc.com/news/world-asia-39219307>.

¹⁶ NCHR Act, Sections 12 and 13.

¹⁷ Human Rights Watch, World Report 2019, Pakistan, available at: <https://www.hrw.org/world-report/2019/country-chapters/pakistan>.

¹⁸ ANNI Report 2018.

¹⁹ NHRC, ‘Kasur: the horror prevails’, available at: <https://nchr.gov.pk/wp-content/uploads/2019/01/kasur-The-horror-Prevails.pdf>.

Transgender Rights

Through championing the rights of the transgender community, the NCHR has shown its commitment to pluralism and successfully pursued an all-encompassing mandate. In 2018, the NCHR conducted various activities to promote the rights of the transgender community. It successfully managed to incorporate legislative measures in the Transgender Persons (Protection of Rights) Act 2018.²⁰ They also vouched for the protection of the community and worked closely with the police department to include sensitisation sessions with the Punjab Police on how to approach crimes perpetrated against transgender people. The Commission also signed a Memorandum of Understanding (MoU) with transgender rights-based organisation in Islamabad to further work in this domain. On 10 May 2019, a transgender person named Chahat was the victim of an acid attack in Rahim Yar Khan.²¹ In normal circumstances, such incidents are spoken about, but rarely result in investigations. Nevertheless, the NCHR directed the district police officer to investigate this matter and submit a comprehensive report to the Commission.²²

Human Rights Defenders

Another milestone was the formulation and official launch of the policy guidelines for the protection of Human Rights Defenders (HRDs) in collaboration with the Pakistan Human Rights Defenders Network (PHRDN).²³ The guidelines, which were officially launched on 10 December 2018 coincided with the 70th anniversary of the Universal Declaration of Human Rights (UDHR) and the 20th anniversary of UN Declaration for Human Rights Defenders.

The NCHR has also worked closely with civil society organisations (CSOs) to publish a report in February 2019 on torture. According to the Commission, it investigated 350 cases of allegations of torture in just six months in Faisalabad, Punjab. The report details about 1,424 medico-legal certificates prepared on the orders of the courts between 2006 and 2012. However, no action against any single police officer has taken place.²⁴

The Commission has also time and again supported CSOs and those working for human rights and has openly collaborated with them in seeking two-way knowledge sharing.

Jail and Detention Center Visits

Despite holding the legal power to investigate human rights violations and visit jails, in practice the Commission always has to seek prior permission from the Government.²⁵ Following the death

²⁰ ANNI Report 2018.

²¹ *Dawn*, 'Transperson burned in acid attack,' *Dawn News*, 10 May 2019, available at: https://epaper.dawn.com/DetailImage.php?StoryImage=10_05_2019_178_004.

²² Source Consultant with the Ministry of Human Rights's Facebook Page, available at: <https://www.facebook.com/muhammad.usman.7186896/timeline?lst=100000106401868%3A100000060185946%3A156301880>

²³ *The News*, 'Policy guidelines of NCHR for the protection of Human Rights Defenders (HRDs) launched,' 10 December 2018, available at: <https://bytesforall.pk/publication/policy-guidelines-protection-human-rights-defenders>.

²⁴ Justice Project Pakistan, 'Policing as Torture,' 13 February 2019, available at: https://www.jpp.org.pk/wp-content/uploads/2019/02/2019_01_13_PUB_Policing_as_Torture.pdf.

²⁵ NHRC Act, Section 9(c).

of Mian Javed Ahmed in December 2018 (a professor and former Chief Executive Officer of a university) in custody of the National Accountability Bureau's (NAB) (a civilian agency with the mandate to probe corruption cases), the Commission demanded to be allowed to visit the NAB detention cell.²⁶ However, the NAB did not initially reply to the NHCR request.²⁷ It was only months later – in April 2019 - that the NCHR was finally able to conduct a pilot visit to review the conditions and facilities provided to the prisoners.²⁸ This means that the Commission cannot act of its own initiative and has to wait for approval before embarking on visits.

The NCHR's performance in 2018 is a testimony to their human rights work and their commitment to promote justice. In general, according to the officials of the Commission, the NCHR has been acting like a court whereas in reality it is a quasi-judicial body. The belief and expectation that the NCHR will pass judgments and ensure actions, has put a lot of pressure on the Commission and has in turn increased the expectations to devise actions and take decisions that do not directly fall under its mandate. It has, however, vowed to work more to promote understanding of its mandate.

4. Democratic Space in Pakistan

Politics in Pakistan have been marked by instability. Both civilian governments and military regimes have altered the landscape of governance in the country. Religious sentiments coupled with sectarianism and ethnic conflicts have further pushed back the democratic character of the country. In addition, terrorist organisations operating in the country further weaken the existing and limited democratic space.²⁹

In 2018, Pakistan held general elections that saw the new, yet popular, political party, Pakistan Tehreek-e-Insaf (PTI) win. Despite the European Union (EU) observers qualifying the elections as well administered,³⁰ some saw the victory of PTI as a result of the military's "*influence*" over the elections.³¹

Ever since it came to power in July 2018, the new Government has claimed it will be "*laying the foundation of a true democratic (system).*"³² Unfortunately, as time passes and the Government's

²⁶ *Pakistan Today*, 'NCHR chairman takes suo motu notice of Mian Javed's death,' 25 December 2018, available at: <https://www.pakistantoday.com.pk/2018/12/25/nchr-chairman-takes-suo-motu-notice-of-mian-javeds-death/>.

²⁷ I. Junaidi, 'NCHR unable to probe allegations against NAB,' *Dawn News*, 14 February 2019, available at: <https://www.dawn.com/news/1463718>.

²⁸ *Dunya News*, 'NCHR delegation visits NAB jail in Lahore,' 30 April 2019, available at: <https://dunyanews.tv/en/Pakistan/489511-NCHR-delegation-visits-NAB-jail-in-Lahore->.

²⁹ S.P. Covey, 'Law, Order and the Future of Democracy in Pakistan,' *Brookings*, 21 May 2012, available at: <https://www.brookings.edu/research/law-order-and-the-future-of-democracy-in-pakistan/>.

³⁰ European Union Election Observation Mission, 'EU EOM presents final report on the general elections, with recommendations for reform,' 7 June 2019, available at: https://eeas.europa.eu/election-observation-missions/eom-pakistan-2018/63785/eu-eom-presents-final-report-general-elections-recommendations-reform_en.

³¹ Madiha Afzal, 'An Inflection point for Pakistan's democracy,' *Foreign Policy, Democracy and Disorder*, available at: https://www.brookings.edu/wp-content/uploads/2019/02/FP_20190226_pakistan_afzal.pdf.

³² *Pak Tribune*, 'PTI laying the foundation of true democratic system: Imran Khan,' 28 January 2019, available at: <http://paktribune.com/news/PTI-laying-foundation-of-true-democratic-system-Imran-khan-282089.html>.

first year is coming to an end, the perils of the so-called “*true democracy*” have also been unveiled.³³

Perils and Restrictions to Journalism

In the 2019 press freedom index Pakistan ranked 142 out of 180 countries, slipping three places from 2018.³⁴ The government’s intentions to promulgate a new law to establish a single media regulatory authority called Pakistan Media Regulatory Authority (PMRA) that would control all types of media including social media caused unrest among journalists and civil societies.³⁵ However, the government paid no heed to their concerns. Luckily, the law could not be promulgated because of the removal of the main architect of the proposed law from the Ministry of Information, Broadcasting and National Heritage.

Journalism in Pakistan is one of the most dangerous professions owing to the existing security conditions of the country. Despite this, there are no protective mechanisms available to journalists. The conditions of working media professionals, already bad, have gone downhill. Forced abductions of journalists, violence, torture, baseless police cases, intimidation, surveillance, and above all the culture of impunity are rampant crimes.³⁶ CSOs including press clubs working in their support and for the protection of their rights also face bullying both online and offline.³⁷

An illustration of the ongoing crackdown on the media is the case of the Pashtun Tahafuz Movement (PTM), a political movement from war-torn region, North Waziristan. Leaders of the movement have been advocating for the rights of their people and of victims of enforced disappearances and extrajudicial killings. However, the Government has attempted to block all coverage of their public rallies and speeches on mainstream media. Several journalists who covered their rallies have been facing baseless police cases or labeled as anti-state actors.³⁸ A female journalist, Sanna Ejaz, who worked with the state-owned Pakistan Television (PTV) was fired from the channel due to her association with PTM before the 2018 General Elections.³⁹

In addition, journalists and media professionals have to be mindful when criticizing the Government and state department’s policies, particularly when it comes to the military. In most cases, those critical of the Government are labeled as ‘anti-state.’ Media personnel are mostly

³³ M. A. Nasar, ‘2018 elections — a masterclass in rigging,’ *Daily Times*, 25 July 2018, available at: <https://dailytimes.com.pk/272488/2018-elections-a-masterclass-in-rigging/>.

³⁴ Reporters without borders (RSF), ‘2019 Press Freedom Index,’ available at: https://rsf.org/en/ranking_table.

³⁵ *Pakistan Today*, ‘Press Freedom,’ 19 April 2019, available at: <https://www.pakistantoday.com.pk/2019/04/19/press-freedom-2/>.

³⁶ Ibid.

³⁷ Report, ‘Four press clubs in Balochistan closed down after threats from militants’, *Journalism Pakistan*, 2 November 2017, available at: <https://www.journalismpakistan.com/four-press-clubs-in-Balochistan-closed-down-after-threats-from-militants/>.

³⁸ Committee to Protect Journalists, ‘Pakistani reporter Gohar Wazir detained in Khyber Pakhtunkhwa after covering Pashtun demonstrations,’ 28 May 2019, available at: <https://cpj.org/2019/05/pakistani-reporter-gohar-wazir-detained-in-south-w.php>.

³⁹ A. Malik, ‘PTV terminates anchor Sana Ejaz ‘on association with PTM,’ *Daily Times*, 10 May 2018, available at: <https://dailytimes.com.pk/238116/ptv-terminates-anchor-sana-ejaz-on-association-with-ptm/>.

targeted in smear campaigns. For instance, on 4 July 2019 the twitter trend #ArrestAntiPakJournalists went viral.⁴⁰

In addition, on 8 July 2019 three media channels have been shut down on the orders of the Pakistan Electronic Media Regulatory Authority (PEMRA) for airing speeches of the opposition party.⁴¹ The PEMRA also barred from airing two different interviews of heads of mainstream political parties currently leading the opposition benches in the National Assembly that were conducted by two senior journalists Hamid Mir on 1 July 2019 and Nadeem Malik on 11 July 2019. It did not provide any reasons or clarification for the ban.⁴²

In these circumstances, it is clear that media freedom is increasingly under threat in Pakistan, and journalists and media groups are facing a constant risk. A continuous surveillance and online monitoring of their activities add psychological pressure leading to self-censorship.⁴³

Hampering the Rights of CSOs

CSOs have been facing new challenges since the new Government came to power. The problematic Foreign Contribution Regulation (FCRA) Act is currently under consideration by the Government. It contains a number of restrictive provisions that will limit the activities of civil society in Pakistan.⁴⁴ The law risks legitimising NGO surveillance and questioning on funding. It will also make pre-activity approvals from authorities mandatory. Such provisions are in violation of the right to freedom of association, religious freedom, and right to privacy. The proposed bill needs to be changed but CSOs have not been consulted.

In October 2018, the Government shut down the operations of 18 INGOs without any explanations. Some were labeled as carrying out ‘anti-state’ activities.⁴⁵ In addition in February 2019, 42 NGOs were also denied registration after the Government of Pakistan was placed on the Financial Action Task Force (FATF) grey list. The said registrations were rejected by the intelligence agencies on account of not being compliant with the Economic Affairs Division (EAD) policy guidelines.⁴⁶

This intimidation of CSOs has unfortunately increased recently. Both international and local organisations have had their activities restricted by security institutions. Several field activities

⁴⁰ *Dawn News*, ‘Arrest AntiPakJournalists’ tops Twitter trends in Pakistan,’ 4 July 2019, available at: <https://www.dawn.com/news/1492098>.

⁴¹ *Dawn News*, ‘Channels taken off air,’ 10 July 2019, available at: <https://www.dawn.com/news/1493167/channels-taken-off-air>.

⁴² *Dawn News*, ‘Hamid Mir Show taken off air; PEMRA says not responsible,’ 1 July 2019, available at <https://www.pakistantoday.com.pk/2019/07/01/hamid-mir-show-taken-off-air-pemra-says-not-responsible/>.

⁴³ H. Baloch & A. Qamar, ‘Dangers of Digital Surveillance: An account of self-censorship by journalists and human rights defenders,’ <https://bytesforall.pk/publication/dangers-digital-surveillance/>.

⁴⁴ A. Khan, ‘Foreign Contribution Act: International NGOs to face robust scrutiny,’ *Tribune News*, 10 June 2015, available at: <https://tribune.com.pk/story/900885/foreign-contribution-act-international-ngos-to-face-robust-scrutiny/>

⁴⁵ Imaduddin, ‘Govt. tells 18 INGOs to shut down operation in Pakistan,’ *Business Recorder*, 5 October 2018, available at: <https://www.brecorder.com/2018/10/05/443793/govt-tells-18-intl-ngos-to-shut-down-operation-in-pakistan/>.

⁴⁶ S. Rana, ‘Govt. refuses to register 42 NGOs,’ *Tribune News*, 16 February 2019, available at: <https://tribune.com.pk/story/1911633/1-govt-refuses-register-42-ngos/>.

have been ordered to wrap up immediately and in some cases security forces have been intimidating NGOs by visiting their offices, inquiring about their work, interfering with and accessing both their public and private records.⁴⁷

Many NGOs and HRDs groups working in far-flung areas of the country are constantly at risk. While it is required since 2011, it is only now mandatory in practice that NGOs and INGOs have to ask for permissions from local administrations and to apply for a No-Objective Certificates (NOCs) each time they want to carry out an activity, and explain their mandate before they can proceed with their work.⁴⁸

Both civil society and media freedoms have been impeded resulting in a shrunken civic space. In such a scenario, the mandate of the NHRC too will be hampered due to its close collaboration with CSOs. It is, however, uncertain how the interplay of politics and new legislations will impact the performance of NGOs and whether the situation of human rights will improve or not.

5. Role of the NCHR in the Changing Democratic Environment

The Commission unequivocally said that the new policies and the new Government had not affected them, mainly because the Government had seemingly not committed itself to working with the NCHR.⁴⁹ The Commission itself believed that the Government will need time to understand the dynamics of working with the NHRC and that it was too early to comment on.

The Federal Minister for Human Rights, Dr. Shireen Mazari, visited the Commission in October 2018.⁵⁰ The Minister was briefed about the work of the Commission and the issues that it faces in data collection, court cases and visits. According to the NCHR officials, in regards to the Commission, the Minister provided no indication of her full support. Therefore, the Commission believed that they would receive minimal support from the Government both regarding the resolution of issues that they face in the administration, as well as in terms of funding.

The Commission unfortunately has not taken a strong stance on the current restriction of civic space. Perhaps, this is owed to the internal financial and administrative issues of the Commission. Although, the Commission has the mandate to review laws and policies; however, it did not give the necessary attention to the problematic laws and policies restricting the work of human rights and development in the country. Had the Commission sought and reviewed, in particular, the Non-Governmental Organisations (NGOs) Policy 2013 issued for local NGOs receiving Foreign

⁴⁷ T.Mehdi, 'Why NGOs in Pakistan are at the brink of extinction?,' *Dawn News*, 19 November 2018, available at: <https://herald.dawn.com/news/1398721>.

⁴⁸ Fata Disaster Management Authority, 'Policy for issuance of NOC to NGOs/INGOs,' FDMA, 25 August 2011, available at: www.fdma.gov.pk/files/noc1.doc. NOCs were made mandatory after the US marines killed Al-Qaeda's leader Osama Bin Laden's in a covert surgical strike inside Pakistan in May 2011. A physician, Dr. Shakeel Afridi working on a polio eradication project for Save the Children in Abbottabad helped track Bin Laden by providing confirmed DNA information to the US government. Due to Save the Children's involvement in Bin Laden's killing, the Government made it mandatory to seek prior permissions for all NGOs and INGOs before carrying out any humanitarian, development or human rights activity in sensitive parts of the country.

⁴⁹ Interview NCHR Official, 30 May 2019.

⁵⁰ U. Jamshaid, 'Dr. Shireen Mazari visits NCHR,' *Urdu Point*, 26 October 2018, available at: <https://www.urdupoint.com/en/pakistan/dr-shireen-mazari-visits-nchr-465729.html>.

Contributions⁵¹ and international non-governmental organisations (INGOs) Policy 2015⁵² during its first tenure, it would have been an important step towards securing the working spaces for humanitarian, development and rights based organisations in Pakistan. However, the Commission in its first tenure did not take this initiative, instead kept its eyes closing on the problematic policies regarding NGOs and INGOs currently in practice.

In terms of defending civic spaces and constitutional freedoms in the country, the following work of the NCHR, however, serves as emblematic examples of their attempts to act against increasing restrictions.

NCHR's Stance on Financial Action Task Force Report (FATF)

In June 2018, Pakistan was formally placed on the grey list of the FATF. As a consequence, NGOs faced a lot of repercussions. In simple terms, the placement of Pakistan on the grey list meant that Pakistan served as an aide to terrorist groups and also provided them with the necessary funding needed to carry out insurgencies in different regions. One of the measures taken by the Government in a bid to get itself cleared from the grey list, was to cancel/deny registration of some NGOs. Unfortunately it was human rights and development NGOs that ended being targeted rather than NGOs providing support to violent groups.⁵³

The NCHR chairperson Justice (R) Ali Nawaz Chowhan responded by writing a column in a leading English daily, *The News International*⁵⁴ against Recommendation No. 8 of the FATF report that requires the Government to review NGO regulations.⁵⁵ According to the NCHR, this recommendation was used to hinder the country's civic space. The NCHR also believed that charitable organisations working to uplift the different segments of society would be the one to bear the brunt of Pakistan being placed on the grey list. The NCHR called for strong transparency on the part of the Government to make sure it holds accountable those using cross-border movement of cash and illicit funds for terrorist activities, without drawing parallels with human rights organisations.⁵⁶ The Commission also clearly stated that the Government should take the necessary steps to ensure that a crackdown against the banned terrorist organisations is not carried out in an indiscriminate way.⁵⁷

The NCHR response to the issue was a step in the right direction. It not only acknowledged the issue at hand, but also highlighted the implications that it had on the civic spaces. However, the NCHR's own limitation meant that it mainly provided advises.

⁵¹ Ministry of Finance, Revenue and Economic Affairs, 'Policies and Plans,' *Economic Affairs Division*, available at: <http://www.ead.gov.pk/policiesDetails.aspx>.

⁵² Ibid.

⁵³ S. Rana, 'Govt. refuses to register 42 NGOs,' *Express Tribune*, 16 February 2019, available at: <https://tribune.com.pk/story/1911633/1-govt-refuses-register-42-ngos/>.

⁵⁴ Justice (R) Ali Nawaz Chowhan, 'The FATF tightrope,' *Dawn News*, 25 August 2018, available at: <https://www.thenews.com.pk/print/358850-the-fatf-tightrope>.

⁵⁵ FATF Recommendations, available at: <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html>.

⁵⁶ Justice (R) Ali Nawaz Chowhan, 'The FATF tightrope,' *Dawn News*, 25 August 2018, available at: <https://www.thenews.com.pk/print/358850-the-fatf-tightrope>.

⁵⁷ A.Nawaz Chowhan, 'Anti money laundering and counter terror financing laws,' 30 August 2018, available at: <https://www.pakistantoday.com.pk/2018/08/29/anti-money-laundering-and-counter-terror-financing-laws/>.

The NCHR's Stance on Enforced Disappearances

The NCHR, between 2014 and 2018, received multiple cases of enforced disappearances. Enforced disappearances are widespread in Pakistan. Most of the complaints received by the COIOED are from regions with security issues where the military is carrying out operations including former Federally Administered Tribal Areas and Baluchistan. However, a large number of cases also belong to Khyber-Pakhtunkhwa, Punjab and Sindh provinces, because they are fears that they are used to finance and facilitate terrorist activities inside the country.⁵⁸

In addition, political activists and citizens such as those associated with the PTM movement have also been reported missing in recent years.⁵⁹ Several leading activists and politicians supporting the PTM movement are currently either in state's detention or went underground because of fear of being kidnapped or killed. These include two sitting member of the National Assembly: Mohsin Dawar and Ali Wazir and women rights activists: Gulalai Ismail.

The practice of enforced disappearances in Pakistan is not new, however, the number of cases has increased in the last year.⁶⁰ In most cases, families of the victims of enforced disappearances have to await years for justice. It is also likely that family of disappeared will face intimidation by the state authorities to make sure they remain silent.⁶¹

The new Government vowed to put an end to the practice once and for all. The Federal Minister for Human Rights suggested to Prime Minister Imran Khan, in November 2018, to sign the International Convention against Enforced Disappearances, however with some reservations.⁶²

When the new Government came into force, the NCHR – in a press conference on 6 December 2018 in Karachi - formulated some recommendation such as to establish provincial level committees to take up enforced disappearances cases.⁶³ The NCHR also advocated for a change in Pakistan Penal Code (PPC) to list enforced disappearances as an offence and to adopt a definition of torture and enforced disappearance.⁶⁴ The chairperson of the NCHR also seconded the directives of the Senate's Functional Committee on Human Rights to the Government to draft

⁵⁸ The Commission of the Inquiry on Enforced Disappearances, Official Missing Persons' List, Monthly Progress on Cases of Alleged Enforced Disappearances, 2 July 2019, available at: <http://coioed.pk/missing-persons/>.

⁵⁹ K. Daud, 'Pakistan's Pashtun Rights Movement Suffers First Casualty,' 5 February 2019, available at: <https://thediplomat.com/2019/02/pakistans-pashtun-rights-movement-suffers-first-casualty/>.

⁶⁰ A. Siddique, 'Gov't Report Highlights Scale Of Enforced Disappearances Across Pakistan,' 1 June 2018, available at: <https://gandhara.rferl.org/a/pakistan-report-highlights-scale-of-enforced-disappearances-across-government/29265978.html>.

⁶¹ Amnesty International, 'Pakistan: Enforced disappearances,' 27 March 2019, available at: <https://www.amnesty.org/en/latest/research/2019/03/pakistan-enduring-enforced-disappearances/>.

⁶² I. Junaidi, 'PM advised to sign convention against enforced disappearances,' *Dawn News*, 6 November 2018, available at: <https://www.dawn.com/news/1443938>.

⁶³ *The News*, 'NCHR forms committee to take up enforced disappearance cases,' 8 December 2018, available at: <https://www.thenews.com.pk/print/402225-nchr-forms-committee-to-take-up-enforced-disappearance-cases>.

⁶⁴ S. Wasif, 'Govt. vows to end enforced disappearances,' *Express Tribune*, 31 August 2018, available at: <https://tribune.com.pk/story/1791821/1-govt-vows-end-enforced-disappearances>.

a bill in this regard. This resulted in the drafting of a bill making enforced disappearances a crime. The Prime Minister approved the initiative on 28 January 2019.⁶⁵

The NCHR in February 2018 also published a report on the issue. According to the Commission it had received 100 cases of enforced disappearances between 15 December 2015 and 25 October 2018, of which 23 had been disposed of, while 18 were *sub-judice* or under investigations. The Commission provided recommendations to the Government of Pakistan including to ratify the international Convention on Enforced Disappearances.⁶⁶

In 2018 the NCHR also presented an inquiry report on the issue of torture that specifically looked into cases of police torture between 2006 and 2012 in Faisalabad District.⁶⁷ The report comprehensively suggests legislative reforms, as well as reforms of the criminal justice system at both the institutional and policy levels. In Pakistan there is still no law criminalizing custodial torture including custodial death and custodial rape, and making remedies and reparations available to victims.⁶⁸ According to officials at the NCHR, the report although being lauded has not led to changes in law. However, it is worth noticing that the NCHR has taken stances on issues that are unlikely to be popular with Government officials.

As mentioned in this Chapter the NCHR is still facing internal problems. The commission will be able to work for the freedom of the civil society and improve the democratic conditions of the country only if it is able to firstly gain the independence that an NHRI is entitled to and to address its administrative and resources constraints.

6. Conclusion and Recommendations

The NCHR, which is only four years old, has had its share of both progress and failures. Since its inception, the Commission has been facing serious challenges owing to the nature of its work, coordination with other statutory bodies and its stance on serious human rights violations. Compared with the previous year, the performance of the NCHR has considerably improved and has had positive impacts. Their stance on enforced disappearances, torture, the Hazaras and people of the Kalash Valley, all show the dynamic standing of the Commission. While these issues are mostly brushed away by the Government, the NCHR showed both strength and wisdom in investigating them.

Under the new Government, the democratic space has been adversely affected. Under such conditions the victims and their families look to the NCHR to provide them with some way forward. However, while the Commission has made tremendous efforts in various fields, in most

⁶⁵ S. Chaudhry, 'PM approves draft law to criminalise 'enforced disappearances,' *Express Tribune*, 29 January 2019, available at: <https://tribune.com.pk/story/1899507/1-pm-approves-amendments-declare-enforced-disappearances-criminal-offence/>.

⁶⁶ NCHR, 'The unending saga of enforced disappearances,' Preliminary report, available at: <https://nchr.gov.pk/wp-content/uploads/2019/02/Enforced-Disappearances.pdf>.

⁶⁷ NCHR, 'Police Torture in Faisalabad, a comprehensive inquiry report on systematic torture by police in district Faisalabad from 2006-2012,' 31 January 2019, available at: <https://nchr.gov.pk/category/reports/>.

⁶⁸ *The News*, 'Criminalise custodial torture now: HRC,' 26 June 2018, available at: <https://www.thenews.com.pk/latest/334009-criminalize-custodial-torture-now-hrcp>.

part it has not dealt with the shrinking civic space. It is unfortunate that the Commission has a lot of potential and capacity to impact change, but could not do more for democracy in the country.

In a challenging situation where there are more constraints on human rights organisations than before, the Commission must now act strongly to ensure that human rights are not compromised anywhere. It is up to the Commission to ensure that the democratic freedoms are not compromised. While it is purely an advisory body, it is closely linked to the Parliament. The Commission should therefore build stronger ties with the parliamentary bodies through which concerns can be raised at the highest level.

It is impossible to foresee how the Commission will perform in the coming years. The previous Commission has completed its term in May 2019 and a new one is yet to be constituted. It will therefore be interesting to see how the new Commission will work as compared to the standards set by the previous one. In the coming years, the new Commission will have to form a team that understands the issues of human rights along with the laws of Pakistan. It must also try to ensure that decisions are made internally and independently to exercise its mandate.

Lastly, the NCHR needs to work in coordination with CSOs and lend an ear to their demands and concerns as they understand deep rooted human rights issues and are present on the ground, allowing them to get an important insights on the human rights situation of the country. The NCHR should also devise a competent follow up mechanism with civil society.

It is true for the most part that the country is not facing the most favorable times. Democracy has been reduced to only a concept on paper and there has been efforts to curb existing freedoms. The Commission should make sure that what is written in their mandate is transformed into action. As the civic space in Pakistan is being restricted it is important that the NCHR devises a strategy to lobby for practical actions that promote the principles of democracy.

6.1 Recommendations

To the Government of Pakistan:

- 1) Appoint the new commissioner without any further delay;
- 2) Ensure that democratic freedoms recognized in the Constitution of the Islamic Republic of Pakistan, including the rights of the media professionals and those working for the promotion and protection of human rights, are protected;
- 3) Legalize the NCHR's Policy Guidelines on the Protection of Human Rights Defenders;
- 4) Reconsider its policy guidelines for re-registration of CSOs, both local and international to help enhance the working spaces of non-profit organisations in the country;
- 5) Discourage intimidating tactics, including hate mongering, cyber-bullying, leveling false charges, labeling, against media professionals, social media activists and HRDs;
- 6) Acknowledge and respect the mandate of the NCHR and provide it with a proper autonomous status;
- 7) Ensure that the NCHR is given all possible support in order to promote human rights and social justice in the country;

- 8) Repeal or amend all laws that are in violation of international human rights laws and standards, including the Prevention of Electronic Crimes Act and provide the NCHR with an opportunity to hold dialogue with the relevant Government departments in this regard; and
- 9) Trust the Commission in making its own internal decisions regarding its financial budget, visits for inquiry and fact-findings, and the hiring of staff.

To the NCHR:

- 1) Review Policy for Local NGOs Receiving Foreign Contributions (NGOs Policy, 2013) and INGOs Policy 2015 (Ministry of Interior); and suggest amendments on the clauses that impose undue restrictions on humanitarian, development and rights-based work;
- 2) Strategise a plan to engage all stakeholders around the shrinking of civic spaces and advocate for the promotion of civil and political rights of media professionals, social media activists and HRDs;
- 3) Coordinate more with CSOs working on human rights, particularly for the promotion and protection of civic freedoms;
- 4) Ensure that its new leadership prioritizes the issue of shrinking civic freedoms, especially as this will also help securing its own working space;
- 5) Continue discussion on pressing issues pertaining to amending restrictive legislations such as PECA in close coordination with CSOs;
- 6) Promptly propose amendments to the existing legal framework on torture;
- 7) Continue advocating for the adoption of a law against enforced disappearances and the ratification of the International Convention on the Protection of All Persons from Enforced Disappearances;
- 8) Engage the Government to overcome challenges around hiring of competent permanent staff;
- 9) Enhance the capacity of its staff by providing them with the necessary human rights and technical trainings;
- 10) Engage with CSOs and the media in order to increase knowledge of its mandate among the general public;
- 11) Highlight its chronic challenges, including budgetary constraints, absence of its own funding and staffing issues at the Parliament level; and
- 12) Ensure that it updates its Complaint Mechanism System and integrates a robust follow up mechanism on human rights violations.

SRI LANKA: THE HUMAN RIGHTS COMMISSION OF SRI LANKA- ITS SUCCESS AND CHALLENGES IN TIMES OF TRANSITION

Law and Society Trust¹

1. Introduction

The report assesses the work of the Human Rights Commission of Sri Lanka (HRCSL)² in 2018. It was developed based on a review of the Commission's website, newspaper reports and through interviews with civil society organisations (CSOs) and some commissioners and coordinators at several regional offices of the HRCSL.³ The observations in this report are also based on the history of engagement of the Law and Society Trust with the HRCSL.

The report identifies the progress made by HRCSL in human rights advocacy as well as the challenges it faced by briefly mapping the political context and legal and operational framework within which the Commission functions.

2. Overview

The HRCSL was established through the HRCSL Act No. 21 in 1996⁴ to give weight to Sri Lanka's commitment in protecting human rights as a member of the United Nations (UN), and to perform the duties and obligations imposed on Sri Lanka by various international treaties. This includes the commitment to maintain the standards set out under the Paris Principles in 1993.

Although an Act of Parliament established the HRCSL, it received little government support and constitutional recognition was awarded only through the enactment of the 17th amendment to the Constitution in 2001. The amendment requires that the President seeks approval from the Constitution Council when appointing and removing the Chair and members of the Commission.

According to CSOs the commission was created under international pressure and to prove that the government conformed to international human rights law, not because of the government's robust commitment to human rights. This resulted in the institution being rendered powerless and struggling with untrained staff and limited funding.⁵

However, in 2015 there was a significant political change with the election of a President who had cross-party support and was ostensibly committed to a democratic reform agenda. This period also

¹ Dr. Sakuntala Kadirgamar, Executive Director, with the comprehensive research support of Ms. Sahla Ilaham. See the Law and Society Trust Website available at: <https://lstlanka.org/>.

² Website available at: <http://www.hrcsl.lk/>

³ The persons interviewed include: two Commissioners, one program officer, and five regional coordinators from the HRCSL and seven CSOs.

⁴ Human Rights Commission of Sri Lanka, Act No. 21 in 1996, 21 August 1996, [Hereinafter HRCSL Act], available at: <http://hrcsl.lk/english/ACT/english.pdf>.

⁵ Human Rights in South Asia: an Agenda for the Next Decade (Law and Society Trust, July 2001, Page 47.

saw the appointment of a new set of Commissioners who started to bring about change. The membership of HRCSL – which remains unchanged since 2015 includes: Deepika Udagama (Chairperson), Mr. Hamid Ghazali Hussain (Commissioner), Ms. Ambika Satkunanathan (Commissioner), Dr. Upananda Vidanapthirana (Commissioner), and Mr. Saliya Pieris (replaced by Ms. Ramanie Muttetuwegama in March 2018 after he took up the position of Chair of the Office of Missing persons).⁶

The new Commission increased its activities and engagement on human rights issues. For instance, the abolition of the death penalty was the very first recommendation made by the Commission on 1 January 2016.⁷

The strong advocacy on human rights and the subsequent independent work of the commission has resulted in it being upgraded again to an ‘A’ status by the Global Alliance of National Human Rights Institutions- Sub Committee on Accreditation (GANHRI-SCA) in May 2018.⁸ However, the GANHRI-SCA report also provided recommendations to be considered by the government to further enhance the status of the HRCSL. These include:

- Constitutionalising the independence of the human rights commission;
- Legislating a formal procedure for the appointment of the commissioners that should occur in a more transparent manner and will continue to ensure pluralism and diversity;
- Broadening the mandate of the commission to inquire into the broader range of human rights and not only into fundamental rights.⁹

The GANHRI-SCA also noted that the HRCSL has recently been designated as the National Preventive Mechanism (NPM) under the Optional Protocol to the Convention against Torture (OPCAT), but that it has not been provided with an explicit legislative mandate in this regard.

3. The HRCSL and its Mandate to Protect and Promote Human Rights

HRCSL's Mandate

According to its founding law, HRCSL has the mandate to conduct inquiry and investigation of complaints into violations of human rights; to advise and assist the government in formulating legislation and administrative directives and procedures; to make recommendations to the Government regarding measures which should be taken to ensure that national laws and administrative practices are in accordance with international human rights norms and standards; as well as on the need to accede to treaties and other international instruments in the field of human rights; and to promote awareness of, and provide education in relation to, human rights.¹⁰

⁶ HRCSL's Website available at: <http://hrctl.lk/english/about-us/members-of-the-commission/>.

⁷ ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia, 'Sri Lanka: Reviving amid Challenges,' 2017, p. 148, available at: <https://www.asiapacificforum.net/resources/2017-anni-annual-report/>.

⁸ GANHRI Sub-Committee on Accreditation Report, Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), May 2018, p. 35, available at: <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20Report%20May%202018-Eng.pdf>.

⁹ Ibid.

¹⁰ HRCSL Act, Section 10.

The HRCSL can intervene *suo moto* and therefore it does not wait for a complaint to be made or a violation to occur. It may intervene and advise the Government in anticipation of a detrimental impact on human rights.

The Commission however noted that it is mandated to inquire into the actions of state actors but not private individuals and corporations. This is an unnecessary limitation and may lead to situations where some human rights violations are not addressed.¹¹ Another limitation stems from the fact that social, economic, and cultural rights are not constitutionalised and so the HRCSL cannot inquire into violations of these rights. Ironically many of the complaints and grievances sent to the HRCSL relate to social, economic and cultural rights.

Handling of Complaints

Regarding its complaint mechanism the Commission observed that it is difficult for it to address the plethora of complaints that it receives but it has instead adopted the approach of clustering them and issuing policy guidelines as to how such cases should be addressed.¹² It hopes that the guidelines and directives that it issues will have the potential to impact the case in a positive way.¹³

The Commission also expressed the view that there were operational aspects that required attention in how they receive complaints. For instance, the hotline has problems and the Commission believes that they have not established an efficient system for taking calls by staff on duty. One of the improvements that it is considering is to establish a centralised call centre where it is possible to log and monitor all calls.

Not all cases can be resolved speedily and the Commission has challenges in communicating with individual complainants regularly to update them on the status of the case. Some human rights activists also believe that cases take a long time to be resolved, and they may drop off the radar screen of the Commission.¹⁴

Advocacy against the Death Penalty

Advocacy against the death penalty has been a consistent strand of the HRCSL's work and they uphold this against all odds – even at a time when the Executive is increasingly advocating for the death penalty and regards opposition to it as a personal attack on his policies.

In July 2018 the HRCSL published a letter to the President stating that the death penalty should not be implemented to combat drug trafficking, stressing on the fact that the punishment is cruel and inhumane and a violation of the right to life.¹⁵ A local news page published the letter and

¹¹ Workshop on 'Business and Human Rights,' 6 March 2019, Colombo.

¹² Workshop on 'Gender Equality and Freedom of Religion', 13 August 2019, ICES Colombo, Sri Lanka

¹³ Ibid.

¹⁴ Interview with Mr. Ruki Fernando from INFORM Human Rights Documentation Centre, 3 August 2019.

¹⁵ The letter is available in Sinhala at: <http://hrctl.lk/english/wp-content/uploads/2018/07/HRCSL-Letter-to-H-E-President-on-Death-Penalty-13-07-2018-Sinhala.pdf> and in English at: <https://www.colombotelegraph.com/index.php/dear-mr-president-do-not-re-implement-death-penalty-human-rights-commission/>.

received a lot of commentary from the public. Responses varied with some people taking the sides of the government and others supporting the view of HRCSL.

Some who supported the government on the death penalty commented that the HRCSL is ‘*Dollar Kakkas*’ (Dollar crows) or money chasers and has drug connections. However, the majority of the comments were in favour of the non-implementation of the death penalty stating that the Government has larger offenders to worry about, that the judicial system in Sri Lanka is imperfect so innocent people and poor people could be hanged while the wealthy people could argue against the imposition of the death penalty on them. Some suggested that there could be alternatives and reforms that could be developed with the careful consideration of the HRCSL, others questioned the motives of the President for supporting the death penalty for drug dealers.¹⁶ In effect, the debate around the death penalty became intensely politicised but the HRCSL did not shy away from addressing it.

Following its comments, the HRCSL attracted a wrath of threats from many politicians and other individuals. This pushed the Prime Minister's Office to request that the Inspector General of Police ensures the security of HRCSL's Chairperson, Dr. Deepika Udugama. In its statement, the Prime Minister's Office said it was dismayed by reports of venomous attacks targeting the Chairperson and that the Commission was an independent body appointed in line with the Constitution. The Prime Minister also directed the Police Chief to inquire into such statements.¹⁷ However, there was no clear outcome out of this directive.

Speaking Out Against Violence Directed at Minorities:

The HRCSL wrote two letters to the President¹⁸ and to the Prime Minister¹⁹ condemning the communal violence that has taken place in the Digana and Teldeniya areas of Kandy. The violence occurred in March 2018 after a Sinhalese man died, allegedly after a road incident led to an altercation between the deceased and a group of Muslim men. Sinhala mobs, including Buddhist monks, set fire to two mosques as well as Muslim businesses and homes in the areas. Local sources report at least eight homes and 50 businesses were burnt in the attacks. Further, after tension occurred in Kandy, the HRCSL provided phone numbers through a press release for people to use in case of an emergency.²⁰ CSOs appreciated the strong and immediate actions of the HRCSL although they expressed regret that, to this day, the report following the investigation has not been published.

¹⁶ *The Colombo Telegraph*, “‘Dear Mr President, Do Not Re-Implement Death Penalty’ — Human Rights Commission,” 26 July 2018, available at: <https://www.colombotelegraph.com/index.php/dear-mr-president-do-not-re-implement-death-penalty-human-rights-commission/>.

¹⁷ Asian Mirror, ‘PM Dismayed By ‘Venomous Statements’ Targeting Human Rights Commission Chairperson Deepika Udugama,’ 20 July 2018, available at: <https://www.asianmirror.lk/news/item/27855-pm-dismayed-by-venomous-statements-targeting-human-rights-commission-chairperson-deepika-udugama>.

¹⁸ HRCSL, ‘Violence Perpetrated by Some Groups of Persons on the Basis of Religion’, March 2018, available at: <http://hrsl.lk/english/wp-content/uploads/2018/03/Letter-to-President-English.pdf>.

¹⁹ HRCSL, ‘Recent Violent Events Based on Religious Division and Hatred,’ 7 March 2018, available at: <http://hrsl.lk/english/wp-content/uploads/2018/03/Eng.pdf>.

²⁰ HRCSL Media announcement available in Sinhala at: <http://hrsl.lk/english/2018/03/13/the-media-announcement/>.

Bringing Human Rights to the Fore through Commemorative Events

To mark International Women’s Day on 8 March 2018, the HRCSL published a report entitled ‘*Empowering Women in the Informal Sector: A Human Rights Agenda.*’ The report was compiled based on a roundtable discussion including the HRCSL and its ten regional offices and it was launched at a forum with civil society.²¹ The report highlights issues faced by women working in the informal sector such as a lack of access to resources including credit and land, sexual harassment, financial insecurity, the dismantling of families of those who work in transitional employment, and the challenges faced by elderly informal workers. The Human Rights Commission’s engagement recast the issue as a human rights issue rather than only a labour and economic issue.

To mark the International Day in Support of Victims of Torture, a film festival was organised by the HRCSL showcasing films related to torture on 26 June 2018.²² The HRCSL uses these commemorative events as a way to raise awareness and discussions on human rights.

Advocating for the Rights of Persons with Disabilities

In October 2018, the HRCSL issued some recommendations to the Chairman of the University Grants Commission – Sri Lanka, Vice Chancellor of the University of Colombo, Director of the Institute of Indigenous Medicine and three other respondents to protect the education of a university student with disabilities. The Commission called for the payment of compensation for the student whose education was disrupted, for a formal disciplinary inquiry into the process that led to the student’s exclusion and the introduction of policies to support the education of disabled students within the university education system.²³

Protecting the Rights of Teachers

In August 2018, the HRCSL followed on complaints made by the Executive Director of the Centre for Human Rights and Research and the Ceylon Teachers’ Union President, alleging that the Chief Minister of Uva Provincial Council had harassed and intimidated the Principal of a school in his province, demanding that the Principal kneel before him and apologise for what he perceived as slight.²⁴ The complainants argued that the victim’s right of free expression under Article 12 (1) and Article 10 the Constitution were violated. There were also allegations that politicians intimidated the police, obstructing them from pursuing their inquiry.

²¹ HRCSL, ‘A World without Her? Empowering Women in the Informal Sector: A Human Rights Agenda,’ 8 March 2018, available at: <http://hrsl.lk/english/wp-content/uploads/2018/03/English-Report.pdf>.

²² HRCSL, ‘Human Rights Commission of Sri Lanka organizes Human Rights Film Festival to commemorate International Day in Support of Victims of Torture,’ 26 June 2018, available at: <http://hrsl.lk/english/2018/07/04/human-rights-commission-of-sri-lanka-hrcsl-organizes-human-rights-film-festival-to-commemorate-international-day-in-support-of-victims-of-torture/>.

²³ HRCSL, ‘Recommendation of Human Rights Commission of Sri Lanka on Rights of Persons with Disabilities Focusing on the Higher Education Sector,’ available at: <http://hrsl.lk/english/2018/11/14/the-human-rights-commission-of-sri-lanka-has-issued-a-recommendation-on-the-right-to-education-of-an-undergraduate-with-disabilities/>.

²⁴ Allegedly, the Principal rejected a school admission application sponsored by the Chief Minister. The letter is available in Sinhala at: <http://hrsl.lk/english/wp-content/uploads/2018/10/HRCSL-writes-to-Mr.-Keerthi-Tennakoon.pdf>.

Following the inquiry, the HRCSL published a notice and called upon the Chief Minister to appear before the Commission, which was unprecedented.²⁵ The Commission held an extended inquiry and the incident attracted considerable publicity. The Chief Minister eventually resigned.

Supporting the Rights of the Hill Country Tamil Community Living on Plantations

The Tamil community living on plantations has been marginalised, as they have been stateless for decades. While they now have been granted citizenship²⁶ and so have legal access to health and educational social services, they do not have the equal opportunity to do so. Many young people complain that they are impeded from accessing university education and government employment, even where they have the required qualifications, as they live in dwellings on the plantation that do not have house numbers and hence do not have postal registration. Letters informing them of interviews and other time-sensitive information also do not reach them. They are lobbying for the registration of their dwellings and the HRCSL is engaging with the relevant authorities to enable this.²⁷

Prison Reforms

On 22 November 2018, the assault of prisoners in remand by prison officials at the Angunakolapalessa Closed Prison was captured on CCTV, and was publicised in the media. Following the news, the HRCSL visited the prison, obtained statements from prisoners, and requested the Superintendent of the Prison to ensure that those who alleged they had been assaulted be examined by the Judicial Medical Officer (JMO). The Commission also requested the Superintendent to provide medical assistance to inmates who required it.

The Commission has undertaken a number of follow-up visits in December 2018 to obtain further statements of prisoners, monitor whether they saw the JMO as requested and the status of their general well-being. In early December 2018 the Commission summoned the Commissioner-General of Prisons and the Superintendent of Angunakolapelessa Closed Prison for inquiries about the incident. During these inquiries the Commission reiterated the need to adhere to the constitutional provisions on freedom from torture and pointed to the Convention against Torture Act No. 22 of 1994, which criminalises torture. Inquiries are on-going and the Commission expects to issue its recommendation soon. However, the delays in publishing its reports and recommendations have led to frustration among complainants and CSOs as there is always the danger that another pressing or challenging incident will take place to eclipse the centrality of the issue.

²⁵ HRCSL, Public Notice, 8 October 2018, available at: <http://hrctl.lk/english/2018/10/08/hrctl-public-notice/> ; and Daily News, 'HRCSL summons Uva Province Chief Minister,' 30 January 2018, available at: <http://www.dailynews.lk/2018/01/30/local/141412/hrctl-summons-uva-province-chief-minister?page=2>.

²⁶ The Grant of Citizenship to Persons of Indian Origin Act No.35 of 2003, available at: <https://www.refworld.org/pdfid/4c516c5b9.pdf>.

²⁷ Interview with Mr. Nihal Chandrasiri, HRCSL Research and Monitoring Unit, 13 August 2019.

Vetting of UN Peacekeepers

In March 2018 the Chair of the HRCSL wrote to the President concerning erroneous reports by local Newspapers that it was delaying the vetting of 101 military personnel who were to be deployed in a UN peacekeeping mission to Lebanon and that it was denying approval despite the UN approving the deployments.²⁸ The HRCSL is the only national human rights commission selected by the UN to vet army personnel for peacekeeping missions and the HRCSL considers this to be a vote of confidence. However, the Sri Lankan Army does not fully cooperate in the vetting process and the press has not reported accurately on the role required of the HRCSL. Yet, the Office of the President has not publicly rectified these errors. This is disheartening knowing that the President is also the Commander in Chief.

External Representation

In August 2018, the Commonwealth Secretary-General Patricia Scotland QC visited the HRCSL and discussed with Chairperson Dr. Deepika Udagama and other commissioners the future activities of the Commission.²⁹

Limitations to HRCSL's Implementation of its Full Mandate

The environment for human rights advocacy and human rights defenders (HRDs) to carry out their work has deteriorated in recent times. The Executive has tried to undermine the work of the HRCSL when issuing hostile reactions to advocacy against the death penalty and accountability for war crimes. In September 2018, the Cardinal of the Catholic Church portrayed human rights advocacy as an unnecessary Western imposition that undermines religious values.³⁰ The media too have been biased and even provocative in its coverage of Sri Lanka's many ethno-religious conflicts.³¹

However, challenges to the HRCSL do not only come from the political realm but are also prevalent in its day-to-day operations. It appears that the HRCSL was conceptualised as yet another bureaucratic institution within Sri Lanka's public service and this has stymied efforts of the commissioners to recruit persons with an ability and a passion for defending human rights.

The lack of appropriately trained support and program staff creates additional pressure on the commissioners, who have to play a direct role in many micro aspects of the commission's work. It has also led to delays in implementing programs and following through on inquiries, which in turn impacts the public's perceptions of the efficiency of the Commission. The 10 regional offices

²⁸ HRCSL, 'Briefing Concerning News Reports on the Vetting by the Human Rights Commission of Sri Lanka of Military Personnel to be Deployed for Peacekeeping Operations,' 4 April 2018, available at: <http://hrsl.lk/english/wp-content/uploads/2018/04/Letter-to-H.E.-President-re-Vetting-English.pdf>.

²⁹ HRCSL, 'Visit of the Commonwealth Secretary-General Patricia Scotland QC to HRCSL,' available at: <http://hrsl.lk/english/2018/08/02/visit-of-the-commonwealth-secretary-general-patricia-scotland-qc-to-hrcsl/>.

³⁰ *Daily Mirror*, 'Human rights is the latest religion among Western nations: Archbishop,' 23 September 2018, available at: <http://www.dailymirror.lk/article/Human-rights-is-the-latest-religion-among-Western-nations-Archbishop--155899.html>.

³¹ Economynext, 'High risk of political control in Sri Lankan media, study finds,' 29 October 2018, available at: https://economynext.com/High_risk_of_political_control_in_Sri_Lankan_media_study_finds-3-12369-7.html.

of HRCSL too suffer from resource shortages and run on a skeletal staff and little administrative support or transport facilities.³²

International organisations such as the UN and bi-lateral donors have supported the work of the HRCSL, but they are unable to address the issue of staffing. While they can support capacity development and provide program support they cannot support the core functions of the Commission.

The budget of the HRCSL is approved in parliament but the Treasury determines the amount the Commission receives. This would not be the case if the budget were drawn from a consolidated fund. Commissioners have advocated for establishing a special service – separate from the public service - for all independent commissions, such as for instance the diplomatic service. This would ensure that while the Commission would continue to have a strong regulatory framework, it would be one that is based on its unique mandate and function.³³

The inconvenience and reputational cost that the staffing issue presents to the Commission was illustrated when temporary staff was hired in 2018 to review and clear a backlog of 1400 cases that accumulated since 2000, but could not be paid for a full six months until bureaucratic procedures relating to their recruitment on a temporary basis were formalised.³⁴

Another limitation faced by the HRCSL is the fact that there are no sanctions that it can impose if its advice or recommendations are ignored by the government. A Commissioner tentatively suggested that the ratio of recommendations that are ignored is of 60%.³⁵

4. Democratic Space in Sri Lanka

The current Commissioners were appointed in 2015, when the democratic space had opened considerably in Sri Lanka. The President elected in January 2015 had the support of the two major political parties and was committed to constitutional reforms and good governance. This included establishing measures to ensure transitional justice and accountability for war crimes, abolishing the executive presidency and establishing mechanisms to eradicate corruption and to ensure transparency.

The parliamentary elections held on 17 August 2015 did not, however, establish a clear majority and the two major political parties - the United National Party and the Sri Lanka Freedom Party - agreed to form a national coalition government for two years. The coalition government had the tacit support of many of the minority parties as well, since the common objective was to reform the Constitution, and re-establish a pluralist democracy.

However, the national government was beset by many problems and it soon unravelled. It was undermined by corruption scandals and the commitments to constitutional reforms and transitional justice were fast evaporating. None of the perpetrators of violence, including those allegedly responsible for the killing of journalists and HRDs and for disappearances including abductions in

³² Interview with Regional Coordinator, Human Rights Commission, Trincomalee Regional Office, 13 August 2019.

³³ Interview, Ambikha Satkunanathan, Commissioner, Human Rights Commission, 12 August 2019.

³⁴ Ibid..

³⁵ Ibid.

“white vans” were held to account.³⁶ The rhetorical commitment to good governance and democracy and pluralism was no longer heard. The personal relationship between the President and the Prime Minister broke down and they publicly disagreed on matters of policy, personalities and more.

The year 2018 was a turbulent year for Sri Lanka and it has had an impact on the political, economic and human security development of the country. There were strikes and student unrest over anticipated university educational reforms and the corruption scandal associated with the former Governor of the Central Bank undermined the Prime Minister.³⁷ There were disagreements relating to the commitments made to the international community on matters relating to transitional justice.³⁸ In February, local government elections led to a resounding victory of the newly formed party by former President Rajapaksa. The current President, trimming his sails to the new political winds, sought to establish a relationship with former President Rajapaksa, whom he had previously denounced in no uncertain terms.³⁹

On 26 October 2018 the United People’s Freedom Alliance (UPFA) led by the President, withdrew from the national government. Immediately afterwards the President swore in Former President Mahinda Rajapaksa as the new Prime Minister. The President said that Ranil Wickremesinghe had been removed from the office of Prime Minister under Article 42(4) of the Constitution.⁴⁰ To justify his move the President went as far as to refer to the cultural dissonances between him and the Prime Minister, one of which was the team of “*butterflies*” in the cabinet.⁴¹

The Prime Minister’s efforts to demonstrate that he had a working majority in Parliament, despite the withdrawal of the President’s party, were thwarted as the President suspended Parliament on 27 October 2019. Eventually parliament was re-convened on 14th November 2019 and amidst unruly and violent scenes, a majority of members recorded their support for the Prime Minister.

This was a constitutional coup – a unilateral and secretive decision, undertaken without consulting the Parliament or seeking its approval. It ran counter to the 19th Amendment to the Constitution that specifically put in check the President’s power to remove a Prime Minister during his term of

³⁶ In Sri Lanka, with tens of thousands of unresolved enforced disappearances, “white vaning” is a euphemism for abduction and torture - based on the vehicle commonly used. See JDS, ‘Sri Lanka: Gotabhaya acknowledges use of white vans to “take in” suspects,’ 14 February 2019, available at <http://www.jdslanka.org/index.php/news-features/politics-a-current-affairs/854-gotabhaya-rajapaksa-admits-> .

³⁷ *Daily Mirror*, ‘IUSF Protests Against SAIM Issue,’ 25 January 2018, available at: <http://www.dailymirror.lk/article/IUSF-protests-against-SAIM-issue-144623.html>; Ground Views, ‘The Bond Issue Controversy: An Analysis,’ 26 March 2015, available: <https://groundviews.org/2015/03/26/the-bond-issue-controversy-an-analysis/>.

³⁸ BD News, ‘Beleaguered Lankan President Sirisena asks UN to respect national sovereignty,’ 28 September 2018, available at: <https://bdnews24.com/world/2018/09/28/beleaguered-lankan-president-sirisena-asks-un-to-respect-national-sovereignty/>.

³⁹ The full text of Maithripala Sirisena’s Election Manifesto is available at: <http://www.asianmirror.lk/news/item/5782-full-text-of-maithripala-sirisena-s-election-manifesto>.

⁴⁰ Article 42 of the Constitution of Sri Lanka states: “*The President shall be responsible to Parliament for the due exercise, performance and discharge of his powers duties and functions under the Constitution and any written law, including the law for the time being relating to public security.*”

⁴¹ “Butterflies” is a derogatory reference to the LGBTQ community.

office.⁴² The Supreme Court of Sri Lanka found on 13 December 2018 that the President's move was unconstitutional and illegal.⁴³

As a consequence Former President Rajapaksa backed down from claiming the Prime Minister office and Wickremesinghe was once again reinstated. It nominally ended the crisis after seven weeks of political and economic turmoil but the events demonstrated the fragility of Sri Lanka's transition. The constitutional coup undermined public confidence that political actors were committed to good governance and the rule of law. Although the coup was resolved, there were no consequences for those who acted unconstitutionally.

The HRCSL three-year term was due to end in October 2018. However, in the midst and confusion of Sri Lanka's constitutional crisis no action was taken regarding the Commission. It is only in February 2019, when the constitutional crisis was resolved and the government was reinstated, that the commissioners' contracts were extended for a second three-year term. The commission was protected in that it could legally continue its work till it was replaced. Nevertheless for four months it functioned in a shroud of uncertainty regarding its tenure.

Former President Rajapaksa's re-entry into politics has re-energised the Sinhala-Buddhist nationalist discourse and its unconditional support to the military. In the scramble for electoral support the major parties no longer profess a public commitment to human rights and the rule of law. The political debate is polarised, harsh and divisive. This is not unique to Sri Lanka and is echoed in the region and globally. Thus the HRCSL and other regional commissions will face further challenges in 2019.

5. Democratic Backsliding and Contraction of Civic Space: Role of the HRCSL

Combatting Hate Speech

The HRCSL issued a letter to the head of the Telecommunication Regulatory Commission, noting that hate speech should be regulated in a manner that does not infringe on the right to information and freedom of expression.⁴⁴ The initiatives of the HRCSL on hate speech regulation attracted some adverse comments in the media⁴⁵ with some members of the public expressing distrust in the Commission's work, and in the work of NGOs, and generally being protective of the rights of the Sinhala Buddhists even in times of communal conflict.⁴⁶

⁴² The full text of the 19th Amendment to the Constitution is available at: <https://www.parliament.lk/en/constitution/nineteenth-amendment> .

⁴³ A seven-judge bench found that the President lacks the power to dissolve Parliament at will before four-and-a-half years from the day of its first sitting, citing the 19th Constitutional amendment adopted in 2015.

⁴⁴ HRCSL, 'Lifting Restrictions on Social Media,' 15 March 2018, available at: <http://hrctl.lk/english/wp-content/uploads/2018/03/HRCSL-letter-to-TRC.pdf>.

⁴⁵ *Colombo Telegraph*, 'Human Rights Commission Bats For Freedom Of Expression And Right To Information,' 16 March 2018, available at: <https://www.colombotelegraph.com/index.php/human-rights-commission-bats-for-freedom-of-expression-and-right-to-information/>.

⁴⁶ *Colombo Telegraph*, 'Human Right Commission Of Sri Lanka To Investigate Complaints Regarding Kandy Violence,' 7 April 2018, available at: <https://www.colombotelegraph.com/index.php/human-right-commission-of-sri-lanka-to-investigate-complaints-regarding-kandy-violence/comment-page-1/#comments> .

In response to the attacks in Tehlideniya, Digana, and Kandy, further action was taken with the HRCSL's Kandy Regional Office taking initial steps towards investigating the communal violence and collecting written submissions from affected persons.⁴⁷

Training and Engagements with Human Rights Defenders

Given the limited human resources that the HRCSL has at its disposal, especially at the regional offices level, the regional coordinators have worked closely with CSOs in their regions and have trained HRDs to identify and report on violations of fundamental rights. These defenders bring these incidents to the notice of the regional offices to enable a response from the Commission. This was considered to be a successful approach and contributed to strong community relations.⁴⁸ In the recent context where funding to CSOs is reduced, it is feared that the CSOs too may lack the resources and capacities to mobilise and work with the HRCSL.

Review of Bills

The HRCSL seeks to engage in the review of legislation that it believes may impact on human rights. For it to be effective in this respect, it is vital that the Bills are forwarded to the Commission prior to it reaching the public domain. The Commission however regrets that it does not receive draft Bills at an early stage when it would be possible to make constructive inputs.

In 2018 there were discussions on repealing the widely criticised Prevention of Terrorism Act, 1979 and replacing it with a Counter Terrorism Law. However, the draft Counter Terrorism Bill has also been subjected to intense criticism as a more draconian piece of legislation that will institutionalise among other repressive features, surveillance and expanded procedures for arrest and detention.

It is fundamental that the HRCSL's recommendations are adopted in the drafting of legislation, especially laws relating to public security, and counter terrorism. It is also vital that Commission's guidelines on arrest and detention that anticipate the potential for abuse be followed by law enforcement officials. The Commission's guidelines respond to the anxiety of families who alleged that relatives were arbitrarily arrested and even disappeared and come in the wake of revelations that there was no documentation of, or standard arrest procedures during and in the aftermath of the civil war. That culture of impunity still prevails today. In these circumstances there is a greater likelihood for persons being unaccounted.⁴⁹

⁴⁷ HRCSL, 'HRCSL inquiry on violent incidents based on religious hatred in Kandy District,' available at: <http://hrsl.lk/english/2018/04/06/hrsl-inquiry-on-violent-incident-based-on-religious-hatred-in-kandy-district/> .

⁴⁸ Interview with Mr. Nagarathnam Vijeyakanthan from the National Peace Council (NPC), 5 August 2019.

⁴⁹ Directives Issued By The Human Rights Commission Of Sri Lanka On Arrest And Detention Under The Prevention Of Terrorism (Temporary Provisions) Act No 48 Of 1979, 18 May 2015, available at: <http://hrsl.lk/english/2016/05/27/directives-issued-by-the-human-rights-commission-of-sri-lanka-on-arrest-and-detention-under-the-prevention-of-terrorism-temporary-provisions-act-no-48-of-1979/>.

Protection of Fundamental Rights during Elections:

In February 2018, Sri Lanka held local government elections. In January, the HRCSL issued guidelines for police officers to follow during the elections.⁵⁰ All these guidelines are embedded in the election laws and should be well-known to the police. However political actors and even the police who are subjected to political pressures, routinely ignore them. The HRCSL directives brought the issue to the forefront, which was an important signal. The Commission monitored the compliance with the guidelines and stated that it would have to inquire into complaints of violations resulting from either action or inaction by the police.

Further, directives pertaining to activities of public officers and officers of the Provincial Public Service in connection with the elections were also issued.⁵¹ A hotline was established as an election complaint desk.⁵² The HRCSL informed the media that initial written information and evidence would be collected from affected parties.⁵³ Usually, the Election Commission addresses election-related issues. However, the intervention of the HRCSL reinforced the point that the right to political participation is a human right and should be protected as such.

6. Conclusion and Recommendations

Many human rights activists congratulate HRCSL's robust advocacy for and in defence of human rights – especially its advocacy against torture, the death penalty, for non-discrimination of minorities, and for the principles of due process and equality before the law. In a context where the rule of law is frequently undermined by political and other influential actors this has been a challenge from which the HRCSL has not shied. Anti-torture activists also noted that they had a good relationship with the Commission not only as an organisation, but also as a network known as the Sri Lanka Collective against Torture. They believe that the HRCSL is moving towards being independent from the government.

When the Commission was asked to comment on what they considered to be their successes in 2018, it noted that it has been able to assist in land dispute cases where its mediation has led to the return of lands to people who had lost access to it. The Commission also noted that by conducting research on prisons, it was able to develop relationships with prison officials that enabled their speedy interventions when crisis break out in the prisons. The Commission has also now arranged for on-site training for prison officials who may not otherwise have the opportunity to attend trainings. This has led to an improved relationship with the prison staff. The Commission also believes that some of their regional offices are well received by the community and that the gay and lesbian community is proactive in engaging with the Commission, appreciating its stance on equality and non-discrimination.

⁵⁰ HRCSL, 'Local Authority Election – 2018, Guidelines to Police Officers,' 16 January 2018, available at: <http://hrctl.lk/english/wp-content/uploads/2018/01/HRCSL-Guidelines-to-Police-Officers-E.pdf>.

⁵¹ HRCSL, 'HRCSL issues Guidelines to Police Officers on Local Authorities Election,' available at: <http://hrctl.lk/english/2018/01/22/hrctl-issues-guidelines-to-police-officers-on-local-authorities-election/>.

⁵² HRCSL, Media Notice – Election Complaint Desk, 29 January 2018, available at: <http://hrctl.lk/english/wp-content/uploads/2018/01/HRCSL-Media-Notice-E.pdf>.

⁵³ HRCSL, 'Human Right Commission Of Sri Lanka To Investigate Complaints Regarding Kandy Violence,' 7 April 2018, available at: <https://www.colombotelegraph.com/index.php/human-right-commission-of-sri-lanka-to-investigate-complaints-regarding-kandy-violence/comment-page-1/#comments>.

In a time when political actors' support for human rights appears to be instrumental and transient, and dependent on the perceived mood of the electorate, HRCSL has been consistent and unwavering in its messaging and advocacy of human rights. Although it has not been able to address all the grievances sent to it, and state actors do not follow its recommendations at times, the resilience and consistency of messaging by the Commission has been remarkable. This has been its greatest contribution during these challenging times. It also has taken great efforts to improve its outreach through its regional offices by working with and through CSOs in the regions.

While this report focuses on the year 2018, it is impossible to ignore the impact of the terrorist bombings that occurred in Sri Lanka in April 2019. As a consequence, at the time of writing this report Sri Lanka remains governed under Emergency regulations, and repressive laws such as the Prevention of Terrorism Act (PTA). While the PTA is slated for review and repeal, there remains a danger that it may be re-cast in a more repressive format and packaged as a Counter-Terrorism legislation with all the prospects of becoming an instrument to further violate citizen's rights.

Sri Lanka is also heading for a number of elections in the coming months – a Presidential election, possibly Provincial Council elections and Parliamentary elections. Elections are likely to be conducted under a mushroom cloud of emergency regulations. In this pre-election context, the reforms proposed by the HRCSL and CSOs to further strengthen the HRCSL might not receive the attentions it deserves. In such a context however, the tasks of the HRCSL remain urgent and challenges faced by the Commission will be compounded.

6.1 Recommendations:

To the Government of Sri Lanka:

- 1) Establish the HRCSL under the Constitution to ensure its independence and the appointment of Commissioners as stated under the 19th Amendment to the Constitution;
- 2) Secure the powers, functions and duties of the Commission through the Constitution with further details to be provided by the HRCSL Act;
- 3) Expand the membership of HRCSL so that there are sufficient numbers that can serve as Provincial Commissioners;
- 4) Make it mandatory for the relevant respondent to give reasons in writing to the Commission within a certain period when its recommendations are not implemented;
- 5) Empower HRCSL to refer the matter to the Court of Appeal to enforce its decision when the respondent does not comply with its recommendations or if the Commission is not satisfied with the explanation given for non-compliance;
- 6) Support HRCSL by staffing it with a strong second tier leadership and program staff who are trained in and committed to human rights; and
- 7) Allocate sufficient funding to the HRCSL to ensure adequate human and financial resources.

To the Parliament of Sri Lanka:

- 1) Amend the HRCSL Act so that no action or determination of the Commission can be challenged except under Article 126 or 141 of the present Constitution;

- 2) Amend the HRCSL Act so that adequate funding for the functioning of the Commission is provided through parliament through the Consolidated Fund;
- 3) Amend the HRCSL Act to ensure that a formal procedure for the appointment of the commissioners occurs in a more transparent manner and continues to ensure pluralism and diversity;
- 4) Amend the HRCSL in order to broaden the mandate of the Commission to inquire into the broader range of human rights and not only into fundamental rights; and
- 5) Adopt a law that gives HRCSL an explicit legislative mandate as the National Preventive mechanism (NPM) under the optional Protocol to the Convention against Torture (OPCAT).

6) Recommendations to HRCSL:

- 1) Ensure that the gain made by HRCSL are not lost;
- 2) Strengthen the HRCSL's advocacy and outreach through social media and other channels; and
- 3) Work closely with the international community, international NGOs and national civil society and continue to advocate for human rights.

THE MALDIVES: CO-OPTED DURING TYRANNY AND MUDDLED IN DEMOCRACY

Maldivian Democracy Network (MDN)¹

1. Introduction

This chapter assesses the performance of the Human Rights Commission of the Maldives (HRCM)² in the context of democratic space and fundamental freedoms in the country. The reporting period of this report covers the year 2018, during which the Maldives experienced severe backsliding of democracy and fundamental rights ahead of the presidential elections. Existing democratic systems were severely damaged and rendered dysfunctional during this period. This report is based on a review of the HRCM's annual reports, press statements, media reports, as well as cases submitted by the Maldivian Democracy Network (MDN) to the HRCM, information shared at various meetings with the HRCM where MDN was present and information provided to MDN by victims of human rights violations.

This is the 12th consecutive annual assessment of HRCM by the Asian NGO Network on National Human Rights Institutions (ANNI), and as mentioned in previous reports, HRCM is yet to acknowledge or implement any of the recommendations made in the previous years. Over the years, MDN sent a reminder letter with all its recommendations to HRCM, enquiring about the recommendation's implementation status. No response has been received from the HRCM. MDN also reached out to HRCM for inputs on this report during its drafting phase to no avail.

This analysis highlights both the successes and challenges of HRCM and aims to open avenues for collaboration with civil society. However, HRCM's attitude of non-engagement with MDN, one of the most active non-governmental organisations focusing on good governance and the protection of human rights in the country, does not bode well for such collaboration. In order to execute its constitutional mandate and tackle the human rights issues the Maldives face, the NHRCM needs to change their outlook and view civil society organisations as allies.

2. Overview

The 2008 Maldives Constitution lists HRCM as an independent institution that needs to be established and funded through the State budget.³ Its enabling act, the Human Rights Commission of the Maldives Act (6/2006), regulates the appointment procedures of its members, their tenure and responsibilities, as well as its mandate and special powers.

¹ Ahmed Naaif Mohamed (naaif@mdn.mv), Shahindha Ismail. Website: <http://mdn.mv/>

² The Commission's website is available at: <http://www.hrcm.org.mv>.

³ Constitution of the Republic of Maldives, Article 189, available at: <https://storage.googleapis.com/presidency.gov.mv/Documents/ConstitutionOfMaldives.pdf> ; and Human Rights Commission of the Maldives Act (6/2006), Section 30, available at: <http://www.hrcm.org.mv/publications/otherdocuments/HRCMActEnglishTranslation.pdf>.

The Global Alliance of National Human Rights Institutions (GANHRI) Sub Committee on Accreditation (SCA) in 2010 accredited the HRCM with a B grade status due to its failure to ensure pluralism and more specifically for failing to enable the presence of a representative of different religious traditions.⁴ This, however, is due to a limitation in Article 9(d) of the Maldives Constitution that stipulates that every Maldivian shall be a Muslim. As mentioned in previous ANNI reports⁵ it is regretful that the SCA grading is solely based on the enabling law of the HRCM rather than also on an assessment of the degree to which the NHRI is, or failing to, implement its mandate to promote and protect human rights as specified in the Paris Principles as the primary objective of an NHRI. The NHRI has not submitted for re-accreditation since 2010.

The enabling law of the HRCM states that their work must be in accordance with the Islamic Shari'a.⁶ While Islamic Shari'a is interpreted differently by scholars in the Maldives, the HRCM appears to be set back by this provision, showing a tendency to avoid scrutiny of issues that may be perceived as religious. Taking into consideration the fact that the Maldives is currently struggling with the rapidly growing problem of religious fundamentalism and violent extremism, the HRCM is not seen to seek resolutions to issues such as women's rights and children's rights through moderate Islamic teachings and interpretations.

The enabling law requires the HRCM to present its annual report to the President and the Parliament.⁷ However, MDN would like to highlight the failure of the Parliament to hold the HRCM accountable, despite countless shortcomings of the HRCM in protecting human rights in the past four years.⁸ Its lack of pro-activeness and commitment to act as a significant instrument for checks and balances is also a contributing factor to the failure of HRCM. This may stem from a need for increased human rights education and awareness among Members of the Parliament, so that they are better equipped to scrutinise the performance of the HRCM.

Members of the HRCM also often cite the change in members as a response to criticism about the commission's mandate, independence and integrity. In 2018, when the family of murdered blogger Yameen Rasheed met with the HRCM, accompanied by civil society members and inquired around delays in investigation and victim support, the members repeatedly referred to former Commissioners when the Commission did not have an adequate explanation to questions. Therefore, MDN would like to highlight that the HRCM must ensure the institutional continuity of the commission.

⁴ Global Alliance on National Human Rights Institutions, Report and Recommendation of the Session of the Sub-Committee on Accreditation (SCA), ICC SCA on Accreditation Report, March-April 2010, Section 3.1, available at: [https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20REPORT%20MARCH%202010%20-%20FINAL%20\(with%20annexes\).pdf](https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20REPORT%20MARCH%202010%20-%20FINAL%20(with%20annexes).pdf).

⁵ Forum-Asia, 2018 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia, available at: https://www.forum-asia.org/uploads/wp/2018/12/2018_ANNI-Report_FINAL.pdf, and 2017 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia, available at: <https://www.forum-asia.org/uploads/wp/2017/12/ANNI-Report-Final.pdf>

⁶ Human Rights Commission of the Maldives Act (6/2006), Section 2(a).

⁷ Human Rights Commission of the Maldives Act (6/2006), Section 32(a).

⁸ The Parliament, where the authoritarian ruling party has had a majority has neglected holding the HRCM accountable by its silence.

3. HRCM and its Mandates to Promote and Protect Human Rights

The enabling law of the HRCM stipulates the mandate of the HRCM and designates it as an independent institution to protect and promote human rights in the Maldives. The enabling law grants the commission a wealth of powers,⁹ such as the power to initiate a case on its own accord, to investigate cases of human rights violations, to carry out unannounced visits to prisons, detention centres and other places where people are held in State care, and the power of ex-parte claim.

To uphold the aforementioned non-exhaustive list of the mandate, HRCM has established a total of eight departments; Southern Regional Office, Corporative Affairs Department, Commission Bureau, Advocacy Department, Research and Monitoring Department, Investigation Department, Legal and Policy Department, and National Preventive Mechanism. On a structural level, the HRCM is equipped to fulfil its mandate. However, the HRCM repeatedly highlights a lack of financial independence as a hindrance to the fulfilment of their mandate.

However, upon closer scrutiny MDN has found that even though the State imposes a ceiling of funding for each institution and government authority, the Ministry of Finance does not follow the normal procedure of approval of expenditure for the HRCM, and therefore the budget that the State allocates to the institution is at the Commission's discretion. It is also possible that HRCM does not fully fulfil its mandate because while it is equipped with some well-trained technical staff, decision-making often overrides technical opinion and is instead made by Commissioners who may not be technical experts. These, act as impediments to the functionality of the HRCM.

Complaints Handling

The HRCM reviewed a total of 396 cases in 2018, including 82 *suo moto* cases.¹⁰ 49% of the cases filed with HRCM in 2018 were cases relating to violation of detainee rights. Records show 45 cases of allegations of torture, 94 cases of allegations of insufficient healthcare for detainees and 56 allegations of other violations of detainee rights.

Detainees' rights are one of the key areas MDN works on. MDN extensively monitored the state of detainee rights in 2018, in particular because of the high number of civilians detained for participating in pro-democratic demonstrations. MDN is concerned that HRCM is using misleading statistics in its reporting when it counts a case 'closed' as being resolved. HRCM notes that 92 cases have been "*closed because the issue was resolved.*"¹¹ Information from victims and families of victims shows that a case may be closed when the HRCM considers that it lacks substantial evidence (while determining how substantial the evidence is not in the jurisdiction of the HRCM), or simply after interviewing the perpetrator (which is mostly police personnel), neither of which resolves the matter for the victims.

⁹ Human Rights Commission of the Maldives Act (6/2006), Sections 20 to 22.

¹⁰ Human Rights Commission, Annual Report 2018, 4.2, p.14, available at: <http://www.hrcm.org.mv/publications/annualreports/AnnualReport2018.pdf>

¹¹ Human Rights Commission, Annual Report 2018, 4.2.3, p. 16.

For instance, during the arrests and detention of protestors in 2018, MDN filed complaints and wrote letters to HRCM in an attempt to obtain updates on these cases and see whether HRCM had investigated claims of torture made by detainees. HRCM responded to MDN saying that information of the cases may only be provided to the families of victims and removed MDN from the conversation about the mass arrests that occurred under the State of Emergency from 5 February to April 2018.

MDN also discovered that the Commission had contacted the families of victims by telephone and advised families to withdraw the complaints “*now that the victims had been released from detention.*” For those families who refused to withdraw the complaints a response was communicated shortly after, which said that the investigation had concluded that there were no evidence of unlawful action by the police. We note with serious concern that the HRCM does not have the jurisdiction to advise claimants or victims to withdraw complaints following allegations of torture or arbitrary arrest and detention whether the victim have been released from detention or not. The mandate of the HRCM remains that allegations of torture and/or arbitrary arrest and detention should be investigated fairly. Their current approach seems to fall below this standard. Detainee rights were also the category with the most unsolved cases in 2018.¹² 46.7% of cases the NHRI investigated in 2018 were placed in this category.

There are four main methods to submit a complaint to HRCM: (1) through their toll-free number 1424, (2) via email, (3) by fax, and (4) by filling out a designated form, and submitting it in person at the counter.¹³

According to HRCM it has received 931 calls through their toll-free number in 2018, out of which emerged 76 new cases.¹⁴ The HRCM do not list the number of cases submitted via form or email, and attempts to find these figures did not yield results in time for publication. An incident where a foreign teacher bullied students inside a school, discriminating against locals and calling Maldivians “*stupid and uncivilised*” was reported over the phone to the HRCM. The response from the call centre at the HRCM was that the matter should be reported to the Ministry of Education since it involved a teacher, and despite explanations that human rights violations based on race and nationality were made against children, the responder from HRCM refused to lodge the case.¹⁵

HRCM claims that once a form is submitted through any of the means mentioned above, the claimant would receive a receipt acknowledging that the case has been filed and is under investigation. However, when MDN submitted claims of torture with the HRCM both via email and through the designated form, a receipt of acknowledgement was not provided. None of the families MDN worked with to file these complaints received such a receipt. Not having a receipt or a case number makes it difficult to follow the progress of a case, and makes the system less transparent and more inaccessible to the victims and their families.

¹² Human Rights Commission, Annual Report 2018, 4.2.1, p. 15.

¹³ Human Rights Commission of the Maldives, How to lodge a complaint, available at: http://www.hrcm.org.mv/complaint/How_to_lodge_a_Complain.aspx

¹⁴ Human Rights Commission, Annual Report 2018, 4.2.6, p. 18.

¹⁵ An officer of MDN was contacted by victims, whereby the officer made telephone calls to the telephone number advertised by the HRCM for lodging complaints.

The designated form also provides a host of challenges for a victim or individual at risk or even a civil society organisation (CSO). One of the main obstacles to filing complaints is the fact that an organisation cannot file a complaint on behalf of a victim. Some people that MDN spoke to are not comfortable with indicating their identity in the complaints form due to fear that their identity may not be protected. The form also asks the claimant to enter personal details such as the national identity card number and the permanent address of the victim. This requirement of personal information proves to be a recurring complication when assisting victims of arbitrary arrest and torture, where an organisation such as MDN may wish to file a complaint to prompt an investigation, but needs to spend precious time in filling the personal details of the victim. MDN believes that these administrative requirements can be filled in *after* an investigation is launched in time-sensitive matters such as in cases of ongoing torture. It must also be noted that the HRCM does not acknowledge complaints made by organisations, and communications made to MDN following complaints are made via a template for “*letters sent by individuals*” and are sent to the personal address of the Executive Director of MDN.

HRCM, however, does uphold the confidentiality of complainants and witnesses. The media often complains that in the guise of protecting witnesses and complainants, the HRCM refuses to share information on the progress of cases of gross human rights violations. The HRCM is of the opinion that reporters often misconstrue facts and cause impediments to investigations. However, the HRCM could share information with civil society actors on cases they submitted, but currently the flow of information between HRCM and complainants on the progress of their case is very limited. Several families that MDN assisted during the State of Emergency arrests in 2018 faced this problem where they had to make repeated calls and visits to the HRCM to get information about progress in investigations, only to be told that the investigation was going on, without any further information.

Reparations and Remedy

One of the most serious concerns with the current HRCM is that the Commission does not appear to respect the importance of providing a remedy for victims of human rights violations. HRCM does have the authority of ex-parte claims, and by extension of the Chapter of Rights of the Constitution, to lobby for urgent hearings at the parliament, and to make recommendations and advise on contingency measures that need to be taken to protect a vulnerable individual.

The enabling law is silent on the authority of the HRCM in providing reparations. However, the current justice system of the Maldives follows lawsuits in the Civil Court for those seeking reparations. Therefore, the enabling law does not limit the HRCM from filing lawsuits at the Civil Court on behalf of victims. Yet, there is no record of a case where the HRCM has assisted a victim to seek compensation for torture.

Additionally, statements made by the HRCM indicate that the Commission does not engage with families of victims in their investigation, whereby avenues for victims and families for redress are limited. In the case of murdered blogger Yameen Rasheed, the family of Rasheed was informed by the Chair and other Commissioners at a meeting one year after the murder, in 2018, that the Commission did not believe the family of the deceased should be contacted or engaged during the investigation because the Commission had all the information they needed.

Laws & Regulations

In 2018, the HRCM worked extensively on developing new regulations, commenting and reviewing regulations drafted by various government bodies and providing feedback and input on legislation. However, it is interesting to note that all evidence on the official HRCM website indicates that almost all inputs (reviews, suggestions and edits) have been made on regulations and policies pertaining to economic, social and cultural rights. The website contains documents labelled '*legal reviews*' however it appears to be recommendations made following investigation of specific cases of torture.

Given the volume of arbitrary arrests, torture, unfair dismissal based on political alignment, obstruction of assemblies, criminal sentencing and fines based on defamation claims, shutdown of media houses and many more violations of civil and political rights in 2018, MDN believes that HRCM has not engaged sufficiently in commenting on laws and regulations relating to civil and political rights.¹⁶ MDN has repeatedly observed that the HRCM tends to engage in a higher number of less contentious issues, such as the rights of children and the right to health.

Capacity Building

As done in the past years, HRCM conducted 18 capacity building and outreach workshops for a wide range of target audiences, including but not limited to students, first-time voters, civil servants, police and other institutions.¹⁷ As reported in 2017, the qualitative outcomes of these engagement programs are not shared in detail. For example, there is no information about evidence of knowledge change of the participants following these workshops, or regarding feedback from participants. It is also noted that gender disaggregated data of participants, age brackets, or region of involvement is unavailable in the reports.

It will be useful to make an in-depth assessment of the capacity building work of the HRCM, as the number of workshops held for a year is extremely limited, and could be made more effectively in collaboration with civil society, which conducts many more human rights trainings.

HRCM's Limitations

The 11-point guidelines on the HRCM delivered by a Supreme Court ruling in 2015 continue to be followed by the Commission today.¹⁸ The guidelines prevent the institution from reporting on gross human rights offences, weaknesses in the legal system, and gaps in policy on the grounds that it would tarnish the name and reputation of the country, and challenge its sovereignty.

In a meeting held on 14 May 2019 with the HRCM and visiting personnel from the Commonwealth Human Rights Initiative, MDN inquired whether the Commission had any plans to challenge the guideline and get them reviewed/repealed. The Chair of the Commission claimed that the guidelines do not in any way hinder the work of the Commission, and that therefore she did not

¹⁶ Human Rights Commission, Annual Report 2018, 4.1.8, p. 12.

¹⁷ Human Rights Commission, Annual Report 2018, 4.2.15-4.3, p. 29-44.

¹⁸ Minivan News Archive, Translation: Supreme Court v. HRCM, available at: <https://minivannewsarchive.com/politics/translation-supreme-court-v-hrcm-100080>.

see the need to get them repealed. While the guidelines may not have had an impact on the commission's activities, it does control what the Commission can say in a report to an external organisation, and thus severely hinders the independence of the HRCM. The former Commissioners of the HRCM who received the guidelines have maintained that it harms the independence of the Commission.

Another limitation to the HRCM is the fact that while it may have employees with the requisite technical backgrounds, the current Commissioners are ill equipped to practice modern human rights approaches. The Commissioners are also not appointed based on their technical background as much as their political background. Additionally, a burdensome bureaucracy and lack of autonomy, results in technical expertise within the institution being trumped with that of the decisions of Commissioners that are often ill informed on the issues.

On a deeper level, how the institution perceives human rights is problematic. The prioritisation of less contentious human rights issues – such as child rights - has been commonplace with the current Commission. When asked to address serious ongoing violations of civil and political rights at a conference in 2018, the Commission hid behind the concept of indivisibility of rights to justify its daring failure at addressing violations of peoples’ fundamental freedoms. The Commission stated that because of the indivisibility of rights when it works on issues relating to economic, social, and cultural rights it actually also addresses civil and political rights issues.

Furthermore, the Commission’s understanding of what constitute human rights is also problematic. When asked why it had not done more on issues relating to the right to shelter and right to work, the Commission alluded to the fact that those rights did not fall into what it considers to be human rights.

4. Democratic Space in the Maldives

The Maldives first transitioned into a democracy in 2008 with the ratification of a new Constitution after over thirty years of struggle under an autocratic ruler. The first democratically elected President, Mohamed Nasheed of the Maldivian Democratic Party was ousted through a coup d’état organised by the then opposition assisted by the military and the police. Nasheed was forced to resign halfway into the presidential term, on 7 February 2012. The presidential election of 2013 was won by one of the organisers of the coup, Yameen Abdul Gayyoom, after six attempts at polling. Many alleged that the police and the Supreme Court colluded with him to obstruct polling. For instance, the Supreme Court annulled the first round of elections that Nasheed won with a landslide. The period from the 2013 election to the 2018 election marks the most severe backsliding of democracy and shrinking space for civil society in the history of the Maldives.

The judiciary continues to practice highly problematic overreach of its constitutional role by encroaching on both legitimate roles and powers of the Executive and the Parliament. In recent years this has created a culture in which the Supreme Court has unconstitutionally taken over the entire judiciary, including its administration, which by law should be conducted by the Department of Judicial Administration. This has led to the judiciary infringing on elements vital to a democracy and to undermining the separation of powers. For instance, the Parliament is the primary oversight

body of independent institutions.¹⁹ However the Supreme Court ruling (2017/SC-C/11) in 2017 means that a decision by the Parliament to remove members of independent commissions now requires to be heard and approved by the Supreme Court.²⁰

Mounting evidence of grand corruption, strong international scrutiny and threat of targeted sanctions by the European Union (EU), lead to a sudden change in the behaviour of the Supreme Court. This consequently led to the ruling of 1 February 2018 which ordered the release of several political prisoners (among which were leaders of the opposition). The Government reacted with the announcement of a State of Emergency on 5 February, and by arbitrarily arresting two Supreme Court Justices as well as politicians. The State of Emergency lasted for over a month. The arrests lead to public outcry, protests, and a spike in human rights violations and unusual use of force by the Government that included several arbitrary arrests, police brutality and torture of politicians, protesters and journalists covering the protests.

In the chaotic five years from 2013 to 2018 all of the institutions, including the HRCM, backtracked steadily towards autocracy. Members of the Parliament were arbitrarily detained and eventually declared unseated by the judiciary and the Elections Commission. The Prosecutor General demonstrated heavily politicised behaviour against the opposition in which several political leaders were arrested, charged and sentenced unfairly.²¹ The National Integrity Commission did not investigate police conduct and the HRCM remained silent throughout even gross human rights violations. One example is the arbitrary decision of President Yameen to extend the State of Emergency²² on 20 February 2018 and revoke fundamental rights against Article 544 (Limitation of rights in a State of Emergency).²³

Under President Yameen's government, the space for civil society and human rights defenders (HRDs) to operate were significantly restricted. The Peaceful Assembly Law remains an unconstitutional law that limits the right to peaceful assembly more than it regulates it.²⁴ The family of murdered HRD and blogger Yameen Rasheed, along with civil society and hundreds of civilians organised a peaceful walk to mark the first anniversary of the murder on 23 April 2018, but had to confront the police who tried to stop the rally at different intersections around the city.²⁵

Any form of dissent or criticism of the administration made online was also heavily scrutinised by people employed by the government. Supporters of the (then) opposition party lost their jobs and in some instances were terminated from employment for posting anti-government sentiments from

¹⁹ Constitution of the Republic of Maldives, Article 70 (b) 5, available at: <https://www.wipo.int/edocs/lexdocs/laws/en/mv/mv001en.pdf>

²⁰ Supreme Court, Case Number 2017/SC-C/11, available at: <http://supremecourt.gov.mv/uploads/2/sc-ninmunthah/hukum/2017-sc-c-11.pdf>

²¹ Human Rights Watch, "An All-Out Assault on Democracy," *Crushing Dissent in the Maldives*, 16 August 2018, available at:

²² Aljazeera, "Maldives Extends State of emergency by 30 days", 21 February 2018, available at: <https://www.aljazeera.com/news/2018/02/maldives-extends-state-emergency-30-days-180220165006679.html>

²³ Human Rights Watch, *World Report 2019, Maldives*, available at: <https://www.hrw.org/report/2018/08/16/all-out-assault-democracy/crushing-dissent-maldives>.

²⁴ Maldivian Law, *Regulation on Assembly* (Reference Number not found), available at: <http://www.mvlaw.gov.mv/pdf/gavaid/minHome/7.pdf>.

²⁵ *The Edition*, 'Year on, justice still pending for Yameen Rasheed's murder,' available at: <https://edition.mv/news/5812>.

their personal social media accounts. It is noted that the HRCM remained silent through these violations.

The opposition coalition led by Ibrahim Mohamed Solih of the Maldivian Democratic Party contested the presidential elections in 2018 with pledges of radical reforms, including judicial reform, transitional justice, reclamation of the economy and legislative changes among many others. The elections were conducted under the watchful eyes of the international community, and despite subtle obstructions to voting such as extreme delays related to an electronic queuing system and rumours of officials of the Elections Commission having been instructed to rig the polling, voters stood in line for up to nine hours to cast their votes. Preliminary results were heard early the following morning and elections ended peacefully with Ibrahim Mohamed Solih appointed as the President of the Maldives on 11 November 2018.

The Parliamentary Elections were held in April 2019. The elections were conducted peacefully across the country and the Maldivian Democratic Party secured a super majority (65 out of 87 seats), gaining the necessary majority for Constitutional amendments.

The new government has taken several significant steps to strengthen the Maldives' democratic institutions and restore the right to freedom of expression and peaceful assembly. For instance, one of the key changes implemented by Solih's coalition is the formation of separate independent committees to investigate claims of corruption, deliberate negligence by the state in investigations of and complicity in murder and enforced disappearances.²⁶ These committees were given the legal authority to carry out investigations in June of 2019 by a vote in Parliament.²⁷ President Solih, along with all of his appointed cabinet members and all MDP candidates for the Parliament election also for the first time in the history of Maldives publicised asset declarations ahead of elections.²⁸

On 14 November 2018 the Parliament repealed the Anti-Defamation Act, which was enacted in 2016 and used to restrict media freedom. The Parliament also questioned the Maldives Broadcasting Commission during a televised committee meeting. During the meeting the current President of the Broadcasting Commission admitted that under the previous regime they had misused the Anti-Defamation law to target media opposing the former administration.²⁹ There is currently a case lodged with the Parliament Committee to impeach two members of the Maldives

²⁶ Government Gazette, Resolution Number 16/2018: Presidential Commission on Corruption and Asset Recovery, available at: <http://web.gazette.gov.mv/gazette/download/4435>; Government Gazette, Resolution Number 1/2019 : Presidential Commission on Enforced Disappearances and Deaths, available at: <http://web.gazette.gov.mv/gazette/download/4543>.

²⁷ President's Office, Press Release: President ratifies the Bill on Presidential Commissions, 24 June 2019, available at: <https://presidency.gov.mv/Press/Article/21390>.

²⁸ *Maldives Independent*, 'MDP candidates disclose personal finances,' 24 February 2019, available at: <https://maldivesindependent.com/politics/mdp-candidates-disclose-personal-finances-143935> ; President's Office, The Cabinet, available at: <https://presidency.gov.mv/Government/Cabinet/16>.

²⁹ *Maldives Independent*, 'Broadcasting regulator asked military to shut down Raajje TV,' 5 November 2018, available at: <https://maldivesindependent.com/politics/broadcasting-regulator-asked-military-to-shut-down-raajje-tv-142476>.

Broadcasting Commission, both of whom have been accused of being political activists for the previous administration.³⁰

The new administration also repealed the Freedom of Expression and Protection from Defamation Law. Civil society is included in consultations and partnerships in relevant areas, and a new non-governmental organisation (NGO) bill is to be submitted to the Parliament by the government. The President's Office has set up a mechanism for those who were unfairly dismissed from employment due to political interference and investigations are currently being conducted over applications made to the committee.

International bodies have also acknowledged this change, with the Council of the European Union voting unanimously on 17 June 2019 to dissolve the framework of restrictive measures against the Maldives.³¹

The new Parliament has made several statements in relation to the HRCM during its debates, raising concern over the conduct of the institution in the recent years, with some Members of Parliament accusing the HRCM of being politically biased and incompetent. The parliamentary oversight committee for independent institutions has been investigating institutions over the past few months, and at the time of drafting this report the Committee is in the process of investigating allegations against the Prosecutor General. It is likely that the HRCM will be summoned to the Committee in the near future.

It is notable that, after four years and eleven months following the disappearance of HRD, journalist and former employee of the HRCM, Ahmed Rilwan Abdulla the HRCM quite suddenly submitted an investigation report into the disappearance to the Parliament on 8 July 2019.³² According to the family of Rilwan, the HRCM did not contact the family before concluding the investigation or even inform them an investigation had been completed. It is highly likely that the report was sent to the Parliament by the HRCM in an attempt to secure their seats for a second term or to avoid impeachment for incompetence, which has been raised in parliament and by the public on several instances.

5. Role of HRCM in the Democratic and Civic Space in the Country

As assessed in previous ANNI reports, the HRCM largely failed to monitor and report on human rights violations, especially as the former government became more authoritarian and started encroaching on fundamental rights enshrined in the constitution.³³ The HRCM became an instrument that was co-opted by the previous regime in legitimising severe human rights violations while performing the absolute minimum on implementing its mandate. HRCM was seen to be turning a blind eye on police impunity, and the use of excessive force in dispersing protestors.

³⁰ *Sun Online*, 'Parliamentary committee launches separate probes into BroadCom members,' 4 July 2019, available at: <https://en.sun.mv/54284>.

³¹ Council of the EU, Maldives: Council revokes sanctions framework, 17 July 2019, available at: <https://www.consilium.europa.eu/en/press/press-releases/2019/06/17/maldives-council-revokes-sanctions-framework/>.

³² *The Edition*, HRCM submits report on abducted journalist Ahmed Rilwan to parliament,' 8 July 2019, available at: <https://edition.mv/news/11395>.

³³ ANNI Report 2018

In 2018, the declaration of the State of Emergency sparked anti-government protests where masses protested from 5 February 2018 until 22 March 2018. HRCM deployed staff to monitor the protests taking place in Male city and published situational reports within 24 hours.³⁴ While the HRCM's 2018 protest monitoring report mentioned a total number of 73 cases of arrests, local media reports stated 141 protestors were arrested in just one night.³⁵

MDN's own monitoring noted that the police used excessive force and arrested protestors every night. Journalists covering the protests were both attacked and denied access to cover these protests.³⁶ However, situational reports by the HRCM did not acknowledge any of this.

One of the recommendations made to the HRCM in 2017 by MDN was to establish a focal point within the HRCM to coordinate with civil society actors, and HRDs in an effort to closely monitor and provide rapid response in cases of urgency.³⁷ The HRCM does not seem to recognize the need for such a position, or the need to provide rapid response for HRDs or mobilise resources to address an issue. The HRCM was noted to be extremely unresponsive to calls and cases of HRDs. Discussions with the Commissioners at the HRCM following the murder of HRD Yameen Rasheed reminded the HRCM of this recommendation. MDN was told that any HRD can also use the existing complaints mechanism. The extremely prolonged investigation that took five years in the case of disappeared HRD and journalist Ahmed Rilwan Abdullah, a former employee of the HRCM, demonstrates the need for improvement in the attitude of the HRCM towards the protection of HRDs. MDN is still attempting to engage with them, in a bid to streamline the programmatic work that both MDN and HRCM does.

6. Conclusion and Recommendations

In conclusion, the performance of the HRCM has not improved sufficiently over the 11 years of ANNI assessments. This conclusion is based on the ongoing trend of neglectful and politically biased behaviour of the HRCM. Considering the politically chaotic period of time during which the performance assessments have been made, and considering that other independent institutions have faced similar criticism, it can be said that a systemic overhaul is necessary in order to ensure effectiveness of institutions in the country. The culture of politically biased appointments to independent institutions must stop if institutions are to be able to function independently.

While the protection of independent bodies from political intimidation is significantly strong in enabling laws and would protect the HRCM from politically motivated impeachment, it is highly likely that Parliament Committees will investigate the Commissioners. These investigations will be necessary, following critical reports of failure to implement their mandate. In addition, individual complaints have been submitted to the Parliament in relation to serious human rights related crimes, such as the abduction and disappearance of Ahmed Rilwan and the murder of Yameen Rasheed, where both families maintain that the HRCM has neglected their duties. Further,

³⁴ Human Rights Commission of the Maldives, Index of Other Reports, available at: http://hrcm.org.mv/dhivehi/publications/Other_Reports.aspx

³⁵ *The Edition*, '141 People arrested from Friday night's protest: police,' 17 March 2018, available at: <https://edition.mv/news/5535>.

³⁶ Reporters Without Borders, 'State of emergency in Maldives, journalists harassed and attacked,' 6 February 2018, available at: <https://rsf.org/en/news/state-emergency-maldives-journalists-harassed-and-attacked>

³⁷ ANNI Report 2017, Recommendations.

cases alleging torture with damning evidence have also not been forward to the Prosecutor General's Office by the HRCM.

It is likely that the HRCM will make some effort to be seen to be carrying out their duties in the final months of their current term, and in preparation for any questioning from the parliament. An example of this is a recent press statement on 7 August 2019 by the Commission accusing the Prosecutor General of baselessly rejecting a torture case that the Commission had sent for processing of criminal charges against officials of the Maldives Correctional Service in the case of the prison death of Abdulla Rasheed, a political prisoner who died in prison in 2017.³⁸

6.1 Recommendations

To the HRCM:

- 1) Increase accessibility to the investigations system for victims and their families by engaging with them regularly and creating Victim Support Officers who are available to help the victims or their families throughout the investigation;
- 2) Review and improve the Complaints Form to require less personal information at the initial lodging of complaint, and amend the forms to enable organisations to submit complaints to the Commission;
- 3) Conduct a training program around the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights for the Commissioners, the Secretary General, researchers, case workers, and first responders, such as counter staff and call centre staff;
- 4) Provide an update on the status and implementation of recommendations made to the HRCM by the ANNI since 2007;
- 5) Include budget allocations for technical training on criminal investigations for the staff of the Complaints Department, including the Criminal Procedure Code, The Penal Code and any standards for criminal investigations set forth by the Prosecutor General; and
- 6) Establish a designated desk or focal point at the HRCM for HRDs.

To the Parliament

- 1) Establish a thorough vetting system that includes assessment of performance at previous employment / position and public consultations prior to any appointments to independent institutions;
- 2) Conduct quarterly sessions to make inquiries into the performance of the HRCM, include public feedback in assessments, and make these inquiries public; and
- 3) Question the current HRCM on the issues highlighted in this report that raise concern over the failure to deliver their mandate.

³⁸ *Maldives Independent*, 'Prosecutor General declines to raise charges over custodial death,' 8 August 2019, available at: <https://maldivesindependent.com/crime-2/prosecutor-general-declines-to-raise-charges-over-custodial-death-147319>.

HONG KONG: PRELUDE TO HONG KONG'S WORST POLITICAL CRISIS

*Hong Kong Human Rights Monitor*¹

1. Introduction

This report was prepared by the Hong Kong Human Rights Monitor², and has been endorsed by the Civil Human Rights Front.³ The report covers developments relating to the establishment of a National Human Rights Institution (NHRI) in Hong Kong as well as Hong Kong's democratic and civic space from 1 January 2018 until the first half of 2019. This report is based on reports and submissions by other civil society groups as well as news monitoring.

2. Overview

Widespread outbreak of public discontent erupted through large-scale peaceful marches in mid-2019. The series of protest was triggered by Hong Kong Government's proposed amendments to the Extradition Law⁴ that would allow the transfer of people from Hong Kong to Mainland China to face criminal proceedings. The underlying problems, however, are the inclination of the Hong Kong Government towards Beijing, at the cost of Hong Kong's autonomy, and the subsequent rapid narrowing of democratic space. The protests have since developed from demanding the withdrawal of the extradition bill and accountability of responsible officials, to demands for democracy and accountability of the police force for using excessive force on protesters.⁵ Events in the year of 2018 covered in this report foreshadow the eruption of this prevalent civil unrest and the gravest challenge to date to Hong Kong Government's legitimacy.

In 2018, the Hong Kong Government continued to disregard its duty to uphold the separation of Hong Kong's unique system from Mainland China as stipulated by the One Country Two Systems principle, which was adopted by China and the United Kingdom in the Sino-British Joint Declaration at the time of the handover in 1984.⁶ The One Country, Two Systems principle is crucial in guaranteeing Hong Kong's stability and economic success. The longstanding rule of law and protection of human rights in Hong Kong would not have survived the handover from the UK to China, without the separation of Hong Kong from the authoritarian regime of Mainland China.

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² See Hong Kong Human Rights Monitor's Facebook page, available at: <https://www.facebook.com/hkhrm/>.

³ See Civil Human Rights Front's Facebook page available at: <https://www.facebook.com/CivilHumanRightsFront/>.

⁴ The Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 is available at <https://www.legco.gov.hk/yr18-19/english/bills/b201903291.pdf>. The Government's Legislative Council Brief of the bill is available at https://www.legco.gov.hk/yr18-19/english/bills/brief/b201903291_brf.pdf.

⁵ Amnesty International, 'How Not to Police a Protest: Unlawful Use of Force by Hong Kong Police,' 21 June 2019, available at <https://www.amnesty.org/en/documents/asa17/0576/2019/en/>.

⁶ Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 19 December 1984, available at <https://www.cmab.gov.hk/en/issues/joint3.htm>.

Previous ANNI reports have established that the different existing human rights watchdogs in Hong Kong are crippled in design and unable to uphold international and constitutional human rights. They each have a narrow mandate, leaving many rights uncovered and lack independence from the administration.⁷ Arbitrary but binding power of interpretations of the Basic Law (Hong Kong Administrative Region's Constitution)⁸ by the Chinese National People's Congress Standing Committee (NPCSC) of Mainland China have led to a lack of political will and ability from the Hong Kong Government to uphold the One Country Two Systems principle and to protect human rights.

Hong Kong's rapidly decaying democratic situation has attracted international attention. Six States made specific recommendations to Hong Kong at the United Nations (UN) Human Rights Council's Universal Periodic Review (UPR) in November 2018. Three recommendations were about ensuring the enjoyment of civil and political rights in Hong Kong.⁹ In contrast, no specific recommendations were made to Hong Kong in the previous UPR in 2013.

3. Democratic Space in Country

In recent years, defiance towards the Chinese government and the ruling party of China has become increasingly less tolerated. While Beijing's direct interference in Hong Kong was rare in 2018, the Hong Kong Government has been promoting pro-Beijing policies and failed to uphold the One Country, Two Systems principle citing the need to protect "*national security*" to crackdown on civil liberties.¹⁰

Elections

In 2016, the Hong Kong Government introduced *de facto* political vetting of candidates for all elections. The Electoral Affairs Commission required candidates to submit a form in which they pledge to uphold Hong Kong's Basic Law. The officers in charge of overseeing the elections could also refer to a candidate or their affiliated parties' past statements to determine whether they support Hong Kong's independence, which the government deems to be contrary to the Basic Law. Such political vetting of candidacy was challenged in the High Court by Hong Kong National Party, a pro-independence group, who was barred from standing in the election in 2016.¹¹ However, in February 2018, the Court confirmed that election officers have the power to determine

⁷ Hong Kong Human Rights Monitor, 'Hong Kong: More Threats, Less Protection,' 2017 ANNI Report, p.164, available at <https://www.forum-asia.org/?p=29320>.

⁸ The Basic Law of the Hong Kong Special Administrative Region of the Peoples' Republic of China, available at: https://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf.

⁹ Human Rights Council, Report of the Working Group on the Universal Periodic Review on China, 26 December 2018, paras 28.14, 28.205, 28.343-6, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/446/59/PDF/G1844659.pdf?OpenElement>

¹⁰ Amnesty International, 'Year-end Human Rights Review 2018– Hong Kong,' 26 March 2019, paras: 1.1-1.9, available at: https://www.amnesty.org.hk/wp-content/uploads/2019/03/HKReview_2018.pdf.

¹¹ Chris Lau, 'Hong Kong election officials can block candidates based on political views but must ensure clear evidence, court rules,' *South China Morning Post*, 13 February 2018, available at: <https://www.scmp.com/news/hong-kong/law-crime/article/2133194/court-rejects-pro-independence-activists-case-hong-kong>.

whether prospective candidates are sincere in their pledge to uphold the Basic Law.¹² As a consequence, in 2018, four candidates were barred from standing in elections, including three in the Legislative Council by-elections, and one in a rural representative election due to their stance on Hong Kong's independence and self-determination.¹³

This system of political vetting of candidates has unjustifiably restricted the right to political participation.¹⁴ Feeling excluded and unheard, Hong Kong people have turned to the streets to express their opinion, hence the mass outbreak of protests in 2019. Unfortunately, such practice appears to remain applicable to upcoming elections. Major upcoming elections include the District Council Elections in November 2019, and Legislative Council General Elections in 2020.

Bulldozing Bills despite Oppositions

Following the disqualification of six pro-democracy elected members in 2016, the Hong Kong Government and its allies (also known as the pro-establishment camp, which is often also pro-Beijing) have had absolute control of the Legislative Council.¹⁵ They made sure government proposed bills were passed despite strong opposition among civil society, often without sufficient public consultations.

For instance, the Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Bill was proposed by the Hong Kong government to allow passengers to clear both Hong Kong and Mainland border checks at a single location in Hong Kong. This would allow laws from Mainland China to be enforced on Hong Kong's soil for the first time ever. According to the Hong Kong Bar Association this constitutes a violation of the Basic Law.¹⁶ The bill was passed on 14 June 2018 amid controversy over the decision of Legislative Council's President Andrew Leung to set a time

¹² Chan Ho Tin v. Lo Ying Ki Alan and Others (13/02/2018, HCAL162/2016) [2018] 2 HKLRD 7, [2018] HKCFI 345, para 107, available at:

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=113686&currpage=&loc=p107

¹³ *The Guardian*, 'Hong Kong authorities block pro-democracy candidate from by-election,' 27 January 2018, available at: <https://www.theguardian.com/world/2018/jan/27/hong-kong-authorities-block-pro-democracy-candidate-from-by-election>; *South China Morning Post*, 'Hong Kong lawmaker Eddie Chu disqualified from running in village election after being questioned twice on independence,' 2 December 2018, available at:

<https://www.scmp.com/news/hong-kong/politics/article/2176031/hong-kong-lawmaker-eddie-chu-disqualified-running-rural>.

¹⁴ Kong Tsung-gan, 'Opinion: Disqualified: How the gov't compromised Hong Kong's only free and fair election,' *Hong Kong Free Press*, 31 January 2018, available at <https://www.hongkongfp.com/2018/01/31/disqualified-hong-kong-govt-compromised-citys-free-fair-elections/>; and Hong Kong Watch, 'Political screening in Hong Kong - The disqualification of candidates and lawmakers ahead of the March by-elections,' 8 March 2018, available at: <https://www.hongkongwatch.org/all-posts/2018/3/7/political-screening-in-hong-kong-a-report-on-the-disqualification-of-candidates-and-lawmakers>.

¹⁵ See Civic Party, Submission to the United Nations Universal Periodic Review - Hong Kong Special Administrative Region (HKSAR) China, 31st session of the UPR Working Group of the Human Rights Council (November 2018), 15 January 2018, paras 13-21, available at: <https://www.legco.gov.hk/yr17-18/chinese/panels/ca/papers/ca20180430cb2-1335-4-ec.pdf>

¹⁶ Hong Kong Bar Association, 'Statement of the Hong Kong Bar Association on the Decision of The NPCSC of 27 December 2017 on the Co-Operation Agreement between the Mainland and the HKSAR on the Establishment of the Port at the West Kowloon Station of The Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-Location Arrangement,' 28 December 2017, available at:

https://www.hkba.org/sites/default/files/20171228%20-%20Bar%20Co-Location%20Arrangement%20Statement%20%28English%29%20FINAL_0.pdf.

limit for the second reading debate, denying 11 legislators the chance to speak.¹⁷ The pro-democracy camp (aka pan-democrats) also criticised Leung's decision to eject five pan-democratic legislators from the Legislative Council Chamber for standing and shouting during the speech of the Secretary for Housing and Transport. Leung refused to allow them to re-enter the Council Chamber for the final day of debate, preventing them from being able to vote.¹⁸

In addition, the Hong Kong Government deployed staff to monitor lawmakers in the Legislative Council Complex to make ensure the Co-location bill was passed. Pro-democracy camp finds such practice to amount to an infringement on their privacy, and a violation of the separation of powers.¹⁹

In 2017, the NPCSC adopted a nationwide law that criminalises abuse of China's national anthem and in November 2017 it decided to add the National Anthem Law to Annex III of Hong Kong's Basic Law.²⁰ In accordance with Article 18(2) of the Basic Law, Hong Kong shall apply the national laws listed in Annex III to the Basic Law locally by way of promulgation or legislation. The Chinese National Anthem Law includes ideology and expressions of socialism of Mainland China, which are contrary to the capitalist system of Hong Kong. Furthermore, the bill proposed by the Hong Kong Government to implement the National Anthem Law in Hong Kong criminalises public and intentional insult of the anthem, punishable by a fine and three years of imprisonment. The government tabled the bill at the Legislative Council in January 2019 without public consultation. The bill was expected to be adopted before July 2019 but this was disrupted by the public protests relating to the Extradition Law.

In short, the Legislative Council had become a rubber stamp house. However, when the government proposed the controversial Extradition Bill in February 2019, it made the mistake of attempting to pass the bill speedily. It allowed only 20 days for consultation, and ignored submissions against the bill from pan-democrats, lawyer groups, local and international chambers of commerce, professional bodies, and the diplomatic circle.²¹ As a consequence, on 8 June 2019, 1.2 million people participated in a peaceful march against the Extradition Bill, marking the start

¹⁷ *South China Morning Post*, 'Chaotic Legislative Council meeting sees 11 Hong Kong lawmakers miss chance to speak in rail checkpoint debate,' 8 June 2018, available at: <https://www.scmp.com/news/hong-kong/politics/article/2149801/chaotic-legislative-council-meeting-sees-11-hong-kong>; See further similar practice in the bills committee: *South China Morning Post*, 'In unprecedented move, May 7 deadline set for Legco bills committee to scrutinise controversial joint checkpoint plan,' 13 April 2018, available at: <https://www.scmp.com/news/hong-kong/politics/article/2141582/may-7-deadline-set-legco-bill-committee-scrutinise>.

¹⁸ *South China Morning Post*, 'Outrage in Hong Kong's Legislative Council as five lawmakers barred ahead of crucial vote on China joint rail checkpoint,' 14 June 2018, available at: <https://www.scmp.com/news/hong-kong/politics/article/2150790/outrage-hong-kongs-legislative-council-five-lawmakers-barrred>.

¹⁹ Law Lay Dream, 'What are the legal basis and public interest for the government to monitor movement of pro-democracy LegCo members?,' (政府監控立法會泛民議員動向的法理依據及公眾利益何在?), 27 April 2018 (Chinese only), available at: <https://www.inmediahk.net/node/1056634>.

²⁰ The Law of the People's Republic of China on National Anthem and Hong Kong's National Anthem Bill can be found in Constitutional and Mainland Affairs Bureau, Legislative Council Brief - National Anthem Bill, 9 January 2019, available at: https://www.legco.gov.hk/yr18-19/english/bills/brief/b201901111_brf.pdf.

²¹ Hong Kong Watch, 'A Broken Firewall: The Extradition Law and the Rule of Law in Hong Kong,' 1 May 2019, available at: <https://www.hongkongwatch.org/all-posts/2019/5/1/new-hong-kong-watch-report-exposes-widespread-business-fears-about-the-extradition-law>.

of a series of protests that developed into the most serious legitimacy crisis for the Hong Kong Government since the handover.

Outlawing Political Party and Eviction of a Foreign Journalist

In September 2018, the Hong Kong Government outlawed the pro-independence Hong Kong National Party, the first time a political organisation in Hong Kong is banned for “national security” reasons.²² It is in addition to the de facto general ban on Demosisto, a political party, which supports Hong Kong’s right to “self-determination.”²³

In October 2018, Hong Kong authorities refused to renew the work visa of Victor Mallet, the *Financial Times* Asia News Editor and vice-president of the Foreign Correspondent Club (FCC), after he hosted a talk at the club by a pro-Hong Kong independence advocate. Mainland central government authorities condemned the FCC for hosting the talk. In November 2018, Hong Kong authorities refused to allow Mallet, who is a British citizen, to enter Hong Kong as a tourist.²⁴

Whether or not people support the independence movement, restrictions on the rights to freedom of expression and association in the name of national security or integrity of the Chinese territory raise alarm for the Hong Kong people who fear further that it is a sign of further tightening of civil liberties.

Public Order Ordinance and other Laws on Public Assembly

2018 saw important court decisions in relation to public assemblies. The court handed the heaviest sentence for rioting since Hong Kong history to a defendant involved in the Mong Kok clash of 2016, a protest that turned into a violent conflict with police.²⁵ In another case, the Court of Final Appeal confirmed new sentencing guidelines for unlawful assembly involving violence.²⁶ The new sentencing guidelines suggest imposing custodial sentences on any participants and organisers

²² *Hong Kong Free Press*, ‘Pro-independence party officially banned by Hong Kong gov’t in historic move restricting freedom of assembly,’ 24 September 2018, available at:

<https://www.hongkongfp.com/2018/09/24/breaking-pro-independence-party-officially-banned-hong-kong-govt-historic-move-restricting-freedom-assembly/>; *Hong Kong Free Press*, ‘Hong Kong’s ban on pro-independence

National Party upheld, as gov’t rejects appeal,’ 21 February 2019, available at:

<https://www.hongkongfp.com/2019/02/21/breaking-hong-kongs-ban-pro-independence-national-party-upheld-govt-rejects-appeal/>; and Report on the prohibition of the operation of the “Hong Kong National Party” by the Hong

Kong Special Administrative Region Government and related circumstances, 18 April 2019, available at:

https://www.news.gov.hk/eng/2019/04/20190418/20190418_155029_125.html.

²³ See footnotes above 10 and 11.

²⁴ *Hong Kong Free Press*, ‘Hong Kong rejects visa renewal for foreign press club vice-pres. who chaired independence talk,’ 5 October 2018, available at: <https://www.hongkongfp.com/2018/10/05/hong-kong-refuses-visa-renewal-foreign-press-club-vice-pres-chaired-independence-talk/>; *Hong Kong Free Press*, ‘Senior Financial Times

journalist Victor Mallet banned from entering Hong Kong,’ 9 November 2018, available at:

<https://www.hongkongfp.com/2018/11/09/just-senior-financial-times-journalist-victor-mallet-banned-entering-hong-kong/>.

²⁵ *Hong Kong Free Press*, ‘Localist Edward Leung sentenced to six years in jail over Mong Kok unrest participation,’ 11 June 2018, available at: <https://www.hongkongfp.com/2018/06/11/localist-edward-leung-sentenced-six-years-jail-mong-kok-unrest-participation/>.

²⁶ CAP. 245, Public Order Ordinance, Section 18, available at: <https://www.elegislation.gov.hk/hk/cap245>.

of public assemblies who have turned violent, even if other participants committed the violence.²⁷ Prior, unlawful assemblies were mostly punished by non-custodial sentences.

The Court's decision has reignited concerns that the Public Order Ordinance, enacted in 1967, imposes excessive restrictions on the right to freedom of assembly. The Public Order Ordinance's definitions of unlawful assembly and riot are vague and open to abuse. Under the Public Order Ordinance, an assembly where a "*breach of the peace*" is committed becomes a riot and the people assembled will be regarded as being "*riotously assembled*."²⁸ The offence does not require a common purpose from the crowd to engage in a riot. The moment "*any person*" taking part in a public assembly that committed a breach of the peace, he/she can be found guilty of rioting and face a maximum of 10 years imprisonment. The Ordinance also requires protests of a certain size to be approved. The UN Human Rights Committee heavily criticised the legislation in 2013.²⁹³⁰

In addition, nine leaders of the occupy movement of 2014, aka the Umbrella Movement, were prosecuted under the archaic common law offence of causing public nuisance, which carries a maximum sentence of seven years' imprisonment. The Umbrella Movement was a peaceful protest and none of the defendants advocated violence. The nine leaders - including two current Legislative Council members, one of whom received a suspended sentence due to serious medical condition - were convicted and sentenced in 2019 for up to 16 months imprisonment.³¹

Judiciary

Hong Kong courts have often been required to handle political problems, such as issues relating to the constitutionality of the Co-location Bill, the civil disobedience Umbrella movement etc. Not only is the judiciary not suited for settling political disputes, it is forever under the threat of the NPCSC's arbitrary but binding interpretation of the Basic Law. For instance in 1999, the NPCSC interpreted an article in the Basic Law differently from the Hong Kong Court of Final Appeal. It therefore became clear that the NPCSC's interpretation of the Basic Law, which is often twisting its meaning, supersedes the final adjudication power of the Court of Final Appeal, hence putting Hong Kong's judicial independence in question.³² According to Reuters, "*Hong Kong's judges*

²⁷ *Hong Kong Free Press*, 'Hong Kong democracy activists Joshua Wong, Alex Chow, Nathan Law free to go after Occupy sentence appeal,' 6 February 2018, available at: <https://www.hongkongfp.com/2018/02/06/breaking-hong-kong-democracy-activists-joshua-wong-alex-chow-nathan-law-free-go-occupy-sentence-appeal/>.

²⁸ CAP. 245, Public Order Ordinance, Section 19.

²⁹ Human Rights Committee, Concluding observations on the third periodic report of Hong Kong, China, adopted by the Committee at its 107th session (11 – 28 March 2013), 29 April 2013, para 10

³⁰ The Hong Kong Watch issued a brief on this legislation, available at <https://www.hongkongwatch.org/s/Public-Order-Ordinance-briefing.pdf>

³¹ *Hong Kong Free Press*, 'Hong Kong's leading Umbrella Movement activists handed jail sentences,' 24 April 2019, available at: <https://www.hongkongfp.com/2019/04/24/breaking-hong-kongs-leading-umbrella-movement-activists-handed-jail-sentences/>.

³² *Ng Ka Ling v Director of Immigration* 19991 HKLRD 315. See also Albert H. Y. Chen, 'Constitutional Crisis in Hong Kong: Congressional Supremacy and Judicial Review' (1999) 33; *The International Lawyer*; and 1025 scholars also argue that there should be limits to NPCSC's power to interpret the Basic Law. See Cora Chan, 'The legal limits on Beijing's powers to interpret Hong Kong's Basic Law,' *Hong Kong Free Press*, 5 November 2016, available at: <https://www.hongkongfp.com/2016/11/05/legal-limits-beijings-powers-interpret-hong-kongs-basic-law/>.

are increasingly expressing such fears in private, concerned that interpretations and amendments from China's parliament could soon force them to curb the city's freedoms.”³³

On the other hand, in less politically charged cases such as cases relating to LGBT rights, the Court of Final Appeal has proven to be more liberal. In June 2018, the Court of Appeal ruled in the case of Angus Leung that the husband of a male civil servant was not entitled to spousal benefits. The Court of Final Appeal later overturned the decision in 2019.³⁴ In July 2018, Hong Kong's Court of Final Appeal also handed down a landmark ruling for the *QT case* requiring immigration authorities to grant same-sex partners spousal visas previously available only to heterosexual couples.³⁵

4. Establishment of a NHRI

There is no national human rights institution, or “human rights commission” in local terminology, in Hong Kong. There are a number of separate watchdogs, each with a narrow focus on specific human rights. These include the Equal Opportunities Commission (EOC),³⁶ the Privacy Commissioner for Personal Data (PCPD),³⁷ the Independent Police Complaints Council (IPCC),³⁸ the Ombudsman,³⁹ the Independent Commission Against Corruption (ICAC),⁴⁰ the Commissioner on Interception of Communications and Surveillance,⁴¹ and the Legal Aid Services Council.⁴² The setups of these watchdogs remain as it was outlined in previous ANNI reports.⁴³

The EOC embarked on a review of its complaint handling procedures in late 2017, a first attempt since its establishment. The review outcome is yet to be published but the process has been criticised by civil society organisations (CSOs) for being secretive and lacking sincerity.⁴⁴

In September 2018, the UN Committee on the Elimination of Racial Discrimination (UNCERD) also criticised the EOC's lack of independence as a human rights institution.⁴⁵ In addition, four

³³ Greg Torode, James Pomfret, ‘Hong Kong's judges voice fears over China influence in judiciary,’ Reuters, 15 March 2018, available at: <https://www.reuters.com/article/us-hongkong-law/hong-kongs-judges-voice-fears-over-china-influence-in-judiciary-idUSKCN1GR0LD>.

³⁴ Leung Chun Kwong v Secretary for the Civil Service and Commissioner of Inland Revenue [2019] HKCFA 19, available at: https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=122337&currpage=T

³⁵ QT v Director of Immigration [2018] HKCFA 28, available at: https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=116049&currpage=T

³⁶ Website available at: <http://eoc.org.hk>.

³⁷ Website available at: <http://pcpd.org.hk>.

³⁸ Website available at: <http://ipcc.gov.hk>.

³⁹ Website available at: <http://ombudsman.hk>.

⁴⁰ Website available at: <https://www.icac.org.hk>.

⁴¹ Website available at: <https://www.sciocs.gov.hk>.

⁴² Website available at: <http://www.lasc.hk>.

⁴³ Hong Kong Human Rights Monitor, ‘Hong Kong: More Threats, Less Protection,’ 2017 ANNI Report, p. 164, available at: <https://www.forum-asia.org/?p=29320>.

⁴⁴ *South China Morning Post*, ‘Hong Kong's equality watchdog head slammed for cronyism and poor governance,’ 15 February 2018, available at: <https://www.scmp.com/news/hong-kong/politics/article/2133418/hong-kongs-equality-watchdog-head-slammed-cronyism-and-poor>.

⁴⁵ Committee on the Elimination of Racial Discrimination, Concluding observations on the combined fourteenth to seventeenth periodic reports of China (including Hong Kong, China and Macao, China), 19 September 2018, paras 9-10, available at:

states recommended China to set up a NHRI in accordance with the Paris Principles during China's UPR in November 2018.⁴⁶ The recommendations, accepted by China, are applicable to Hong Kong too. Even though Hong Kong is not a country under the One Country Two Systems principle, the EOC and the Ombudsman should endeavor to comply with the Paris Principles and develop into an independent human rights commission with broad mandates in order to promote and monitor the implementation of the rule of law in the judiciary and law enforcement, and to implement international human rights standards. However, the Hong Kong Government continues to dismiss the need to establish a body in addition to or to replace the existing mechanisms, claiming that the existing mechanisms have worked well.⁴⁷

While the civil society continues to demand for the establishment of a human rights commission, considering the legal and political context mentioned above, we remain pessimistic in the prospect of success. Nevertheless, civil society continues to use the Paris Principles and other international standards as yardsticks to monitor and measure the effectiveness of the Government and of the existing watchdogs. They remain crucial reference points, especially for resisting the current rapid human rights regression.

5. Advocacy Strategies

In view of the police's excessive use of force in handling the series of protests against the Extradition Bill since June 2019, there is a strong demand from all walks of life for setting up a statutory independent commission of inquiry to comprehensively investigate police misconduct. There is increased awareness of the defects of the police complaint mechanism, and the lack of mechanism to redress human rights violations. Therefore, it may be possible to galvanise more support for the establishment of a human rights commission. A key advocacy strategy would be to conduct public education on the role of a human rights commission.

6. Conclusions and Recommendations

By deferring to Beijing, crushing civic and democratic space and paying no heed to public opinion, the Hong Kong Government has failed to represent the people of Hong Kong and to uphold its core values. It does not come as a surprise then that the people of Hong Kong have now woken up to the fact that the root of the problem lies in the fact that someone who was not democratically elected but rather handpicked by Beijing leads the Hong Kong Government. The only solution to the current crisis would be to having a government of the people by the people for the people.

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fCHN%2fCO%2f14-17&Lang=en

⁴⁶ Human Rights Council, Report of the Working Group on the Universal Periodic Review on China, 26 December 2018, 28.66-71.

⁴⁷ Government's Press Release, 'Government gives an initial response to concluding observations of UN Committee on the Elimination of Racial Discrimination on Hong Kong's Report,' 31 August 2018, available at: <https://www.info.gov.hk/gia/general/201808/31/P2018083100325.htm?fontSize=1>: *"We would like to point out that human rights are fully protected by law in the HKSAR, and are enshrined in the Basic Law, the Hong Kong Bill of Rights Ordinance (HKBORO) and other relevant legislation such as anti-discrimination legislation. These are buttressed by the rule of law and an independent judiciary. There is also an existing institutional framework of statutory organisations which help promote and safeguard human rights and eliminate discrimination..."*

6.1 Recommendations:

To the Chinese Government:

- 1) Stop its repression on Hong Kong, and respect Hong Kong's autonomy including the One Country Two Systems principle guaranteed in the Sino-British Joint Declaration; and
- 2) Extend a standing invitation to human rights experts of the UN to visit Hong Kong.

To the Hong Kong Government:

- 1) Start restoring democracy.
- 2) Restore public confidence by setting up a human rights committee (a national human rights institution) to keep public powers in check;
- 3) Protect the right to freedom of expression according to its international human rights obligations and as provided for in the Basic Law. National security should be clearly and strictly defined in law and any restrictions on freedom of expression for the protection of national security should be proportionate and necessary. Only actions which are intended and likely to incite imminent violence may be punished;⁴⁸
- 4) Stop using politically motivated prosecutions and other legal procedures against peaceful protesters to silence critical voices and deter people from participation in the public sphere; and
- 5) Bring the Public Order Ordinance into line with Hong Kong's obligations under the International Covenant on Civil and Political Rights;⁴⁹

To the International Community:

- 1) Continue to support the maintenance of Hong Kong's core values – the rule of law, and protection of human rights. Timely international attention has slowed down the regression of rights in Hong Kong;
- 2) UN treaty bodies should prioritise the review of states with rapid decline in their human rights situation. Hong Kong's state report on the International Covenant on Civil and Political Rights was due in March 2018. The Human Rights Committee should review Hong Kong as soon as possible, with or without a state report from Hong Kong.⁵⁰

⁴⁸ Amnesty International, 'How Not to Police a Protest: Unlawful Use of Force by Hong Kong Police,' 21 June 2019, para 1.9

⁴⁹ Ibid, para 2.6.

⁵⁰ Hong Kong government completed consultations on the outline of the state party's report by January 2018. However at the time of writing, Hong Kong's state party report is yet to be published on the UN and Hong Kong government's websites. See UN website available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=HKG&Lang=en; and Hong Kong Government's website available at: https://www.cmab.gov.hk/en/press/reports_human.htm.

MONGOLIA: ROLE OF NHRCM IN DEMOCRATIC BACKSLIDING AND CONTRACTION OF CIVIC SPACE

*Centre for Human Rights and Development (CHRD)*¹

1. Introduction

This report was prepared by the Centre for Human Rights and Development (CHRD) for the 13th year since 2005. The report is based on the National Human Rights Commission of Mongolia (NHRCM)'s² 2018 Annual Report³ and the 18th Status Report on Human Rights and Freedoms in Mongolia,⁴ as well as the website and other relevant sources of the Asian NGO Network on National Human Rights Institutions (ANNI).⁵

Information for the report was collected through desk research and interviews with NHRCM Secretariat officer. A draft of the report was sent by email to the members of the Mongolian Human Rights NGOs Forum, and the Director of the NHRCM Secretariat. Their comments and feedback were incorporated into the report.

2. Overview

NHRCM was created by law in 2000, and established operationally in 2001.⁶ It has been reviewed three times by the International Coordinating Committee of National Human Rights Institution (ICC), and awarded “A” status each time.⁷ As per its mandate,⁸ the NHRCM resolved complaints, made recommendations on laws, delivered demands and recommendations to relevant state entities, initiated plans as well as inquiries, issued court claims on behalf of individuals for violations of their human rights, and conducted training, meetings and consultations as well as research.⁹

NHRCM made progress on the implementation of previous year's ANNI recommendations and we acknowledge NHRCM's effort and contribution to that end. For instance, in December 2017, member organisations of the Human Rights NGO Forum sent an official request to the State Great Hural¹⁰ to: (1) Amend the National Human Rights Commission of Mongolia Act (NHRCM Act)

¹ Contact persons: G.Urantsooj, urna@chrd.org.mn, Sh.Sarankhukhuu, saku@chrd.org.mn. CHRD's website is available at: <https://chrdmongolia.wordpress.com/>

² NHRCM's website is available at: <http://en.nhrcm.gov.mn/>.

³ NHRCM, The Activity Report, 2018, available in Mongolian at: <http://nhrcm.gov.mn/doc/786/>.

⁴ NHRCM, The 18th annual status report on human rights and freedoms in mongolia, 2018, available at <http://en.nhrcm.gov.mn/news/status-report-human-rights-and-freedoms/>.

⁵ See webpage available at: https://www.forum-asia.org/?page_id=19132&nhri=1.

⁶ Law on the National Human Rights Commission of Mongolia, 7 December 2000, [Hereinafter NHRCM Act], available at: <http://en.nhrcm.gov.mn/news/national-human-rights-commission-of-mongolia-act/>

⁷ Review process of compliance with the Paris Principles on the status of the national institutions for the promotion and protection of human rights, available at: <https://nhri.ohchr.org/EN/Pages/default.aspx>

⁸ NHRCM Act, Article 3.1.

⁹ NHRCM, Annual Activity Report, 2019, available in Mongolian only at: <http://nhrcm.gov.mn/doc/786/>.

¹⁰ The State Great Hural is Mongolia's unicameral Parliament. See Appendix 1: List of laws, draft laws, procedure draft and policy documents which the NHRCM commented on.

in compliance with the Paris Principles, (2) organise a hearing on its status report on human rights and freedoms in the State Great Hural's Plenary Session (3) issue a resolution regarding the implementation of its recommendations, (4) cooperate with NHRCM for the implementation of the Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments,¹¹ and (5) ensure adequate funds for the NHRCM operations including by abolishing the practice of approved budget reduction by the Ministry of Finance.

In 2014, the President of Mongolia initiated amendments to the NHRCM Act. In 2018, important progresses were made in that regard with the presentation of a concept paper regarding amendments to the NHRCM Act and the subsequent introduction of the said amendments.¹² The concept paper and the draft amendments were prepared by a Working Group within the Ministry of Justice and Internal Affairs. The amendments are now under consideration by the Ministry of Justice and Home Affairs.

During interview on 16 August 2019 with Ch. Altangerel, the Director of the NHRCM Secretariat and a member of the Ministry of Justice's Working Group he stated that: *"When the amendments to the Law on NHRCM are adopted, a) a mechanism for the prevention of torture will be defined ... b) the selection process of the Commissioner will become transparent with people's participation, c) the internal structure of NHRCM will be expanded d) and the amendments to the Law on NHRCM will be discussed at the Plenary Session of the State Great Hural within the year."*¹³

Therefore, amendments to the NHRCM Act take into consideration previous recommendations made by the members of the Human Rights NGO Forum. However, a review of the draft reveals that the proposed amendments do not include the participation of the people in the nomination process of the Commissioners.¹⁴

3. NHRI and Its Mandates to Promote and Protect Human Rights

Inquiries

According to the law, NHRCM is entitled to conduct inquiries on its own initiative on the basis of information received with regard to violations of human rights or at the request of business entities, organisations or officials, to issue inquiry or to make recommendations and ensure their implementation.¹⁵

In 2018, the NHRCM carried out a total of 109 inquiries out of which 79 were planned inquiries, 15 took place after complaints were lodged, and 15 after information was received on emerging

¹¹ Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments, 22-23 February 2012, available at: <https://www.forum-asia.org/uploads/wp/2017/01/Belgrade-Principles-Final.pdf>.

¹² Working group at the Ministry of Justice and Internal Affairs, 'The concept of the revised draft Law on NHRCM,' March 2019, available in Mongolian at: <https://mojha.gov.mn/wp-content/uploads/2019/03/NHRC-Uzel-Barimtlal.pdf>.

¹³ Interview with Ch. Altangerel, the Director of the NHRCM Secretariat, 16 August 2019.

¹⁴ Ministry of Justice and Internal Affairs, Revised draft Law on NHRCM, March 2019, available at: <https://mojha.gov.mn/wp-content/uploads/2019/03/NHRC-tusul.pdf>.

¹⁵ NHRCM Act, Article 17.

issues. For example, inquiries were carried out into police custodies, detention centers, in relation to the right to work as well as preventive inquiry in regard to the safety of child jockeys.¹⁶ As the Director of the NHRCM Secretariat said: *“The planned inquiries were conducted by NHRCM’s local officers in 21 provinces. Planned inquiries should be conducted once every two months at the police and detention centers. As result of the planned inquiries conducted in detention centers, many undertook reparation work....”*¹⁷

Comments on Draft Laws

The NHRCM reviewed 27 draft laws, policy documents and procedures submitted to the State Great Hural. It made 107 recommendations on those draft laws, policy documents and procedures in order to ensure their compliance with human rights principles and norms. As stated in previous ANNI reports, there are no provisions within the NHRCM Act that regulates its role in the law drafting process. Such regulatory article should be included in the amendments to the NHRCM Act.

The Director of the NHRCM Secretariat explained that: *“In practice, there are three ways for NHRCM to comment on a draft law. 1) It can submit – of its own initiative - its recommendations on the Labor Law, the Law on Health and the Law on Investigation of Criminal Offences, 2) it can – of its own initiative - become a member of draft law working group 3) it can send its recommendations on the draft laws after receiving a request from a draft law working group or the Ministry of Justice and Internal affairs.”*¹⁸

The NHRCM submitted recommendations on Amendments to the Labor Law on 20 April 2018.¹⁹ In addition, following consultations with the Ministry of Labor and Social Welfare, the State Professional Inspection Agency, the Trade Union of Mongolia, the Mongolian Bar Association, the Open Society Forum and other human rights NGOs of Mongolia, it submitted an additional 32 recommendations on 21 June 2018.²⁰

However, according to the NHRCM out of the 184 recommendations it submitted on the draft law on Criminal Code and the draft Law on the Investigation of Criminal Offences and other related laws between 2013 and 2016 only 48% were taken into consideration. For example, 47% of the total 95 recommendations submitted on the draft law on the Criminal Code and 50% of the total 89 recommendations made on the Law on Investigation of Criminal Offences were adopted.²¹ This reinforces the need for a regulatory article relating to the role of NHRCM in the review of draft laws to be included in the amendments to the NHRCM Act.

¹⁶ NHRCM, The Activity Report, 2018, p. 8

¹⁷ Interview with Ch. Altangerel, Director of the NHRCM Secretariat, 16 August 2019.

¹⁸ Interview with Ch. Altangerel, Director of the NHRCM Secretariat, 16 August 2019.

¹⁹ NHRCM, Official letter to the Chairman of State Great Hural, 20 April 2018, info@nhrcm.gov.mn.

²⁰ NHRCM, Official letter to the Vice Chairman of State Great Hural, 21 June 2018, available at: info@nhrcm.gov.mn

²¹ NHRCM, The Activity Report, 2018, p. 12.

Legal Services

NHRCM has provided 408 hours and 24 minutes of legal advice in total to 1,035 individuals and enterprises via email, phone calls and meetings in person.²² The total numbers of legal advices of 2018 were two times lower than the previous year.

In addition, according to Article 17.1.1 of the NHRCM Act, the NHRCM can submit claims to the Courts with regard to cases of human rights violations to participate in person or through a representative in judicial proceedings in accordance with procedure established by the law, to put forward requests to the competent authorities or officials with regard to imposing administrative sanctions on officials who have violated human rights, and to demand organisations or officials to stop activities which violate human rights, or which create conditions for such violations.

In 2018, NHRCM filed two cases with the court for compensation and remedies in cases relating to illegal investigations.²³ However, as the Director of NHRCM Secretariat explained “*It is common that the compensation of remedies allocated tends to be less than the requested amount.*”²⁴

Formulation of Recommendations

The NHRCM has full authority to formulate demands and recommendations to individuals and business entities in order to restore human rights and freedoms and eliminate the violations. Within the reporting period, a total of 33 recommendations and 30 demands were submitted to the business entities in relation to complaints received by NHRCM. NHRCM has received responses on 22 recommendations out of the 33, and 23 responses out of the total 30 demands.²⁵

Trainings

In 2018, NHRCM conducted 339 trainings sessions for a total of 818.5 hours for 15,424 participants.²⁶ As the Director of the NHRCM Secretariat explained: “*The NHRCM has signed a Memorandum of Understanding with the Police Office, the General Executive Agency for Court Decisions, the General Staff of the Mongolian Armed Forces, the General authority for border protection and the State Professional Inspection Agency. The MoU provides for NHRCM to conduct trainings for the officers of the above mentioned state authorities and other about human rights.*”²⁷

Publications

In 2018, a total of 11 publications such as human rights books, booklets and hand-outs were developed and printed out for training and public awareness purposes. The Chief Commissioner,

²² NHRCM, The Activity Report, 2018, p. 19.

²³ NHRCM, The Activity Report, 2018, p. 20.

²⁴ Interview with Ch. Altangerel, Director of the NHRCM Secretariat, 16 August 2019.

²⁵ NHRCM, The Activity Report, 2018, p. 21.

²⁶ NHRCM, The Activity Report, 2018, p. 28.

²⁷ Interview with Ch. Altangerel, Director of the NHRCM Secretariat, 16 August 2019.

Commissioners, and staff of the Secretariat also gave interviews, and provided clarification and information 12 times on television, three times on radio, five times for newspapers and four times for websites.²⁸

Complaints

The NHRCM received 623 complaints from individuals and private enterprises including 195 complaints from local areas. According to NHRCM, 593 of them were resolved after it took necessary actions such as carrying out investigations and providing mediations. Complaints are dealt with according to the NHRCM's Procedure of Complaints Handling and Monitoring of the Implementation of its Recommendation.²⁹ However NHRCM does not provide information on its monitoring process on its official website.

As Ch. Altangerel, the Director of the Secretariat of NHRCM said: *"NHRCM started using a cyber-program named "able" to coordinate its internal activity at the national level since 2015. When the complaint is submitted to any of the local officers of NHRCM and secretariat officers in Ulaanbaatar, it directly goes to the Chief Commissioner first. Then the Chief Commissioner transfers it to the related officer who according to Article 3.3.2 of NHRCM's Procedure of Complaints Handling and Monitoring of the Implementation of its Recommendation, must resolve the complaint within 30 days."*³⁰

However, NHRCM faces some legal restrictions in how it can handle complaints. For instance, in Section 11.2 of the NHRCM Act it is stated that *"Commissioner shall not receive complaints on the inquiry, investigation and judicial examination of jury or resolved jury, civil case and dispute resolution,"* which restricts its mandate and powers to protect human rights. In addition, the NHRCM Act, does not contain any provision relating to the complainants and witnesses' protection.

According to the NHRCM's Annual Report of 2018, it receives complaints from people through phone calls, emails, and smartphone applications, orally and in writing. However, according to the draft law on NHRCM while submission of complaints orally and in writing is stated in the law, submission of complaints through phone calls, emails, and smartphone applications is not enshrined in a legal framework. Therefore, the above-mentioned Ministry of Justice concept paper recommends that the law should regulate the process of receiving complaints and evidence by phone calls and emails.³¹

According to the above-mentioned MoU 50% of NHRCM's inspection work was conducted in detention centers and prisons and also more than 50% of all complaints received came from suspects, defendants and prisoners. This is further illustrated by the breakdown of complaints submitted to the NHRCM in 2018 where the most common violations of human rights were 1)

²⁸ NHRCM, The Activity Report, 2018, p. 34, 35

²⁹ Chief Commissioner of NHRCM, Decree adopting "Procedure of Complaints Handling and Monitoring of the Implementation of its Recommendation", 2013, available at: ch.altangerel@nhrcm.gov.mn

³⁰ Interview with Ch. Altangerel, Director of the NHRCM Secretariat, 16 August 2019.

³¹ Ministry of Justice and Internal Affairs of Mongolia, Introduction of the Revised draft Law on NHRCM, March 2019, available at: <https://mojha.gov.mn/wp-content/uploads/2019/03/NHRC-taniltsuulga.pdf>.

false accusations 2) labor rights, 3) arbitrary arrest, 4) torture 5) right to submit complaints to the state authorities.³²

NHRCM doesn't have a plan to follow-up on investigations and recommendations nor does it publicise detailed information on the measures taken or not taken by public authorities in implementing specific recommendations or decisions. Previous ANNI report called on the State Great Hural and its Standing Committee on Legal Affairs to follow the implementation of the NHRCM's recommendations and on the Government to impose sanctions on those officials who have not implemented them.

According to the Ministry of Justice regarding the concept paper on the required draft amendments to the NHRCM Act, the authorities tend to not submit their responses to NHRCM in a timely manner and the Complaints and Inquiry Officer of NHRCM follows up on complaints by email or by phone call to ask for the organisations/authorities to submit their responses back in writing. It concluded that the uncertainty on the timeframe required by the law to submit the responses is therefore causing difficulties.³³

Status Report on Human Rights and Freedoms

In April 2019, the NHRCM submitted its 18th status report on human rights and freedoms to the State Great Hural.³⁴ It covered six main topics:

- Human rights education policy and its implementation;
- Sexual and reproductive rights and health issues of women with disability;
- Sexual harassment in the workplace;
- The prevention of torture;
- Implementation of the right to work for officers of the National Emergency Management Agency; and
- Status of implementation of the Law on Gender Equality by agencies.

The status report is based on the NHRCM's inquiries and research, the complaints and demands it receives from citizens, an assessment of the implementation of its recommendations of the 16th status report on human rights and freedoms, research analysis of civil society organisations (CSOs) and researchers, and information provided by the Government ministries, agencies and other organisations. The report includes twenty-five recommendations that were delivered to the Great State Hural for consideration.

The Standing Committee on Legal Affairs of the State Great Hural discussed the status report on 8 May 2019. The report was also discussed at the Plenary Session of the State Great Hural on 17 May 2019. ANNI's previous recommendations included a recommendation for the Parliament to discuss the status report in plenary session and to adopt a resolution on the implementation of the recommendations made in the report with a view to monitor their implementation. It is therefore

³² NHRCM, Activity Report, 2018, p. 77.

³³ Ministry of Justice and Internal Affairs of Mongolia, Introduction of the Revised draft Law on NHRCM, March 2019.

³⁴ NHRCM, The 18th annual status report on human rights and freedoms in Mongolia, 2018, available at: <http://en.nhrcm.gov.mn/news/status-report-human-rights-and-freedoms/>.

welcomed that, as a result of the Plenary session of the Great State Hural, Mr. G. Zandanshatar, the chairperson of State Great Hural, gave the order to the Standing Committee on Legal Affairs to work on a draft resolution on the 18th status report. Unfortunately, the draft resolution of the Standing Committee has not been adopted yet.

Budget

Article 22.2 of the NHRCM Act states that “*The State Great Hural shall approve and reflect specifically the budget of the Commission in the State Consolidated Budget on the basis of the latter's proposal, and this budget shall fulfill the requirements for the independent conduct of its activities.*” However, although there is a legal environment to maintain NHRCM’s financial independence, its planned activities could be threatened if inadequate funds were allocated to it due to the country’s economic situation.³⁵

For example, the NHRCM budget of 2016 was of 731.6 million tugriks which was 0,009% of the State total budget and in 2017 it was 805.6 million tugrik which is 0,011% of the State’s total budget. In 2018 the MNHRC’s budget proposal of one billion tugrik and 140 million was approved. It represents an increase of 326 million tugriks compared to the previous year. However, this success wasn’t repeated in 2019. Even though, the State total budget for 2019 was increased by two trillion tugriks, NHRCM budget was decreased by 60 million tugriks. However, as the State’s budget increases, so should the budget to monitoring the State’s responsibilities. Moreover, a regulation allocating a set percentage of the state budget to be allocated to the NHRCM should be adopted, especially as the current NHRCM budget is insufficient to cover local operational costs.

Table 1. Percentage of NHRCM in total state budget³⁶

Year	2016	2017	2018	2019
Annual budget of NHRCM	731.6 million tugriks	805.6 million tugriks	1,140.6 million tugriks	1,083.3 million tugriks
Total State budget	7,749,656.3 million tugriks	7,420,601.4 million tugriks	7,710,777.6 million tugriks	9,406,581.7 million tugriks
Percentage in total State budget	0.009%	0.011%	0.015%	0.012%

4. Democratic Space in Mongolia

In recent years, the Parliament has adopted several laws in order to ensure public participation in decision making such as the Public Hearing Law,³⁷ the Law about Law,³⁸ the General

³⁵ ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia, 2018, available at: https://www.forum-asia.org/uploads/wp/2018/12/2018_ANNI-Report_FINAL.pdf.

³⁶ Law on State budget of Mongolia, available at: www.legalinfo.mn.

³⁷ Public Hearing Law, 8 July 2015, available at: <https://www.legalinfo.mn/law/details/11225>.

³⁸ Law about Law relating to the improvement of the law and basis of the law, and conducting impact analysis on the implementation of laws, 29 May 2015, available at <https://www.legalinfo.mn/law/details/11119>.

Administrative Law³⁹ and the Law on Deliberative Polling of Mongolia.⁴⁰ Unfortunately both the state officials and the citizens don't have sufficient knowledge about these laws to implement them.

On the other hand, there are currently laws, which have had negative implications, such as the Petty Offence Law that restrict the right to freedom of expression.⁴¹ Journalists who report about corruption or herders who complain because of the impact of mining activities are amongst the most affected by the implementation of the Petty Offence Law. They, along with human rights defenders (HRDs) are facing the risks of having to pay fines when expressing their opinion and position if found guilty of harming the dignity and reputation of others.

According to the Media Freedom Report prepared by the Globe International Center, the implementation of the Petty Offence Law has put journalists under pressure from the courts and the authorities. It stated that most of the complaints against journalists are from governmental organisations, the authorities and politicians. It also concludes that, since the implementation of the Petty Offence Law, the number of cases against journalists has increased. According to 36% of the 300 journalists involved in the survey of the above mentioned Media Freedom Report have been charged with a court or a police department in connection with an article or broadcast that they have prepared.⁴²

For example, journalist S. Budragchaa published four articles about state corruption between January and April 2018.⁴³ She was found guilty under the Petty Offence Law for harming the dignity and reputation of others, and sentenced to pay a fine of 2.000.000 tugriks. She appealed the decision but on 12 June 2018, the Criminal Court maintained the fine of 2.000.000 tugriks. According to her, the judge didn't properly check the evidence and made a one-sided decision. She appealed the decision again and on 30 April 2019 the Appellate Court found the decision of the Criminal Court to be invalid.⁴⁴

In addition, even though CSOs had opportunities to participate in the legislative environment, because of their limited economic resources they couldn't engage with state agencies and citizens to improve the implementations of the above-mentioned law. CSOs are also concerned by the restrictions included in the revised version of the Non-Governmental Organisations (NGO) Law, which violates the right to freedom of association.⁴⁵

³⁹ General Administrative Law, 9 June 2015, available at: <https://www.legalinfo.mn/law/details/11259>.

⁴⁰ Law on Deliberative Polling of Mongolia, 9 February 2017, available at: <https://www.legalinfo.mn/law/details/12492>.

⁴¹ Petty Offence law, 11 May 2017, available at: <https://www.legalinfo.mn/law/details/12695?lawid=12695>.

⁴² Globe International Center, Media Freedom Report, 2019, available at: <http://globeinter.org.mn/old/en/index.php>.

⁴³ These include: 'Mr Gavaa, Head of the City Archive Department is being examined by the Independent Authority Against Corruption of Mongolia,' 'The cyber programs of City Archive Department was sold out to the state organizations,' 'The archive documents were deposited in his mother-in-law's Homeowners association at 5.000.000 tugriks,' 'Mr Gavaa, Head of the City Archive Department gave advice to himself with payment of 2.000.000 tugriks,' available at: <http://archive.dardas.mn/>.

⁴⁴ Globe International Center, Media Freedom Report, 2019.

⁴⁵ Draft Law on Nonprofit legal entity, 2018 <https://mojha.gov.mn/wp-content/uploads/2019/05/TBB-huuliin-tusul.pdf>

5. Role of NHRCM in the Democratic Backsliding and Contraction of Civic Space

HRDs are at higher risk to face restrictions because of the above-mentioned law. In that context, NHRCM initiated the Draft Law on Human Rights Defenders on 18 February 2016.⁴⁶ In 2017 NHRCM established the Ex-officio Council to assist the Commission's operations. The Council consists of 21 representatives from CSOs actively engaged in human rights. Unfortunately, relevant measurements have not been taken in order to effectively use the current structure. However, NHRCM has been actively engaged in consulting with human rights defenders as well in attending policy dialogues conducted by NGOs. Unfortunately, the discussions on the Draft Law on Human Rights Defenders have been put to a halt.

In addition, while NHRCM has acknowledged the contributions and roles of CSOs and journalists, its power and influence to promote the activities of CSOs and journalists are lacking because of its limited resources.

6. Conclusions and Recommendations

During the reporting period, the NHRCM has been adequately performing its responsibility to monitor, promote and protect human rights within its current financial capacity.

Progress were made regarding previous ANNI recommendations such as the one relating to the discussion of NHRCM in the Plenary Session of the State Great Hural. However, the NHRCM needs to strengthen its follow-up plan on investigations and recommendations by monitoring the implementation of its recommendations and decisions and of the State Great Hural Legal Affairs Standing Committee's resolution, and publishing detailed information on measures taken or not taken by the state organs to implement its recommendations.

Even though there has been progress on the amendments to the NHRCM Act, it must also ensure that it requires the citizen's participation in the nomination process of the Commissioners.

6.1 Recommendations:

To the State Great Hural and the Standing Committee on Legal Affairs:

- 1) Build the capacity of the officers of the Secretariat of the State Great Hural on making a human rights analysis on the draft laws being discussed;
- 2) Regulate the procedure for NHRCM to make recommendations on all draft laws being discussed to be approved by State Great Hural;
- 3) Continue discussing the status report on human rights and freedoms in Mongolia at the Plenary session of the Great State Hural, issue a resolution and require a report from the Government of Mongolia on the implementation of its resolution;
- 4) Adopt amendments to the NHRCM Act and include a provision requiring the involvement of the citizen in the nomination process of the Commissioners; and

⁴⁶ NHRCM, Introduction of the Draft Law on Human Rights Defenders, 2017, <http://nhrcm.gov.mn/media/documents/%D0%A5%D1%83%D1%83%D0%BB%D0%B8%D0%B9%D0%BD-%D1%82%D0%B0%D0%BD%D0%B8%D0%BB%D1%86%D%83%D1%83%D0%BB%D0%B3%D0%B0.pdf>

5) Adopt the Draft Law on Human Rights Defenders.

To the Government of Mongolia:

- 1) Ensure implementation of the resolution of the State Great Hural and its Standing Committee on Legal Affairs in relation to the NHRCM recommendations and publicize the measures taken on the resolutions to the public; and
- 2) Ensure the budget sustainability of the NHRCM's budget and consider increasing it.

To NHRCM:

- 1) Review amendments to the NHRCM Act so as to include a provision requiring the involvement of the citizen in the nomination process of the Commissioners;
- 2) Design a follow-up plan to monitor the implementation of its recommendations and decisions on investigations and recommendations , as well as to monitor the State Great Hural and Legal Affairs Standing Committee's resolution, and publish detailed information on measures taken or not taken by the state organs to implement its recommendations to the public;
- 3) Build the capacity of its local officers in human rights. While some officers have the capacity, knowledge and willingness to promote human rights and engage with CSOs, some don't; and
- 4) Require an experience certificate attestation from the local officers of NHRCM.

ANNEXE 2: List of laws, procedures and policy documents on which the NHRCM comments in 2018¹

1.	Draft Bill on drug treatment	2018/01
2.	Revised Law on the Court and the Legal Status of Judges	2018/02
3.	Medical Science ethical committee, subcommittee charter draft	2018/02
4.	Governmental draft decree on "National Assembly Council Composition" and the "The Rule of National Council on the Legal Education of All people"	2018/04
5.	Draft Law on the Prevention of Crime and Violation	2018/04
6.	"Protection standard of Minor Witness and Victim Protocol" in the "General Plan of Action for the Implementation of the UN Human Rights Council" approved by the Government resolution 204 in 2016	2018/04
7.	Draft bylaw of National Committee for the Child	2018/04
8.	Revised Labour Law	2018/04
9.	Draft Law on Attorney	2018/05
10.	Draft Law on Cyber Security	2018/05
11.	Draft Law on Alcohol Prevention and Control	2018/05
12.	Revised Labour Law	2018/06
13.	Draft Law on the Protection of Witnesses and Victims –	2018/07
14.	Draft Action Plan for the Implementation of the National Human Rights Action Program (2018-2020) in Mongolia	2018/09
15.	Government Activity Plan for the implementation of recommendations from the UN Human Rights Committee's conclusions regards to Mongolia's Sixth Annual Report on the Implementation of the International Covenant on Civil and Political Rights	2018/09
16.	Amendments to the Criminal Code	2018/09
17.	Amendments to the Law on Investigation of Criminal Offences	2018/09
18.	Amendments to the Petty Offence Law	2018/09

¹ NHRCM, Activity Report, 2018, p. 11,12.

19.	Amendments to the Law on Investigation of Regulatory Infringement	2018/09
20.	Amendments to the Law on Enforcement of Court Decisions	2018/09
21.	“Sustainable Development Education” National Implementation Plan	2018/09
22.	Joint Order of the Minister of Environment and Tourism, Ministry of Education, Culture and Science on the adoption of National Sub Committee composition and rules	2018/09
23.	Draft Law on Legal Assistance	2018/11
24.	Draft law on Non Profit Legal Entity	2018/11
25.	Draft Law on Freedom of Religion	2018/11
26.	Draft "Procedure for developing and approving special requirements for the Governing and Chief Executive Officer of the State Service"	2018/11
27.	Draft “ General rules for developing the Definition of Civil Servant position”	2018/11

REPUBLIC OF KOREA: NHRCK- READY FOR AN AMBITIOUS TOUGH START

Korean House for International Solidarity (KHIS)¹

1. Introduction

This report was prepared by the Korean House for International Solidarity (KHIS).² KHIS is the only member of ANNI in Korea and has been active in monitoring the performance of the National Human Rights Commission of Korea (NHRCK)³ as a member of the Executive Committee of the National Human Rights Commission of Korea Watch (NHRCK Watch) network. This report relies on a variety of resources including news articles, NHRCK's annual reports, and statements and discussions from the NHRCK Watch. Opinions from human rights activists and experts on the NHRCK were also collected. This report covers the period from January 2018 to July 2019.

2. Overview

In October 2017, following criticisms by its own staff and Korean civil society that NHRCK was failing at fulfilling its mandate, the NHRCK established an Innovation Committee for three months.⁴ The Innovation Committee assessed why had the NHRCK previously failed to fully function⁵ and on 29 January 2018, presented several recommendations for further innovation to the NHRCK. For instance, it recommended the establishment of an independent selection committee that includes civil society to nominate and select NHRCK's commissioners including its Chairperson. This was also one of the main recommendations made by the Global Alliance of National Human Rights Institutions – Sub-Committee on Accreditation (GANHRI-SCA) in May 2016.⁶

In accordance with the recommendations, NHRCK, NHRCK Watch, and members of the National Assembly including Hong Ik-pyo and Lee Jae-jeong jointly held a panel discussion at the National Assembly in April 2018 and finally proposed a bill to amend the National Human Rights Commission of Korea Act (NHRCK Act).⁷ Unfortunately, as of today the bill is still pending in the National Assembly.⁸

¹ Na Hyun-pil, Executive Director of KHIS is the main author of the report with interns and volunteers of KHIS assisting in basic research and translation. Contact: khis21@hanmail.net

² See website available at: http://www.khis.or.kr/page/about_eng.asp.

³ See website available at: <https://www.humanrights.go.kr/site/main/index002>.

⁴ NHRCK Website, NHRCK launched Innovation Committee, 17 November, 2017, available at: <https://www.humanrights.go.kr/site/program/board/basicboard/view?currentpage=3&menuid=002002005&pagesize=10&boardtypeid=7013&boardid=7601808>.

⁵ KHIS, 2009-2016 ANNI Reports, available at: <https://www.forum-asia.org/?programmes=nhri-advocacy&cat=245&nhri=1>.

⁶ GANHRI Sub-Committee, GANHRI Sub-Committee on Accreditation Report, May 2018, pp. 41-43, available at: <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20FINAL%20REPORT%20-%20MAY%202016-English.pdf>.

⁷ National Human Rights Commission Act, Act No.14028, 3 February 2016, available at: <https://www.humanrights.go.kr/site/homepage/menu/viewMenu?menuid=002003001002>

⁸ The draft bill is not public.

3. The NHRCK and Its Mandates to Promote and Protect Human Rights

The NHRCK's Structure, Mandates, Independence and Pluralism

The NHRCK is an independent institution, not affiliated with any of the legislative, judicial, or executive branches of the government by law. However, in practice, its organisational structure and budget are controlled by the executive branch. Therefore, some argue that its independence should be fully guaranteed by elevating its status to a constitutional body through a constitutional reform.

The NHRCK can make recommendations and present opinions on the Government's human rights-related policies and submit opinions to courts. In addition, it assumes the role of a quasi-judicial organisation in investigating and redressing cases of human rights violations and discriminations. In particular, it can investigate and seek remedial measures for violations of the right to equality by corporate bodies, organisations, and private persons. The NHRCK also presents human rights policies, offers human rights education and engages in promotional activities.¹⁴

The NHRCK has 11 commissioners, which includes the Chairperson (Minister level), three Standing Commissioners (Vice Minister level), and seven Non-standing Commissioners. As of December 2018, it employs a total of 220 personnel with a budget of KRW 31.412 billion (USD 26.66 million) for the fiscal year 2018. Both its manpower and budget increased slightly in 2018 compared to the previous year.¹⁵

The Chairperson, a Standing Commissioner, and two Non-standing Commissioners are nominated by the President, two Standing Commissioners and two Non-standing Commissioners are elected by the National Assembly, and three Non-standing commissioners nominated by the Chief Justice of the Supreme Court.¹⁶ The Chairperson is to be appointed by the President after a confirmation hearing at the National Assembly.¹⁷ The term of office for all commissioners is three years, and they can serve a consecutive term only once. In addition, neither gender may account for more than 60% of all 11 commissioner positions.

In January 2016, the NHRCK Act was revised to require that each appointed position be advertised and that diverse opinions and nominations were collected. In May 2016, GANHRI-SCA reaccredited the NHRCK with an A status after three deferrals in a row. However it recommended that the NHRCK Act be amended so as to:

¹⁴ NHRCK Act, Article 19 (Duties).

¹⁵ In 2017, the number of the NHRCK personnel was 195, and the budget was KRW 29.289 billion (USD 24.92 million). See: NHRCK, *Annual Report 2017* (English version), p. 13, available at: <https://www.humanrights.go.kr/site/program/board/basicboard/view?menuid=001003001003002&searchcategory=%EC%97%B0%EA%B0%84%EB%B3%B4%EA%B3%A0%EC%84%9C&pagesize=10&boardtypeid=7602929>.

¹⁶ NHRCK Act, Article 8.

¹⁷ The Chairperson can appear and state his/her opinions before the National Assembly if deemed necessary and is obligated to testify and give answers to questions in person if required by the National Assembly. The Chairperson can speak at a Cabinet meeting on behalf of the NHRCK.

- Require the advertisement of vacancies; and
- Ensure a consistent process is applied by a single independent selection committee.¹⁸

Yet, no commissioner had been elected or nominated through an independent selection committee until the Presidential Office first established a committee to select the NHRCK Chairperson in May 2018.¹⁹ The selection committee was established through a close consultation between the Presidential Office and the NHRCK and comprised seven members. The Presidential Office nominated three members while the NHRCK nominated the rest four members after collecting advises from civil society. Following a roundtable discussion organised by NHRCK Watch on 24 May 2018, CSOs submitted a list of 11 names to the NHRCK. The NHRCK delivered the list to the Presidential Office, which selected four out the 11 nominees. After receiving and assessing applications publicly, the selection committee submitted a list of three nominees to the Presidential Office. A similar process was employed in July 2019 in selecting Non-standing Commissioner Mun Sun-hye.²⁰

However, in 2018 Standing Commissioners Jeong Moon-ja (nominated by the Democratic Party of Korea) and Kim Min-ho (nominated by the Liberty Korea Party) were elected by the National Assembly and Non-standing Commissioner Lim Sung-taek nominated by the Chief Justice of the Supreme Court without the creation of an independent selection committee nor the participation of civil society.

The amendment bill to the NHRCK Act requiring the establishment of an independent selection committee that includes members of civil society is unlikely to pass the National Assembly before June 2020 when the 20th National Assembly term will come to an end.

In other words, though the President has followed the international community's recommendation by nominating Commissioners through an independent selection committee, the National Assembly and the Supreme Court did not. It seems that they would only do so if the NHRCK Act is revised to make such process mandatory. Otherwise the risks of having an unqualified and/or inappropriate person become a NHRCK Commissioner will remain.

One of the reasons why the National Assembly has not been responsive to the continuous requests from the NHRCK and civil society for the revision of the Act is the lack of lawmakers' awareness and interest in the NHRCK. In this regard, all the activities of the NHRCK Commissioners should be public. The Innovation Committee recommended to enhance the transparency of the NHRCK's operation by opening its meetings to the public (where possible) and publishing the minutes of meetings.²¹

¹⁸ GANHRI Sub-Committee, GANHRI Sub-Committee on Accreditation Report, May 2018, pp. 41-43.

¹⁹ NHRCK, 'An independent selection committee for the NHRCK Chairperson to be launched for the first time,' 18 June 2018, available at:

<https://www.humanrights.go.kr/site/program/board/basicboard/view?currentpage=29&menuid=001004002001&pagesize=10&boardtypeid=24&boardid=7602871>.

²⁰ NHRCK, 'Vacancy announcement for Non-standing Commissioner,' 13 May, 2019, available at:

<https://www.humanrights.go.kr/site/program/board/basicboard/view?currentpage=7&menuid=001004002001&pagesize=10&boardtypeid=24&boardid=7604100>.

²¹ The NHRCK Innovation Committee, *Innovation Committee Activity Report* (2018), pp. 89-90.

The public has the right to know the positions of each Commissioner about human rights-related matters. Allowing the public to evaluate each Commissioner can be a very important way to protect the independence and diversity of the NHRCK. However, as of today, almost one year after the nomination of the Chairperson Choi Young-ae, none of the Innovation Committee’s recommendations for enhancing transparency have been implemented.

The NHRCK’s Effectiveness

According to the NHRCK Annual Report 2018,²² petitions, counseling requests, and complaints and inquiries submitted to the NHRCK surged dramatically in May 2017 following the President’s instruction to the NHRCK to reinforce its standing.²³ However it returned to normal in 2018. The NHRCK attributed the change to the fact that it “*enhanced promotional activities concerning its tasks and clarified the subjects of investigation in the submission stage in order to focus its resources on critical issues.*”²⁴

Table 1: Petitions, Counseling Requests, and Complaints and inquiries in the Last Five Years²⁵

Year	Petitions	Counseling requests**	Complaints & Inquiry	Total
Cumulative sum*	132,185	368,924	471,489	972,584
2018	9,280	32,278	45,968	87,522
2017	12,329	36,370	42,939	91,632
2016	10,647	31,616	38,020	80,281
2015	10,695	32,030	37,961	80,686
2014	10,923	34,547	36,623	82,093

* The cumulative sum is the total from 25 November 2001 (the date of the establishment of the Commission), until 31 December 2018.

** Counseling figures include face-to-face petitions closed by counseling.

On 24 July 2018 the NHRCK changed the previous Human Rights Counseling Center into the Human Rights Counseling and Mediation Center and established the Preliminary Investigation and Mediation Team dedicated to the preliminary investigation and mediation of petitioned cases by recognising the need to “*resolve the problem of major cases being neglected for an extended period of time due to the shortage of investigators and to conduct preliminary investigations using diverse instruments (rejection, mediation, settlement, etc.) in the initial stage of submission to bolster the*

²² NHRCK, *Annual Report 2018* (English version), available at:

<https://www.humanrights.go.kr/site/program/board/basicboard/view?menuid=001003001003002&searchcategory=%EC%97%B0%EA%B0%84%EB%B3%B4%EA%B3%A0%EC%84%9C&pagesize=10&boardtypeid=17&boardid=7604331>

²³ On 25 May 2017 Senior Presidential Secretary for Civil Affairs Cho Kuk gave a briefing saying, “*there was a strong desire by the President to act in a manner that would regulate human rights violations in the country and promote human rights and that Moon instructed all institutions to increase their rate of accepting recommendations of the NHRCK*”

²⁴ NHRCK, *Annual Report 2018* (English version), p. 118.

²⁵ NHRCK, *Annual Report 2018* (English version), p. 83.

Commission's mediation function."²⁶ This followed the February 2018 recommendations from the NHRCK's internal task force team which was formed to improve the submission and processing procedures of petitions.

According to the NHRCK's own evaluation, with this realignment, the period spent on the processing of dismissal was drastically reduced, but there remains room for improvement in facilitating the mediation of cases.²⁷ Moreover, the NHRCK acknowledges that many of the discrimination-related petitions have not been handled promptly when it states that it "*fell short of the public's expectations due to the Commission's organizational structure and workforce shortage.*"²⁸ Kim Seoung-yeon, Executive Director of Disability Discrimination Act of Solidarity in Korea criticises that:

*"We have seen so many cases where the Human Rights Counseling and Mediation Center simply refuses to accept a petition, saying the concerned matter does not fall under the category for a disability discrimination complaint after reviewing the petition. The Human Rights Counseling and Mediation Center seems not to take into account the difficulties of a person with disability in expressing their problems or filling out papers. For many of them, it is almost impossible to make their issues heard through the NHRCK because their petition can barely pass the preliminary investigation stage."*²⁹

Both the NHRCK and civil society agree with the need to increase the manpower of the Commission, especially the number of investigators handling petitions in the NHRCK. However, it is not just a matter of manpower. If investigators fail to address human rights-related cases with in-depth understanding of human rights and a human rights mindset, the NHRCK's effectiveness in handling human rights complaints and petitions will continue to decline even after its manpower has been enhanced. The NHRCK should also review the root causes of the reduced number of petitions and ask itself whether it may also be the result of an increased frustration from the petitioners in the NHRCK's processing of their petitions as well as from the increased number of dismissed cases due to excessive emphasis on operational efficiency.

4. Democratic and Civic Space in Korea and the Role of NHRCK's in Addressing It

Conscientious Objectors and Death Penalty

On 28 June 2018, the Constitutional Court of Korea found the current laws punishing conscientious objectors for refusing military services to be unconstitutional.³⁰ However, in December 2018, the Ministry of Defense responded by announcing that it would have conscientious objectors serve in

²⁶ NHRCK, *Annual Report 2018* (English version), p. 122.

²⁷ NHRCK, *Annual Report 2018* (English version), p. 128.

²⁸ NHRCK, *Annual Report 2018* (English version), p. 128.

²⁹ On 29 March 2019, Kim Seoung-yeon raised this issue during a meeting of the Executive Committee of the NHRCK Watch. She reconfirmed the comment in a phone call with the author on 30 July 2019.

³⁰ Constitutional Court, Case on Conscientious Objectors [2011Hun-Ba379 et al. June 28, 2018], 18 June, 2018, available at:

http://search.court.go.kr/ths/pr/eng_pr0101_E1.do?seq=1&cname=%EC%98%81%EB%AC%B8%ED%8C%90%EB%A1%80&eventNum=33791&eventNo=2011%ED%97%8C%EB%B0%94379&pubFlag=0&cId=010400.

a correctional facility for 36 months - double the term of the military service - as an alternative service. The Ministry would be in charge of supervising it.³¹

Human rights organisations fiercely protested the plan by criticising that it was just another way of punishing conscientious objectors and that it was against human rights. In response, on 22 March 2019, the NHRCK presented its opinion to the government, stating that the term for conscientious objectors should be the same or similar with that of regular military service and another way of serving the term such as commuting from home should be considered.³²

On 10 September 2018, the NHRCK recommended that the government sign the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), aiming at the abolition of the death penalty.³³ However, the government has so far remained silent about the abolition of the death penalty.

The NHRCK had made those two recommendations following a special briefing to the President on 7 December 2017, during with President Moon Jae-in requested the NHRCK to bring about specific measures to address the matters of conscientious objectors and the death penalty.³⁴ However as of today, an alternative service for conscientious objectors that is against human rights is being introduced and the abolition of the death penalty is far from realisation.

Non-Discrimination Legislation and Human Rights of Sexual Minority

Chairperson Choi Young-ae presented a plan to legislate a Non-Discrimination Act, stating her first and most important mission as the NHRCK Chairperson was to eliminate all forms of hatred and discrimination.³⁵

Beginning with participating in a queer festival, a first for a state body in 2017, the NHRCK has continued to show its support for sexual minorities by hanging a rainbow banner on the exterior wall of the NHRCK building during queer festivals in 2018 and 2019. In January 2019, the Planning Group for Response to Hate-motivated Discrimination was also founded at the NHRCK

³¹ Hankyoreh, 'A single proposal for '36-month service at a correctional facility' for conscientious objectors' alternative service,' 28 November 2018, available at: <http://www.hani.co.kr/arti/politics/defense/872102.html>.

³² NHRCK, 'The NHRCK opinion on the Ministry of Defense's plan of alternative services.' 28 March, 2018, available at:

<https://www.humanrights.go.kr/site/program/board/basicboard/view?currentpage=10&menuid=001004002001&pagesize=10&boardtypeid=24&boardid=7603929>. When deemed necessary, the NHRCK submits its opinion to all the relevant government bodies and issues a press release on the fact.

³³ NHRCK, 'The NHRCK recommend the government sign the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty,' 11 September, 2018, available at:

<https://www.humanrights.go.kr/site/program/board/basicboard/view?currentpage=23&menuid=001004002001&pagesize=10&boardtypeid=24&boardid=7603246>.

³⁴ *Money Today*, 'NHRCK conducted a survey on the status of the death penalty and conscientious objection,' 8 March 2018, available at: <http://news.mt.co.kr/mtview.php?no=2018030809353286113>.

³⁵ NHRCK, 'Inaugural Speech of Chairperson Choi Youngae,' 26 October, 2018, available at:

<https://www.humanrights.go.kr/site/program/board/basicboard/view?currentpage=2&menuid=002002001&pagesize=10&boardtypeid=7003&boardid=7603442>.

to conduct surveys on hate-motivated discriminations and non-discrimination legislation and to offer education and promotional activities.³⁶

However, there has been little progress on the Non-Discrimination Act front. The third governmental NAP did not clearly indicate any plans to promote and protect the human rights of sexual minorities nor to adopt a non-discrimination act. Those provoking hatred toward sexual minorities are instead pressing lawmakers into the opposite direction. Even those lawmakers who have been supportive of a non-discrimination legislation are avoiding the issue in fear of negative impacts on the upcoming general election in April 2020.

Against this backdrop, human rights organisations urge the NHRCK to keep taking initiatives in favor of a Non-discrimination Act. Without the NHRCK's determinant action and support, it will be difficult for the law to be adopted before the next National Assembly.

Hatred towards Refugees and Migrants

In May 2018, about 500 Yemeni entered the Jeju Island seeking protection as refugees. It created an intense dispute within Korean society as Korea had never seen such an influx of asylum seekers. Many Koreans had negative perceptions of the Yemeni asylum seekers.

On 1 June 2018, Choi Young-ae, Chairperson of the NHRCK issued a statement, urging the government take appropriate measures to protect the refugees.³⁷ In December 2018, the Chairperson also expressed her deep regret regarding the government's decision to grant the refugee status to only two out of the 484 Yemeni asylum seekers, to grant humanitarian status to 412 of them and to reject 56.³⁸

The Korean government however maintained its anti-human rights refugee policies despite growing criticisms and concerns over the spreading of hatred towards refugees and migrants. Recent news report also claim that the government manipulated interview results of asylum seekers to dismiss their application.³⁹

³⁶ NHRCK, 'The NHRCK launches the Planning Group for Response to Hate-motivated Discrimination,' 20 February, 2018, available at: <https://www.humanrights.go.kr/site/program/board/basicboard/view?currentpage=13&menuid=001004002001&pagesize=10&boardtypeid=24&boardid=7603788>.

³⁷ NHRCK, 'The Chairperson's statement urging appropriate measures for Yemeni asylum seekers in the Jeju Island,' 1 June 2018, available at: <https://www.humanrights.go.kr/site/program/board/basicboard/view?currentpage=29&menuid=001004002001&pagesize=10&boardtypeid=24&boardid=7602829>.

³⁸ *Yonhap News Agency*, 'S. Korea gives 2 Yemeni asylum seekers refugee status,' 14 December 2018, available at: <https://en.yna.co.kr/view/AEN20181214002500315?input=2106m>.

³⁹ The Dong-A Ilbo, '[Exclusive] Refugee interviewer stopped applicants from explaining the cause of application and requested signature after writing down questions and answers that were not shared,' 18 June 2019, available at: <http://www.donga.com/news/article/all/20190618/96039136/1>.

Human Rights in Sports

The #MeToo movement was ignited in Korea with prosecutor Seo Ji-hyun's disclosure of cases of sexual harassment inside the Prosecution Office on 29 January 2018.⁴⁰ She provided a turning point to question the issue of sexual harassment by people in power, which has been long suppressed in Korean society.

In response, the NHRCK formed and operated a special investigation team for sexual harassment and violence on 14 March 2018.⁴¹ Later in February 2019, following the exposure of prevailing violence including sexual violence towards female athletes, the NHRCK launched a special investigation task force on human rights in sports to investigate the current situation of student athletes and prepare appropriate measures.⁴²

Therefore, the NHRCK had to form two special task forces (the Planning Group for Response to Hate-motivated Discrimination and Special Investigation Task Force on Human Rights in Sports) in 2019 alone. Though it is in its mandate to respond to emerging and urgent human rights-related matters, such ad-hoc responses also raise the question of the need to enhance its organisational and personnel capacity.

Business and Human Rights

In March 2018, the NHRCK recommended the Ministry of Trade, Industry and Energy to improve the National Contact Point (NCP) system for the OECD Guidelines for Multinational Enterprises.⁴³ Once again after the first recommendation in 2011, the NHRCK recognised the need for improvement of the Korean NCP system by criticising the fact that civil society and labor circles remain excluded from its operation.⁴⁴

On 9 August 2018, the NHRCK also recommended that the heads of 988 public institutions practice human rights-conscious management using the Human Rights Management Manual for State Owned Enterprises.⁴⁵ In addition, it recommended that the heads of 30 central ministries and

⁴⁰ Korea Herald, '[Editorial] Keep #MeToo alive,' 8 March, 2018, available at:

http://khnews.kheraldm.com/view.php?ud=20180308000816&md=20180311003211_BL.

⁴¹ Hankyoreh, 'Formation of a 'special team dedicated to Me-Too Movement', 23 March 2018, available at:

http://www.hani.co.kr/arti/society/society_general/837406.html#csidx8af4b03af65328b968b10e2c3395d21.

⁴² *News1 Korea*, 'Sexual harassment investigation on 6,132 teams... The launch of a special task force on human rights in sports,' 25 February 2019, available at: <http://news1.kr/articles/?3556382>.

⁴³ NHRC, 'The OECD NCP should be more active in preventing and remediating human rights abuses by multinational corporations,' 15 March, 2018, available at:

<https://www.humanrights.go.kr/site/program/board/basicboard/view?menuid=001004002001&searchselect=boardtitle&searchword=OECD&pagesize=10&boardtypeid=24&boardid=7602514>

⁴⁴ Naeil News. "Will the Korean NCP's reform start again?" (Mar. 16, 2018),

http://www.naeil.com/news_view/?id_art=269536

⁴⁵ NHRCK, 'Human Rights Management Manual for State Owned Enterprises,' 20 November, 2018, available at: <http://humanrights.go.kr/site/program/board/basicboard/view?menuid=002003003002&pagesize=10&boardtypeid=7019&boardid=7603529>; and NHRCK, 'The NHRCK recommends the establishment and implementation of human rights management system to heads of public institutions,' 29 August, 2018, available at:

<https://www.humanrights.go.kr/site/program/board/basicboard/view?menuid=001004002001&searchselect=boardtitle&searchword=%EC%9D%B8%EA%B6%8C%EA%B2%BD%EC%98%81&pagesize=10&boardtypeid=24&boardid=7603188>

17 upper-level local governments provide support to help their institutions practice human rights management and add human rights management as an assessment criteria of public institution management.⁴⁶

Introducing human rights management into public institutions including state owned enterprises is one of the main projects that the NHRCK has put continuous efforts in with the expectation that when human rights management is fully rooted in public institutions, it will have ripple effects onto private enterprises.

However, the recent death of a subcontract worker at a thermal power plant operated by Korea Western Power Corporation, a public corporation, demonstrates that the government and the NHRCK should adopt more determinant policies and actions in order to fully establish human rights management.⁴⁷ In particular, the investigation authority of the NHRCK should be expanded to cover human rights abuses occurring in or committed by private enterprises, and those with professional knowledge and capacity in business and human rights should be appointed to address these issues.

On 28 December 2018, the NHRCK issued its opinion that the company YooSung Enterprise Co., the trade union, the governing Employment and Labor Administration, and local government should work together to take up measures for the protection of the right to health of workers who had been suffering due to violence, continuous threats of dismissal and discrimination against union members since 2011.⁴⁸ The labor union and civil society welcomed the opinion but criticized the fact that it came so late.⁴⁹ In fact, the trade union has repeatedly submitted several petitions against the company's human rights abuses to the NHRCK since 2013, but the NHRCK started its investigation on discrimination claims in 2017 only.

While waiting for the NHRCK's decision, the court found the company guilty of various unfair labor practices.⁵⁰ It is rare for an NHRCK's decision to lag behind that of a court which typically takes much longer. Besides the investigation of discrimination claims, the NHRCK also conducted a survey about the health impact of the suppression of the labor union on YooSung union members, but the survey results were only published on 11 January 2019.⁵¹

⁴⁶ NHRCK, *Annual Report 2018* (English version), pp. 45-46.

⁴⁷ Koreatimes, 'Subcontractor operations criticized after young man's death,' 13 December, 2018, available at: http://www.koreatimes.co.kr/www/nation/2018/12/371_260340.html

⁴⁸ NHRCK, *Annual Report 2018* (English version), p. 75. Due to violence, continuous threats of dismissal and discrimination against union members, the majority of union members have suffered from serious physical and psychological illnesses with two of them dead from suicide and one dead from cerebral hemorrhage.

⁴⁹ The NHRCK Watch, 'Joint Statement: Human Rights Commission's belated decision, YooSung Enterprise! Stop discrimination against democratic labor union members now!,' 14 January, 2019], available at:

http://www.khis.or.kr/spaceBBS/bbs.asp?act=read&bbs=en_board&no=185&ncount=182&s_text=&s_title=&pageno=1&basic_url=

⁵⁰ *KBS NEWS*, 'The Supreme Court found the union-busting YooSung's dismissal of workers violating the collective bargaining agreement.' 4 October, 2018, available at: <http://news.kbs.co.kr/news/view.do?ncd=4046339&ref=A>.

⁵¹ NHRCK, 'Prolonged labor disputes in YooSung caused serious mental health problems in the workers,' 11 January, 2019, available

at: <https://www.humanrights.go.kr/site/program/board/basicboard/view?menuid=001004002001&searchselect=board>

When it comes to human rights abuses by private enterprises, the NHRCK can only investigate claims related to discrimination and sexual harassment. In the case of YooSung Enterprise, the NHRCK was able to exercise its investigative power because the democratic labor union members were discriminated against. If the NHRCK had been more prompt in investigating the matter and publishing its result, the sufferings of the workers might have been mitigated. Despite the NHRCK's official apology for the delay in this specific case, it has been criticised for taking relatively passive position to trade union-related issues. The NHRCK should immediately enhance its expertise and capacity in labor rights.

The Third NAP and Framework Act on Human Rights

The Korean government has established and implemented the National NAP since 2007. The first NAP covered the period from 2007 to 2011; the second NAP covered the period from 2012 to 2016 and the third NAP should have been implemented from 2017. However, amidst the 2016 candlelight revolution⁵² and the following power change in 2017, the implementation of the third NAP had been postponed.

The first two NAPs were established and implemented without serious engagement or consultation with civil society. Korean civil society had no special interest in the process, and the NHRCK didn't fulfill its role either.

The NHRCK recommendation for establishing a separate NAP on Business and Human Rights was not accepted by the government. As a compromise, the government expressed its plan to allocate a section to business and human rights in the NAP instead of establishing a separate one on business and human rights.

The third NAP was finally published in August 2018 and fell far short of civil society's expectations.⁵³ Almost every area, especially non-discrimination against sexual minorities, business and human rights, refugees and migrants, labor rights, and information rights failed to meet not only the level proposed by civil society but also the one recommended by the NHRCK.

The Ministry of Justice and the NHRCK pursued the enactment of a Human Rights Framework Act to institutionalise the process of developing and implementing human rights policies at the national and local levels including the establishment of the NAP.⁵⁴ The NHRCK says that it tried to collect opinions of outside experts and to hold discussions with human rights and CSOs and

[title&searchword=%EC%9C%A0%EC%84%B1%EA%B8%B0%EC%97%85&pagesize=10&boardtypeid=24&boardid=7603688.](#)

⁵² Hankyroeh, 'Candlelight demonstration participants receive human rights award in Berlin,' 7 December, 2017, available at: http://english.hani.co.kr/arti/english_edition/e_international/822524.html.

⁵³ The third NAP is available in Korean at:

<http://www.moj.go.kr/moj/334/subview.do?enc=Zm5jdDF8QEB8JTJGYmJzJTJGbw9qJTJGMTIxJTJGNTAxNDYzJTJGYXJ0Y2xWaWV3LmRvJTNgcGFzc3dvcml0QlMjZyZ3NCZ25kZVN0ciUzRCUyNmJic0NsU2VxJTNEJTI2cmdzRW5kZGVtdHIIM0QlMjZpc1ZpZXdNaW5lJTNEZmFsc2UIMjZwYWdlJTNEMSUyNmJic09wZW5XcmRTZXEIM0QlMjZzcmNoQ29sdW1uJTNEJTI2c3JjaFdyZCUzRCUyNg%3D%3D>.

⁵⁴ The NHRCK and the Ministry plan to present a bill by the end of 2019. There is no official statement made by both agencies regarding the enactment of a Framework Act on Human Rights.

relevant government agencies.⁵⁵ However, the NHRCK should have provided appropriate explanation for its failing to present its official position and timetable for the Framework Act since almost one year has passed since the third NAP was published. It should also allow for comprehensive discussions to evaluate it, enhance its implementation, or receive amendment suggestions.

Cooperation of the NHRCK with Civil Society

The NHRCK's independence and cooperation with civil society was undermined by the blacklisting of the NHRCK staff by Lee Myung-bak's government in 2009 (the Presidential Office prepared a blacklist of the NHRCK staff who the Presidential Office believed anti-government and delivered it to then NHRCK Secretary General Kim Ok-shin) and the death of Woo Dong-min, a disability rights activist who died from pneumonia on 2 January 2011 after participating in a sit-in protest at the NHRCK building from 22 November to 6 December 2010.⁵⁶

Both the NHRCK Watch and the Innovation Committee urged the NHRCK to take full responsibility in investigating and punishing those found responsible in these two cases.⁵⁷ The NHRCK conducted investigations between July and November in 2018. A number of human rights activists and experts joined the fact-finding investigation and the NHRCK published its findings on 11 December 2018.⁵⁸ According to the report, the blacklist was believed to have been prepared by the police and the Presidential Office. The NHRCK will request the prosecution to investigate everyone involved including former President Lee Myung-bak in order to further establish the facts as it was limited in its investigative power and some agencies – including the National Police Agency refused to cooperate with NHRCK.⁵⁹

In relation to the death of Woo Dong-min, the NHRCK recognised its responsibility by suspending heating in the building and restricting access to his assistant. In presenting the investigation results, Chairperson Choi Young-ae apologized for the NHRCK's faults and promised to adopt a declaration on the human rights of Human Rights Defenders.

⁵⁵ NHRCK, *Annual Report 2018* (English version), p. 27.

⁵⁶ KHIS, 'Republic of Korea: Endless Despair,' 2012 ANNI Report, pp. 179-180., available at: https://www.forum-asia.org/uploads/books/2012/nov/05033_ANNI%202012.pdf; NHRCK, 'Inaugural speech of Chairperson Choi Young-ae,' 26 Oct. 2018, available at: <https://www.humanrights.go.kr/site/program/board/basicboard/view?menuid=002002001&boardtypeid=7003&boardid=7603442>.

⁵⁷ NHRCK Watch, 'The Stakeholder Opinion of Korean Civil Society Regarding the ICC-SCA Review of the NHRCK in May 2016,' 2 September 2016, available at: http://www.khis.or.kr/spaceBBS/bbs.asp?act=read&bbs=en_board&no=153&ncount=149&s_text=&s_title=&pageno=3&basic_url

⁵⁸ NHRCK, 'The NHRCK presents its investigation results regarding the NHRCK blacklist and the death of a disability rights activist,' 11 December, 2018, available at: <https://www.humanrights.go.kr/site/program/board/basicboard/view?menuid=001004002001&searchselect=boardtitle&searchword=%EB%B8%94%EB%9E%99%EB%A6%AC%EC%8A%A4%ED%8A%B8&pagesize=10&boardtypeid=24&boardid=7603599>; Hankyoreh, 'A person who can't work together' There was a blacklist of the NHRCK staff,' 11 December 2018, available at: http://www.hani.co.kr/arti/society/society_general/873937.html#csidxa5253ba468776efbad2886e225ad460.

⁵⁹ *Yonhap News Agency*, 'Prosecutors launch probes into 'blacklist' allegations under former governments,' 16 January 2019, available at: <https://en.yna.co.kr/view/AEN20190116002600315?input=2106m>.

The illegitimate intervention into the NHRCK by the Government was found to continue under the Park Geun-hye Government. It is reported that a document showing that intelligence police inspected former Standing Commissioner Jang Hyang-suk (elected by the National Assembly on the nomination of the opposition party) for three years from 2012 to 2015, was discovered during a prosecution investigation into illegal activities of intelligence police.⁶⁰ Chairperson Choi issued a statement, expressing her strong regrets to the National Police Agency and urging the Agency to take prevention measures.⁶¹ The NHRCK Watch also published a statement pointing out that the Chairperson's regrets would not solve the problem and urged the NHRCK to adopt strong measures to protect and enhance its independent status.⁶² Clearly it reaffirmed the need for the NHRCK to fully implement all the recommendations made by the Innovation Committee.

The one year under Chairperson Choi Young-ae's NHRCK has demonstrated that it is not easy to regain the civil society's trust. As many human rights activists and experts note, the NHRCK should continuously listen to and accept civil society recommendations and criticisms in order for it to overcome its past mistakes and regain its confidence.

5. Conclusion and Recommendations

The election of Chairperson Choi Young-ae has been followed by positive changes with the NHRCK becoming a stronger voice on diverse human rights-related matters. The annual meeting of Asia Pacific Forum of National Human Rights Institutions to be held in Seoul in September 2019 will also provide a good opportunity for the NHRCK to demonstrate it by taking initiatives in promoting and protecting human rights both domestically and internationally.

However, despite its efforts to sever itself from past mistakes, the loss of confidence of civil society has not been fully recovered. Of course, one cannot expect it is easy to redress nine years of wrong practices in one.

The amendment bill to the NHRCK Act is still pending at the National Assembly and those provoking discrimination and hatred are continuously attacking the NHRCK. Its organizational capacity and budget remains short of fulfilling the increased expectations on the NHRCK. Nevertheless, the NHRCK should listen to the civil society and keep in mind that the nomination of a human rights activist as its Chairperson is not the end of innovation but rather the beginning.

The NHRCK will be reviewed for its reaccreditation by the GANHRI-SCA during Chairperson Choi's term. It is really important for the NHRCK to show the international community that it has

⁶⁰ *Yonhap News Agency*, 'Circumstances of illegal surveillance by the government's intelligence police on the standing committee members of the NHRCK,' 22 April 2019, available at: <https://www.yna.co.kr/view/AKR20190422060900004?input=1179m>.

⁶¹ Hankyoreh, 'Chairperson Choi Young-ae, 'strong regret' on the Park administration's surveillance on the NHRCK by intelligence police,' 30 April 2019, available at: http://news.khan.co.kr/kh_news/khan_art_view.html?artid=201904301656001&code=940100#csidxc29b5fc7017407997ac09a5cc76304a.

⁶² The NHRCK Watch, 'In addressing surveillance on the NHRCK by the Park administration, NHRCK's expression of regret is not enough,' 14 May 2019, available at: http://www.khis.or.kr/spaceBBS/bbs.asp?act=read&bbs=notice1&no=549&ncount=525&s_text=&s_title=&pageno=1&basic_url

indeed reestablished its status as a national human rights protection mechanism by fully implementing all the recommendations of the GANHRI-SCA. The NHRCK should continue to improve itself. Enhancing the status of the NHRCK including the amendment of its enabling Act can only be achieved through support from and cooperation with civil society and such support and cooperation will come only after the NHRCK implemented enough positive reforms.

In addition to its internal reshaping the NHRCK should also monitor and guide the Moon Jae-in government's policies by actively presenting its opinions. With the upcoming general election in April 2020, people are concerned over the dramatic increase of discrimination and hatred towards migrant, refugees and sexual minorities. Moreover, under the excuses of the economic situation, attempts to reduce the protection of labor rights continue. While the surrounding atmosphere of the NHRCK has become friendlier as shown with the establishment of an independent selection committee by the Moon government, we should remember that a national human rights institution's main role is to monitor and check the authorities.

We expect that the NHRCK will fulfill its key mandates of both guiding the Moon Jae-in government's human rights policies into the right direction including the enactment of a Non-Discrimination Act and the Human Rights Framework Act as well as checking and monitoring any retreats in human rights policies, especially in labor rights protection.

5.1 Recommendations

To the Government of Korea:

- 1) Prescribe the mandatory establishment of an independent selection committee for the NHRCK commissioners by law in line with recommendations by the GANHRI-SCA, the NHRCK and civil society;
- 2) Cooperate and consult with the National Assembly and civil society in order to amend the NHRCK Act;
- 3) Fully implement all of the NHRCK's recommendations; and.
- 4) Ratify the ILO Core Conventions to protect labor rights.

To the National Assembly:

- 1) Amend the NHRCK Act to include a provision establishing an independent selection committee that includes civil society's participation in accordance with the GANHRI-SCA's recommendation;
- 2) Ratify the ILO Core Conventions to protect labor rights; and
- 3) Enact a Non-Discrimination Act and a Framework Act on Human Rights.

To NHRCK:

- 1) Use every endeavor to have its Act be amended to establish an independent selection committee;
- 2) Work with the Government and the National Assembly in order to secure and enhance its independent status by amending relevant laws and regulations;

- 3) Accept civil society organisations' recommendations and fully implement them and engage in regular consultations and meetings with them to restore its trust;
- 4) Fully implement the Innovation Committee's recommendations;
- 5) Use every endeavor towards the enactment of a Non-Discrimination Act and a Framework Act on Human Rights;
- 6) Work towards greater respect of labor rights in law and in practice;
- 7) Engage with civil society by accepting and implementing its criticisms and recommendations; and;
- 8) Go all lengths to ensure the implementation of its recommendations by the Korean government including by introducing the international human rights standards to the government, the National Assembly, and the public.

TAIWAN: THE REMAINING QUARTER OF THE LAST MILE

Covenants Watch and Taiwan Association for Human Rights¹

1. Introduction

This report was prepared by Covenants Watch and the Taiwan Association for Human Rights. It covers the period going from January 2018 until June 2019. For the purpose of this report, the authors collected information through frequent exchange of information with other human rights NGOs and activists; direct representation within the President's Office Human Rights Consultative Committee (POHRCC) through the membership of Song-Lih Huang's the Convener of Covenants Watch; in-person consultations with legislators and high-level governmental officials, as well as media reports.

2. Overview

Human rights NGOs have advocated for the establishment of a National Human Rights Institution (NHRI) in Taiwan since 1999. Although the Government took some initial steps in 2002 and again in 2014, it never formulated a concrete plan to setup an NHRI. In 2018, following the POHRCC's recommendations the President's Office instructed the Control Yuan to prepare a draft bill on the Organic Act of the NHRI.² This is up to date the strongest signal of existing political will to establish an NHRI.

According to its Constitution Taiwan has a five-power structure.³ Each power is organised and administered in a Yuan, a constitutional body. In addition to the conventional Executive, Legislative and Judicial Yuans, the Control Yuan (CY) is a constitutional organ with 29 members who are *de facto* ombudsmen with investigative and impeachment powers and which primary aim is to monitor the misconduct of civil servants. The Examination Yuan is responsible for recruitment and evaluation of civil servants.

3. Human Rights Situation in Taiwan

On 24 May 2017 Taiwan's Constitutional Court issued the Judicial Yuan Grand Justices Interpretation No.748, which states that the law that requires a marriage to be between a man and a woman was unconstitutional.⁴ The decision ordered the government to protect LGBTIQ rights by either revising the Civil Code or passing a separate same-sex marriage law within the next two years. Conservatives political parties strongly opposed the proposal and decided to put the issue to a referendum, which was

¹ The authors include Song-Lih Huang, Convener of Covenants Watch, Yibee Huang, CEO of Covenants Watch, Yi-hsiang Shi, Deputy Secretary General of Taiwan Association for Human Rights (TAHR), and Eeling Chiu, Secretary General of TAHR.

² See minutes of the POHRCC meetings in 2017 and 2018 available in Chinese at: <https://www.president.gov.tw/Page/227>.

³ The Constitution of the Republic of China (Taiwan) is available at: <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=A0000001>.

⁴ The Constitutional Interpretation Order (in Chinese) at: <http://cons.judicial.gov.tw/jcc/zh-tw/jep03/show?expno=748>

organised on 24 November, 2018. Sadly, almost 70% of the voters rejected the proposal to reform the Civil Code.⁵

The referendum was held on the same day as local election, which led the campaigns on both the referendum and the local election to take place at the same time and influence each other. For instance, the issue of same-sex marriage became the main point of debate, and conservative forces united to block the legalisation of same-sex marriage. They used it as a leverage to fight against the Democracy and Progressive Party (DPP) – the ruling party – in the local elections. The “anti-equality” union used the referendum to portray DPP as disrupting the traditional values. Despite months of continued campaign and lobbying against revising the Civil Code, the parliament – which ultimately had to follow the Court’s decision - finally adopted a law permitting same-sex marriage on 22 May 2019.⁶

In addition, the conservatives had also put the question as to whether the State should reduce LGBTI-related teaching material in primary and middle schools. Again more than 70% of the voters agreed with the proposal. Fortunately, the government held firm on its ground by claiming that it could not violate the “Gender Equality Education Act.” However, associated with the defeat of the ruling party in the referendum, many incumbent mayors and magistrates were replaced by much more conservative politicians in the local elections.

Many thought that the spread of fake news and disinformation through social media during the campaign on the referendum severely disturbed the local elections and referendum outcome. The threat was particularly worrisome as the sources of disinformation could often be tracked to China leading to fear that it could have an even higher stake in the President election in November 2019.⁷ Both government and the civil society started to pay attention to the issue of disinformation, and tried to cope with this new form of challenge, that is sometimes described as warfare against democracy.

Regulations of mass and social media may run the risk of infringing people’s rights to information and freedom of expression. Some NGOs have therefore warned that national security should not come at the cost of human rights. As President Tsai’s government worried over China’s intrusion into Taiwan’s media, the Executive Yuan, led by Premier Su Tseng-chang, and the Legislative Yuan with a DPP majority, passed a series of bills related to the defense of democracy.⁸ Human rights NGOs are still observing if these bills could inadvertently violate human rights. Apart from those mentioned above, numerous human rights issues remained unchanged. To begin with, human rights laws, such as the Refugee Law and Assembly and Parade Act, are still in the Legislative Yuan.⁹

⁵ Scott Morgan, ‘Same-sex marriage referendums: Taiwan Civil Code may remain unchanged,’ *Taiwan News*, 24 November 2018, available at: <https://www.taiwannews.com.tw/en/news/3582617>.

⁶ A short introduction to the “Enforcement Act of Judicial Yuan Interpretation No. 748” is available at <https://www.loc.gov/law/foreign-news/article/taiwan-same-sex-marriage-law-enters-into-effect/>

⁷ *Taiwan News*, ‘China seeking win with information warfare: professor,’ 22 April 2019, available at: <http://www.taipeitimes.com/News/taiwan/archives/2019/04/22/2003713841>.

⁸ Stacy Hsu, ‘Taiwan government defends ‘CPP’ agents’ bill, Focus Taiwan, 11 July 2019, available at: <http://focustaiwan.tw/news/acs/201907110024.aspx>.

⁹ The Bill for the Refugee Act has been in the parliament since 2015, and the Assembly and Parade Act since 2016.

Economic development projects keep on infringing on indigenous traditional regions, and the government often rules that it is not necessary to obtain the prior permission of indigenous peoples.¹⁰ This is despite the fact that indigenous peoples have the right to be consulted on the utilisation of their land and natural resources according to Article 21 of the Indigenous Peoples Basic Law.¹¹ With regard to housing rights in urban areas, many cases remain unsolved. The government has not been able to provide satisfactory alternatives to people forcibly evicted, and resources for housing placement remain limited. Furthermore, despite international pressure, crew members of fishing vessels, especially those migrant workers who are recruited abroad, are not protected by the Labor Standard Law.¹²

Finally, the Executive Yuan passed in December 2018 the “Bill to Implement the Convention Against Torture, and Cruel, Inhuman and Degrading Treatment or Punishment and its Optional Protocol.”¹³ However, the Legislative Yuan has not yet discussed the bill this year. On a related matter, in 2018 the Executive Yuan reviewed the Prison Act and made major modifications to the bill. However, amendments have also not been discussed in the parliament yet. In the meantime, prisoners remain in unsatisfactory conditions due to overcrowding, low staff/prisoner ratio, and deficient medical staff and facilities.¹⁴

Since President Tsai Ing-wen took office in May 2016, the Taiwanese Government has come under reviews on the implementation of five international human rights Conventions. The Government undertook its second review¹⁵ of the state report on the International Covenant of Civil and Political Rights (ICCPR) and the International Covenant of Economic, Social and Cultural Rights (ICESCR) in January 2017,¹⁶ and its first review of the Convention of the Rights of Persons with Disabilities (CRPD) and the Convention of the Rights of the Child (CRC) in November of the same year.¹⁷ In July 2018, the Government also undertook its third review of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).¹⁸ Despite this commitment, the Executive Yuan and Legislative Yuan have been slow at drafting or revising the numerous laws and policies that the reviews identified as not compatible with international human rights law including the Refugee Law,

¹⁰ The Asia Cement Corporation was granted the right to mine for 20 more years in one of the traditional territories of indigenous peoples. See: Chen Wei-han, Asia Cement Corp’s exemption from Mining Act amendment sparks outcry, 8 December 2017, available at: <http://www.taipeitimes.com/News/front/archives/2017/12/08/2003683614>.

¹¹ The Indigenous Peoples Basic Law, available at: <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=D0130003>.

¹² Labor Standards Act, available at: <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=N0030001>.

¹³ Press release of the Executive Yuan (in Chinese) at: <https://www.ey.gov.tw/Page/9277F759E41CCD91/dfc36c95-bfd0-478f-974a-fe0d67754c42>

¹⁴ Sophia Yang, ‘Taiwan prison overcrowding called into question by intl. human rights experts,’ *Taiwan News*, 19 January 2017, available at: <https://www.taiwannews.com.tw/en/news/3077842>.

¹⁵ Please note that Taiwan is not a member of the United Nations. Therefore, reviews are conducted by international experts (not UN affiliated). For more information see: Chen Yu-chiao, ‘The ‘Taiwan Model’ of Adopting Human Rights Treaties Without UN Membership,’ *The News Lens*, 25 April, 2019, available at: <https://international.thenewslens.com/article/117711>.

¹⁶ Materials including the concluding observations of the review on ICCPR and ICESCR at: <https://www.en.covenantwatch.org.tw/treaty-reviews/2017-second-review-on-iccpr-and-icescr/>

¹⁷ Materials including the concluding observations of the review on the CRPD and CRC at: <https://www.en.covenantwatch.org.tw/treaty-reviews/2017-initial-review-on-crpd/> and <https://www.en.covenantwatch.org.tw/treaty-reviews/2017-initial-review-on-crc/>

¹⁸ Materials including the concluding observations of the review on CEDAW at: <https://www.en.covenantwatch.org.tw/treaty-reviews/2018-third-review-on-cedaw/>.

laws relating to forced evictions, the Assembly and Parade Act, the Prison Act, the Personal Information Protection Act, and the Mental Health Act.

Lacking an NHRI, the current human rights protection system in Taiwan is patchy and scattered. There are several unstaffed human rights committees or task forces, such as the POHRCC, the Executive Yuan Human Rights Protection Promotion Group, the Committee for the Promotion of the Benefits and Interests of the Child and Youth, and the Committee for the Promotion of the Rights of Persons with Disabilities. The above-mentioned human rights committees usually only have one meeting every three to six months, the selection of the members is not open and transparent, and the agenda is often decided by governmental agencies which serve as the secretariat for these groups.

4. Establishment of NHRI

NGOs in Taiwan have been advocating for the establishment of NHRI since 1999. After failed attempts in 2002 and 2003 during President Chen Sui-bian's mandate, the government has set the issue aside.¹⁹ Attention on the establishment of an NHRI was brought back when Taiwan came under review on the implementation of international human rights treaties. By ratifying international human rights instruments, Taiwan brought into its legal system the following human rights conventions: ICCPR and ICESCR (2009), CEDAW (2011), CRC (2014), and CRPD (2014). The legislation implementing these international conventions requires the Government to set up a review system for its human rights reports. Since, every review committee in its Concluding Observations and Recommendations urged Taiwan to establish an NHRI. More specifically, the review committees on CRC and CRPD requested the government to setup the NHRI to systemically monitor the implementation of these two conventions.²⁰

The Convener of Covenant Watch, Mr. Song-Lih Huang, was appointed in May 2016 as a member of the POHRCC, which is chaired by Vice President Chen and meets once every three months. This gives Covenant Watch an opportunity to share the position of its member organisations with high-level officials, such as the vice presidents of the Executive Yuan, Judicial Yuan, and Control Yuan. Mr. Huang has made several proposals for establishing an NHRI to the POHRCC in an attempt to move forward the discussion. However, the progress was stalled at the discussion phase, with POHRCC considering where within the governmental system the NHRI should be set up.

While it does not have the human rights mandate under the Constitution or the Control Act,²¹ CY members enjoy the discretion to initiate investigations on the issues it deems relevant. The CY is an ombudsman institution and can independently monitor the Government. As some Ombudsman Institutions have been accredited with 'A' status by the Global Alliance of National Human Rights

¹⁹ Mab Huang, A National Human Rights Commission for Taiwan? In JA Cohen, WP Alford, CF Lo (ed.) *Taiwan and International Human Rights: A Story of Transformation*. Springer Nature Singapore, 2018.

²⁰ Concluding Observations of the initial report of the Republic of China (Taiwan) on the Convention on the Rights of Persons with Disabilities (CRPD) adopted by the International Review Committee (IRC) on 3 November 2017, available at: https://en.covenantswatch.org.tw/wp-content/uploads/2018/12/2017-CRPD-CORs_EN.pdf and Concluding Observations on the First Report of the Republic of China/Taiwan on the Implementation of the UN Convention on the Rights of the Child, 24 November 2017, available at: https://en.covenantswatch.org.tw/wp-content/uploads/2018/12/2017-CRC-CORs_EN.pdf.

²¹ Control Act of the Republic of China, available at: <https://www.cy.gov.tw/ct.asp?xItem=3158&mp=21&CtNode=1734&returnctNode=1734&returnxItem=3139>.

Institutions Sub-Committee on Accreditation (GANHRI-SCA), the CY claimed that it is equivalent to an NHRI and therefore there is no need to establish “another” NHRI.²² However, the CY has not performed any comprehensive evaluation of its compliance with the Paris Principles. While it seems difficult to have a serious discussion on the issue of NHRI without giving due consideration to the CY, the capability and suitability of CY in assuming the role of protecting and promoting human rights has also never been assessed.

In view of this impasse, Covenant Watch invited Ms. Rosslyn Noonan²³ to lead an assessment mission to Taiwan which conducted a weeklong survey in July 2017.²⁴ The final report was published in October 2017, which Mr. S.L. Huang presented to the POHRCC on 13 October.²⁵ The mission concluded that the best option for establishing an NHRI in a timely manner would be to make it part of the CY and to provide for a fully compliant Paris Principles institution by amendments to the Organic Law of the Control Yuan and to the Control Act.

However, the current CY does not comply with the Paris Principles. The appointment of CY members does not include civil society participation and the composition of CY does not adequately reflect the plurality of the society. Its mandate does not specifically include the protection of human rights, and the CY currently plays a minimal role in promoting human rights. CY’s mandate instead focuses on ensuring that civil servants conform to domestic laws but it does not often refer to international human rights laws. In addition, the CY has almost no interaction with civil society, and there is no discernable mechanism of accountability such as the requirement to report to the parliament.

After Mr. Huang presented the report of the international experts to the POHRCC in October 2017, two options - a structurally independent NHRI or setting up an NHRI in the Control Yuan - were subsequently presented to the President for her decision. Although President Tsai did not announce any plan she apparently preferred (or was willing to try) the latter option, as a six-member task force within CY was established in March 2018 to draft a new proposal.²⁶ This task force has since gathered regularly but the CY has not produced any concrete proposal. A DPP Legislator (Ms. Mei-nu Yu) pressed the CY at the end of 2018 about the issue, which responded that it did not get an explicit instruction from the President. An official document from the President’s Office was therefore sent to the CY in February 2019, requesting the preparation of a proposal to set up the NHRI in a timely manner and with taking discussions of the POHRCC into consideration,²⁷

The six-member task force drafted a proposal which was based on the idea (similar to that of Covenants Watch) of dividing the CY’s structure into (1) a human rights institution and (2) the remaining

²² This is implied by Control Yuan’s bill on the ‘Organic Act of The Control Yuan National Human Rights,’ available at: (not available yet online)

²³ Rosslyn Noonan is former Chief Commissioner of the New Zealand Human Rights Commission and Asia Pacific Forum and an expert NHRI Consultant.

²⁴ The mission, with Ms. Noonan joined by Agantaranansa Juanda and Sushil Pyakurel, was sponsored by the Asia Pacific Forum of National Human Rights Institutions and the Asian Forum for Human Rights and Development (FORUM-ASIA).

²⁵ Asia Pacific Forum, Forum Asia, ANNI, ‘Taiwan NHRI Assessment Report 2017’, 2017, available at: https://en.covenantwatch.org.tw/wp-content/uploads/2017/03/Final-Taiwan_NHRI_Assessment_Report_2017.pdf.

²⁶ Of the 29 Control Yuan members, 18 were nominated by the Nationalist Party and 11 new members were nominated by the DPP earlier this year; their term ends in July 2020.

²⁷ Please add a link to the official document. it is not available online

ombudsman, each with 11 and 18 designated members. However, this proposal was completely overturned in CY's "Human Rights Committee" and again in a "CY Meeting" held from April through June 2019.²⁸

The CY instead sent a "Bill on the Control Yuan National Human Rights Commission/Committee"²⁹ along with minor revisions of the "Organic Law of the Control Yuan" to the Legislature in June 2019.³⁰ This version of the Bill was almost the same as the 2015 proposal, which stated basically that the current CY can play the role of an NHRI, and proposed conferring the title of Human Rights Commissioner to all 29 Control Yuan members without major reform to the structure and function of the CY.

In the preparation of the Bill, the CY neglected the Concluding Observations and Recommendations of the review committee on CRC and CRPD, which indicated the need to set up an NHRI to systematically monitor the implementation of human rights conventions and protect the rights of children and persons with disabilities. The reluctance of CY members to do so therefore hinders any discussion on the conditions of specific vulnerable groups.

Discussions in the Executive Yuan in 2018 on the establishment of a National Preventive Mechanism (NPM) pursuant to the Optional Protocol to the Convention against Torture faced the same problem: CY claimed that it could assume the responsibility of NPM, but refused to form a specific organisation or to assign any particular member in charge of the coordination.³¹

Meanwhile, Covenants Watch has worked with DPP Parliamentarian, Ms. Chun-Mi Chou, on a new Organic and Functional Act of the NHRI in the CY.³² Covenants Watch's proposed NHRI would comprise 11 pre-designated Commissioners with the other 18 members of the CY remaining as Ombudsmen. All NHRI Commissioners would enjoy the status of CY members in terms of their investigative and impeachment powers. The 11-member NHRI would function independently of the CY, although the Chief Commissioner would be the president of the CY, to prevent potential conflicts in the human rights and ombudsman functions of the CY. The NHRI's budget and personnel would be specifically allocated by the Legislative Yuan. The mandate of the NHRI would include both human rights promotion and protection, and it will have powers of investigation in both public and private sectors. The NHRI Commissioners would enjoy the same investigative powers as CY members, but the nature of the power would be administrative, rather than judicial. If, upon investigation, criminal activities are revealed, the case would be referred to the judiciary. The NHRI would also be required to turn in an annual report to the Parliament. It would enjoy independence from other governmental powers and from the CY.

²⁸ Organic Law of the Control Yuan, Article 7: "Control Yuan Meeting shall be organised by the president, vice president, and members of the Control Yuan and chaired by the president."

²⁹ It is not clear whether the Control Yuan was to establish a committee or a commission, as "wei yuan hui" in Mandarin can mean either of these two terms.

³⁰ The draft bill is not available online yet.

³¹ In preparatory meetings for the draft bill on "The Act to Implement the UN Convention against Torture, Cruel and Other Inhuman or Degrading Treatment or Punishment and its Optional Protocol," the Control Yuan said that it could assume the role of NPM without making organisational changes.

³² Legislator Chou's bill (in Chinese) is available at:

https://lci.ly.gov.tw/LyLCEW/agenda1/02/pdf/09/07/01/LCEWA01_090701_00012.pdf

It is critical that the Legislative Yuan looks into the NHRI bills (CY's and Legislator Chou draft bills) in the 2019 September-December session, because it is the last session for this term, and all bills not adopted after that will be invalidated. The last session also means low efficiency, as many legislators will be busy with their re-election campaigns.

5. Advocacy Strategies

Despite the drawback that the CY continues to insist that it already meets the requirements set out in the Paris Principles, the recent development is significant because for the first time in history, the government, the parliament, and the CY have the same view that is that the NHRI must be set up as part of the CY. Now that the struggle boiled down to the two bills (from the CY and Legislator Chou), the Legislative Yuan can finally tackle the issue. The aim should be to complete the whole process in 2019, so that the new institution (both the newly founded NHRI and a reformed Control Yuan) can begin to function when the term of the current Control Yuan members end in July 2020.

The next focus of civil society advocacy will be targeting legislators to ensure that Legislator Chou version of the bill – the Organic and Functional Act the NHRI - is adopted. For those DPP legislators who hold deep-rooted animosity against the CY, it is important to persuade them that before Taiwan can manage to have a major constitutional reform, restructuring CY is the best and most practical way of dealing with the powers of CY. The positive performance of the newly appointed CY members improved the CY's image, but that did not give impetus to the discussion about the establishment of an NHRI.

6. Recommendations

To the Government of Taiwan:

- 1) Delineate the human rights duties and functions of the executive branch (such as drafting and implementing the National Human Rights Action Plan) and of the NHRI. For example, as both bodies have the duty to monitor the realization of human rights conventions, the government should try to clarify distinctions;
- 2) Explain to the public the difference in functions and achievements expected of an NHRI and the institution of an Ombudsman;
- 3) Examine whether there should be division of labor among CY members, including by setting up a National Preventive Mechanism to prevent torture, cruel and other inhuman or degrading treatment or punishment; and
- 4) Promote awareness regarding an NHRI, particularly about the human rights promoting and protective roles an NHRI can play, and the distinction between the human rights duties of an NHRI, the executive branch of the government, and an ombudsman institution.

To the Legislative Yuan:

- 1) Carefully examine the two bills and check their compatibility with the Paris Principles. It should consult the civil society and experts before it makes decisions.

To the CY:

- 1) Start to prepare itself for the new tasks associated with the NHRI, including by holding training sessions on working methods that are new to the CY, such as national inquiry, monitoring on CRC and CRPD, and functions of NPM.

To Local NGOs:

- 1) Continue to advocate and educate the legislators for the enactment of the Organic and Functional Acts of the NHRI, which is fully compliant with the Paris Principles.

To the Asia Pacific Forum for NHRIs (APF) and FORUM-ASIA:

- 1) Plan a follow-up assessment in Taiwan;
- 2) Technically help Taiwan go through the draft bills article by article to make sure that it is compatible with the Paris Principles; and
- 3) Start the educational process for the government, legislators, CY members, and the general public regarding the functions of a properly operating NHRI, especially its interaction with other governmental authorities, the judiciary, and the ombudsman institution.

The Asian NGOs Network on NHRIs (ANNI) is a network of human rights organisations and defenders engaged with national human rights institutions in Asia to ensure the accountability of these bodies for the promotion and protection of human rights.

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International Campaign for Human Rights in Iran – Iran;
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Judicial System Monitoring Program (JSMP) – Timor-Leste;
Justice for Peace Foundation (JPF) - Thailand;
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This publication has been made possible with the generous support of

