CONFERENCE PROCEEDINGS

2ND INTERNATIONAL CONFERENCE

NATIONAL HUMAN RIGHTS INSTITUTIONS IN SOUTHEAST ASIA

13-14 JULY 2017
BANGKOK THAILAND

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International Studies (ASEAN-China) Program
Faculty of Liberal Arts, Thammasat University

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Introduction

As independent, state-funded bodies with broad, internationally-endorsed mandates to protect and promote human rights, National Human Rights Institutions (NHRIs) serve as a vital bridge between the government and civil society, and play a distinct role in ensuring the effective implementation of international human rights standards at the national level. However, in Southeast Asia, NHRIs find themselves established in transitional or repressive regimes, posing unique obstacles to the promulgation of their mandate. The capacity to investigate human rights violations, to conduct national inquiries or public hearings and to secure remedies for human rights victims of NHRIs in the region of Southeast Asia are often not satisfactory.

To address the potentials, challenges and opportunities of NHRIs in the Southeast Asia Region, Asia Centre in collaboration with ASEAN-China International Studies Program, the Lutheran World Federation and with the support from the Taiwan Foundation for Democracy convened the Centre's 2nd International Conference on "National Human Rights Institutions in Southeast Asia: Challenges of Protection". It was held at the Centre's premises in Bangkok, Thailand on 13 and 14 July 2017.

Over the course of two days and nine panels, the conference assembled over 29 presenters and 44 participants from across the ASEAN, New Zealand, Nepal, India, the U.S. and the U.K. Two of the six Southeast Asian NHRIs—the Myanmar National Human Rights Commission (MNHRC) and Indonesia National Commission on Human Rights (Komnas HAM)—were in attendance along with a representative from the New Zealand National Human Rights Commission.

The papers in this conference proceedings examine NHRIs in Southeast Asia and beyond and their capacity to protect and promote human rights in the Southeast Asia region. Through the assessment of NHRI's principle and mandate, regional system and network, its interaction with civil society and its effectiveness. All papers in this conference proceeding have been reviewed and administered by the editors. The authors are responsible for the accuracy of facts, quotation, data, statements and the quality of the English language in their work. The papers are organised in the way it appeared in the conference program.

This conference was followed up by Asia Centre's publication: "National Human Rights Institutions in Southeast Asia: Selected Case Studies" published in 2020. An assessment of a nascent regional human rights architecture that is facing significant challenges in protecting human rights. For more information on this publication click the link here.

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National Human Rights Institutions: From idea to implementation

Micheal J V White

New Zealand Human Rights Commission

Abstract

National human rights institutions (NHRIs) are one of the most important institutional developments of recent years. NHRIs can play a key role in promoting and protecting human rights. They are able to do so by the unique position they occupy between government, civil society and nongovernmental organisations. Their codification in the Paris Principles and endorsement by the United Nations General Assembly in 1993 has changed the human rights landscape globally. The Paris Principles constitute a concrete template for NHRI design, with guidelines covering their independence, jurisdiction, mandate and composition. These Principles have had the positive impact of introducing and even strengthening NHRIs. NHRIs can now be found in a wide range of political regimes -from Bahrain to Colombia, to Ireland. Their numbers have soured from 21 in 1991 to approximately 120 active NHRIs in 2015. NHRIs are now a mainstay of multi-level human rights governance. The challenge remains, however, to ensure that these institutions are effective in improving human rights practices. This paper explores the history and development of NHRIs and examines the role of the Paris Principles. It considers the effectiveness of these institutions as mechanisms of human rights protection and explores the institutional and environmental features that are required for NHRIs to work effectively.

Introduction

National Human Rights Institutions (NHRIs) play an increasingly pivotal role in international and national human rights systems. Put simply NHRIs are national bodies tasked with promoting and protecting human rights. The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights[1] Subcommittee on Accreditation has stated (2013:46):

> *[They are] established by States for the specific purpose of advancing and defending human rights at a national level, and are acknowledged to be one of the most important means by which States bridge the implementation gap between their international human rights obligations and actual enjoyment of human rights on the ground.*

NHRIs are one of the most important institutional developments of recent years. NHRIs can play a key role in promoting and protecting human rights. They are able to do so by the unique position

[1] Now the "Global Alliance of National Human Rights Institutions".

they occupy between government, civil society and non-governmental organisations. Their codification in the Paris Principles and endorsement by the United Nations General Assembly in 1993 has changed the human rights landscape globally. The Paris Principles constitute a concrete template for NHRI design, with guidelines covering their independence, jurisdiction, mandate and composition. These Principles have had the positive impact of introducing and even strengthening NHRIs. NHRIs can now be found in a wide range of political regimes - from Bahrain to Colombia, to Ireland. Their numbers have soured from a handful in 1991 to approximately 120 active NHRIs in 2015. NHRIs are now a mainstay of multi-level human rights governance.

The Asia Pacific Forum of National Human Rights Institutions has stated that "[s]trong and effective NHRIs help bridge the 'protection gap' between the rights of individuals and the responsibilities of the State by:

- Monitoring the human rights situation in the country and the actions of the State
- Providing advice to the State so that it can meet its international and domestic human rights commitments
- Receiving, investigating and resolving complaints of human rights violations
- Undertaking human rights education programs for all sections of the community
- Engaging with the international human rights community to raise pressing issues and advocate for recommendations that can be made to the State."[2]

While this may be the case, many challenges remain to ensure that these institutions are strong and effective, and have an ongoing positive impact on human rights practices.

This chapter explores the history and development of NHRIs and examines the role of the Paris Principles. It then considers the institutional and environmental features that are required for NHRIs to work effectively.

1. A BRIEF HISTORY

Modern human rights have their genesis in World War II and the articulation of Roosevelt's four freedoms in the 1941 Atlantic Charter (Roosevelt, 1941). The Atlantic Charter was an affirmation of "certain common principles in the national policies of their respective countries on which they based their hopes for a better future for the world." (Ibid) It emphasised freedoms for all the men in all the lands. Nelson Mandela has noted that while one of the purposes of the 1941 Charter was clearly to mobilize support for the Allies among non-aligned countries and colonies, it had a much wider impact, reaffirming faith in the dignity of each human being and propagating a host of democratic principles (1994: 83-84).

The following year in 1942, the Declaration of the United Nations was adopted by 25 countries declaring a commitment to the principles of the Atlantic Charter (United Nations, 1942). The preamble of the Declaration states (Ibid):

> *that complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve **human rights** and justice in their own lands as well as in other lands, and that they are now engaged in a*

[2] http://www.asiapacificforum.net/support/what-are-nhris/

common struggle against savage and brutal forces seeking to subjugate the world.

The 1942 Declaration of the United Nations formed the basis for the United Nations Charter, the Universal Declaration of Human Rights and all subsequent international human rights covenants and conventions. The international human rights framework that emerged is premised on the centrality of the role of States and their Governments in protecting human rights. In line with this emphasis, the importance of establishing independent national machinery explicitly devoted to the enforcement and improvement of human rights became rapidly apparent. Human rights involve the relationship between individuals and the State. Accordingly, the practical task of protecting human rights is a national one. The emergence of democratic rule in many countries post World War II highlighted the importance of democratic institutions in safeguarding the legal foundations upon which human rights are based. It became rapidly apparent that the effective enjoyment of human rights calls for the establishment of national infrastructures.

The importance of national institutions was first considered by the Economic and Social Council (ECOSOC) in 1946 where member States were invited to consider establishing information groups or local human rights committees (1946). Although there was some diplomatic debates and occasional resolutions that acknowledged the importance of national institutions (ECOSOC, 1960), it wasn't until some 30 years later that progress was made to strengthen such institutions. In 1978, the Commission on Human Rights – the predecessor of the United Nations Human Rights Council - organised a seminar which resulted in draft guidelines for the structure and functioning of national institutions. The United Nations General Assembly subsequently endorsed these guidelines (1978: 1).[3] The guidelines suggested that national institutions should:

a) "Act as a source of human rights information for the Government and people of the country
b) Assist in educating public opinion and promoting awareness and respect for human rights
c) Consider, deliberate upon, and make recommendations regarding any particular state of affairs that may exist nationally and the Government may wish to refer to them
d) Advise on any questions regarding human rights matters referred to them by the Government
e) Study and keep under review the status of legislation, judicial decisions and administrative arrangements for the promotions of human rights, and to prepare and submit reports on these matters to the appropriate authorities
f) Perform any other function which the Government may wish to assign to them in connection with the duties of that State under those international agreements in the field of human rights to which it is a party" (OHCHR, 1993: 3)

The Office of the High Commissioner for Human Rights notes in relation to structure that the guidelines recommended that national institutions should:

[3] The General Assembly also requested that the Secretary-General submit a detailed report on NHRIs

a) "Be so designed as to reflect the composition, wide cross-sections of the nation, thereby bringing all parts of that population into the decision-making process in regard to human rights
b) Function regularly, and that immediate access to them should be available to any member of the public or any public authority
c) In appropriate cases, have local or regional advisory organs to assist them in discharging their functions." (Ibid: 4)

While this was a significant step forward, it should be noted that the guidelines referred to national institutions in a general way which included government agencies and public organisations concerned with human rights. The idea of independence was still in its infancy.

The first NHRIs had emerged during the late 1970s and early 1980s. However, up until 1991 there had been little interaction or collaboration between the small number.[4] In September that year, the first International Workshop on National Institutions for the Promotion and Protection of Human Rights took place in Paris. At this workshop, the Principles relating to the status of national institutions ("the Paris Principles") were developed. The Paris Principles provide a benchmark - a set of minimum requirements - for NHRIs.

While the impetus for the creation of NHRIs was continuing to grow, perhaps the watershed moment was the 1993 World Conference on Human Rights in Vienna. At the Conference NHRIs compliant with the Paris Principles were, for the first time, formally recognised as important actors in the promotion and protection of human rights. Their establishment and strengthening was formally encouraged (1993: 36). That same year the Paris Principles were adopted by the United Nations General Assembly by resolution 48/134 of 20 December.

Since then, the establishment and strengthening of NHRIs in compliance with the Paris Principles have been central concerns of the United Nations and other international actors. The Human Rights Council has regularly passed resolutions relating to NHRIS, and Treaty Monitoring Bodies often include recommendations for establishing or strengthening NHRIs in their Concluding Observations.

The Paris Principles are the basis for engaging in the international human rights system. NHRIs, through their Global Alliance, undertake a peer review of new NHRIs and periodic reviews of existing NHRIs to assess their compliance with the Paris Principles. Those found to be fully compliant ('A' status NHRIs) have strong rights of participation in international human rights forums, including the Human Rights Council, with the Special Procedures and the Universal Periodic Review, and the Treaty Monitoring Bodies.

2. CREATING MINIMUM STANDARDS

[4] It is unclear exactly how many institutions existed prior to 1990. This is because it is difficult to be certain about the type and number of institutions in Africa at the time. For all other regions there were only 8:

- 3 in Asia – Pacific (New Zealand, Australia and the Philippines)
- 3 in the Americas (Canada, Mexico and Guatemala)
- 2 in Europe (France and Denmark)

In Africa there were 3 institutions which could possibly be added to the tally taking the total to 11 (Benin, Togo and Morocco).

The Paris Principles detail minimum standards of independence from Government (through establishment via constitutional or legislative text, financial autonomy, appointment processes) and pluralism - both in the composition of the NHRI and the appointment of its members. The Principles further require that a NHRI should be given as broad a mandate as possible.

3.1 Independence

The appreciation of the importance of independence has developed overtime. Today independence is considered the cornerstone of an NHRI. It is one of the elements which enables them to navigate the unique position they occupy, between government, and civil society and nongovernmental organisations ("NGOs").

There are broadly four levels of independence; independence of the institution, independence of its office holders, operational independence and financial independence or autonomy. In order to protect the independence of the institution the Paris Principles require that a national institution have its mandate "clearly set forth in a constitutional or legislative text" (United Nations General Assembly, 1993). By creating and setting out the powers and mandates of a NHRI constitutionally or legislatively, the NHRI is given a degree of formal independence and is less vulnerable to influence or interference than if established by an executive order. Best practice is considered to be imbedding the establishment of an NHRI is constitutional provisions rather than ordinary legislation. However, this may not always be possible depending on a particular State's constitutional framework. One example of an NHRI being established by constitutional provisions in the Asia Pacific region is Timor-Leste's Office of the Provedor for Human Rights and Justice. The Provedor's office is established under section 27 of the Constitution, which provides:

> *...the Ombudsman shall be an independent organ in charge to examine and seek to settle citizens' complaints against public bodies, certify the conformity of the acts with the law, prevent and initiate the whole process to remedy injustice ... [t]he activity the Ombudsman shall be independent from any means of grace and legal remedies as laid down in the Constitution and the law.*

The Office of the Provedor's independence is further reinforced by Law No.7/2004 setting up the office. Article 5 provides that "the Office shall operate as an independent statutory body and shall not be subject to the direction, control or influence of any person or authority."

By contrast, in the case of the New Zealand human rights Commission, it is established as an "independent Crown entity" pursuant to the Crown entities Act 2004, an ordinary piece of legislation.

In addition to structural independence the Paris Principles acknowledge the very real need to maintain the independence of office holders if an NHRI is going to be effective in discharging its mandate. This is primarily achieved in two main ways:

a) Ensuring a stable mandate for office holders; and
b) Ensuring a transparent process of appointment and dismissal.

Looking across the region, independence of office holders is generally enhanced by making full-time appointments with a duration of at least 3 years. In some States, civil society are involved in the appointment process. This can further enhance independence. It also helps address the Paris Principles requirement of Pluralism. The Human Rights Commission of Thailand is one such example, requiring a Selection Committee comprising a diverse range of members, including; judges; academics; the Chairman of the Law Council; and representatives from private human rights organisations. In addition to the mandate and process of appointment, the appointees themselves are important to a body's independence. The Commonwealth Secretariat has noted (2001: 29):

> *Whatever the appointment process, the crucial requirement for appointees is that they are demonstrably politically neutral and persons of high integrity and standing. Without these characteristics, the office is unlikely to gain the confidence of the public.*

Operational independence requires an NHRI to be able to appoint its own staff and manage its resources and work programme free of government interference. One indicator of operational independence is the ability of a NHRI to undertake investigations. Such powers can include the ability to require production of documents, witnesses etc. For example, Part 5 of the New Zealand Human Rights Act 1993 enables a Human Rights Commissioner to apply to the Courts for an order requiring the production of documents or requiring a person to give evidence in an inquiry. It should be noted that it is unusual for such powers to be used. Former Australian Human Rights Commissioner, Chris Sidoti, explains the reason for this as follows (Spencer, 2002):

> *If there were no powers, those with information essential to the effective functioning of a national human rights institution could withhold the information without fear of the consequences. The institution would be stymied in its work, unable to obtain the information it requires and so unable to form any conclusions about the matter under investigation. But, where the powers exist, those with information have no incentive to withhold it and will almost always provide it without any compulsion – because they know that they can be compelled if they refuse to tender it voluntarily.*

Finally, an NHRI must have full financial autonomy –their budget should not be subject to interference by the executive or any other branch of government. NHRIs should be able to determine their strategic priorities and activities, and have sufficient resources to carry out its functions effectively. Full financial and administrative autonomy can be difficult to achieve and maintain.

3.2 Pluralism

Pluralism is a recognition that there are many different groups active in a State, and NHRIs need to accommodate and recognise these differences – including languages, cultures, religion etc. The importance of this diversity is expressly recognised in the Paris Principles which requires both members and staff of an NHRI to be drawn from a broad cross-section of society, ensuring multiplicity of opinion (United Nations General Assembly, 1993).

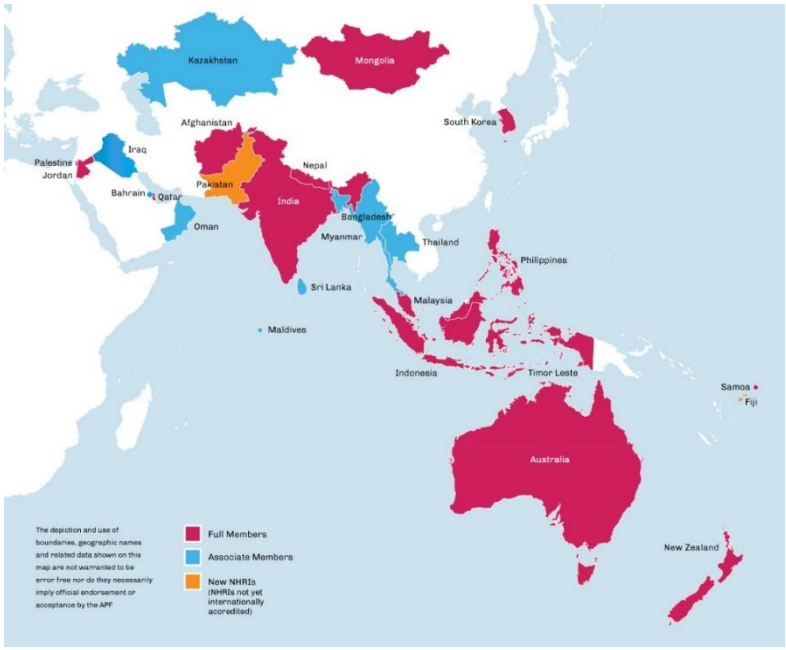
In societies divided among ethnic, political, and/or religious grounds, the criterion of pluralist representation becomes even more significant. Without diversity, there is a danger that the NHRI and its work will not be viewed with public confidence, therefore damaging its credibility and legitimacy.

3.3 Structure

The Paris Principles do not prescribe a particular structure or framework. The 1993 Vienna Declaration on Human Rights states that "it is the right of each State to choose the framework which is best suited to its particular needs at the national level" (United Nations World Conference on Human Rights, 1993: 36). NHRIs can take many forms. The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights Subcommittee on Accreditation has identified the following structural models (2013:47):

- Commissions
- Ombudsman institutes
- Hybrid institutions
- Consultative and advisory bodies
- Research institutes
- Civil rights protectors
- Public defenders
- Parliamentary advocates

Interestingly however, to date, NHRIs across the Asia Pacific region have, in the main, been cast in a similar mould. Of the 24 National Institutions across the region 19 are Human Rights Commissions.



Source: Asia Pacific Forum of National Human Rights Institutions

3.4 Broad Mandate

The Paris Principles confirm that "a national institution shall be given as broad a mandate as possible…" (United Nations General Assembly, 1993). While there is scope within the idea of "a broad mandate" for creating bespoke institutions to align with specific environments and frameworks, the Principles do set out a non-exhaustive list of functions that NHRIs should have (Ibid):

- Monitor the implementation of human rights obligations of the State party and report annually (at least);
- Report and make recommendations to the Government, either at the Government's request or on its own volition, on human rights matters, including on legislation and administrative provisions, the violation of human rights, the overall human rights situation in the country and initiatives to improve the human rights situation;
- Promote harmonization of national law and practice with international human rights standards;

- Encourage ratification of human rights treaties;
- Contribute to reports that States parties are required to submit to the United Nations treaty bodies on the implementation of human rights treaties;
- Cooperate with regional and United Nations human rights bodies as well as with human rights bodies of other States;
- Assist in the formulation of human rights education programmes; and

- Raise public awareness about human rights and efforts to combat discrimination

When we look across the region the functions of NHRIs generally align with the functions set out in the Paris Principles. Burdekin concluded in his assessment of NHRIs in the Asia Pacific region that their functions cover a range of activities, such as (Burdekin, 2007).

> *(a) advising Government and Parliament on issues related to legislation or administrative practices, or proposed legislation, or policies or programmes within their jurisdiction;*
>
> *(b) educating the public and members of the executive (police, prison officials, the military) and the judiciary about human rights and disseminating information about human rights;*
>
> *(c) monitoring compliance by Government, government agencies and the private sector on international human rights treaty obligations;*
>
> *(d) promoting the ratification of human rights treaties and advising on the development of new international human rights instruments;*

(e) contributing to government reports to international Treaty Bodies and following up and disseminating reports by the Treaty Bodies;

(f) co-operating with the United Nations, other NHRIs and national and international NGOs;

(g) inspecting custodial facilities and places of detention;

(h) receiving and investigating complaints of human rights violations, conciliating such complaints or providing other remedies;

(i) compelling the attendance of witnesses and production of documents where necessary to conduct effective enquiries or investigations and taking evidence on oath or affirmation; and

(j) conducting national enquiries into systemic violations of human rights.

3. BEING AN EFFECTIVE NATIONAL HUMAN RIGHTS INSTITUTION – BEYOND THE PARIS PRINCIPLES?

The Paris Principles clearly create the platform for a NHRI to effectively operate. However, in some circumstances complying fully with the formal criteria in the Paris Principles may not be possible in the short to medium term. In these cases what makes an effective institution?

The International Council on Human Rights Policy report *Performance & Legitimacy: National human rights institutions* noted that many NHRIs that formally respected the Paris Principles were not particularly effective in guaranteeing human rights. Others - less numerous -failed to comply with the Paris Principles but still achieved reasonable results (2004). This report does not suggest that the Paris Principles are not vital to the successful operation of National Institutions. Rather, these institutions have been effective in promoting and protecting human rights despite, not because of their absence. It is, however, interesting to consider these other factors identified by the *Performance & Legitimacy* report (Ibid):

Public legitimacy

National institutions win public or popular legitimacy when they are seen to stand up for the right of the powerless against powerful interests and act fairly in treating issues within their purview. An institution's legitimacy is also always partly rooted in its formal or legal status.

Accessibility

National institutions should make known what they do, and how they can be contacted, to the general public and non-governmental bodies. Their offices should be accessible. Disadvantaged groups in society should be encouraged to use them.

Consult and engage with civil society

Civil society organisations, in particular human rights NGOs and community based groups, can be effective links between national institutions and individuals or groups who are politically, socially or economically marginalised. Civil Society's involvement is particularly important in the creation of NHRIs.[5]

Strategic focus

Programmes should focus on issues of immediate daily concern and be relevant to the public and to public bodies.

Develop effective international links

NHRIs can become a key meeting point where national human rights enforcement systems link with international and regional human rights bodies. NHRI networks can provide support and guidance – they can assist strengthening independence and reinforce public legitimacy.[6]

4. ESTABLISHING NHRIs IN THE ASIA PACIFIC REGION

Having considered what NHRIs are, where they come from and broadly what they do, it is useful to close by coming full circle and consider why a State would want to establish an NHRI?

One proposition is that NHRIs are created largely to satisfy international audiences. They are a relatively low-cost way of improving a State's international reputation. The International Council on Human Rights Policy has suggested there are essentially 3 reasons for the establishment of an NHRI (Ibid):

1) To facilitate transition from conflict (Democratization); South Africa, Philippines, Spain etc;
2) To consolidate and improve human rights protections; Australia, Canada, New Zealand etc; and
3) To respond to allegations of serious human rights abuses; Mexico, Togo, Nigeria.

In addition to these reasons, Renshaw, Byrnes and Durbach suggest three factors contributing "to the national momentum towards the establishment of NHRIs in the Pacific" (2010):

1) Recognition that rights are at present inadequately protected and that there is a need for further measures to promote and protect human rights;
2) There is a need for ongoing dialogue on the subject of human rights and culture. NHRI could play a role in shepherding this dialogue informed by international norms but situated within the state and close to the people; and

---

[5] "If you give birth to a human rights commission in a climate of ignorance and lack of understanding, potential hostility and suspicion, this will prove to be problematic; people will not understand the role of such a commission."

[6] For example, the role of GANHRI and the APF

3) Sovereignty remains a principal concern for nations of the Pacific. Regionalism is seen as a supplement to national efforts.

I believe that these factors apply equally to the wider Asia-Pacific/Asia region.

At the time of writing 24 NHRIs had been established across the region in very different and sometimes challenging environments. The effectiveness of these institutions is often perceived to rest upon their independence. Even where established in accordance with the Paris principles the problem remains of how to maintain the required independence of an institution which is established by law and financed by national Government, and whose members are appointed – to a greater or lesser degree – by those Governments. This is an ongoing challenge.

Another concern often raised in relation to NHRIs in the region is that they only have recommendatory powers. While some NHRIs have "quasi-judicial" powers in relation to obtaining evidence, they are not judicial bodies. Generally, they operate by way of recommendations; proceed far less formally than courts; and frequently resolve complaints by mediation or conciliation. Some NHRIs do have the power to make "orders", "determinations" or findings in some instances. However, enforcement of these can be more problematic.

6 CONCLUDING REMARKS

NHRIs sit at the crossroads between government and civil society. This is their point of difference and what enables them to effectively monitor and advocate for improved human rights realisation.

As mentioned earlier, to do so effectively requires NHRIs to be autonomous from the State so that they can investigate the State as well as other actors committing human rights abuses. They must also be independent from NGOs and civil society. It is here where NHRIs often have to grapple with the uncomfortable dilemma of how to be independent, while at the same time establishing working relationships with both government and NGOs. The NHRI bears the responsibility to ensure that they are not merely an extension of the government, but an independent oversight agency willing to speak out against their appointers if necessary.

The independence of these institutions and thus their effectiveness can be fragile and must be vigorously protected by the State, civil society and members and staff. For example, experience shows that few NHRIs are financially and administratively independent of the government. This creates ongoing tension with the need for NHRIs to maintain independence.

As more and more NHRIs are established throughout the region it is important to understand what independence and legitimacy might look like in different country contexts. NHRIS must work collaboratively -both bi laterally and through networks - to enhance the understanding of the need for independence and to assist institutions strengthen their independence where there are gaps. Creating the space for robust national institutions to operate will ultimately improve the protection of rights across the region.

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National Human Rights Institutions and the United Nations Human Rights Treaty Body System: a Rebuttal to the Sceptics

Domenico Zipoli
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Abstract

The United Nations human rights treaty body system consists of nine main Conventions establishing ten treaty bodies (TB). National Human Rights Institutions (NHRIs) from all regions are increasingly engaging with the TB system and building their capacities to ensure their most effective participation and contributions to the system. All TBs open their work to NHRIs though to varying degrees and with different statuses. Rules, working methods, and practices relating to NHRI engagement, as well as experiences by both TBs and NHRIs, have developed across the system. At the same time, a critical analysis of the TB system essentially focuses on the persistent disjuncture between existing international human rights standards and their domestic application, often referred to as the human rights "compliance gap". Some within academic circles have subjected the TBs to what may be generally referred to as the "ineffectiveness critique", branding the system as relatively weak, top-down and contextualized. Among others, the following two elements are seen as the system's inherent weaknesses: - The apparent ambiguity in standards; - The lack of a strong or judicial-type enforcement mechanism Both elements are set within an overarching legitimacy concern related to a transnational governance system which is based on the existence of collective problems shared by States and the different political systems and communities. By situating the Conventions within the most recent scholarship on human rights treaty compliance, the paper will highlight the crucial impact that NHRIs have in bringing about domestic human rights policy change following treaty ratification and the central role they need to play throughout the TB processes if they are to do so. There has increasingly been considerable discussion concerning the role of NHRIs within the TB system, both within the TBs and among TBs and NHRIs, including the Global Alliance of National Human Rights Institutions (GANHRI). It is our intention to make use of the resulting experiences and perspectives about TB– NHRI engagement to further the discussion about the necessity of analysing the TB system in a critical manner and to better appreciate the necessity of an iterative and mutually constructive relationship between global human rights norms and their domestic application.

Introduction

A critical analysis of the UN Human Rights Treaties essentially focuses on the persistent disjuncture between international human rights standards on the one hand, and practice in domestic jurisdictions on the other, often referred to as the human rights "compliance gap". A recurrent trend both amongst academic and policy environments has been to subject UN Human Rights Treaty Bodies (TBs) to what may be generally referred to as the

"ineffectiveness critique"[7] , conventionally branding the system as weak[8], top-down and a-contextualized. Amongst others, the following two elements are seen as the system's inherent weaknesses:

- The apparent ambiguity in standards;
- The lack of a strong or judicial-type enforcement mechanism.

By first of all reviewing aspects of such critical scholarship, the paper wishes to highlight that recent impact studies do not sufficiently reflect on the role of domestic non-state actors in bringing about human rights policy change following treaty ratification.[9] This paper wishes to situate the engagement of National Human Rights Institutions (NHRIs) within such narrative, framing the TB – NHRI interaction within the procedural structure of Human Rights Experimentalism (HRE). It is through this relatively novel governance theory that the above-mentioned criticisms are to be valued as necessary elements of a properly functioning system, reliant on the iterative and mutually constitutive relationship between the global norm and local contextualization. The analysis will above all focus on the ICCPR and ICESCR, two examples of earlier UN human rights treaties whose provisions do not explicitly allow for stakeholder involvement.[10] If the HRE structure results applicable to such earlier treaties, one may assume overall application throughout the TB system.

I. UN Human Rights Treaty Impact Assessments – the Fuel for Scepticism

It is nearly fifty years since the first UN human rights treaty entered into force.[11] The amount of TBs which the UN human rights system is endowed with has now grown to a total of ten, with active discussions on expanding this number further. This growth of the TB system has on the one hand increased worldwide human rights monitoring capacity, whilst on the other it has caused the system's overall complexity to bring about structural challenges to its effectiveness

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[7] S. Moyn, The Last Utopia (Harvard UP, 2012) and E. Posner, The Twilight of International Human Rights Law (OUP, 2014).

[8] O. A. Hathaway, *Do Human Rights Treaties Make a Difference?*. The Yale Law Journal 111 (2002), p. 2020; X. Dai, *The Compliance Gap and the Efficacy of International Human Rights Institutions*, in T. Risse, S. C. Ropp and A. Sikkink (eds.) The Persistent Power of Human Rights. From Commitment to Compliance, Cambridge University Press (2013), p. 95.

[9] Reliance on domestic actors is particularly crucial for international human rights, given the absence of an international enforcement mechanism and weak institutions – Dai (2013), pp. 95-96.

[10] The latest human rights treaties specifically mention stakeholder involvement, including NHRIs (CRPD, Art. 33 and OPCAT Art. 17).

[11] The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) entered into force on 4th January 1969.

(risk of substantive overlap, contradiction, lack of coordination and a fragmentation of the human rights protection system as a whole). To obviate these ensuing challenges, the UN has taken a number of initiatives, the most recent of which (2014)[12] aims to streamline and harmonize the work of the ten Geneva-based committees. Apart from structural challenges, performance evaluations of UN human rights treaties have been offering a rather bleak picture. Two different sets of assessments may be discerned, both of which use the act of formal treaty commitment (ratification) as yardstick for evaluating domestic human rights implementation.

The first category of TB performance evaluations cover a selection of (if not all) TBs within the same investigative effort. Taking six of the major human rights conventions, Emilie Hafner-Burton and Kyoteru Tsuitsui find that ratification is significantly associated with an increase in state repression.[13] Oona Hathaway discusses the apparent limits of treaties in reducing human rights violations, highlighting that "the poor reporting record merely reflects the main weakness of the treaty body regime – States lack incentives to police their compliance with Treaty Body procedure (reporting) and Treaty Body recommendations".[14] On the lack of incentives for States to comply, Anne Bayefski also finds that "states may selectively provide requested information, present information in a way that obscures the situation on the ground, or ignore concerns or questions posed by the treaty body".[15] She also points to low TB awareness, especially amongst those individuals and groups most affected by treaty violations as TB processes are mainly conducted far from domestic scrutiny (media and NGOs). In his often-cited study on human rights treaty impact, Eric Neumayer evinces that treaty ratification may be associated with worse personal integrity rights, have negative impact on civil rights and may even lead to an overall worsening of human rights in defined circumstances.[16]

The second category relates to *Treaty - specific* impact studies, highlighting the necessary specificity of each human rights treaty's functioning. The ICCPR has been subject to the highest amount of research on the impact of treaty ratification and we hereby offer just a number of selected examples. By initially asking herself whether the ICCPR makes a difference in human rights behavior, Linda Camp Keith finds no relationship between ICCPR ratification

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[12] GA Resolution 68/268, "Strengthening and Enhancing the Effective Functioning of the Human Rights Treaty Body System", 9th April 2014 (available at http://www.ohchr.org/Documents/HRBodies/TB/HRTD/A- RES-68-268_E.pdf).

[13] E.M. Hafner Burton & K. Tsuitsui, *Human Rights in a Globalizing World : The Paradox of Empty Promises*, American Journal of Sociology 110 (2005), pp. 1373 – 1411.

[14] O.A. Hathaway, *Do Human Rights Treaties Make a Difference?,* Yale Law Journal 111 (2002), p. 1935.

[15] A.F. Bayefski, The Future of UN Treaty Monitoring, Cambridge University Press (2001)

[16] Specifically within autocracies with no civil society, E. Neumayer, Do International Human Rights Treaties Improve Respect for Human Rights, Journal of Conflicr Resolution (2005).

and human rights practices.[17] Yonatan Lupu finds no significant impact – negative or positive – of CCPR ratification on physical integrity rights guarantees.[18] Wade Cole's investigation leads to similar findings, as no significant aggregate between ICCPR ratification and physical integrity or empowerment rights was identified.[19] A negative relationship between ratification and rights performance was found by Heather Smith – Cannoy, whose analysis associates ratification with worse human rights performance over time.[20] Similarly, Daniel Hill finds that ICCPR ratification is associated with a small but significant decrease in physical integrity protections.[21]

The above review suggests that whether analysis is generalized or specialized, treaty ratification alone – without the assistance of downstream domestic effects – yields little if any noticeable improvement in human rights guarantees. In other words, treaty ratification does not directly constrain violations. All the above studies have focused their investigative onus on the crystallized point of ratification rather than considering the steps taken before and after ratification. Ratification does not produce reform per se and this simple caveat is reflected in these studies' partly negative findings on the effectiveness of human rights treaties.

Let us now turn to a specific institutional dialectic which has not been taken into consideration by the above critical assessments. The analysis that follows highlights the vernacular value of NHRIs, a specific domestic actor which is part of State administration but independent from it, defined as "a bridge between international norms and local implementation […] designed to ensure the state's compliance with its international legal obligations".[22]

I. *UN Human Rights Treaty Bodies – NHRI* Interaction and Governance Dynamics

We have started this paper with a short reflection on the expansion of the UN Human Rights Treaty system. At the same time, NHRIs have also surged in numbers since the initial 1970s' wave of institutional establishment. The 1991 Paris Principles paved the way for what resulted

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[17] L. Camp Keith, *The United Nations International Covenant on Civil and Political Rights : Does it Make a Difference in Human Rights Behaviour?,* Journal of Peace Research 95 (1999).

[18] Y. Lupu, *Best Evidence: The Role of Information in Domestic Judicial Enforcement of International Human Rights Agreements*, International Organizations 67 (2913), p. 469

[19] W. Cole, *Mind the Gap : State Capacity and the Implementation of Human Rights Treaties*, International Organizations 69 (2015), pp. 405 – 435.

[20] H. Smith – Cannoy, Insincere Commitments: Human Rights treaties, Abusive States and Citizen Activism, Georgetown University Press (2012).

[21] D. W. Hill, *Estimating the Effects of Human Rights Treaties on State Behavior*, Journal of Political Studies 72 (2010), p. 1161.

[22] R. Goodman & T. Pegram, Human Rights, State Compliance and Social Change – Assessing National Human Rights Institutions, Cambridge (2012), p. 29.

in being a five-fold increase of NHRIs worldwide during the 90s and early 2000s, the total number of accredited NHRIs today amounting to 121.[23] NHRIs vary in institutional structure: Human Rights Commissions, Ombudsmen, Defensores del Pueblo, Procurators for Human Rights, and National Advisory Commissions on human rights all have distinct structural and functional peculiarities. But no matter in which form, NHRIs assist and advise States on the implementation of international human rights norms and UN recommendations.

NHRI engagement with the UN human rights system as a whole has also been steadily growing, with the Human Rights Council's close cooperation with A-status NHRIs enshrined in its very foundation (GA resolution 60/251 and HRC resolution 5/1). Further progress has been made to enhance the participation of NHRIs in the context of the UPR. With the broadening of their contribution opportunities, as per the outcome of the review of the Council in 2011 and through resolution 16/21[24], NHRIs are now involved in all UPR stages. Beyond the UPR, the close interaction between NHRIs and the Council is also exemplified by their contributions to Special Procedures. For example, national institutions help monitor and encourage the local implementation of the recommendations of Special Rapporteurs on thematic issues. In December 2015 the UN General Assembly's Third Committee, in ground- breaking GA Resolution 70/173[25], has called on all relevant UN processes and mechanisms to enhance the participation and contributions of Paris Principles compliant national human rights institutions (NHRIs) to their work. And notwithstanding specific reference to increasing TB-NHRI interaction[26], the actual extent and dynamics related to such specific cooperation is however somewhat less clear-cut. The binary, growing complexity common to both TBs and NHRIs is just one of the shared traits:

- Both of a quasi-judicial nature (soft institutions)[27];
- Both not subsidiary bodies (ideally, independent);

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[23] As of 20 June 2017, Chart of the Status of National Institutions, International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) (available at http://nhri.ohchr.org/EN/Pages/default.aspx)

[24] Available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/TF/A-HRC-RES-16-21_en.doc.

[25] GA Res. 70/173 (Third Committee), National Institutions for the Promotion and Protection of Human Rights, A/RES/70/163 (17 December 2015).

[26] "The General Assembly: […] 17. Invites the human rights treaty bodies, within their respective mandates and in accordance with the treaties establishing these mechanisms, to provide for ways to ensure the effective and enhanced participation by national human rights institutions compliant with the Paris Principles at all relevant stages of their work".

[27] A specific range of "processes and practices that have a normative/regulatory dimension, but that do not operate primarily through the conventional mechanisms of command-and-control-type legal institutions" in G. de Burca & J. Scott, *Narrowing the Gap: Law and New Approaches to Governance in the European Union*, 13 Colum. J. Eur. L. (2007).

- Both supervising States' implementation of international standards (soft mechanisms of enforcement).

TB – NHRI interaction is not an innovative call for institutional dialogue. The *Marrakech Statement on strengthening the relationship between NHRIs and the human rights treaty bodies system* (10 June 2010)[28] and the *Conclusions of the International Roundtable on the Role of National Human Rights Institutions and Treaty Bodies* (Berlin, 23 and 24 November 2006)[29] are two clear examples that international policy has indeed proceeded, at least on paper, in this direction. Furthermore two standardized mechanisms of NHRI-TB interaction already exist, namely National Preventive Mechanisms[30] and National Monitoring Mechanisms.[31] Both mechanisms have often found their domestic institutional space within existing NHRIs.

From a *governance perspective*, the classic principal-agent model, whereby States delegate specific mandate and powers to International Organizations (IGOs, in the case at hand, the OHCHR), has been challenged by the growing number of state and non-state actors involved in the transmission belt between the global and domestic arenas. In addition, this two-agent system has been found to hold inherent structural faults, amongst others the unaccountability in relation to "false positives"[32] , that is States which commit to UN human rights treaties without the intention of complying. New institutional agents are able to play important roles in the channeling, translation and application of international norms by operating in novel spaces of interaction, at bilateral, multilateral, regional and trans-governmental levels. Outside of direct state control, they are also perfectly placed to act as domestic overseers of State action vis-à-vis their international commitments. And whilst IGOs continue to play the fundamental role of norm creation and global coordination, the growing regime complexity has resulted in a shift away from exclusive State Party – UN dialectics, adding additional layers of non-state and private authority.

In order for this overgrowth of human rights governance levels to be clearly outlined and structured, international relations theorists have recently introduced the concept of *orchestration*[33], a distinct form of institutional management architecture to collaboration,

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[28] Available at http://www2.ohchr.org/english/bodies/HRTD/docs/MarrakeshStatement_en.doc.

[29] Available at http://www.osce.org/odihr/26111?download=true.

[30] OPCAT, Art. 3

[31] CRPD, Art. 33.2

[32] B. Simmons, *Mobilizing Human Rights: International Law in Domestic Politics*, Cambridge University Press (2009).

[33] K. Abbot & D.Snidal, *International Regulation without International Government: Improving IO Performance through Orchestration*, Venderbilt Journal of International Law Vol. 42 No. 2 (2009).

delegation and hierarchy. This method, useful to keep in mind during this paper's argumentation, stems from the need to bypass state consent in a governance framework which has recently turned more ambitious and open-ended than ever before. In short, orchestration occurs when (1) the *Orchestrator* (IGO) seeks to influence behavior of the *Target* (State) via *Intermediaries*, and (2) the *Orchestrator* lacks authoritative control over the *Intermediaries*, which, in turn, lack the ability to compel compliance of the *Target*.[34]

If we are to apply this structure to TB governance in relation to NHRIs, the model is adjusted accordingly: the TB Members together with the United Nations Office of the High Commissioner for Human Rights (OHCHR) act as *Orchestrators* seeking to influence the behavior of the *Target*, the States Parties to the Treaties. In between this bilateral dialectic, the model highlights the fundamental role of the *Intermediary*, in our case UN-affiliated NHRIs and their collective representative body, the Global Alliance of National Human Rights Institutions (GANHRI). It is the context-specific knowledge of and independence from the State which make NHRIs a functional gateway to inform and strive to bridge the aforementioned gap to compliance. This three-legged institutional environment (Orchestrator – Intermediary – Target) is particularly suited to the legal nature of the international human rights treaty system, based on both hard law (treaties, conventions and protocols) and soft law (recommendations, declarations, principles and guidelines) instruments. Amongst this varied mix of legal standings, NHRIs have gradually been vested with increased margins of independent and effective action outside of the State's authority, thus breaking the traditional (and criticized) two-agent (State Party – UN) system. By adding an institutional connector between international regulators and the state, orchestration suggests that the classic disconnect and distinction between the international and domestic is to be considered somewhat less draconian.

I. Human Rights Experimentalism – a Lens for Rebuttal

This paper argues that a relatively novel governance approach is perfectly suited to rebut critical assessments of TB performance, whilst at the same time elevating the role of NHRIs as key influencers towards human rights compliance by states. Human Rights Experimentalism (HRE), a human rights-specific strand of Global Experimentalist Governance[35], is "a theory of multi-level governance that proposes a way in which [human rights] policy can be made and implemented in a multi-level setting"[36] through an iterative and participatory system, amongst

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[34] T. Pegram, *Global Human Rights Governance and Orchestration: National Human Rights Institutions as Intermediaries*, European Journal of International Relations, Vol. 21 No. 3 (2015)

[35] C. F. Sabel and J. Zeitling, Experimentalist Governance in the European Union – Towards a New Architecture, Oxford University Press (2012).

[36] G. de Burca, *Human Rights Experimentalism*, American Journal of International Law (2017, forthcoming).

different situated stakeholders and actors, at different levels, across a transnational system. It is an approach which sits well with the deep pluralism typical of the international human rights system, in which complex interdependence amongst relevant state and non-state actors has led to issues of authority and policy-making being increasingly "overlapping, contested and fluid".[37] Furthermore, HRE helps the analyst to conceive such varied, multi-actor interdependence within a clear five-stage structure and represents "a form of adaptive, open-ended, participatory, and information-rich cooperation [amongst state and non-state actors], in which the local and the transnational interact through the localized elaboration and adaption of transnationally agreed general norms, subject to periodic revision in light of knowledge locally generated".[38] According to HRE theory, the multi-layered nature of the system is not an unintended result of the growing complexity of the human rights regime, which States and IGOs (the two accepted actors in the classic principal – agent model) have to learn to regulate and adapt to. To the contrary, it is a constructive and institutionalized development, "establishing relationships of legitimate authority by keeping the circle of decision making open to new participants […] and generating possibilities for effective and satisfactory problem solving in a non-hierarchical fashion."[39] For experimentalist governance to function, the following five key features have to simultaneously operate:

1. Initial reflection and discussion among stakeholders with a broadly shared perception of a common problem;
2. A resulting articulation of a framework understanding with open-ended goals;
3. The implementation of these broadly framed goals left to 'lower-level' or contextually situated actors who have knowledge of local conditions and considerable discretion to adapt the framework norms to these different contexts;
4. A continuous feedback provided from local contexts, allowing for reporting and monitoring across a range of contexts, with outcomes subject to peer review; 5. Goals and practices periodically and routinely re-evaluated and, where appropriate, revised in light of the results of the peer review and the shared purposes.[40]

The essential underpinning of experimentalist governance is thus a shared agreement on broad goals paired with the recognition that such goals will be implemented in variation– from context to context and from State to State. Such implementation is guaranteed by a system of recurrent non-hierarchical review mechanisms, with a prominent role given to stakeholder participation. Knowledge of local conditions is considered a fundamental pivot for a functioning HRE system,

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[37] *Ibid*

[38] G. de Búrca, R. O. Keohane, & C. Sabel, *New Modes of Pluralist Global Governance*, New York University Journal of International Law and Politics, Vol. 45, No. 1 (2013), p.4.

[39] Ibid

[40] G. de Búrca, R. O. Keohane and C. F Sabel, *Global Experimentalist Governance* (2014), New York University Public Law and Legal Theory Working Papers, Paper 485, p. 2.

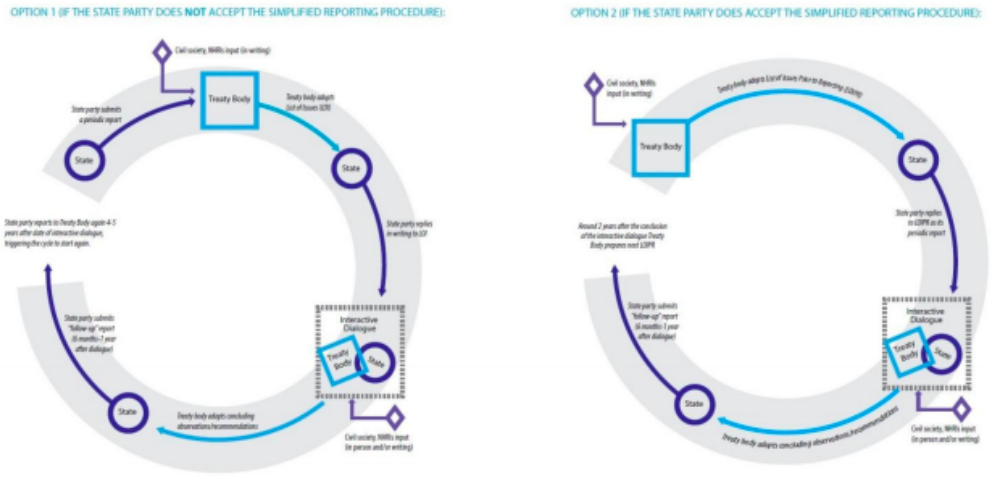
thanks to which a stream of continuous feedback flows from the local to the transnational context, aiding the reporting and monitoring necessary for a "most-effective" implementation of the accepted framework norms. The role of NHRIs as participants in the human rights treaty regime is convincingly interpreted by HRE theory. The diverse contexts and capacities related to all State Parties to a treaty mean that centrally imposed solutions to collective problems are unworkable. In order for framework norms to be effectively implemented, they need to be vernacularized through deliberative processes which include both top-down and bottom-up approaches. Paris Principles-compliant NHRIs can play an important role in such processes.

I. The *UN Human Rights Covenants – NHRI* Interaction through a Human Rights Experimentalist Lens

For clarity's sake, what follows is a chart exemplifying the reporting life cycle typical of UN human rights treaties. Certain TBs may also initiate individual complaints mechanisms and inquiry procedures, the powers for which often stem from successive Optional Protocols to the treaties. NHRIs may have important roles to play in all TB mechanisms and an experimentalist interpretation allows for a more comprehensive overview of the UN human rights treaties operations, emphasizing the significance of actors which go beyond the bilateral nature of the formally understood engagement between the state and the relevant expert committee.[41]

[41] Figure 1: C. Broeker, M. O'Flaherty, *Policy Brief – The Outcome of the GA's Treaty Body Strengthening Process,* Universal Rights Group (2014)

FIGURE 1: REPORTING LIFE-CYCLES FOR STATES PARTIES TO THE HUMAN RIGHTS TREATIES



It is due to the recent and gradual expansion of non-state actor participation within the human rights treaty regime that we now have elements which allow for an interpretation of its operations through an experimentalist lens.

Recent studies have methodically outlined the five experimentalist features within the most recently established regime, the CRPD, which clearly envisages non-state actor participation since its drafting stage and all throughout its operational cycle.[42] However this has not been the case for earlier treaty regimes and the challenge for this paper is to see whether experimentalism can be applied to the earliest forms of human rights treaties, the two Human Rights Covenants.

The growing participatory dimension, which has so far mainly been associated with civil society actors, will be analyzed by focusing on the role of NHRIs as institutional auxiliaries to the classic engagement between the State and the TB.

Diving into an experimentalist interpretation of the UN Covenants, one can find some experimentalist features more easily represented than others.[43]

Central to experimentalism are three, mutually sustaining characteristics, which elevate the importance of NHRIs (contextually situated actor) within the human rights treaty system:

a. *Broad framework goals open to contextualized interpretation for a most effective implementation;*

[42] G. De Burca, *The EU in the Negotiation of the UN Disability Convention*, European Law Review 35 (2010).

[43] For the purposes of this paper, the analysis will only focus on the State Reporting procedure

b. *Broad participation amongst a non-hierarchical and pluralist set of domestic actors;*
c. *Extensive (and recursive) deliberation.*

Each of the above characteristics will now be considered in more detail:

a). Broadness and Open-Endedness

1. Initial reflection and discussion among stakeholders with a broadly shared perception of a common problem;

2. A resulting articulation of a framework understanding with open-ended goals;

The first two elements are of easy application amongst the entirety of the treaties, including the CCPR and CESCR.

With the goal of establishing mechanisms for enforcing the UDHR, the UN Commission on Human Rights proceeded to the drafting of the two Covenants: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). During the international negotiation of the Covenants, which included nearly two decades of intense reflection and discussion before reaching a consensus amongst the 53 different member states of the UN Commission on Human Rights, "it was necessary to accommodate, bridge, submerge and conceal deep divisions and differences, especially between democratic-libertarian and socialist-revolutionary states – differences in fundamental conceptions about the relation of society to the individual, about his rights and duties, about priorities and preferences among them".[44] The product of these discussions led to the creation of the two separate treaties, and the history of their drafting led there being distinct differences between them. Contrasting phrasing is one of the most evident, with the ICCPR employing classic and more rigid rights terminology focused on individual rights (e.g. "Every human being has the inherent right to life" – Art 6; "No one shall be held in slavery" –Art 6) while the ICESCR's focus being more on the obligations of the state, characterized by more flexible language (e.g. "The States Parties to the present Covenant recognize the right to work – Art 6). This relatively more obvious open-endedness within the ICESCR articles stemmed from the argument (brought forward by Western states within the Commission) that civil and political rights were *legal rights against the state*, immediately enforceable and absolute, whilst economic, social and cultural rights were *programme rights from the state*, that would take more time to implement through what has been defined as "progressive realization".

Notwithstanding these differences, the result of contradictory pressures and approaches are directly relatable to the first two features of experimentalist governance:

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[44] L. Henkin, *Introduction* in L. Henkin (ed), the International Bill of Rights: the Covenant on Civil and Political Rights, Columbia University Press (1981), p. 9.

1. At the initial, treaty-making phase, state parties have come together in intergovernmental conferences following a shared understanding that there is a need for stronger legal standards of protection pertaining to the specific range of human rights being discussed.
2. Due to the large number of state parties to these intergovernmental conferences, and the technical necessity of reaching a consensus, both Covenants are characterized by broad and open-ended articulation which requires substantial degrees of interpretation in order for them to be translated into effective domestic implementation. This flexibility is part and parcel of a system which involves the most disparate set of countries in terms of cultural values, governmental set-ups, stages of development and so forth. The focus on "progressive realization" which ICESCR relies on is perhaps evidence of a more clear-cut intention by the drafters of open-endedness; however both Covenants clearly do not indicate precise obligations for the State Parties to follow.

Flexibility on how to implement open-ended framework goals is precisely what allows for an extensive participatory approach. NHRIs are part of this approach.

b). Growing Participatory Dimension and Recursivity – the Feedback Loop

3. The implementation of these broadly framed goals left to 'lower-level' or contextually situated actors who have knowledge of local conditions and considerable discretion to adapt the framework norms to these different contexts;

4. A continuous feedback provided from local contexts, allowing for reporting and monitoring across a range of contexts, with outcomes subject to peer review;

The *third feature* of experimentalist governance relates to the implementation of such open- ended rights through devolution of discretion to local or contextually situated actors. This feature underlines the growing participatory dimension of the human rights treaty system and its value towards a more effective internalization of global human rights standards. Indifferent to which TB and relevant TB mechanism one analyzes, the actors required to act upon them are necessarily locally or contextually situated. In general terms, both the manner of implementation and the actors involved in the process are left to the States Parties discretion, as it is only with contextual knowledge that effective choices can be made.

The *fourth feature* also puts the participatory dimension at the forefront of the treaty processes, adding a fundamental operative layer within which domestic actors can be involved as effective auxiliaries to compliance: recursivity.

These two experimentalist features are part of both Covenants' operations. Feedback provided by localized actors is channeled through both the HRCtee and CESCR within a system of periodic reporting, arguably the most characteristic monitoring measure of the UN TB system. Signatory states are in fact obliged to periodically report on their compliance with treaty obligations. Such report is then assessed by the two Committees which act in their own capacity as recognized

international experts in the field of the specific Treaty's competence. The examination of state reports, which is often referred to as a "constructive dialogue", is of a formally non-binding nature and involves a non-adversarial review of the information provided by the State, followed by a set of recommendations, also known as Concluding Observations. This institutional "weakness" can be surmounted by relying on, amongst others, NHRIs' recursive feedback and consequent pressure. It is within the fourth essential stage of HRE that NHRIs may at best be located as effective influencers of human rights compliance, acting as key actors in bridging the gap between international standards and domestic implementation. NHRIs play a crucial role in the dissemination of Alternative Reports and ground-level information which aid the Committee's experts towards more up-to-date and contextually-informed recommendations directed at State Parties. A Paris Principle-compliant and sufficiently empowered NHRI has the potential to "indirectly increase" both the CCPR and CESCR effectiveness.[45]

Even if both the ICCPR and ICESCR themselves make no explicit mention of NHRI involvement[46] (and appear to hand the norms' implementation, monitoring and reporting entirely to states and their relevant ministries), both Committees have substantiated the role of NHRIs within recent General Comments. Whilst the HRCttee, in its Genereal Comment n. 31, notes that "NHRIs" can contribute "to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies"[47]The CESCR dedicates General Comment 10 to the role of national human rights institutions in the protection of economic, social and cultural rights.[48]

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[45] T. Risse, S. C. Ropp and K. Sikkink (eds.) The Persistent Power of Human Rights, From Commitment to Compliance, Cambridge University Press (2013).

[46] Unlike the CRPD, for instance.

[47] UN Human Rights Committee (HRC), General Comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 15.

[48] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 10: The role of national human rights institutions in the protection of economic, social and cultural rights, 10 December 1998, E/C. 12/1998/25.

NHRI involvement in the implementation of the CESCR has witnessed an arguably more explicit recognition during the build up to the GC's adoption. The Limburg Principles[49] are devoid of any reference to NHRIs, partly explainable due to their adoption predating both the Paris Principlesand the ultimate international confirmation NHRIs received at the Vienna Conference on Human Rights. A decade later, the Maastricht Guidelines on Violation of ESCR (1998) were adopted, within which NHRIs are specifically mentioned amongst those actors which "should address violations of economic, social and cultural rights as vigorously as they address violations of civil and political rights".[50] Interestingly and perhaps adding a layer of doubt on CESCR – NHRI interaction, only "NGOs, national governments and international organizations" are mentioned as actors to be involved in the monitoring and documentation of ESCR violations. [51] The seeming disparity of consideration given by the two Committees is, arguably, a matter of formality. NHRIs do, in fact, increasingly contribute to both Committees' operations and the lack of clarity with respect to HRCtee – NHRI interaction has recently been covered with the adoption of the "Paper on the relationship of the Human Rights Committee with national human rights institutions"[52] in which the role of NHRIs in both the reporting procedure and the individual communications procedure under the Optional Protocol has clearly been outlined.

There are a number of institutional characteristics unique to NHRIs that make them effective as both CCPR and CESCR monitoring agents:

- First of all, NHRIs have an *empowerment advantage*. The "unique position" NHRIs occupy "somewhere between" governments and civil society,[53] means they can empower domestic stakeholders by bringing them together, thus facilitating the participation of social actors in the process. The presence of an NHRI in the Covenants monitoring process "can provide local and transnational advocacy networks with an important ally inside state bureaucracies and give social groups a channel through which to make their claims for information".[54]

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[49] Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, E/CN.4/198/17, 8 January 1987

[50] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, Jan 22-26 1997, sec. 25

[51] *Ibid*

[52] UN Human Rights Committee, Paper on the Relationship of the Human Rights Committee with National Human Rights Institutions, CCPR/C/106/3 (13 November 2012).

[53] See A. Smith, *The Unique Position of National Human Rights Institutions: A Mixed Blessing?*, Human Rights Quarterly 28 (2006), p.904

[54] A. Corkery, National Human Rights Institutions as Monitors of Economic, Social and Cultural Rights, Center for Economic and Social Rights (2012), p. 4.

- Secondly, NHRIs have an *informational advantage*. Also in line with the Paris Principles, information gathering powers are substantially more "intrusive" on state departments,sometimes amounting to powers to subpoena information. Such imposition of cooperation between NHRIs and state departments is clearly not comparable to those mechanisms of information gathering typical of civil society organizations.

Recalling Dai's theory on domestic constituencies, increasing both the political leverage and informational status of domestic actors is seen as the most effective form of influence of weak international institutions on human rights compliance.[55] NHRIs are obvious partners for weak institutions such as the HRCttee and CESCR in influencing State Parties towards compliance.

- Thirdly, NHRIs have a *temporal advantage*. NHRIs are permanent institutions which are able to track issues over extended periods to identify trends (subject of course to their institutional capacity). Under the Paris Principles, they are furthermore required to produce an annual report, which is often presented before Parliament. This periodic reporting function perfectly suits an experimentalist governance approach, as the iterative and revisionist approach that the HRCttee and CESCR seem to follow in their periodic reporting procedures can benefit from these yearly human rights-specific parliamentary discussions.
- Fourthly, and perhaps most importantly, NHRIs have an *advantage of standing*. A legally- defined relationship with the state entails that amongst those actors which contribute to both CCPR and CESCR compliance, NHRI functions can uniquely feed into the policy cycle at various points. Thus NHRIs play an important role in "linking the outcomes of monitoring with the development or amendment of policy, to ensure that actions taken by the state to give substance to its international obligations in fact achieve their stated aims".[56] The Paris Principles envisage a 'triangular' relationship between the international system-state- NHRI[57] an institutional remedy to

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[55] X. Dai, International Institutions and National Policies, Cambridge University Press (2007); X. Dai, *The Compliance Gap and the Efficacy of International Human Rights Institutions*, in T. Risse, S. C. Ropp and K. Sikkink (eds.) The Persistent Power of Human Rights. From Commitment to Compliance, Cambridge University Press (2013).

[56] *Idem.*

[57] R. Carver, *A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law*, Human Rights Law Review 11 (2010) at p. 20.

the "mutual distrust between the international system and state parties.[58] If NHRIs act as genuinely independent intermediaries in the process, their contextually provided information should authoritatively certify or contest the State's interpretation of its performance under both the ICCPR and ICESCR as well as increase the States' receptiveness of HRCttee and CESCR recommendations if these are substantiated by information gathered, amongst others, by an official process at the national level.

This triangular relationship is also important in ensuring the implementation of HRCtee and CESCR recommendations, as both international mechanisms so far lack formal follow-up procedures at the national level.

And although "monitoring" as a term is not explicitly mentioned within the Paris Principles, NHRIs do rely on ongoing activities that "systematically use information" to measure the achievement of defined targets" and provides feedback on the processes for implementing these targets.[59] Such "monitoring" techniques" have been defined as activities that "all NHRIs are to be engaged in".[60] During the TB reporting cycle, NHRIs may first of all provide input during the reporting process both to the Committee, in the form of either alternative reports submission or through private meetings in advance of the official hearings, and to governments themselves, in preparation of the official report. Through these practices, NHRIs are in a position to influence the recommendations by suggesting steps which their respective governments should take to fulfill their obligations, with the invaluable insight into what is, and what indeed is not, achievable within their national context.

After the Committee's adoption of Concluding Observations, a select number of recommendations (usually the most urgent) enter the so-called "Follow-up" procedure, a mechanism put in place to check on the State Party's commitments even in-between submissions of periodic reports. NHRIs during both Follow-Up and in-between periodic reports' submissions more generally, may thus pressurize governments through their peculiar array of institutional actions, including advocacy for legislative reform, facilitating cooperation of domestic actors, actively engaging with the media and (if their specific mandates allow for it) bringing strategic litigation and undergoing national inquiries.

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[58] A. Rosga and M. L. Satterthwaite, *The Trust in Indicators: Measuring Human Rights*, N.Y.U. Pub.Law & Legal Theory Research Paper Series, Working Paper No.08-59, 2008, pp. 27 -28.

[59] High Commissioner for Human Rights, Report of the High Commissioner for Human Rights on Implementation of Economic, Social and Cultural Rights, delivered to the Economic and Social Council, U.N. Doc. E/2009/90 (June8 2009).

[60] R. Carver, *A New Answer to an Old Question: National Human Rights Institutions and the Domestification of International Law*, Human Rights Law Review 11 (2010).

NHRIs' strategic position as monitoring stakeholders enables them to act as both receptors and transmitters within the recursive cycle of CCPR and CESCR activity, as defined through experimentalist theory. Their unique standing also enables NHRIs to translate externally negotiated human rights norms for local audiences. As human rights *intermediaries*, NHRIs can "put global human rights ideas into familiar symbolic terms and use stories of local indignities and violations to give life and power to global movements. [NHRIs] hold a double consciousness, combining both transnational human rights concepts and local ways of thinking about grievences".[61] Whilst taking the U.N. human rights instruments as their core frame of reference, NHRIs are what experimentalist theory calls "contextually situated actors who have knowledge of local conditions". With such a unique standing, NHRIs hold significant potential to act as translators between the universal claims of the international rights regime and national idiosyncrasies.

Acting as a bridge between international and domestic spheres of action, as well as being part of the state administration but independently so, NHRIs are perfectly placed to provide direct services to people affected by the gaps identified by the TB mechanism. NHRIs, through their context-specific expertise, are often involved in the publication of guidelines and the establishment of databases which can be invaluable both domestically and in relation to further TB examination. The fourth feature of experimentalism is thus covered by NHRIs as they bring fresh data and new issues from contextualized and situational knowledge, fueling what one may define as "transnational learning".

c) Periodic Re-evaluation and Revision

5. Goals and practices periodically and routinely re-evaluated and, where appropriate, revised in light of the results of the peer review and the shared purposes.[62]

Apart from emphasizing the participatory dimension of locally situated actors and their role in providing information, translating and vernacularizing norms from the international to the local, experimentalist governance considers the process of iterative "learning from difference" as an essential element to its theoretical structure. Although initially applied to the European Union's architecture[63], iteration and revision may also explain how to solve the apparent legitimacy gap of the UN human rights treaty system, where common problems are shared amongst its

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[61] S. E. Merry, *Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States*, Global Networks 9 (2009), pp. 441–461

[62] G. de Búrca, R. O. Keohane and C. F Sabel, *Global Experimentalist Governance* (2014), New York University Public Law and Legal Theory Working Papers, Paper 485, p. 2.

[63] C. Sabel and J Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU,*European Law Journal 14 (2008), p. 271.

participants (the legal norms being set to counter such problems) and the inherent deep, contextually-driven, diversity of the participants to the system.

The extent of NHRI involvement within the periodic re-evaluation to which the fifth feature of experimentalism refers to is not as clear-cut as with the preceding two characteristics.

If one looks at the State Party-specific reporting cycle of both HRCttee and CESCR, NHRIs are allowed to inform both Committees with new data and information, regularly informing both procedures with updates from "the local".[64] In this *country-specific sense*, NHRIs are included in the periodic re-evaluation of domestic goals and practices.

However if one considers re-evaluation of the *broader framework norms* themselves, NHRIs are considerably less active. Revision may be evinced by the use that both Committees make of General Comments (GCs) in order to update the original, fifty year old, Covenants. Both the HRCtee and CESCR have utilized GCs (and General Discussion days in preparation of GCs) as an opportunity to update and include issues which had not been taken into consideration at the time of ratification. International NGOs and academic experts have increasingly been involved in drafting GCs, but NHRI participation in these processes has been close to non-existent.[65] Critics have pointed out that the HRCttee has formulated its GCs within closed meetings and that not all actors involved in the ICCPR system participate in the process, with its internal consensus-driven procedure reflecting the common-denominator of the experts' opinions and not much else.[66] With the adoption of the "Paper on the relationship of the HRCttee with NHRIs"[67]It seems to have acted upon these criticisms as it specifically addresses and invites NHRI input on the drafting and use of the Committee's GCs. Only one GC has been adopted since (GC N. 35, replacing GC 10, on the Right to Liberty and Security of Persons (art.9) in 2014[68]) and the HRCttee duly solicited the input of National Human Rights Institutions (NHRIs), non-governmental organizations (NGOs), and academia to submit comments on the draft. Regrettably, the Danish Institute for Human Rights was the only NHRI to submit a comment.[69]

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[64] Network of African NHRIs, Network for the Americas , Asia Pacific Forum, European Network of NHRIs.

[65] Research on OHCHR Database website (May 2017).

[66] Amongst others, Yogesh Tyagi, The UN Human Rights Committee – Practice and Procedure, Cambridge University Press (2011), p. 294 and E. Marsh, General Comments available at www.icva.ch/doc00000486.html, para 38 -39.

[67] 80UN Human Rights Committee, Paper on the Relationship of the Human Rights Committee with National Human Rights Institutions, CCPR/C/106/3 (13 November 2012).

[68] UN Human Rights Committee (HRC), General comment no. 35, Article 9 (Liberty and security of person), CCPR/C/GC/35 (16 December 2014).

[69] Available at http://www.ohchr.org/EN/HRBodies/CCPR/Pages/DGCArticle9.aspx

Notwithstanding the arguably more explicit provisions related to NHRI involvement in CESCR' operations, an analysis of Written Submissions on Draft CESCR GCs show no NHRI submissions, in contrast to the vast array of international NGOs and academics involved in the process.[70]

From this preliminary analysis it may be argued that the iterative revisionary dimension has increasingly been present within the Covenants' operations. However NHRIs have barely been involved in this revisionary process of the framework norms themselves. In both Covenants' GCs submissions and Discussion Days, apart from TB experts (some with a professional NHRI background) and State representatives, it has been mainly international NGOs and experts from academia which have collaborated towards norm revision. It may thus be tentatively argued that for matters of general application, NHRIs tend to be excluded (self-excluded?) with their input being more important during their own State's reporting on treaty compliance. One possible role within this fifth experimentalist feature which may include NHRIs into these revision procedures is input by regional/global NHRI organizations such as the GANHRI, APF, NANHRI, ENNHRI and the Network for the Americas. These organizations have the capacity to offer contextually-relevant advice built on the shared opinions of many national institutions at once, with a unique experience in terms of bridging the so-called compliance gap between the international and domestic.

I. **Conclusion**

This paper has attempted to first of all rebut the critical assessments directed at UN human rights treaties performance. Impact assessments should now step away from ratification effects only and look at the causal mechanisms and conditions underlying human rights treaty impact following the first act of ratification.

Secondly, NHRI interaction with the two Covenants has been interpreted through a Human Rights Experimentalist lens. Within all of the five experimentalist features, NHRIs have the potential to play an influential role in successfully integrating and disseminating (in this case both HRCtee and CESCR) recommendations stemming from the reporting cycle into their country's domestic human rights system. Some reservations remain as to how much NHRIs are able or indeed willing to participate outside of their own State's reporting cycle, as can be seen by their lack of action when called for framework goal re-evaluation (HRE feature 5).

Within the limits of the present paper, it is hard to outline the various TB-specific idiosyncrasies which relate to NHRI involvement. One may analyze each of the mentioned NHRI – Covenants engagement practices in detail and find means of empirically explaining the direct causation links between them and more effective implementation of the

[70] Research on OHCHR Database website (May 2017).

Covenants' action. It will indeed be part and parcel of this paper's further development. The ongoing Treaty Body Strengthening Process, initiated by Res. 68/268[71], has been actively engaged with NHRI involvement, most notably through the High Commissioner for Human Rights report to the Secretary General on TB Strengthening[72] in which she encouraged TBs to institutionalize "aligned models of interaction among treaty bodies and national human rights institutions […] to harmonize the way the treaty bodies engage with national human rights institutions". Of crucial potential in this regard, Agenda Item 12 of the upcoming Meeting of TB Chairpersons titles "Development of a common treaty body approach to engaging national human rights institutions".[73] It is thus important to substantiate the positive role that NHRIs have in the TB system, and an experimentalist governance framework may help in light of future reform.[74]

To conclude, future TB impact assessments should focus on the relationship between human rights treaties and practices on the ground and not on one-shot treatment of ratification as a catalyst for domestic human rights change in and by itself.[75] Incorporation of the treaties' content into domestic policy is in fact to be witnessed in multi-staged, multi-stakeholder processes which span many years, before and after ratification. It is only under certain domestic institutional circumstances that conventions can incentivize facilitation of enhanced human rights protection and NHRIs are perfectly placed to aid towards such endeavour.

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[71] United Nations, GA Resolution 68/268, "Strengthening and Enhancing the Effective Functioning of the Human Rights Treaty Body System", 9th April 2014 (available at http://www.ohchr.org/Documents/HRBodies/TB/HRTD/A-RES-68-268_E.pdf).

[72] Report of the United Nations High Commissioner for Human Rights on the Strengthening

[73] 29th Meeting of Chairpersons (26 – 30th June 2017, New York), available at: http://www.ohchr.org/Documents/HRBodies/TB/AnnualMeeting/29Meeting/ProvisionalAgenda.docx.

[74] GA Res A/RES/68/268, para 41 decides that by no later than 2020, the General Assembly will undertake a comprehensive review of the effectiveness of measures taken 'in order to ensure their sustainability, and, if appropriate, to decide on further action to strengthen and enhance the effective functioning of the human rights treaty body system'.

[75] K.L. Cope and C.D. Creamer, *Disaggregating the Human Rights Treaty Regime*, Virginia Journal of International Law, Vol. 56, No.2 (2016).

ASEAN Regional Cooperation on Anti Trafficking in Persons Especially Women and Children.

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Abstract

The purpose of this study is to discuss the scope of the problems within the regional cooperation among ASEAN member-states against trafficking and to evaluate the adequacy of these regional responses. The Association of Southeast Asian (ASEAN) member states has developed regional cooperation to combat trafficking in person, especially women and children i.e. *ASEAN Convention Against Trafficking In Persons, Especially Women and Children (ACTIP-WC).* Ratification ACTIP-WC shows recognition of the urgency in addressing the problem of human trafficking and establishes a legal framework to combat the issue. This commitment made by ASEAN member states are both necessary and urgent considering Southeast Asia has the highest rate of human trafficking in the world. The importance of the issue needs the following questions analyzed: What are the challenges in conducting the regional cooperation on anti-trafficking? Are member states able to develop a genuine cooperation that sufficiently eliminates human trafficking in the region? This paper discusses the process and adequacy of the legal frameworks on anti trafficking; and an examination of the notable 'trafficking' cases in Southeast Asia, namely the "Siti Aisyah" case (Indonesia-Malaysia) and the "Mary Jane Veloso" (Indonesia-Philippines).

***Keywords*:** Trafficking, women, regional cooperation, ASEAN, Indonesia, Malaysia, Philippine

Introduction

Southeast Asia (SEA) is in a critical condition when it comes to human trafficking. This region has the highest rate of destination, source and transit for trafficking in the world. Victims of human trafficking (often referred to as "modern slavery"), has been rampant in SEA with its countries placing high in the 2016 Global Slavery Index (GSI). The index looked at 176 countries in its analysis and found around 45.8 million people to be "enslaved" across the world, with SEA countries such as Indonesia, Myanmar, Thailand, and Philippines ranked in the top 20 in absolute people number of people trapped in modern slavery.

Women and children in Southeast Asia are the dominant victims of the human trafficking, where approximately 55-60% of trafficking victims are women. According to the International Labour Organisation (ILO), the majority of people trafficked for sexual exploitation or subjected to forced labour are female. It has been conservatively estimated that at least 200.000 – 225.000 women and children from Southeast Asia are trafficked annually, and this represents nearly one third of the global trafficking trade (UN Women). The survey mentions that supply and demand sides of the human being trade are served by "gendered" vulnerabilities to trafficking.

To put it generally, Trafficking in Persons (TIP) activities have been caused by triggers that impose a threat to humanity and society such as economic crisis, reduced survival rate, armed conflict, ethnic cleansing, limited freedom to move, or social and political imbalance. These triggers or factors alone does not cause trafficking, but contributes to the vulnerability of victims and provides an open opportunity for trackers in running their illegal business (Kosser 2013, Sassen 2013, UN 2013). For example gender biased policy that results in women having a dependability on men. This imbalance in appreciation will place women in a dangerous position when man's support to women is no longer existent or withdrawn. While a national effort in combating trafficking in person is essential, regional or multilateral engagement is a key component for effective anti-trafficking effort. Trafficking is categorized as a trans boundary threat as perpetrators would mostly network and have links to neighboring states in conducting the crime. Therefore, countries cannot work alone to counter this problem. In handling people trafficking, particularly women and children, cross border cooperation at regional and international level is a must and inevitability

In order to respond to the growing number of human trafficking, particularly women and children, the member of Association of Southeast Asian (ASEAN) states has developed regional cooperation to combat Trafficking in Persons, especially women and children. At the High Level Meeting of the ASEAN 27 in Kuala Lumpur, Malaysia, on 21 November 2015, the Heads of State has signed the ASEAN Convention against Trafficking in Persons, Especially Women and Children (ACTIP-WC). This Convention continues the effort of ASEAN Declaration against Trafficking in Persons, Especially Women and Children (ACTIP-WC) issued in 2004.

The Convention shows the ASEAN member states commitment to the implementation of the existing principles of human rights and protection of women and children as set forth in the *Universal Declaration of Human Rights*, *ASEAN Human Rights Declaration*, the *United Nations Convention Against Transnational Organized Crime* and *Protocol to Prevent and punish Trafficking in Person, especially Women and Children*. Ratification of the ACTIP-WC shows understanding and recognition among the states on the urgency to address the problem of human trafficking, especially women and children occurred in the region. The Convention states that the agreement is based on the following: "*RECOGNIZING that trafficking in person constitutes a violation of human rights and an offense to the dignity of human being"* (ASEAN, 2015). This clause demonstrates that the ASEAN member states acknowledge that the act of Trafficking in Persons is a gross violation of human rights as well as threat to honor and dignity as a human being. More importantly, the convention establishes a legal framework for the ASEAN region to address the issue of trafficking of persons especially women and children.

The commitment of ASEAN is necessary and urgent in response to the demand from international standard in combatting human trafficking. In 2016, the US State Department released its annual Trafficking in Persons (TiP) report placed SEA countries namely Brunei, Cambodia, Vietnam, Indonesia, Singapore and Thailand in Tier 2[76].

[76] Tier 2 means that the government of a country that does not fully meet the Trafficking Victims Protection Act (TPVA)'s minimum standard but is making significant efforts to meet those standards

Notably, Malaysia is placed in the Tier 2 Watch List,[77]and Burma ranked within Tier 3[78]as one of the "worst offenders" according to this report. This data shows how serious human trafficking issues in SEA from an international standard point of view and requires states to take strong action in handling human trafficking.

SEA government response in responding to human trafficking can be categorized as low. From the total score of the most responsive countries in the world like Netherlands which has a score of 78.43, SEA countries show a comparatively low score to Netherland's i.e.: Cambodia (35,67), Malaysia (35.15), Myanmar (33.76), Indonesia (40,61); and Thailand (41,52).

Interestingly Philippines has the highest score among SEA countries (54.18) with a relatively strong response rate despite fewer resources. Therefore the ratification of ACTIP is an important step to respond to international concern of SEA's condition in regard to the problem of human trafficking.

The convention recognizes this and has highlighted the significance to combat transnational crime together regionally. It is acknowledged that transnational crimes such as human trafficking will not be successfully crushed if it is fought only at the national level. Law enforcement and prevention at the national level does not seem sufficient as the case of TiP in ASEAN is still high.

Therefore even though ASEAN member states have highlighted the significance to counter trafficking, this regional effort needs to be assessed on its impact and its possibility to be implemented significantly. Here, the following questions are asked: What are the challenges in conducting the regional cooperation on anti-trafficking? Are member states able to develop a genuine cooperation that sufficiently eliminates human trafficking in the region? The purpose of this study is to discuss the scope of the problems of the regional cooperation among member-states of ASEAN against trafficking in women and children in Southeast Asia and to evaluate the adequacy of these regional responses.

It is argued that while there is intention to combat trafficking in women and children among ASEAN member states collectively, it still faces fundamental constraints to significantly address the problems. The interest in saving and protecting women and children tend to be neglected because the state still marginalize the interests of women and children in facing threats comes from human trafficking. In responding to the issue of security of women and children, the state prioritizes its narrow interests of the state survival rather than representing the women and children's needs. The government has not taken the idea of a dangerous threat to the women and children being exposed by trafficking activities seriously.

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[77] Tier 2 Watch List refer to government of country that do not fully meet the Trafficking Victims Protection Act (TPVA)'s minimum standard but are making significant efforts to meet those standard and a) the absolute number of victims of severe forms of trafficking is very significant or is significantly increasing, b) there is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year, and c) the determination that a country is making significant efforts to meet the minimum standards was based on commitments by the country to take additional future steps over the next year.

[78] Tier 3 if the government of countries do not fully meet the TVPA'a minimum standards and are not main significant efforts to do so

Similarly, regional cooperation which is expected to significantly reduce this transnational crime will assume to run on the spot. Translating ACTIP-WC into reality remains problematic. This is due to the policy of the states in Southeast Asia which holds strongly the traditional sovereignty. This does not allow strong cooperation among ASEAN countries in dealing with transboundary crimes. The state is more alert in mobilizing the resources to defend the territory from an alien/enemy attack that tries to seize its territory than to deal with women and children issues. The interest in saving and protecting women and children is neglected because from the state point of view, the security and interest of women and children is not a priority. States have more interest in dealing with "high politics" issues rather than the issue of trafficking women and children which is considered as "low politics".

This paper will discuss: firstly, the regional norms that exist in the region and analyze the differences of such norms among the member states; secondly, the process and adequacy of the legal frameworks on anti-trafficking; and thirdly, an examination of the notable 'trafficking' cases in Southeast Asia, namely the "Siti Aisyah" case (Indonesia-Malaysia) and the "Mary Jane Veloso" (Indonesia-Philippines). An analysis of the two cases reveals the difficulties that arise in conducting regional cooperation in combatting human trafficking due to, among others, difference in norms and sovereignty issues.

Ratification Process and the Pitfall of the Convention

ACTIP-WC is a result of a long journey among ASEAN members to acknowledge the significance of cooperating in combating trafficking regionally. Initially ASEAN member states adopted the ASEAN Declaration against Trafficking in Persons Particularly Women and Children on 29 December 2004 in Vientiane, Lao People's Democratic Republic. The Convention also shows the ASEAN member states commitment to the implementation of the existing principles of human rights as well as to protect women and children as set forth in the *Universal Declaration of Human Rights*, *ASEAN Human Rights Declaration*, the *United Nation Convention Against Transnational Organized Crime* and *Protocol to prevent and punish Trafficking in Person, especially Women and Children.*

The copy of the UN Protocol is also found in some of the ACTIP-WC chapters for example in Article 1 ACTIP-WC which mentions the purpose of the protocol as follows:

> ".. to effectively a. Prevent and combat trafficking in person, especially against women and children"…b. Protect and assist victims of trafficking in person with full respect for their human rights and .. "c. To promote cooperation among States"

The idea behind UN Protocol and ACTIP – WC is to encourage states to cooperate and take strong action to combat trafficking in person, particularly women and children. Most importantly, states must prioritize protecting women and children since they are the most vulnerable victims from the exposure of trafficking activity and used to be marginalized in society. The similarity in the ACTIP and the UN Protocol can be understood, as all ASEAN members are the state Parties of the Palermo Protocol and are expected to be committed in implementing them. The adoption has also shown how and to what extent the international norms and regulation can influence the policies of the countries in the region particularly, as well as how far ASEAN member states have adopted the international norms. The ACTIP-WC obliges

ratification from at least six countries to be effectively into force. Philippines became the sixth among the 10 ASEAN member states to ratify the convention after depositing the country's instrument of ratification to the ASEAN Secretary General on 7 February 2017. Cambodia, Singapore and Thailand ratified the convention earlier in 2016. Burma is the fourth country then approved the ratification in December 2016.

The six countries that ratified the convention have shown the strong government's political commitment to combating trafficking in person regionally. However, the commitment for regional cooperation is in line with the national agenda. In other words, ASEAN member states will cooperate regionally in combating trafficking as long as this is in line with national agendas and its authority. Regional agenda that do not conform to or are beyond the capacity of state to act are difficult to realize.

For example the ratification of the convention confirms Thailand continued commitment to combating human trafficking and is consistent with the government's policy which declared fighting human trafficking as a national agenda. It also underscores the government's commitment to cooperate with ASEAN Member States to jointly combat this crime. Similarly, Burma's union Parliament approved ratification in December 2016 of the ACTIP-WC was an attempt to strengthen regional collaboration in combating trafficking as well as reducing cases of trafficking in the country (Nyien, 2016).

The consideration of the priority of the national interest that is more specific to the national reputation in ASEAN has encouraged the Philippines to immediately ratify ACTIP-WC in 2017. The Philippines is an ASEAN co-chair in 2017 and is concerned to show that Philippines is in charge of a good ASEAN chairman by running agreed agendas. As Philippine permanent representative to ASEAN Elizabeth Buensucceso argues that "the ratification of the ACTIP is included in the "dream list" of deliverables during the Philippines chairmanship of ASEAN this year" (Mateo, 2017).

Interestingly, Indonesia is expected to be at the forefront of issues of combating trafficking. Instead, this country does not belong to the preceding six country category in ratifying the ACTIP-WC and has lagged behind Cambodia and Burma which ratified in December 2016. One of the reasons for this delay can be attributed to the process of Indonesian law making . Indonesia's "lateness" in submitting its ratification instruments, is mainly because the bill is currently still in the process of harmonization with national law at the House Representative (Yosephine, 2016). Indonesia's delay to deposit may also mean that the issue of regional cooperation in combating trafficking in women and children is not urgent or priority for the national interest.

The convention has established a legal framework for the ASEAN region to address the issue of trafficking of persons especially women and children. With this ratification is hoped that significant regional cooperation on trafficking women and children can be implemented. However, significant implementation of the ratification remains questioned particularly due to the history of the member states which lacks a strong adherence to rule of law. This problem will be explained below.

Problems of Cooperation in conducting the 3P

A fundamental international framework used around the world to combat human trafficking, including the ACTIP, is the "3P" paradigm, which emphasizes prosecution, protection and prevention. While this serves as the approach, the forms and areas of cooperation in dealing with trafficking among the member states are mentioned specifically in article 12 and article 13. Article

12 mentions the area of regional cooperation that include investigation and prosecution of trafficking: " *To further strengthen regional cooperation in the investigation and prosecution of trafficking in persons case*." The ACTIP goes so far as mentioning the intervention of the state on the obligations of member states of ASEAN to make strict actions against traffickers, " ... *To ensure that any person who perpetrates or supports trafficking in person is brought to justice*." This agreement demonstrates ASEAN members commitment to significantly persecute the parties that are involved in this crime.

However, identifying what constitutes trafficking in this sense is not easy. ASEAN member states particularly face difficulty to agree upon what cases constitute trafficking. In Article 2 of ACTIP-WC, ASEAN has defined trafficking is as follow:

> "the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation"…. (ACTIP-WC).

The definition above is actually adopted from UN *Protocol to Prevent, Suppress and Punish Trafficking in Person, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime*, within Article 3.

Although the notion of trafficking has a character that distinguishes it from other types of crimes, in practice it is often interpreted differently by each country. For example may be that a host state usually provides a punishment on a smuggling charge while the community and government of a home country from which the victim comes from would believe that the victim is as an act of trafficking. An example of this can be seen in the "Siti Aisyah case" whereby she was accused of murder –a case which involves the Indonesian and Malaysian government– and the "Maria Velose case" whereby she was a suspect in a drug smuggling –a case which involves the Indonesian and Philippines government, and later causing turbulent relations among the two government–. The cases have brought intense debate among communities and government in countries involved. In both cases, there was no agreement between the countries about interpreting the case as trafficking or other criminal cases such as drug smuggling. (The differences among ASEAN member countries and its problem is explained in detail by reviewing Siti Aisyah and Maria Veloso case studies below).

Even when evidence has been found that a person has been a victim of trafficking, in fact, it is not easy for a host country to work together to prove them as a victim of trafficking. Usually by reason of the national sovereignty to determine its absolute policy in its own territory and not intervened by another state, the host country remains adamant not to be willing to change its decision. The regional norms and rules have strengthened the idea of traditional sovereignty. In Article 4 of protection of sovereignty stated: (ACTIP-WC, 2015)

> "The parties shall carry out their obligations under this convention in a manner consistent with the principles of sovereign equality and territorial integrity of states and that of non intervention in the domestic affairs of other States."

Without significant agreement between the ASEAN member states, the law enforcement may fail to identify victims and instead penalize them for crimes committed as a result of being subjected to trafficking.There are also doubts on whether rules in the protection of trafficking victims can be applied. Chapter IV, .Article 14 about Protection of Victims of Trafficking in Person mention this country duty:

"Each Party shall, where applicable provide care and support to victims of trafficking in persons within a reasonable period, information on the nature of protection, assistance and support to which they are entitled to under domestic laws, and under this convention."

Some countries in ASEAN may be reluctant to bear the burden to provide enough facilities for the victims. For instance Indonesia already bears the heavy burden as a transit country from the illegal immigrants that currently overflow to this region. This country together with Malaysia receives many illegal immigrants from Burma or the Middle East, most of which will go to Australia as the destination country. Indonesia will receive a heavy burden if it strictly abides by these conventions. This is also the reason why Indonesia is not in the front run to ratify the ACTIP-WC.

Indonesia is struggling to allocate funds and assistance to deal with the victims of trafficking that need protections, assistance, rehabilitation or rehabilitation as the agenda of ACTIP-WC requires to do so. In fact, Indonesia has been refusing to carry out an obligation to look after the refugees or asylum seekers by not signing and ratifying the 1951 Refugee Convention relating to the Status of Refugees (Refugees Convention) and the 1967 Protocol relating to the status of Refugees.

In order to meet the effort for prevention in trafficking, ASEAN has mentioned various immediate and short term actions that can be done before necessary long term policies are implemented. In chapter III, *Protection of Victims of Trafficking in Persons* stated:

> (1) The parties shall establish comprehensive policies programmes and other measures:… (2) The parties shall endeavor to undertake measures such as research, information and mass media campaigns and social economic initiatives to prevent and combat trafficking in persons…(4) The Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to multilateral cooperation to alleviate the factors that make persons, especially women and children vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity

But the unwillingness and the inability to seriously address the trafficking victims lead to the question of whether the commitment of ASEAN members to combat trafficking can be carried out successfully. This will consequently hamper to implement ACTIP-WC regional cooperation meaningfully.

The two cases studied below can demonstrate the challenge of ASEAN regional cooperation in combating trafficking in person particularly women and children.

Evaluating the case studies: the vulnerability of women and regional weakness

Case Study 1: Mary Jane Fiesta Veloso in Drug-Trafficking. Mary Jane Fiesta Veloso, was arrested in April 2010 for drug trafficking after being caught with 2.6 kilograms of heroin in a suitcase by the Customs and Excise Authorities at the Adisucipto International Airport in Yogyakarta, Indonesia. Veloso, who's then sentenced to death in October 2010, got spared due to a moratorium on capital punishment enacted by Indonesian President Susilo Bambang Yudhoyono. President Benigno Aquino III in August 2011, requested for clemency a year after Veloso had already been sentenced to death.

Yet, in December 2013, the newly elected President of Indonesia, Joko Widodo, issued Presidential Decision No. 31/G - 2014 rejecting all pending requests for executive clemency, particularly for drug-related cases, including that of Mary Jane (Diola, 2015). In May 2014, the Philippines Embassy made a request to the Indonesian Ministry of Law and Human Rights to schedule a jail visit to Veloso, but until October 2014, Indonesian government was not able to act on the request and the year ended without any visit being implemented. Instead, the Philippines Embassy received a note verbale in January 2015 from the Indonesian Foreign Ministry stating that the request for clemency was denied by President Joko Widodo. During the year of 2015, Indonesia planned to execute 20 death convicts and Veloso's name was already included as the 11th in the death row list.

Veloso's case gained support in Indonesia, Philippines and internationally after her appeals for clemency were rejected. World champion boxer Manny Pacquiao, are some notable Filipinos who supported her who even visited her at her Yogyakarta prison. Internationally, Nobel Peace Prize winner and former East Timor President Jose Ramos-Horta, British tycoon Richard Branson, United Nations Secretary General Ban Ki-moon, spoke publicly in support of Veloso. Huge support from many people around the world were also shown through protests, such as the Migrant Care and Labor Unions protest to urge Indonesian President to abolish the death penalty. The network of overseas Filipino workers, Migrante International, launched a series of protest actions through online movement as well.

A courtesy call between Indonesian President Joko Widodo and President Aquino, the latter once again appealed the case of Veloso. Yet, in May 2015, the Indonesian Supreme Court released on its website a report that it had rejected the Petition for Judicial Review filed by Veloso, whereas the private lawyer and Philippine Embassy had not yet received any official written notice

on the matter. Even though President Aquino has sent his second letter to President Widodo, requesting the grant of an executive clemency for Veloso, President Widodo stance did not change a bit on drug-related offenses. Whereas, during President Rodrigo Duterte term of government, it has been decided that the talk depends on Indonesian President Joko Widodo and his government. Duterte stressed that he does not have any proposal on Veloso’s case yet since the talk will depend

on the Indonesian government (Adel, 2017). At the last bilateral meeting of the two presidents, discussion was merely focusing on both countries counterterrorism working groups, to trade and investment. Despite a number of agreements, the bilateral meeting did not discuss the fate of death row drug convict Veloso (Halim, 2017).

In reconciling Veloso's drug-trafficking case, the Philippines invoked a regional treaty, namely ASEAN Mutual Legal Assistance Treaty (ASEAN MLAT), signed to fight transnational crimes in Southeast Asia, which obliges Indonesia to help provide Veloso as a witness to the human trafficking court case (Holmes, 2016). Leila de Lima, Philippine Justice Secretary, suggested invoking the ASEAN MLAT with President Aquino, on the basis that the case would basically prove that Veloso is a human trafficking victim, not a drug trafficker (Esmaquel, 2015). Through ASEAN MLAT, countries are obliged to help each other in fighting crimes across their borders and measure mutual legal assistance in criminal matters so that it could become a major instrument in ending impunity for traffickers. Besides both countries' discussion on the security of sea lanes, cross-border traffic and patrol, and economic cooperation, a possible high-level discussion on Veloso's case was also expected to occur. Yet, all of these attempts that have been made are just a postponement, not an annulment. To conclude, it can be seen that even the Philippines tends only to take formal procedural actions in solving this case. The massive settlement movement only happened at the community level.

Case Study 2: Siti Aisyah's Murder Plot/Trafficking. Siti Aisyah was arrested on 14th February 2017, a day after the death of Kim Jong-nam –the older step brother of Kim Jong-un, the Supreme Leader of Democratic People's Republic of Korea–. Up until now Siti Aisyah, an Indonesian citizen that lived in Malaysia has been accused as one of the murderers of Kim Jong nam along with a Vietnamese woman by the name of Duan Thi Huong. She was captured after a Malaysian police unit was convinced by the CCTV recordings given by Kuala Lumpur International Airport authorities. Siti and Duan was seen smothering Kim Jong-nam with a napkin

while he was waiting for his flight in a boarding room. A statement released by Siti Aisyah indicated that she was volunteering for a prank TV show that rewards her with 400 Malaysia Ringgit and that she has no idea it was a murder scenario. There have been no official statements or responses from Malaysian government towards Siti Aisyah's personal statement of the fraud she claims in the media. Siti Aisyah and Duon Thi Huong, in the eyes of the Malaysian Government, are currently defendants for the case. Both are understood to have violated verse 302 of Malaysian law for conducting a Premeditated murder towards Kim Jong Nam (Erdianto, 2017)

Ever since the capture, Polis Diraja Malaysia (PDM) Malaysian government has conducted a number of investigations and has then put Siti Aisyah into a Malaysian-based trial in such a hastily manner. Indonesia as the country responsible for protecting her has been showing supportive actions on putting her out of the trials and sending certain demands to Malaysia based on the Vienna Convention. Indonesian authorities stance to remain neutral raised internal public discourse whereby the public has demanded Indonesian's government to be more aggressive in terms of demanding 'justice' for Siti Aisyah and not only reminding Malaysia to respect the Vienna Convention on Diplomatic Relations.

There was no clear coordination between Indonesia and Malaysia in the investigation

process, this is seen by Malaysian behaviour that keeps on rejecting Indonesian's demand towards intervention on the investigation. Rather than giving clear information of the whole investigation process, Malaysia chose to give political stance towards DPRK accusing them of recruiting Siti Aisyah as their agent to kill Kim chol or Kim Jong-nam. This statement was made by their Foreign Minister and also the head of Polis Diraja without any further explanation of the result of their investigation.

Siti Aisyah was finally brought to court after a long process of investigation. Diraja Polis Malaysia or the Police unit of Malaysia cannot find any other supporting-valid source to 'cancel' her escort to the court. The only evidence to identify her actions were the CCTV provided by KLIA2 Airport authorities. Malaysia has also finally approved Indonesia's demand for consulate rights to send advocates from Indonesia giving companionship and help to Siti Aisyah in order to face her trials (SuryaMalang, 2017).

So far there are no significant efforts from both sides of the house to try to make improvements towards their coordination in putting Siti Aisyah's case to an end. Malaysia has been very consistent in making verdicts while Indonesia remains confused and hindered from the uncertainty they get from Malaysian government. Indonesian efforts in saving Siti Aisyah are namely demanding consulate rights for Siti Aisyah and reminding Malaysia to respect the Vienna Convention to give more open information towards the case. Both those efforts have met a delay for several weeks however.

Evaluating the two case studies. The two case studies show some points for describing how vulnerable the position of women in Southeast Asia becomes to the victim of trafficking. In general, the root of the problem such as lack of education, poverty can be argued tendency for women to be the victim of trafficking. Criminals activities are taking advantage of the women who are keen to have a better life in neighborhoods like Mary Jean and Siti Aisyah. They were trapped to become the main agent for the smuggling and killer without really understanding what they are doing and its risk.

Now, it is getting popular for transnational crimes activities in Southeast Asia using women like Mary Jean and Siti Aisyah to become the agents of crime. The perpetrators are understood to use the perception of gender bias among society that only men are capable of doing the activities of violent and criminal activities while women are unable to act as a perpetrator of crime. Women are connoted physically weak, timid and have no courage to become violent agents. With this biased gender perception, women are expected to be easier to deceive apparatus by using women. In the case of Veloso, officials in Yogyakarta Immigration, officials are expected not to alert, careless and suspect women as perpetrators of crime. By using women as perpetrators such as in the case of Veloso who brought drugs to the city of Yogyakarta it is expected to escape. Likewise with the case of assassination attempt against Kim Jong-nam , step brother of the North Korea leader , who was likely in the past has always been alert of several attempts to kill him, but becomes less alert with women like Siti Aisyah and Duan Thi Huong who suddenly approaches and attempts to commit murder against him. With the tendency of women being used for transnational crime in SEA has increased, it gives a tremendous task for ASEAN member states to be able to protect their innocent women for taking part in the modus

operandi of the criminal activities. Yet, eradicating poverty as a source of the problems that make women go overseas and part of the unwilling criminal activities may not be easy in the short run. Still, states need to cooperate to discourage women being a prey of criminal activities as well as to limit or to destroy the main perpetrator of the illicit business seriously.

However, it is not easy for ASEAN to conduct genuine and meaningful cooperation due to several issues that limit its efforts in protecting women. First of all, ASEAN member states have difficulties to see the case from a similar perspective. Home and host countries have different opinions about the status of the suspected women. For example in the case Mary Jane, Indonesia has the stance to punish her as a drug smuggler who then deserves to receive death penalties as this country by law. In contrast, the Philippines government and supported by its community believes that Veloso is a victim of trafficking and therefore she deserved to be released from Indonesian punishment. This latter opinion is particularly supported by the confession of Marie Jane recruiter whom part of drug smuggling organized. So far Indonesia considered the Philippines plea and postponed the death penalty, but this country has not annulled Marie Jane condition is found guilty for drug smuggling.

Similarly, there are also differences in response between Indonesia and the Philippines in the case of Siti Aisyah. While the majority of the people in Indonesia, believe that Siti Aisyah is a victim of trafficking, Malaysia, as a host country, reported to the world that she is a killer or as agents of the crime. The woman has been proved guilty by host countries law. There is no consensus or same perception between Indonesia and Malaysia of the action done by Siti Aisyah where Malaysian government sees Siti Aisyah as perpetrators and Indonesia sees her as the victim. This case had also questioned international citizens whether ASEAN had also made transnational crime such as trafficking an urgency and a prior agenda. Without similarity to understand the cases among the member states would be extremely difficult to cooperate in aiming to protect women in Southeast Asia from the prey of transnational crime.

Moreover, ASEAN does not provide a mechanism to mediate the differences in looking at the cases as well as to be able to commit to conducting mutual cooperation closely in handling the problem. The principal region of the traditional Westphalian system still hinder the significant cooperation between the countries to help the SEA women from the prey of trafficking crime. States seem reluctant to conduct mutual intervention in handling the case. For example, there was no clear coordination between Indonesia and Malaysia in the investigation process. The investigation Malaysian government has been very uninformative and has shown a close-secretive manner towards Indonesian government, this is why until this moment Indonesia cannot make any

explicit supportive statement to the action being held by Siti Aisyah. Under the claim to respect the national sovereignty, and its authority, Indonesia mostly preferred to stance in its decision to find guilty of the Mary Jane case and rejected the last proof that she is innocent and a victim of trafficking.

Claim for maintaining respect in national sovereignty has actually become an instrument to show that there is no trust among the ASEAN members to find the truth behind the case which can help to sustain the rights of the victim. The host country tends to prioritize its national

prestige to stand on their previous judgment rather than to rehabilitate the victim. If the host country finally relaxes the punishment, this is merely because of high political consideration, rather than considering sustaining the rights of the women who were suffering from reckless justification of the apparatus.

To conclude

The ACTIP seems hopeful that significant collaborative response among ASEAN member states in prosecution, protection and prevention of women from trafficking crime activities in Southeast Asia would be applied. However, there have been significant detrimental issues which limit the aim of the ACTIP. Member states still have problems in prioritizing its national sovereignty and authority above the mutual collaboration. Lack of mutual trust is also a problem to cooperate in solving the problem. Furthermore, the convention lacks mechanisms to prioritize women protection rather than states interest.

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NHRIs In Southeast Asian States: The Necessary Foundation For An Efficient AICHR

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Abstract

Twenty years ago, the Tehran Framework, adopted during the yearly OHCHR regional workshop for Asia-Pacific laid out four pillars (United Nations 1998) of which one suggested the idea that National Human Rights Institutions (NHRIs) are the most solid foundation at the national level to build an efficient regional human rights mechanism (Baik 2012, 194). In the absence of a strong regional mechanism, the NHRIs have an important role to play for the promotion and the protection of human rights in the Southeast Asian (SEA) States, in the event where those NHRIs are in conformity with the 1993 Paris Principles (United Nations 1993). Those principles include independence both in their funding and their operations, with the possibility of conducting inquiries based on individual communications. According to the Global Alliance on NHRIs (GANHRI), which is mandated by the UN to grade and give accreditation to NHRIs ('Global Alliance of the National Human Rights Institutions' 2017), most of the SEA NHRIs do not enforce those principles at an efficient level, or not at all. Given the lack of independence of the SEA NHRIs and the inefficiency of the AICHR, there has been too little literature on the complementary of the NHRIs and the AICHR in their roles, both at the national and regional levels. Indeed, we strongly believe that such complementary is a lucky possibility if the NHRIs and the AICHR take their cooperation to the next level.

Our paper will explore (1) how, within their own mandates, the SEA existing NHRIs and the AICHR can work together to advance the promotion and the protection of Human Rights in the region; (2) how laws that would establish NHRIs in the remaining countries could be adopted in order to respect the Paris Principles while being strong foundations to the AICHR; and (3) how best practices from NHRIs evolving in a different regional environment (OAS, ECtHR, AfHRC) can influenced the AICHR to strengthen the relationships between SEA NHRIs.

Introduction

The United Nations (UN) has recognized the centrality of the Paris Principles in establishing National Human Rights Institutions (NHRIs) equipped with "quasi-jurisdictional powers" (United Nations 2004) and being able to "facilitate a greater understanding within the judiciary of international human rights norms to ensure their application in national jurisprudence" (United Nations 2004). In other words, NHRIs can operate as bridges between the international human rights norms and mechanisms, and the national ones, their quasi jurisdictional powers allowing them to have a more efficient protective role[79] than regional mechanisms, at least this is the case in Southeast Asia (SEA). The region has a young, non binding, and heavily criticised regional human rights mechanism, the ASEAN Intergovernmental Commission on Human Rights (AICHR) that was adopted in 2009 by the ten ASEAN States. The AICHR being

[79] More on the protective role of NHRIs, Cf. James Gomez & Robin Ramcharan, « *The* « Protection » *Capacity of the National Human Rights Institutions in Southeast Asia* », Southeast Asia Research Centre Working Paper Series, No. 172, 2016 available at http://www.cityu.edu.hk/searc/Resources/Paper/16021610_172%20- %20WP%20- %20Dr%20Gomez.pdf (accessed on 6/21/2017).

stripped of a number of prerogatives (individual complaints, investigation, etc…), not much has been done over the past 8 years to improve the promotion and the protection of human rights in an efficient manner in Southeast Asia. Moreover, only 5 of those 10 ASEAN states, and Timor-Leste[80], have a NHRI even though half of them do not comply entirely with the 1993 Paris Principles (GANHRI 2016).

While the SEA region is currently facing a general backlash on human rights protection, and in the absence of a strong regional mechanism, we would like to investigate how, or if, the NHRIs could (re)enforce the protective role of the AICHR. Our paper will therefore explore (1) how, within their own mandates, the SEA existing NHRIs[81]and the AICHR can work together to advance the promotion and the protection of human rights in the region; (2) how laws that would establish NHRIs in the remaining countries[82] could be adopted in order to respect the Paris Principles while being strong foundations to the AICHR; and (3) how best practices from NHRIs evolving in a different regional environment (Organization of American States (OAS), European Court of Human Rights (ECtHR), or the African Human Rights Court (AfHRC)) can influenced the AICHR to strengthen the relationships between SEA NHRIs.

Increasing Cooperation Between SEA Existing NHRIS & AICHR

In 2004, the four existing human rights commissions in Southeast Asia, namely the Komisi Nasional Hak Asasi Manusia of Indonesia (KOMNAS HAM), the Suruhanjaya Hak Asasi Manusia of Malaysia (SUHAKAM), the Commission on Human Rights of the Philippines (CHRP), and the National Human Rights Commission of Thailand (NHRCT) "decided to come together as a united force to help fast track the establishment of an ASEAN human rights mechanism" (SEANF 2017). It later led to the creation of a forum that took the name of Southeast Asia National Human Rights Institution Forum (SEANF) in 2009. In 2010, the Provedor for Human Rights and Justice of Timor-Leste (PDHJ) joined as the fifth member, and in 2012, the Myanmar Human Rights Commission (MHRC) became the sixth member of SEANF. Thirteen years ago, this "united force" was the first expression of cooperation between the Southeast Asian NHRIs and the later established AICHR, and shows a long lasting regional interest in enhancing regional promotion and protection of human rights. In 2007, to strengthen their relationships, the then four members adopted a Declaration of Cooperation that encourages the Southeast Asian NHRIs to "do whatever possible to carry out jointly, either on bilateral or multilateral basis, programmes and activities in areas of human rights identified and agreed upon

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[80] Timor-Leste is due to join ASEAN in 2017, and is currently an observer within the AICHR mechanism.

[81] There are 6 NHRIs in Southeast Asia : Komisi Nasional Hak Asasi Manusia (Komnas HAM) of Indonesia; Suruhanjaya Hak Asasi Manusia (SUHAKAM) of Malaysia; Myanmar National Human Rights Commission (MNHRC); Commission on Human Rights of the Philippines (CHRP); National Human Rights Commission of Thailand (NHRCT); and, Provedor de Direitos Humanos e Justica (PDHJ) of Timor Leste. (SEANF 2017)

[82] This includes: Brunei-Darussalam, Cambodia, Laos, Singapore, and Viet Nam.In 2007, building on on-going work across its programmes, OSCE's ODIHR established a Focal Point for Human Rights Defenders and NHRIs which closely monitors the situation of human rights defenders and NHRIs in the OSCE region and promotes and protects their interests, see: http://www.osce.org/odihr; Similarly, the Council of Europe and its Commissioner for Human Rights, have also highlighted the need for states to have

at the meetings" (SEANF 2007). It also mandates SEANF members and the AICHR to gradually develop regional strategies to better promote and protect human rights in the region. All members therefore agreed to advise their own government on the necessary steps to establish an ASEAN human rights mechanism complying with the ASEAN Charter (SEANF 2007).

Despite the willingness of the Southeast Asian NHRIs to engage with the AICHR, no real achievement was made between 2009 and 2014. This changed when the AICHR changed its view on the NHRIs, and decided to "held a long-requested meeting with the NHRI representatives on 29 April 2014 during the Consultation with Stakeholders on the Contribution to the Review of the Terms of Reference (TOR) in Jakarta" (Wahyuningrum 2014). During this meeting, the civil society presented a report on AICHR's work highlighting points where the Commission underperformed. Their first point focused on its failure to establish an institutionalised relationship with stakeholders including NHRIs (SAPA Task Force on ASEAN and Human Rights 2014). It led the AICHR to adopt guidelines on its relations with the Civil Society Organisations (CSOs), from which NHRIs
are considered part of (AICHR 2015). Those guidelines adopted in 2015 allow CSOs to apply for consultative status with the AICHR, although the procedure has been deemed controversial as lacking transparency (ICJ 2016). After two rounds of a long process, no NHRI has been awarded such status, or – to this date – has been known to have even applied (AICHR 2017a). As of today, it is not clear whether this status would reinforce the already well-established cooperation between the NHRIs and the AICHR. Indeed, based on section 18 of the Guidelines, the CSOs awarded with a consultative status can be consulted by the AICHR for consultation, seminar, workshop, regular reporting/briefing, implementation of specific studies, project implementer, or any other format determined by the AICHR (AICHR 2015). Rather than a two-ways cooperation, the formula shows that the AICHR will remain in control of the issues treated. Moreover, section 19 provides that "[o]fficial transmission of documents from CSOs and institutions shall be submitted to the ASEAN Secretariat who will circulate to the AICHR Representatives" (AICHR 2015). Therefore, the AICHR is stripped by the ASEAN of the possibility of receiving *unwanted* communications.

Still nowadays, SEANF NHRI-members keep "seeking a regular mode of engagement with the ASEAN, AICHR, ACWC, and related human rights bodies in Asia" (Khine Khine Win 2016), by organising and participating to activities gathering the subregional human rights body(ies), officials and CSOs. For instance, last March, SUHAKAM jointly organised with the AICHR, the first-ever *AICHR Judicial Colloquium on the Sharing of Good Practices regarding International Human Rights Law* in Kuala Lumpur (AICHR 2017b). Strengthening the relationship and the cooperation between the NHRIs and the AICHR through the SEANF is primordial, but we may emphasis on the need for both the existing Southeast Asian NHRIs (whether within the SEANF or outside of it) and the AICHR to assist the other five countries of the subregion to adopt a national human rights body falling under the scope of the 1993 Paris Principles.

LESSONS LEARNT: BEST PRACTICES FROM NHRIS EVOLVING IN DIFFERENT REGIONAL CONTEXTS

As of 24th January 2017, the Global Alliance of National Human Rights Institutions

(GANHRI) Sub-Committee on Accreditation (SCA) has accredited 117 NHRIs throughout the world: 74 of which with a *A* status (full compliance with the Paris Principles), 33 with a *B* status (not full compliance), and 10 with a *C* status (non-compliance) (GANHRI 2017b). Most of all those NHRIs evolve in different national and regional contexts, and have built through the years different relationships with regional human rights bodies. We will have a look at NHRIs interactions within the European, the Latina-American and African mechanisms while trying to draw best practices that could be applied in Southeast Asia. Those best practices are all related to the NHRIs' participation prerogatives in the judicial systems. Indeed, it is worth reminding that among those prerogatives, and depending on the format of the NHRI, "some NHRIs have the power to bring matters to court if their decisions are not adhered to; a NHRI should be prepared to use this power also with respect to participation. A NHRI should consider intervening in court cases touching upon participation as a friend of the court (amicus curiae) to ensure that the relevant human rights provisions are taken into account by the courts" (Ulrik Spliid 2013).

NRHIs in Europe

Although, several European regional organisations have acknowledged and promoted the establishment of strong and independent NHRIs in the European countries[83], we will focus here on the relation between NHRIS, the European Network of NHRIs (ENNHRI)[84]and the European Court of Human Rights (ECtHR). Indeed, the Council of Europe[85]"emphasised the NHRIs' cooperative role. European NHRIs, for instance, have played an active part in the process of the reform of the ECtHR[86]" (European Union Agency for Fundamental Rights 2012). Willing to reinforce the cooperation between the ECtHR and the NHRIs, the 2012 Brighton Declaration issued during the High Level Conference on the Future of the European Court of Human Rights provided that "the States Parties are determined to work in partnership with the Court to achieve this, drawing also on the important work of the Committee of Ministers and the Parliamentary Assembly of the Council of Europe as well as the Commissioner for Human Rights and the other institutions and bodies of the Council of Europe, and working in a spirit of cooperation with civil society and National Human Rights Institutions' ' (High Level Conference on the Future of the and European Court of Human Rights 2012). The Declaration therefore acknowledges the role of European NHRIs in the ECtHR's proceedings. Nonetheless, European NHRIs have been able to intervene as a third

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83 Paris Principles-compliant NHRIs in place, see: http://www.coe.int/en/web/commissioner/co-operation-with-national-human-rights-structures?desktop=true.

84 ENNHRI enhances the promotion and protection of human rights across the wider Europe region, by bringing together NHRIs to work on a wide range of human rights issues and supporting their development. ENNHRI has a membership of 41 NHRIs from across wider Europe, including Ombudsman Institutions, Human Rights Commissions and Institutes: see http://ennhri.org/Promoting-and-protecting-human-rights-across-wider-Europe. 8 The Council of Europe(CoE) is an international organisation whose stated aim is to uphold human rights, democracy, rule of law in Europe and promote European culture. Founded in 1949, it has nowadays 47 member states: see http://www.coe.int/en/web/portal/home.

85 The Council of Europe(CoE) is an international organisation whose stated aim is to uphold human rights, democracy, rule of law in Europe and promote European culture. Founded in 1949, it has nowadays 47 member states: see http://www.coe.int/en/web/portal/home.

86 For instance: Intervention by Des Hogan on behalf of the European Group of NHRIs, High-level conference on the future of the ECtHR, Interlaken, 18-19 February 2010, available at: https://www.bj.admin.ch/dam/data/bj/staat/menschenrechte/emrk/ber-ministerkonf-fe.pdf and intervention by Beate Rudolf, on behalf of the European Group of NHRIs, High-level conference on the future of the ECtHR, Izmir, 26-27 April 2011, available at: https://www.ihrec.ie/download/doc/izmir_oral_statement_european_group_of_national_human_rights_institutions.doc .

party through the procedure of the amicus curiae, both alone[87] or as a group. Indeed, NHRIs being increasingly interested in joining the proceedings of the ECtHR, their ability to do so has been recognised in the news under Article 36§2 of the ECHR (Rajska and Rudzińska-Bluszcz 2016). After several successful interventions by NHRIs alone, the European Network has been able to submit amici curiae as an organisation before the ECtHR. What later became the ENNHRI intervened for the first time in 2008, in the case DD v. Lithuania which is considered "the first such application as a third-party, in other words not as a party to the proceedings, by an European NHRI before this regional court" (European Union Agency for Fundamental Rights 2012). In August 2011, the European Group made its second intervention before the ECtHR in Gauer v. France, focusing its submission on the international standards on protecting women and girls with an intellectual disability from

intrusive procedures such as sterilisation (ENNHRI 2011). The European NHRIs also have a role to play in the execution of the ECtHR level as they can "have a role in the implementation of the judgments of the European Court both at the European and national level" (de Beco 2010). NHRIs can indeed provide information to the Council of Ministers of the CoE in charge of the execution of the judgement, or/and they can monitor its implementation at the national level by giving recommendations to the State authorities on the best measures to take. The European NHRIs are therefore at the heart of the promotion and the protection of human rights, and a true partner of the ECtHR as "they can form bridges between both national and international human rights systems" (de Beco 2010).

NHRIs in the Americas

Firstly, we would like to stress that we will address only the NHRIs in the Latin American context and not the Americas as whole as when it comes to Human Rights and NHRIs, the United States and Canada choose to stay out of the mechanisms. Indeed, the region has a dense array of regional platforms, among them the Organisation of American States[88] and, in particular, its independent mechanism for the promotion and the protection of human rights, the Interamerican Commission on Human Rights (IACHR)[89] and the Court. OAS has quickly shown an interest in the NHRIs with a declaration calling for their establishment in all member states in 1997 (NHRI Torture prevention & response 2012). Since then, the OAS has continuously promoted the role of these institutions which are taking the form of Ombudsman (*Defensor del pueblo*) in most of Latin-American states, and ensure their role of human rights promotion and protection. Similar to the

[87] See for example the intervention of the Northern Ireland Human Rights Commission in *Shanagan v. UK* or the Polish Helsinki Foundation for Human Rights' intervention in *Staroszczyk v. Poland* (no. 59519/00, 22 March 2007).

[88] The Organization was established in order to achieve among its member states "an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence." Today, the OAS brings together all 35 independent states of the Americas and constitutes the main political, juridical, and social governmental forum in the Hemisphere: see http://www.oas.org/en/about/member_states.asp.

[89] The IACHR is a principal and autonomous organ of the Organization of American States ("OAS"). It is composed of seven independent members who serve in a personal capacity. Created by the OAS in 1959 and together with the Inter-American Court of Human Rights ("the Court" or "the I/A Court H.R.), installed in 1979, the Commission is one of the institutions within the inter-American system for the protection of human rights ("IAHRS"). See http://www.oas.org/en/iachr/mandate/what.asp.

European and Southeast Asian NHRIs, an organisation coordinating the work of the NHRIs in the Americas has seen the light of the day in 1995, the Iberoamerican Federation of Ombudsmen (FIO)[90] to which all NHRIs in the region are affiliated. Independent from the FIO but working in cooperation with it, it is worth noticing the existence of sub-regional peer networks such as the Andean Council of Defensorías del Pueblo (CADP)[91] created in 1998 and which includes the NHRIs of Bolivia, Colombia, Ecuador, Peru, Venezuela and Panama (NHRI Torture prevention & response 2012). However, contrary to Europe or SEA, *all* countries in Latin-America have at least one national human rights institution, when they often have several national and local ones. Most of those institutions have been created in the early 1990s (except for Uruguay, Chile and Brazil in the 2010s), and have therefore a long experience of handling the promotion and protection of human rights in a changing context. Like the ECtHR, the Iberoamerican have been able to intervene before the proceedings of the IACHR with the procedure of *amicus curiae*. The Peruvian Defensor del Pueblo[92] is known for its numerous interventions and the Court extensively relies on its *amici curiae*, as well as other documents such as reports submitted as evidence before the Court. The NHRIs can also assist the Court in the implementation of its judgments. Nationally, the Latin-American Ombudsmen have also powers before the courts to effectively protect human rights, and are known to effectively assist the public in gaining access to the judiciary (Reif 2004).

NHRIs in Africa

Aside from being members of networks such as the Network of African National Human Rights Institutions (NANHRI)[1693], African NHRIs have historically engaged with the African Commission on Human and People's Rights (ACHPR) by attending sessions aimed at assisting the ACHPR in the protection and promotion of human rights. Indeed, since a decision from 1998 (IHRDA 2015), NHRIs can become affiliates with the Commission thanks to a mechanism similar to the GANHRI-SCA's accreditation mechanism based on the 1993 Paris Principles (NANHRI 2016). As of 2016, there were 27 NHRIs with *Affiliate* status at the ACHPR, 18 of which received an accreditation *A* (NANHRI 2016). A recent report by UNDP and NANHRI, *Study on the State of National Human Rights Institutions in Africa*, focuses on six key areas of the NHRIs: establishment and oversight; independence; financing; capacity; stakeholder engagement; and rights-based service delivery and development. Outside of NANHRI, some African NHRIs have also concluded bilateral agreements which comprise exchange of

[90] See : http://www.portalfio.org/

[91] See : http://www.defensoria.gob.bo/sp/noticias_proc.asp?Seleccion=359

[92] See the *Five Pensioners Case*, 23 February 2003, no°98 (2003), IACHR; or, *Barrios Altos Case*, 3 September 2001, no°83 (2001), IACHR.

[93] African NHRIs first gathered in Yaoundé (Cameroon) in February 1996 and adopted the *Yaoundé Declaration* establishing a Coordinating Committee of African National Institutions for the promotion and protection of Human Rights tasked with assisting in the coordination of African NHRIs' activities and enhancing their visibility. In October 2007. They formally created the Network of African National Human Rights Institutions (NANHRI) to replace the Coordinating Committee. There are 44 (out of the 47 NHRIs present on the African continent) members. See: http://www.nanhri.org/members/.

knowledge, information and best practices, as well as technical support. The case studies conducted by UNDP and NANHRI show "that recently established NHRIs that benefit from peer support, during their inception periods, perform better in terms of capacity and effectiveness" (UNDP and NANHRI 2016, 73). One of UNDP's representatives acknowledge that "the recognition of the need for effective NHRIs as well as the general changes in the African political and social landscape, and growing international advocacy, have greatly increased the profile of human rights issues in Africa," (UNDP 2016). The study concluded that NHRIs play an essential role in a country towards the advancement of the human rights agenda, good governance and sustainable development. also draws key findings (UNDP 2016), that we believe could be applied to the SEA NHRIs too. Among them:

- It is important to strengthen the human rights-based approach;
- NHRIs should be strengthened to become flagbearers of such an approach among relevant government agencies;
- NHRIs have human and financial constraints, and need greater capacity; • Governments are encouraged to provide appropriate political will for the legal, financial and operational autonomy of NHRIs;
- Governments should work closely with NHRIs in order to address emerging human rights issues.

If we looked at the practice of the NHRIs' interactions with the regional human rights mechanisms, it appears that the NHRIs "are not making serious efforts to engage the Commission" (IHRDA 2015). Indeed, according to the African Activity Reports from the 52nd to 56th Ordinary Sessions, respectively 24, 32, 42, 18 and 43 NHRIs attended the sessions while over the same period, an average of five NHRIs issued statements (IHRDA 2015). On a similar trend, the NHRIs' engagement with the Court is really poor (Reif 2004, 252) as none of them has yet intervene in the proceedings due to a general lack of information (on whether one of their national has submitted a complaint, on the proceedings before the Court, on whether their country recognised the Court, etc.) (IHRDA 2015). Moreover, it seems that the African NHRIs interpret their mandates narrowly and deem themselves non-competent to assist the Court and/or the Commission in the implementation of the decisions. In response to the scepticism of the NHRIs, analysts have argued that "dualism or monism as a prevailing system does not count much so long as states have agreed to be bound by international treaties as a matter of principle" (Dinokopila 2010). Therefore, in an effort to curb the NHRIs engagement with the regional mechanisms and to reinforce its capacities, NANHRI issued few months ago (in 2016) two reports. The first one is a set of *Guidelines on the Role of NHRIs in Monitoring Implementation of Recommendations of the African Commission on Human and People's Rights and Judgements of the African Court on Human and People's Rights*[94] while a second one is a *Mapping Survey of the Complaint Handling Systems of African National Human Rights*

[94] Cf: http://www.nanhri.org/wp-content/uploads/2016/10/draft-13-English-Version.pdf.

Institutions[95].

After looking at how NHRIs interact with their regional human rights mechanisms in Europe and Americas, we came to the conclusion that most of all NHRIs operate with the following scheme:

- The NHRIs, before engaging with the regional mechanism (Commission or Court) have gained a strong position at home, with effective prerogatives of reporting, assisting the public to access and gain justice, and intervening as a third party when necessary.
- The NHRIs first intervene alone before the regional human rights mechanism, first before the commission, gaining later on access to the Court.
- The NHRIs, operating under a regional network also succeed in gaining access to the regional mechanism, and are deemed more powerful in their action as such. - The NHRIs are valued as a strong ally by the regional mechanism, and have become a partner both at the regional and national level.

If we look at the African situation, we acknowledge while there are NHRIs in 47 out of the 54 countries on the continent, much remains to be done in terms of the quality of the relationships between the regional human rights mechanisms and the NHRIs, when there is one. The overall situation is therefore closer to the one in Southeast Asia even through the political and human rights contexts are different.

For the Southeast Asian NHRIs, the main difference with the European and Latin-American mechanisms, remains in the fact that when the NHRIs were created in those regions, the regional human rights mechanisms already existed and were fully functioning. The NHRIs have therefore been integrated to an already existing mechanism. In Southeast Asia, this is not yet the case, so part of the problem for the existing NHRIs is to apply the above scheme while assisting the ASEAN Intergovernmental Commission on Human Rights in creating a binding mechanism too. The second part of the problem would be to assist the other SEA countries in adopting NHRIs in the coming years that would already integrate those best practices.

Setting New NHRIS In SEA As Strong Foundation For AICHR

National human rights institutions, when established in the rights circumstances and in accordance with the 1993 Paris Principles, can play a significant role in promoting and protecting the human rights and fundamental freedoms set forth in the Universal Declaration of Human Rights (UDHR) and the international human rights treaties (OHCHR-Cambodia 2006). Whatever their forms, NHRIs are intended to complement state organs responsible for ensuring that human

[95] Cf: http://www.nanhri.org/wp-content/uploads/2016/10/English-Mapping-Survey-Final.pdf.

rights are protected and observed, and they can also provide an important bridge between Government and civil society (OHCHR-Cambodia 2006). With the partial success of the already existing NHRIs in the region, it feels important to remind how setting new NHRIs in the remaining Southeast Asian countries could reinforce and push further the development of the AICHR and a binding mechanism. By drawing from the above good practices combined with the Paris Principles, we would like to make sure that the NHRIs that would be created in Brunei-Darussalam, Cambodia, Laos, Vietnam or Singapore based on those Principles are equipped to last in time. And, so they do not meet the faith of the NHRC of Thailand or Myanmar which have been downgraded to a *B* accreditation due to their lack of independence while Indonesia was re-upgraded to an accreditation *A* at the end of 2016 thanks to its efforts (GANHRI 2017a). Their existence in SEA, and their mandate and activities, "have been described as an '*unhappy marriage'* between national human rights institutions and national governments" (Phan 2012).

As mentioned, a NHRI can be created under one for four models: a human rights commission, an advisory committee, an ombudsman, or a human rights institute. We have previously seen that, in general, the African and West European countries have preferred a hybrid form of commission and committee, while Latin-American countries prefer the ombudsman model. Scholars identified the human rights commission model, predominant in Commonwealth countries, as the classic type of NHRI since it is the model that is the closet from the one articulated in the Paris Principles (Shubhankar Dam 2007). According to those principles, a commissions carry out a wide range of functions including advising the government on human rights issues, monitoring implementation of human rights laws, and carrying out awareness-raising and training activities in the area of human rights, and depending on the countries, can be granted quasi-judicial investigatory authority (United Nations 1993). Scholars have also identified another model based on the National Consultative Commission of Human Rights of France and therefore, referred to as the *French model* (Shubhankar Dam 2007). This model emphasises the *advisory* role of the body in building bridges between civil society and the government rather than focusing on investigation and monitoring. To sum up, "while institutions developed under the human rights commission model act as quasi-judicial watchdogs on the activities of the state in human rights matters, the French emphasis is on supplementing the activities of the state in pursuing research and awareness" (Shubhankar Dam 2007). Rather than conforming to a unique model, in the eighties and nineties, the idea of adopting a NHRI with a hybrid form between the ombudsman/commission emerged in the Americas and Eastern Europe. This hybrid ombudsman/commission is often mandated "not just to monitor the legality and fairness of public administration but also to promote and protect human rights in the public sector" while being equipped also with "strong investigative powers and the authority to monitor compliance" (Shubhankar Dam 2007). Southeast Asian state have so far privileged the French model of commission, with the exception of Timor-Leste which has established an ombudsman, but we might acknowledge, based on the Latin-American NHRIs' experiences that the hybrid form of ombudsman and commission might suit better when it comes to supporting the development of regional mechanism.

Efforts from CSOs have been observed in the remaining Southeast Asian countries to push for the establishment of independent NHRI. In this regard, the Asia Pacific forum noted that it has responded to "requests for advice from governments and civil society on the role, function, establishment and accreditation of NHRIs […] includ[ing] Cambodia**,** Laos, and Vietnam" (Asia

Pacific Forum 2017). However, it has also emerged that, even though being backed up by neighbouring states through UPR recommendations, those efforts were not materialised yet. For instance, Singapore who continuously argues that human rights are western values received such recommendations from Timor-Leste, Indonesia or even Malaysia, and can't therefore dismiss the relevance of establishing a NHRI (Kuah 2016). Brunei and Laos have both declined the recommendations made to them on adopting a NHRI, and despite CSOs request nothing has yet been done to establish such institution (The Brunei Project 2016; FIDH 2015). In Cambodia, the first efforts to establish a NHRI go back twenty years ago, and have recently received some support by the executive following the Second UPR. However, the backlash that followed the adoption of the Law on NGO (LANGO) in 2015 has put a stop to the efforts of establishing a NHRI (ADHOC 2015). In Vietnam, after a 2011 report from UNDP titled *Building a National Human Rights Institution A study for the Ministry of Foreign Affairs of the People's Republic of Viet Nam*, and since the 2013 Constitutional reform, the government has shown some willingness to establish a NHRI (Vu and Tran 2016), but it has yet come to life.

It has been recognised that enacting a law establishing a NHRI can take time as consultation is needed among all stakeholders as well as the necessity of securing funding on a long-term basis to insure the institution's continuous independence. In its report to the Ministry of Foreign Affairs of the People's Republic of Viet Nam, UNDP highlighted a simple thirteen steps process that might worth to be known:

- Step 1 Establishment committee
- Step 2 Mandate and functions of the institute
- Step 3 Landscape of human rights challenges
- Step 4 Consultation of stakeholders
- Step 5 Draft structural model
- Step 6 Establishment of a Board of Trustees/of the commission
- Step 7 Recruitment of the Board of Directors
- Step 8 Draft strategic plan
- Step 9 Refining the structure: Organisation and processes
- Step 10 Recruitment of staff
- Step 11 Funding
- Step 12 Establishment of an international network
- Step 13 The path towards accreditation with the ICC

Cambodia and Vietnam have already achieved some of those steps, and can count on the support of the APF, SEANF and UN agencies. However, no support by AICHR has been publicly made while it has been proven in other regional contexts that mutual support between NHRIs and a regional human right mechanism can only reinforce both of them. The presence of well-grounded NHRIs in the remaining SEA countries will reinforce the practice of human rights at the national level to only benefit the regional level.

CONCLUSION

It has been admitted by several stakeholders that "[t]he work of SEANF member NHRIs on receiving and investigating complaints from victims of human rights violations, monitoring human rights program implementation, investigating situations, carrying out field visits and offering remedies can support the work of AICHR at the subregional level" (Wahyuningrum 2014). Beyond SEANF's commitment to the protection and promotion of human rights at the sub-regional level, the reinforcement of the work of the AICHR will come from the rationalisation of human rights practice and from the realisation that it's beneficial for all branches of the tree. NHRIs have proven, through the years and despite various contexts, being one of the most reliable institutions to practice human rights at the national level, protecting people's rights as well as institutions'. Therefore, through the concordant efforts of all stakeholders, from existing NHRIs, governments working toward the establishment of a NHRI, the AICHR itself, regional and international NHRIs networks, as well as CSOs, there is a hope for the development of a stronger regional mechanism. The only unknown component is how much time will be needed.

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National Human Rights Institutions in Digital Spaces

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Abstract

The Internet is changing the ways in which people interact, learn and communicate. For those who have access to the Internet, it is becoming increasingly difficult to imagine life without it. It offers people all kinds of opportunities, including exercising our human rights both online and offline, as different UN Human Rights Council resolutions have established.[96] States have also started paying more attention to Internet related rights in the Universal Periodic Review.[97]Throughout Southeast Asia and the world, people have taken to online platforms to express themselves in ways that were not possible through traditional mediums. The Internet's role has become so much more relevant today that many governments have tried to regulate it in ways that threaten citizens' rights. There are many examples: Internet shutdowns, criminalisation of online expression, surveillance, etc. National Human Rights Institutions (NHRIs) as the primary body tasked with promoting and monitoring human rights, have a special and imminent role to play in ensuring that human rights are protected in online spaces as well. The Internet is also providing NHRIs a promising new space where they can reach out to citizens and the state more effectively and directly. A prominent online presence for NHRIs thorough social media can contribute to improving their proximity to victims and to actively promote human rights and monitor the environment for violations, online and offline. Similarly, digital tools, like video conferencing, help NHRIs function more efficiently and save on precious resources. Many NHRIs, in Southeast Asia and elsewhere, are receiving complaints on human rights violations through online platforms. While this is a welcomed development, NHRIs must also be aware of the risks that come from their data being vulnerable to cyber-attacks. NHRI members, staff, witnesses and sources can be targets of governments and third parties online. NHRIs must determine what data they need to protect in their investigation of human rights violations, and whom they need to protect it from in order to keep it secure from unauthorized access and abuse.

This paper will thus focus on three key areas: 1. Digital tools for enhancing efficiency of NHRIs 2. Digital rights and human rights 3. Digital security for NHRIs

1.Introduction

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[96] For example, UN HRC resolutions 20/8, 24/5, 26/13 and 32/13.

[97] See Brown, D. and Sheetal Kumar. Global Partners Digital (2016). Using the Universal Periodic Review for Human Rights Online. https://www.apc.org/en/system/files/Using%20the%20universial%20periodic%20brief%20for%20human%20rights%20online.pdf

Increasingly, people across the globe and more particularly in Southeast Asia are relying on the internet to interact, communicate, work, learn and realise their rights. Similarly, states are also relying on the internet and digital tools to deliver services and improve the overall functioning of the government through e-governance[98] initiatives. As this shift unfolds before us, we are forced to adapt our focus and the way we work to ensure that all people are able to enjoy and exercise all rights across all platforms, including through information and communication technologies (ICTs).

Recognising the potential of ICTs, the ASEAN ICT Masterplan 2020 states: 'Information and Communications Technology (ICT) has played a critical role in supporting regional integration and connectivity efforts. And as the region forges ahead to further deepen economic integration and community building, ICTs are expected to play an increasingly pivotal role' (ASEAN, 2015: 7).

The Masterplan recognised that ICTs, and in particular the internet, have become a core part of the economy and embedded infrastructure, progressively underlying all aspects of socio economic growth and development. It identified eight areas as strategic thrusts: Economic Development and Transformation, People Integration and Empowerment through ICT, Innovation, ICT Infrastructure Development, Human Capital Development, ICT in the ASEAN Single Market, New Media and Content, and Information Security and Assurance. Each of these areas has a potential impact of furthering people's civil, cultural, economic, political and social rights. It would therefore be crucial to address these areas of strategic thrust from a human rights perspective.

The rapid development of ICTs, and the spread of services and applications that make use of them, has been one of the most important developments in human society over the past 30 years. Four aspects of this have been particularly significant where rights are concerned, namely computerisation, telecommunications, the internet and online social networks (Souter, 2013). For those who have access to the internet, it is becoming increasingly difficult to imagine life without it. It offers people all kinds of opportunities, including exercising our human rights both online and offline, as different UN Human Rights Council resolutions have established.[2]In fact, the UN Human Rights Council and the UN Human Rights Committee have recognised the applicability of human rights in the digital environment, and through Special Procedures, resolutions and general comments, they have elaborated on states' responsibilities for upholding human rights online.

National human rights institutions (NHRIs) are now, beyond a doubt, valued as essential actors in the task of protecting and promoting human rights at the national and regional levels. To this end, they must work with one another to meet evolving developments and challenges in the exercise of human rights by all. As more people rely on ICTs to realise their rights, and as states are increasingly moving to regulate the internet, NHRIs must take a proactive approach to ensure that this new space remains an enabling one for the exercise of human rights.

ICTs also offer NHRIs the potential to be more effective and reach citizens, but in doing so, they must remain aware of the security risks or concerns involved for them and their constituencies. The exercise of human rights by individuals through ICTs not only impacts their experience of these rights in the online space; it can also have a significant impact offline, both

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[98] For more information, visit the World Wide Web Consortium website: https://www.w3.org/Consortium

positively and negatively. NHRIs must therefore, in accordance with their mandate of defending human rights, work towards addressing, promoting and protecting human rights exercised by all individuals on all platforms, including online.

2.NHRIs and digital tools

ICTs and more specifically, the internet create new and promising spaces where NHRIs can improve the way they function and reach out to stakeholders in previously unimaginable ways. Digitalisation has fundamentally changed the way we work. NHRIs can develop practices that systematically help them record and store information about their work in digital form. Similarly, digital tools, like email, chat applications and video conferencing, help NHRIs function more efficiently and save on precious resources spent on physical infrastructure. For instance, NHRIs can use online collaborative platforms to work with their staff and partners situated remotely (Association for Progressive Communications, 2011). Similarly, using web-based audio, video and text communication tools can help save on communications costs for NHRIs. However, it should be emphasised that NHRIs must not completely move away from existing offline platforms and mechanisms. This is to ensure that the people who are not able to meaningfully access and use the internet, for reasons of infrastructure, cost, skills, or social and cultural barriers, are not left behind and thus further marginalised. Segments within society who need the attention and protection of NHRIs often experience digital exclusion. To this end, NHRIs also have the responsibility of reminding governments that their obligation to protect, promote and fulfil all human rights includes providing meaningful access to the internet to all people.

The internet also enables NHRIs to reach out to their stakeholders, including citizens and the state, more effectively and directly. A well-resourced, updated and interactive website can help facilitate two-way communication between NHRIs and different stakeholders. NHRI websites must carry broad information on who they are, what their mandate covers, what services they offer to the public, the structure of the organisation, current and past areas of work and initiatives, reports, plans, policies and contact information. In principle, NHRIs should make all available information public through their websites, unless there is good reason to withhold certain information, in accordance with national and international freedom of information standards.

Websites of NHRIs should be accessible and understandable in form and content. They must be designed bearing in mind that the Web is fundamentally designed to work for all people, whatever their hardware, software, language, culture, location, or physical or mental ability. For instance, NHRIs should consider the need to have their websites available in multiple languages, depending on the linguistic makeup of their respective states. Also, the website must be accessible to people with a diverse range of hearing, movement, sight and cognitive ability challenges. To this end, NHRIs must strive to ensure that their websites meet the standards prescribed by the World Wide Web Consortium (W3C),[3] which are widely accepted and followed as good practices by states.

Another key use of the website is in ensuring that people and interest groups are able to invoke the protection mandate of the NHRI by filing complaints or petitions through the digital,

online medium. Many NHRIs in Southeast Asia are already providing this option for people.[99] By ensuring that people can file complaints online in addition to offline means, NHRIs will be able to better connect with victims. Online complaints mechanisms should also offer the option of filing anonymous reports, so as to help persons report violations without fear of repercussions or reprisals. Further, this should be accompanied by means to submit digital evidence or corroborating documents, with clear internal guidelines on how to deal with digital evidence.[100] Online complaints mechanisms can also help victims check on the status of their complaints directly, instead of having to petition the NHRI each time to learn about the progress.

A prominent online presence for NHRIs through social media can contribute to improving their proximity to victims as well as actively promoting human rights and monitoring the environment for violations, online and offline. By engaging with individuals, media and civil society through social media, NHRIs can establish a direct relationship. However, being more active on social media also means being more vulnerable to undesirable comments, threats and confrontations. While this might be a difficult adjustment, over the long run it will turn out to be a substantial aid. For instance, being active on Twitter and Facebook by constantly sharing updates and information on the NHRI's activities would help garner support for its work and integrate it within the larger movement for human rights more obviously. People's reactions will also help NHRIs remain aware of the expectations of different groups, even if these cannot always be met. This can be particularly helpful when an NHRI has to take a position against the state or is facing reprisals from the state as a result of its work. NHRIs will be able to garner support among individuals and civil society on social media in these instances, and this lends to the legitimacy and protection for the NHRIs themselves. Being active on social media also lets NHRIs put out timely and immediate reactions to grave violations. NHRIs coming out in support of victims on social media will also make the victims and interest groups feel supported.

Further, with most media outlets turning digital, monitoring the news for both online and offline violations becomes easier for NHRIs. In many cases, instances of violations are first reported by people on social media before they hit newspapers. By being diligent online, NHRIs will be able to get updated information and diverse accounts of what happened. However, NHRIs must continue with their traditional forms of monitoring in parallel, as in many places access to the internet and digital inclusion remain a challenge.

The data collected through the websites, online complaints mechanisms, monitoring and social media can be used, in addition to data collected offline, to inform annual or periodic reports of NHRIs. For instance, NHRIs can provide aggregated data on the number of visitors to their website and compare it to previously recorded figures. This could help indicate the presence and reach of the NHRI. Data on the gender of complainants could also help indicate whether the NHRI is able to cater to the needs of different gender groups. By tagging the complaints under different categories, NHRIs will be able to determine what forms of violations are more prominently reported through the complaints mechanism. While all of this can be done through offline mediums as well, using online tools promotes efficiency and aids in the process of doin in-depth analysis.

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[99] Including NHRIs in Malaysia, Timor-Leste, Thailand and Indonesia.

[100] For a comparative analysis of how digital evidence is received in European jurisdictions, please see Mason, 2016.

3.Security: What is at risk for NHRIs operating online[101]

While working online and using ICTs can expand the impact of NHRIs considerably, this also requires NHRIs to be aware of vulnerabilities that come with such use and the need to adopt good practices. A strong online presence comes with a responsibility to ensure the security and rights of NHRI staff, partners and beneficiaries.

Threats to the rights of NHRI staff, partners and beneficiaries range from website and database hacking, compromising online communications, leaking or theft of sensitive private or personal information, to becoming victims of social, corporate or government-sponsored surveillance and online or offline abuse.

Digital security: Unpacking the term and basic practices

In the present age, it is essential that all operations and activities undertaken by NHRIs in online and offline spaces take into account good practices for digital security. Digital security is the protection of information and digital identity akin to protection and security in the offline realm. Digital security also refers to a system or a set of practices for securing information and digital identities to prevent harm or undesirable access or use. Digital security includes the use of behaviours and tools in online and offline spaces that lead to the securing of identity, assets and technology. Existing resources such as Security in a Box[102]and the Digital Security First Aid Kit[103] are a good starting point for NHRIs to explore what is at risk and what measures can be adopted to deal with or pre-empt threats.

Contrary to common understanding of the subject, digital security does not necessarily require advanced knowledge of computing technologies. Rather, it requires a thorough understanding of daily work processes and procedures, and a sense of how information is stored or transferred from one person or device to another. This helps the organisation and its staff identify potential vulnerabilities and data leaks, and triggers a process of behavioural change that results in the strengthening of the NHRI's overall information security. For instance, by exploring what passwords are and how they function, NHRIs can come to the conclusion that simply by increasing the length and complexity of a set of characters in a password, an information system's defence can be significantly improved against brute force attacks.[104] This approach to security is also more practical as it helps the organisation identify existing resources to address vulnerabilities rather than thinking only of solutions that can be provided by external actors or experts, which may be expensive and thereby prove to be a barrier. However, to maintain a robust

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101 This section was prepared by Gayatri Khandhadai, Mallory Knodel and Furhan Hussain

102 Available at https://securityinabox.org/en/

103 Available at https://www.apc.org/en/irhr/digital-security-first-aid-kit

104 A brute force attack is a trial-and-error method used to obtain information such as a user password or personal identification number (PIN). In an attack of this kind, automated software is used to generate a large number of consecutive guesses as to the value of the desired data. For more details, please see: https://www.techopedia.com/definition/18091/brute-force-attack

digital security environment, it is recommended that NHRIs consider investing in updated security systems.

Internal risks and mitigation for individuals

Upholding human rights is a challenging task where security threats online and offline may result from political interests and power players. NHRI members, staff, witnesses and sources can be targets of governments and third parties online. NHRIs must determine what data they need to protect in their investigation of human rights violations, and whom they need to protect it from, in order to keep it secure from unauthorised access and abuse.

Though NHRIs enjoy the status of carrying a legal mandate and some level of protection from the state, the organisational approach should always favour proactive measures for establishment of security practices, rather than reactive ones. In order to ensure this, human resources and ICT management within NHRIs may need to assess job roles as well as risk factors of individual staff members in order to devise individual risk mitigation plans in a proactive manner.

Information systems and risks

Any information management systems for NHRIs that are connected to and accessible over the internet are vulnerable not only to malicious acts such as hacking, defacement or distributed denial of service (DDoS) attacks;[105] they can also be compromised unintentionally through human error or network failures. To mitigate outages, careful risk reduction and contingency planning. must be put into place to ensure that staff can communicate with one another, do their work and keep critical lines of communication open with the rest of the world

Similarly, threats to information can happen both accidentally or maliciously. For instance, data storage mediums can be damaged or corrupted. Hackers can hold a device server hostage for ransom through hacking or a malware attack. It is important to assess and mitigate these threats to institutional knowledge and data by taking steps such as backing up data on both shared systems as well as external physical storage devices such as disks. While doing so, it is advisable to use devices that support encryption so as to protect sensitive information and data from being accessible to unauthorised persons.

Here, it must be emphasised that digital security cannot be achieved by only focusing on the security of information and systems. It is also about the physical security of digital devices and the persons that have access to them. This comes from acknowledging that the device as well as the data it contains are important. Data stored in a digital device is only as secure as the physical device and its environment. For instance, data on a device that is not encrypted or protected with strong passwords can easily be accessed by anyone who gains control over the device, even if

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[105] A 'denial of service' attack is where malicious users crowd out legitimate users of a service such as a website or a chat server. In a 'distributed' denial of service (DDoS), attackers use thousands of machines under their control to target a site. For more details, please visit: https://www.digitaldefenders.org/digitalfirstaid/sections/research

this access is momentary.[106]

Understanding risks and consequences

In addition to the inconvenience caused by attacks on systems and information, we must consider the cost of insecure communications and uninformed digital practices on the rights and wellbeing of individuals, as well as the effectiveness and credibility of NHRIs. A few extra steps can go a long way in preventing the inconvenience and potentially dangerous consequences of insecure practices for the organisation, individuals working in NHRIs, and those with whom they are communicating.

One area that particularly warrants attention relates to the security of information provided through online complaints mechanisms on NHRI websites. While the availability of online complaints mechanisms is a welcome development, NHRIs must also be aware of the risks that come from the data of complainants being vulnerable to cyberattacks. This could put the victims – who are already in a stressful situation – in harm's way, as attackers will be able to see what was said by the complainant and who is assisting the victim to access justice.

Given the nature of their work, NHRIs are entrusted with vast amounts of data which include identifying information of victims, evidence of human rights violations, personal testimonies, and contact details of individuals at high risk. An NHRI's task is to not only work towards protecting high risk persons and groups, but also to ensure that all persons and groups communicating with them do not become victims of attacks as a result of poor information management practices. This is where post-assessment of security needs and practices and a structured and well-planned approach towards implementing digital security are required. To begin, it is essential to design a set of policy guidelines, especially a privacy policy, which is of prime importance.

Policies and procedures

A privacy policy is a document that commits to how the NHRI will responsibly monitor, collect, store, disclose and disseminate various forms of information belonging to its staff, partners and beneficiaries. Such an effort goes a long way in ensuring that practical but effective standard operating procedures (SOPs) stem from it and form the basis of all operations pertaining to the use of digital technologies. Similarly, NHRIs should also adopt ICT policies that establish SOPs for communication and information sharing as well as how technology is to be used across the organisation.

From the perspective of security alone, it is important that all organisational management SOPs, including ICT policies, take into account the digital security needs of the NHRI. These include (but are not limited to) procurement, management and disposal of digital devices; use of personal devices and social media for official work; development and maintenance of information systems such as online databases and websites; collection and storage of information; staff access

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[106] Encryption is illegal in some jurisdictions. NHRIs should check national legislation governing encryption

to devices and data; gender sensitivity and consent; security of the NHRI's physical environment; emergency response mechanisms; management of external venues and events; psychosocial support; and capacity building for staff and partners on these issues.

Once policies are in place, NHRIs must strive towards ensuring that they are implemented and that staff receive necessary support and training to adhere to these policies. NHRIs would also need to periodically assess and update their policies and practices to meet the evolving developments in ICTs.

NHRIs must also be cognisant of the vast amounts of information on users that their websites may collect. The security of such a system can only be improved if the online platforms of NHRIs allow an unbroken and secure (SSL/HTTPS) connection, with the option to encrypt the information of users. The website can also be tweaked to never collect user data through cookies and other tracking methods. Further, NHRIs can consider embedding a step-by-step guide to route their complaints through a provided virtual private network (VPN) or proxy connection to improve the anonymity of victims using the online complaint mechanisms. These steps allow privacy to be designed into the system by default and minimise potential harm to complainants as a result of accidental disclosure of identity.[107]

As technology rapidly advances, key human rights institutions leaving online spaces unattended could lead to these spaces being suppressed by interests that diminish fundamental rights across the digital world. Keeping this in mind, NHRIs must take the first step towards committing to establish comprehensive ICT and rights-oriented policies and SOPs in order to reclaim online spaces for activism and protection of critical liberties.

4.Human rights online

Throughout Southeast Asia and the world, people have taken to online platforms to exercise their rights in ways that were not possible through traditional mediums. The internet's role has become so much more relevant today that many governments have tried to regulate it in ways that threaten citizens' rights.

Since the landmark resolution by the UN Human Rights Council in 2012, which affirmed that the same rights people enjoy offline also apply online,[108] the HRC now considers an internet themed resolution every two years[109] and has gone from recognising at a fundamental level the applicability of human rights in the online environment, to addressing critical issues like bridging the gender digital divide, attacks on people for exercising their rights online, ending intentional disruptions to internet access, and improving access to the internet and ICTs for persons with disabilities. The most recent resolution was passed in July 2016 and links human rights online to

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[107] NHRIs should analyse national legislation to see if the use of VPNs is legal in their jurisdiction.

[108] A/HRC/res/20/8, June 2012, available at https://documents-dds ny.un.org/doc/RESOLUTION/GEN/G12/153/25/PDF/G1215325.pdf?OpenElement

[109] A/HRC/res/26/13, June 2014; A/HRC/32/L.20, June 2016.

the achievement of the Sustainable Development Goals.[110]

Further efforts to concretise internet freedom can be seen in the launch of the Freedom Online Coalition of governments in December 2011,[111] greater prominence and acceptance of human rights as a legitimate topic in the UN Internet Governance Forum (IGF),[112] and events such as the Stockholm Internet Forum.[113]

A key indicator that human rights on the internet has become a discussion integrated within human rights mechanisms in the UN is the significant number of submissions by stakeholders to the Universal Periodic Review process[114] and the corresponding recommendations made by states to one another on issues relating to human rights online (Brown & Kumar, 2016).

Some obvious and prominent civil and political rights exercised on and impacted by the internet include freedom of expression, religion or belief, assembly and association. Economic, social and cultural rights such as the right to health, education, culture and work also form a significant area of focus (Esterhuysen, 2016). In terms of stark violations, online harassment and gender-based violence, particularly those experienced by women and individuals who face discrimination based on their sexual orientation and gender identity, warrant attention by NHRIs. Laws and policies implemented by states comprise another key area of focus for NHRIs, as they impact on the ability of people to exercise human rights online and legitimise restrictions.

Freedom of expression

Freedom of expression[115] is a cornerstone of democracy. This guarantee includes the right to hold opinions without interference and the right to receive and impart information. Any limitations placed on this right must meet the standards required and justified by provisions in Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR) and must not put in jeopardy the right itself.[116]

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[110] A/HRC/20/L.13.

[111] The coalition had its sixth meeting in Costa Rica in October 2016. For more information, please visit:

[112] For more information on the Internet Governance Forum, please visit: https://www.intgovforum.org/multilingual

[113] For more information, please visit:

[114] Examples include the 'Coalition Submission to the Universal Periodic Review of India - Internet Rights, Freedom of Expression (FOE) Online and Freedom of Association and Assembly (FOAA) Online in India' by Digital Empowerment Foundation, Internet Democracy Project, Point of View, Nazdeek and Association for Progressive Communications (and the (https://www.apc.org/en/pubs/joint-submission-internet-related-human-rights-iss-1).

[115] Guaranteed by Article 19 of the Universal Declaration of Human Rights as well as the International Covenant on Civil and Political Rights.

[116] As per HRC General Comment No. 10: Article 19 (Freedom of expression), 29 June 1983, available at . An additional requirement is provided in Article 20 of the ICCPR, which declares that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. [22] General Comment No 34, CCPR/C/GC/3.

General Comment No. 34 issued by the UN Human Rights Committee is an authoritative interpretation of the minimum standards guaranteed by Article 19 of the ICCPR. It states that Article 19 protects all forms of expression and the means of their dissemination, including all forms of electronic and internet-based modes of expression.[117] Therefore, the right to freedom of expression was not designed to fit any particular medium or technology. Regardless of whether it is exercised online or offline, it is an internationally protected right to which almost all countries of the world have committed themselves (ARTICLE 19, 2013).

Across Southeast Asia individuals have been charged, arrested and intimidated for their expression online. The risks of this happening are particularly heightened when expression touches upon political issues or human rights defence. Violations take the form of censorship, surveillance, network disruptions, blocking of websites and webpages, takedown of content, criminalisation and imposition of greater punishments for expression online (Association for Progressive Communications *et al*., 2016). When subjected to these violations, people often self-censor, and as a result their ability to form an opinion may be restricted, as they cannot freely search for and disseminate information or opinions online.

Freedom of religion or belief

Freedom of religion or belief,[118] which includes theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief,[119] is also largely impacted by the internet. Increasingly, individuals are relying on the internet to seek and impart information about religions and faiths as well as points of view about them. Online spaces also provide a new platform where individuals can express their opinions or views about religions and seek answers to questions they may have. However, this space available for expressing opinions in relation to religion has consistently come under attack, especially in online spaces (Khandhadai, 2016).

Expression relating to religion in online spaces has been increasingly met with censorship and criminalisation and has, at times, resulted in offline attacks and killings in Asia (*Ibid*.). A serious issue in this regard is the growing discourse in support of applying blasphemy laws to online content. Despite repeated calls by international experts and groups to decriminalise and repeal blasphemy-related laws,[120] These laws are being used to combat dissent and criticism of religions or beliefs, which is proving to be a serious threat to the fundamental exercise of freedom

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[117] Guaranteed by Article 34 of the ICCPR.

[118] Guaranteed by Article 18 of the ICCPR.

[119] As per HRC General Comment 22: Article 18 (Freedom of Thought, Conscience or Religion),30 July 1993, available at:

[120] See, for example, the Jakarta Recommendations on Freedom of Expression in the Context of Religion, available at ; HRC General Comment No. 34: Article 19 (Freedom of Opinion and Expression), available at ; Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence - Conclusions and recommendations emanating from the four regional expert workshops organised by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012, available at ; and Report of the Special Rapporteur to the General Assembly on hate speech and incitement to hatred, , available at http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Annual.aspx.

of expression online as well as the right to freedom of religion or belief. Laws that punish blasphemy or 'hurting religious sentiments' have a stifling effect on dissent and freedom of expression, prohibiting a free exchange of ideas and views on political, social, legal and academic issues that may touch upon religion (Association for Progressive Communications *et al*., 2017a).

Privacy

The right to privacy[121] embodies the concept that individuals have the right to determine who has information about them and to control how, when and to what extent that information is communicated. The right to privacy is a fundamental human right. It is an important safeguard of individual autonomy and human dignity, as it allows individuals to make choices about how they live their lives. It is essential to the exercise and enjoyment of other fundamental human rights, particularly those related to freedom of expression and belief (Nyst, 2013).

In the digital age there are several daunting challenges to the right to privacy.[122] The UN General Assembly and Human Rights Council have recognised these challenges and have called upon states to uphold the right to privacy in digital spaces.[123] Surveillance is a serious and growing challenge to privacy. At a time when massive amounts of data are collected about individuals, states are conducting unlawful and/or arbitrary surveillance, interception of communications, and collection of personal data, which are highly intrusive acts that violate the right to privacy and can interfere with other human rights, like the right to freedom of expression. In particular, mass surveillance fails to meet the tests of necessity and proportionality and may undermine the tenets of a democratic society. Both communications surveillance – including surveillance of online activity and interception of telephone communications – and physical surveillance are popular means of countering crime, disorder and terrorism, as well as pursuing other national security aims. However, these legitimate aims are often used as justification for disproportionate measures, like mass surveillance, and can be abused for more pernicious means, like cracking down on human rights defenders, journalists, and others who challenge the power dynamics within society.

Another of the chief challenges to privacy is data protection or the protection of personal data and information. Identification systems, including ID cards and biometric and DNA databases, are increasingly being adopted by governments as a means of keeping track of citizens and improving the delivery of public services, increasing the effectiveness of law enforcement efforts, and managing migration. ID systems challenge the right to privacy in that they involve the collation and aggregation of large amounts of information that subsequently becomes representative of an individual, without any guarantee of the veracity of that information.

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[121] Guaranteed by Article 12 of the United Nations Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

[122] For an overview by the UN Office of the High Commissioner for Human Rights on the Right to Privacy in the Digital Age, please visit: http://www.ohchr.org/EN/Issues/DigitalAge/Pages/DigitalAgeIndex.aspx

[123] See, for example, United Nations General Assembly resolution A/C.3/71/L.39/Rev.1, available at https://www.accessnow.org/cms/assets/uploads/2016/09/privacy-resolution-2016-UNGA.pdf

Freedom of assembly and association

Freedom of assembly and association[124] online refers to peoples' use of ICTs to exercise their rights to peacefully assemble or associate, either offline or online. Civil society, human rights defenders, youth, marginalised groups and political parties use ICTs for social and political causes (Comninos, 2012). Tools like websites, email groups, mailing lists and social media platforms are used to share information, organise protests or issue joint statements. There are many examples of like-minded citizens rallying for a cause or coming together informally, whether in a geographical location or across borders, utilising growing access to the internet (Venkiteswaran, 2016). For some, the internet offers possibilities to come together with relative safety, where physical gatherings are dangerous. Often, offline and online platforms are used in combination to complement each other.

However, the internet has also made it possible for non-democratic forces, including state and non-state actors, to occupy the spaces at the same time. In some cases, the aim is to disrupt online social movements or to target individuals for their identities and beliefs. Political parties and religious groups are among the major users of the internet to mobilise supporters and in the process, dominate the online public sphere, and as a result offline threats have been replicated and intensified in online spaces (*Ibid*.).

Gender, discrimination and violence

The internet is a critical space for women and sexually marginalised groups to explore issues related to identity, and access information related to sexual orientation and gender identity (SOGI), including on health and education (Kaye, 2015; Association for Progressive Communications *et al*., 2015). This is especially critical for sections of society who already face extensive regulation, silencing and discrimination on the basis of their sexuality and gender. Yet governments in the region censor SOGI-related online content deemed to offend religious and moral sentiments. In some cases civil society advocating for these rights have been targeted (Mageswari, 2016), and in other cases online content relating to sexual rights has been censored (Jakarta Post, 2016).

Violence against women and girls online – such as cyberstalking, cyberbullying, harassment and misogynist speech – limits their ability to take advantage of the opportunities that ICTs provide for the full realisation of women's human rights. Just as violence is used to silence, control and keep women out of public spaces offline, women's and girls' experiences online reflect the same pattern. Online violence includes attacks on their sexuality, exposure of personal information, and, in the digital age, the manipulation of images that are then used for blackmail and destroying their credibility. The consequence of this is that women and girls self-censor, reduce their participation or withdraw from platforms and technology they are using all together. In addition, the normalisation of violent behaviour and the culture that tolerates the violence against women which social media perpetuates and facilitates at rapid speed work to reinforce

[124] Guaranteed in Article 20 of the UDHR and Articles 21 (peaceful assembly) and 22 (association) of the ICCPR.

sexist and violent attitudes, and contribute to norms and behaviour that make online spaces hostile towards women.

In addition, gender-based hate speech online in the name of religion remains largely unaddressed, and women and people who face discrimination based on their sexual orientation or gender identity face severe persecution online, frequently putting them at risk of physical attack as well (Council of Europe, 2016).

Economic, social and cultural rights

Civil and political rights as they pertain to the internet have received much more global attention compared to economic, social and cultural rights (ESCRs). While there have been significant efforts to use the internet to enable access to education, health and food security among other ESCRs, these initiatives have rarely been framed in terms of rights discourse (Brown & Finlay, 2016). The International Covenant on Economic, Social and Cultural Rights (ICESCR) consists of 31 articles dealing with rights such as the right to education,[125] to take part in cultural life and enjoy the benefits of scientific progress and its applications,[126] to work,[127] to health[128] and to food.[129]The internet can impact positively on most articles in the ICESCR. For example, it helps people find work, and unions to organise; it enables small farmers to access competitive market information; it is a powerful enabler of cultural participation, innovation and artistic expression; it allows online learning resources to be shared easily; and it facilitates access to information on health and medical advice.

However, the internet and new technologies can also act as disablers of ESCRs, or even facilitate the violation of rights, as those who are denied access to ICTs are also those who are traditionally marginalised economically and socially. Lack of access further marginalises these groups and alienates them from the process of development at a personal and national level.

More examination is needed on the impact of the internet and ICTs on the exercise of ESCRs at the national level, which is something NHRIs could contribute to.

Laws regulating the internet

States, realising the empowering impact of the internet, have in some cases tried to impose greater

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[125] Guaranteed by Article 13 of the ICESCR.

[126] Guaranteed by Article 15 of the ICESCR.

[127] Guaranteed by Article 6 of the ICESCR.

[128] Guaranteed by Article 12 of the ICESCR.

[129] Guaranteed by Article 11 of the ICESCR.

regulation. Offline regulations, typically in penal legislation, are being applied to online spaces, to bolster internet-specific legislation (Association for Progressive Communications *et al*., 2016). Legitimate expression and exercise of rights on the internet are, as a result, increasingly being redefined as cybercrime.

The former UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue (2011: 10), stated in his 2011 report:

> Legitimate online expression is being criminalized in contravention of States' international human rights obligations, whether it is through the application of existing criminal laws to online expression, or through the creation of new laws specifically designed to criminalize expression on the internet. Such laws are often justified on the basis of protecting an individual's reputation, national security or countering terrorism, but in practice are used to censor content that the Government and other powerful entities do not like or agree with.

To take some examples from Southeast Asia, states such as Thailand (Amnesty International, 2016; Human Rights Watch, 2016) and Myanmar are imposing more severe punishments and penalties for expression online than for expression offline. In countries like Malaysia (Association for Progressive Communications, 2016), and Cambodia (Cambodian Center for Human Rights, 2013), new legislation or amendments are currently being formulated which are likely to further restrict the environment for free expression. The institutionalisation of such restrictions, in contravention of international law,[130] guarantees and obligations, has made it very difficult for human rights defenders and civil society to advocate for reforms and to defend free expression.

Legitimate expression online is often prosecuted as blasphemy, obscenity, sexual deviance, sedition, and criminal defamation. States often rely on public order, national security and religion based exemptions to crack down on legitimate forms of expression and dissent. Non-state actors, some of whom benefit from the tacit support of the state, have attacked (and sometimes killed) individuals for expressing themselves online (Association for Progressive Communications *et al*., 2017b).

NHRIs play a key role in addressing rights violations in online spaces and in ensuring that laws and regulations seeking to govern the internet have a human rights-based approach and do not legitimise violations.

5. Recommendations

Digital tools

NHRIs can:

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[130] As per HRC General Comment No. 34: Article 19 (Freedom of Opinion and Expression), available at

• Explore and utilise ICTs including email, video conferencing and chat applications to improve efficiency in the way they function and carry out their mandate.

• Develop practices that help them systematically record and store information about their work in digital form.

• Ensure that their websites are accessible and updated and that they carry the information necessary for people to understand their rights and the function of the NHRI.

• Ensure that their websites are compliant with World Wide Web Consortium (W3C) accessibility standards.

• Proactively disclose all information, unless there is a specific reason to withhold it (for example, the privacy of victims), in line with principles of freedom of information.

• Enable submission of complaints through their websites and ensure that the process for filing these complaints is accessible to different users.

• Establish and maintain a strong presence in social media as a means of monitoring human rights violations through and on this medium and communicating with victims and the public in general.

• Collect data ethically and use the data aggregated through the website in the annual and periodic reports.

Digital security

NHRIs can:

• Integrate digital security as a component of a larger integrated security policy and measures.

• Determine what data they need to protect in their investigation of human rights violations, and whom they need to protect it from in order to keep it secure from unauthorised access and abuse.

• Based on the assessment of what data they must protect, develop or adopt a holistic internet and communication policy that helps the institution stay effective and secure.

• Work with experts in the field of data protection and security to put in place measures, processes and tools that help them protect and secure this data.

• Use online communication services with an encryption protocol to avoid unlawful interception of communications.

• Prevent others from having access to visitors' or NHRI website users' sensitive information as it passes through the internet, by enabling HTTPS (a communications protocol for secure communication over a computer network) on their websites.

• Save encrypted backups of their documentation and store it in devices and services that enable robust security features, including encryption.

Human rights online

Internet rights promotion

NHRIs can:

• Recognise, reinforce and remind stakeholders that human rights offline are applicable to online spaces as well.

• Contribute to the creation of a national culture of respect for human rights on the internet by acknowledging the role that ICTs play in the exercise and advancement of human rights.

• Increase public awareness of human rights online through campaigns, seminars, press conferences, etc., similar to the initiatives currently undertaken in relation to human rights addressed by the NHRIs.

• Work closely with governments and other authorities to ensure that they adopt a human rights-respecting approach to internet and digitisation initiatives.

• Play a crucial role in the development, formulation and delivery of education initiatives that explain the integral role ICTs play in the exercise and advancement of human rights.

• Impart training about human rights online for key groups such as NGOs, judges, police, journalists, etc., to raise awareness about ICT policies and help ensure a human rights-based approach to ICT laws and policies.

Internet rights protection

NHRIs can:

• Investigate human rights abuses and violations that take place whether in part or wholly on the internet.

• Work in collaboration with national experts from civil society, academia and the technology sector to address the impact of ICT policies on human rights.

• Monitor and comment on legislation and policies that can undermine the exercise of human rights on the internet.

• Advocate for a human rights-based approach to legislation and policies that seek to govern and regulate online spaces.

• Include reports on human rights on the internet in the UPR process and other human rights monitoring bod

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A Strengthening Komnas HAM as the Leading National Human Rights Institution In Indonesia

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Abstract

Indonesia is the only country in Southeast Asia has three National Commissions on human rights which are National Commission on Human Rights (KOMNAS HAM), National Commission on Violence Against Women (Komnas Perempuan) and National Commission on Child Protection (KPAI). Komnas Perempuan and KPAI have different positions with KOMNAS HAM, although the name is the National Commission. However, KOMNAS HAM has "more power" "in terms of position as an independent institution as the National Human Rights Institution (NHRIs). In addition to the three National Commissions, there are several other Commissions such as the Commission for the Protection of Witnesses and Victims, as well as units the work of government agencies such as the Ministry of Justice and Human Rights and the Ministry of Foreign Affairs of the Republic of Indonesia. But the existence of Komnas HAM and other institutions do not contribute positively to the enforcement of human rights, even the image of Komnas HAM is worse than in the previous period, during the New Order period. KOMNAS HAM as the leading institution of three Indonesian Human Rights institutions still faces various obstacles in implementing its functions and tasks. KOMNAS HAM's human resources are not proportional to the workload and the demands and expectations of the people to get excellent service. In addition, to run its mandate, the budget given to KOMNAS HAM is still limited, KOMNAS HAM cannot perform its functions and duties optimally. The main recommendation from this paper is to consolidate and to reformulate the authorities of the three commissions to make them more powerful in coordination among them and supports from the other government institutions, the financial support, as well as decentralization policy through the addition of representative offices in the region, as well as strengthening the number and quality of human resources is needed.

Keywords: National Human Rights Institutions. Mandate, Authority, Decentralization, Representative Office, Human Resources, Financial Support.

I. Introduction

Politically, the history of Indonesian government can be divided into three eras, namely the era of the old order under President Soekarno. The New Order era under the President Soeharto, and the reform era under the governments of several Presidents, namely President B.J Habibie, President Abdurahman Wahid, President Megawati Soekarno Puteri, President Susilo Bambang Yudhoyono, and President Djoko Widodo. The three rounds of government, have a strong correlation with the stages of political development of a nation that includes the political strengthening stage to recognize the independence of the Indonesian nation, the stage of industrialization to carry out economic development activities of Indonesia, stage of welfare State, which is an era where Indonesia makes various efforts to mitigate the adverse effects of

industrialization activities for human life, as well as abundant politics (AFK Organski, in S.Amran Tasai, 2010: 40).

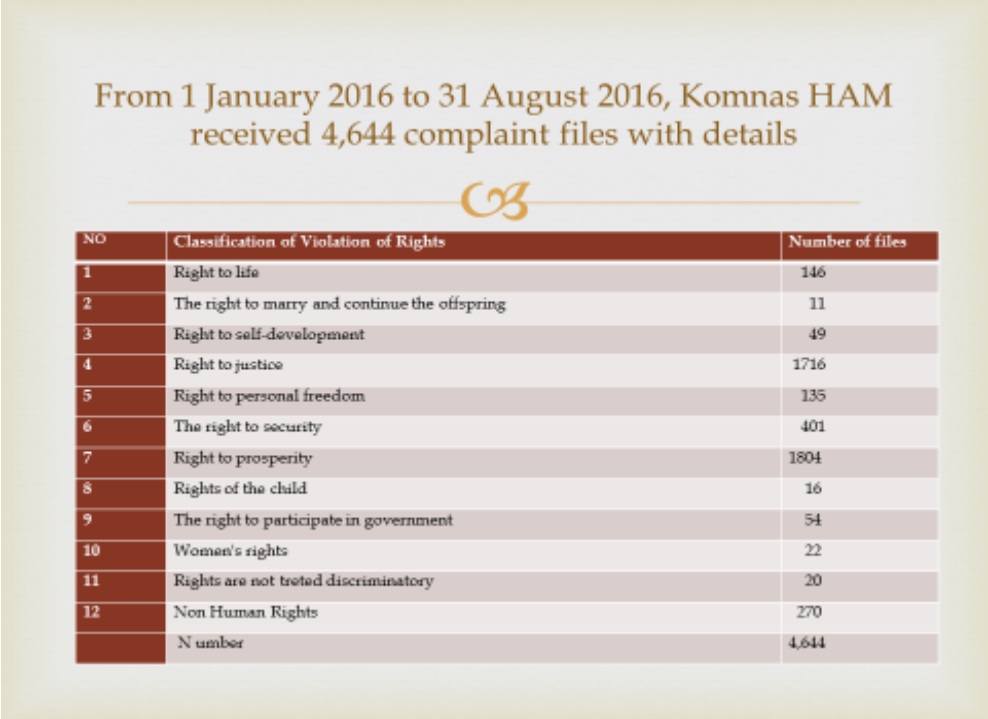
The most important for the history and policy of human rights protection in Indonesia was Indonesia's independence which commemorated only three years prior to the Declaration of Universal Human Rights (UDHR) in 1948. Therefore, human rights has been a debate since the preparation of Indonesian independence (Satya Arinanto, 2008: 6). Afterwards, many international human rights instruments adopted into the 1945 Constitution, the second amendment of the Constitution in 2000 which adopted more articles on human rights, ratification eight (8) United Nations Human Rights Covenants and adopted human rights values into the legislation. One of the main features of modern constitutional law is the existence of the protection of human rights, so that Komnas HAM as an institution specifically created by the State for the purpose of respect, protection and fulfillment of human rights. Human Rights has been positioned in the design of the 1945 Constitution which the Constitution is the highest legal source in the Republic of Indonesia based on Pancasila (Romy Patra, 2012: 210). If summed up all the articles of the 1945 Constitution which the most articles are on human rights. So we must say that human rights protection material becomes the core business of Indonesia in the new Constitution (Jimly Ashiddiqie, 2017:1).

With so many articles in the 1945 Constitution, then the Indonesian government established human rights protection institutions. As a consequence, there are many institutions that have mandates to carry out their duty of human rights promotion and protection. Although Indonesia is the only country in Southeast Asia has three (3) NHRIs which are National Commission on Human Rights (KOMNAS HAM), National Commission on Women (Komnas Perempuan) and National Commission on Child Protection (KPAI), Komnas Perempuan and KPAI have different positions with KOMNAS HAM. Although the name is the National Commission. KOMNAS HAM has "more power" "in terms of position as an independent institution as the National Human Rights Institution (NHRIs).

Therefore, the civil society's hope towards Komnas HAM remains high. This is evident from the many complaints submitted to Komnas HAM to be resolved. For example, in January 2016-August there were 4,644 complaints. The complaint is grouped into 12 sections, and the area with the most complaints relates to property rights or land followed by the right to justice as shown in the table below.

Table:1

Complaint files to KOMNAS HAM from 1 January to 30 August 2016



NO	Classification of Violation of Rights	Number of files
1	Right to life	146
2	The right to marry and continue the offspring	11
3	Right to self-development	49
4	Right to justice	1716
5	Right to personal freedom	135
6	The right to security	401
7	Right to prosperity	1804
8	Rights of the child	16
9	The right to participate in government	54
10	Women's rights	22
11	Rights are not treted discriminatory	20
12	Non Human Rights	270
	N umber	4,644

However, the presence of the Komnas HAM has been unable to improve the protection and enforcement of human rights in Indonesia. Further, the image of Komnas HAM is worse than in the previous period. Komnas HAM in the New Order government that received criticism and judged only the strategy of the ruler to get a positive image in the international world, it showed satisfactory results and received sympathy from the society (Rommy Patra, 2012:210).

It is unfortunate that the National Human Rights Commission for the period 2012-2017 is forged with problems of integrity and institutional accountability, namely the practice of fictitious rent-house practices by a Vice Chairman of KOMNAS HAM and budget deviation of KOMNAS to obtain the title of Disclaimer from the State Audit Board of the Republic of Indonesia in 2015. In addition, based on Civil Society Organisation research and searches of Komnas HAM Commissioners candidates 2017-2022 that nine people from 60 candidates Komnas HAM commissioners have links with radical organizations (mass organizations). From the aspect of independence, known to 13 people affiliated with political parties and 13 people affiliated with the corporation. In terms of integrity, five people are suspected of corruption and gratification. Eleven people in trouble in the right of honesty. Eight people related to sexual violence and 14 people in trouble on diversity issues (Indonesian Legal Aid Center, Press briefing by Totok Yulianto in Cikini, Central Jakarta, Sunday (2/07/2017).

This shows that there is something wrong in the current Komnas HAM, which prompts a need for research on efforts to strengthen Komnas HAM as a key institution in the upholding of human rights in Indonesia.

Research questions are how the role of KOMNAS HAM in synergy with the Komnas Perempuan and KPAI based on their mandate, position, function, coordination?. How is the relationship and division of tasks and functions between the commissions of human rights protection with other

government agencies such as the witness and victim protection agency, the ministry of law and human rights, and the ministry foreign affairs? How to support KOMNAS HAM to be able to carry out its duties and authorities as the leading National Human Rights Institution.

II. Human Rights Institutions: KOMNAS HAM, Komnas Perempuan, KPAI and Government Institutions

The Indonesian Human Rights National Commission (KOMNAS HAM) was established on 7 June 1993 based on the Presidential Decree No.50 Year 1993 on the Indonesian Human Rights National Commission (Presidential Decree No.50/1993). The legal status of Komnas HAM was subsequently strengthened through the Act No.39 Year 1999 on Human Rights (Act No.39/1999). According to article 1 point 7 of the Act No.39/1999, Komnas HAM is an "independent institution, of an equal level to other state institutions and which holds the functions of carrying out research and study, education, monitoring and mediation of human rights".

When compared with Komnas Perempuan and KPAI in terms of mandate , Komnas HAM has a broad mandate. Although the formation of KPAI is regulated in Law, Komnas HAM has a higher mandate than Komnas Anak and Komnas Perempuan. In terms of duties and functions, the three institutions have the same function namely Counseling; Mediation; Assessment and Research; and Monitoring with the same objects in violation of human rights, so it looks overlapping. Therefore, it needs to be consolidated.

Table: 2
Comparison of KOMNAS HAM, Komnas Perempuan and KPAI

Subject	**National Commission on Human Rights**	**National Commission on Women**	**National Commission on Child Protection**
Establishment	Established on 7 June 1993 based on the Presidential Decree No.50 Year 1993 on the Indonesian Human Rights National Commission. The legal was strengthened through the Act No. 39 Year 1999 on Human Rights.	Established on 9 October 1998 based on the Presidential Decree No. 181 Year 1998 on the National Commission on Violence Against Women and renewed by Presidential Regulation No. 65 Year 2005 on the National Commission on Violence Against Women.	Established on 20 October 2002 based on the Act No. 23 Year 2002 on Child Protection in conjunction Act No. 35 Year 2014 on Amendment of Act No. 23 Year 2002 on Child Protection.

Membership	• Maximum 35 people; • Proposed by National Commission on Human Rights, elected by the House of Representatives, inaugurated by the President; • Chairman and 2 Vice Chairs selected from and by members; • 5 years term of office and may be re-elected for just one more term.	• 15 commissioner • Chairman and 2 Vice Chairs selected from and by member; • 5 sub commissions, 3 task forces, and 2 teams; • 5 years term of office and may be re-elected for just one more term.	National Forum on Child Protection as the highest authority and the decision maker; National Commission on Child Protection.
Objectives	- Develop conditions which is conducive to the implementation of human rights; - Improving the protection and enforcement of human rights.	Develop a conducive condition to eliminate all forms of violence against women and to enforce women's rights in Indonesia; To improve prevention and control regarding all forms of violence against women and protection of women's rights.	Influencing policy makers; Promoting the participation of children; Raising awareness of child rights; Ensuring that children have effective means of redress when their rights are violated.

Functions	Counseling; Mediation; Assessment and Research; and Monitoring.	Resource center; Negotiator and mediator; Initiator of the changing and the drafting of legal policy; Monitoring; and Facilitator .	Counseling; Mediation; Assessment and Research; and Monitoring.
National Instruments	The Constitution of the Republic of Indonesia 1945; MPR Decree No. XVII/MPR/1998 on Human Rights; Act Number 39 Years 1999 on Human Rights; Act Number 26 Years 2002 on Human Rights Court Act No 40 Years 2008 on The Elimination of Discrimination, Race, and Ethnic; Presidential Decree No. 50 Years 1993 on the Indonesian Human Rights National Commission; Presidential Decree No. 181 Years 1998 on the National Commission on Violence Against Women.	The Constitution of the Republic of Indonesia 1945; Act Number 39 Years 1999 on Human Rights; Presidential Decree No. 181 Year 1998 on the National Commission on Violence Against Women and renew by Presidential Regulation No. 65 Year 2005 on the National Commission on Violence Against Women.	The Constitution of the Republic of Indonesia 1945; Act No. 23 Year 2002 on Child Protection and renew by Act No. 35 Year 2014 on Amendment of Act No. 23 Year 2002 on Child Protection;Presidential Decree No. 77 Years 2003; Act No. 4 Years 1979 on Children Welfare; Presidential Decree No. 36 Years 1990.

Outstanding cases	Freeport Indonesia,; Trisakti; Marsinah; Tanjung Priok; Munir; Sampit.	Domestic Violence; Indonesian Chinese Descent on May 1998.	JIS (Jakarta International School); Violence in International School .

The power of Komnas HAM also increased with the enactment of the Act No.26 Year 2000 of Human Rights Court (Act No.26/2000). This Act has appointed Komnas HAM as the mere institution that have the mandate to carry out inquiries of gross human rights violations, which according to the Act No.26/2000 comprises on genocide and crimes against humanity.

However, the authority of KOMNAS in handling cases of gross human rights violations is also very limited. Implementation of duties in the field of gross human rights violations as mandated by Act No. 20 of 2006 is dependent on the willingness of other institutions, namely the House of Representatives of the Republic of Indonesia (Parliament) and Attorney General. Its relationship with the Parliament is that the House has the authority in formulating the ad hoc human rights court. While the working relationship with the Attorney General is that the investigation and prosecution are the core authorities of the Attorney General. In some cases the investigation conducted by Komnas HAM was not followed up by the Attorney General. Naturally, the Attorney General is a Government body , and most of the human rights violations are conducted by state apparatus.

Table:2

Mandates to the Gross Violation By the KOMNAS HAM,

Attorney General and Human Rights Court

PRE-INVESTIGATION	INVESTIGATION	PROSECUTION	COURT
KOMNAS HAM	ATTONERY GENERAL	ATTORNEY GENERAL	HUMAN RIGTHS COURT

Komnas HAM can establish an Ad Hoc Team consisting of members of Komnas and the elements of the Society; -At the time of initiation of the investigation, to inform the Investigator. -If there is sufficient initial evidence, submit the conclusions to the Investigator.	It does not include the authority to receive reports; • The Attorney General may appoint an ad hoc investigator; • It must be completed within 90 days of receiving the results of the investigation. 90 days and 60 days extended.	Prosecution performed by the Attorney General; may appoint an ad hoc claimant; the prosecution must be done no later than 70 days from the time the investigation is received; Komnas HAM may request written information from the Prosecutor regarding the progress of the investigation .	Conducted by a panel of five Human Rights Court judges, consisting of 2 persons from the relevant human rights court and 3 ad hoc judges; Judicial hearings up to 180 days from the date of judgment; In case of appeal, it must be terminated within 90 days; In case of appeal, it must be terminated within 90 days.

Next, human rights protection is also carried out by government agencies, namely the Ministry of Justice and Human Rights (Kemenhukham) and the Ministry of Foreign Affairs (Kemenlu). The authority of the Ministry of Justice and Human Rights is very broad in the field of human rights protection. The work unit on a high rank is directly under the Minister. Similarly, the Ministry of Foreign Affairs has a mandate in handling human rights protection, although its work unit is two levels below the Minister. This shows the number of government institutions that deal with Human Rights in Indonesia, but has not been consolidated well. This has led to inefficiency in the handling of human rights.

Table:4

Comparison Between Directorate General on Human Rights Ministry of Law and Human Rights and Directorate on Human Rights and Humanity, Directorate General on Multilateral Cooperation, Ministry of Foreign Affairs

Subject	**Directorate General on Human Rights Ministry of Law and Human Rights**	**Directorate on Human Rights and Humanity, Directorate General on Multilateral Cooperation, Ministry of Foreign Affairs**

Establishment	Based on Government Regulation No. 2 Year 1945 on Establishment of Department in the Republic of Indonesia.	Based on Minister of Foreign Affairs Regulation No. 2 Year 2016 on Organization and Working Procedures of Ministry of Foreign Affairs.
Objectives	Formulating and implementing policy and technique standardization on human rights.	Formulating and implementing policy on foreign and political affairs on multilateral cooperation of civil and political rights, economic rights, social and cultural rights, development rights, minority rights, and humanity.
Functions	• Formulating policy; • Policy implementation; • Formulating, standard, norms, guideline, criteria, and regulations on progression and protection of human rights; • Consulting on technical and evaluation; • Implementing administration on Directory General of Human Rights; • Foreign and home Affairs Cooperation; • Organizing the implementation of National Human Rights Action Plan; • Securing Technical on Implementing the task on progression and protection of human rights.	• Preparing the formulation of foreign affair policy on multilateral cooperation of civil and political rights, economic rights, social and cultural rights, development rights, minority rights, and humanity; • Policy implementation of foreign affair policy on multilateral cooperation of civil and political rights, economic rights, social and cultural rights, development rights, minority rights, and humanity; • Preparing the drafting of standard, norms, guideline, and criteria of foreign affair policy on multilateral cooperation of civil and political rights, economic rights, social and cultural rights, development rights, minority rights, and humanity; • Monitoring and evaluating foreign affair policy on multilateral cooperation of civil and political rights, economic rights, social and cultural rights, development rights, minority rights, and humanity.

Similarly in the field of women's empowerment and Child protection. Indonesia has a Ministry for Women Empowerment and Child Protection (PP-PA). The Indonesian government should give attention to the protection of children in various aspects (Ministry of Women Empower and Child

Protection, 2016: 2) The number of children aged 0-17 years is estimated around 87 million people or about one third of the total population of Indonesia (National Survey, 2015). The rights of the children are included in various laws, including: The 1945 Constitution, Article 28 B (2) states that: "Every child has the right to survival, growth and development, and is entitled to protection from violence and discrimination. However, the implementation of the mandate of the law is not as expected, it is marked by the frequent occurrence of violations of children's rights reflected in the existence of children who experience violence, exploitation and discrimination.

Meanwhile, the flagship program of the Ministry of Women Empowerment and Child Protection (PP-PA) as a leading sector for the protection of women and children has launched the Three ends program. The program aims to:1) Ending violence against women and children;2) Ending the trafficking of persons; and 3) ending the injustice of economic access for women, with the following objectives (Ministry of Women Empowerment and Child Protection, 2017: 19)

However, according to Komnas Perempuan notes in commemorating women's day on March 18, 2017 that the protection of children and women at this time still face several problems, namely:

1) The policy of providing marriage dispensation is the fertility and marital offices of children.
2) The Constitutional Court's decision to reject the petition for view to raise the marriage age limit of children also confirmed the practice of child marriage and violence against girls.
3) Femicide or murder of women because she is female, is a serious issue that concerns the world but still minimal attention to Indonesia.
4) Close relationship between drug crime, human trafficking and migration and dead penalty in Indonesia. Women migrant workers are one of the most vulnerable groups involved in the case. In a number of drug crime cases where women as perpetrators, women's narratives and backgrounds face the death penalty, have not been heard and taken into account in the process of investigation, investigation and trial.
5) Tensions between development policies and political priorities of infrastructure on the one hand with human rights issues Serious impact on women is the threat of basic rights to livelihood, water, a balanced and healthy environment, cultural rights, sources of medicine, etc. are getting stronger due to the enrichment of spatial and spatial policies, resulting in evictions, plantation expansion, customary forest clearance, etc.
6) Criminalization has increased. Criminalization of women victims of domestic violence by their husbands or ex-husbands should also be of concern to the State, among others the reporting of husbands against wives who were supposed to be victims earlier, allegations of theft of husband's ATM to support his children, allegations of forgery of documents for correcting the identity of the husband in the card Family because it is still single status. Criminalization by ex-husbands is also an important issue, in addition to domestic violence that does not stop with divorce, but post-divorce also leaves violence hard to dispute by other legal protections, because it is beyond marital relations.
7) The victim still tends to come to the service created by the CSO / NGO to be explored further. Whereas the State is expanding services in various areas, where such efforts should promote the quality of service that is friendly to the victims, ensuring officers who understand the issues and principles of services that recover the victims, rather

than the efforts of formalism services that put forward the institutional status, infrastructure facilities both buildings and cars . Although infrastructure is important, more victims need quick and friendly service.

III. The Implementation of the Mandates of KOMNAS HAM and its Challenges

It must be admitted that Komnas HAM has succeeded in conducting several research and mediation activities and giving attention to the handling of cases of human rights in the past.

First, the task in the field is very strategic for the development of law that respects human rights in Indonesia. The results of this research are then used to provide input for the drafting of Laws that pay attention to Human Rights. Some research activities that have been done, and then made an input in the discussion of the Act was a study and research function on various cases of human rights violations and made a track record of the contribution of Komnas HAM in the drafting of Act No. 8 year 2016 on Persons with Disabilities.

Second, mediate the cases of violations of the rights of the people, that is carried out mediation functions by facilitating mediation meetings between Parangkusumo residents, Kab. Bantul, affected by the policy of regional regulation; Disputes over the construction of houses of worship; And land disputes involving large groups of citizens such as land disputes around Tesso Nilo National Park in Riau, Kerinci Seblat National, Park in Jambi and Bukit Raya National Park in West Kalimantan; And has submitted recommendations to Government agencies.

Third, opening the case in " 1965 ". The reform era government is committed to the settlement of past human rights violations (Suparman Marzuki, 2009:7). In order to address past human rights violations, namely the 1965 incident, which Komnas HAM was involved in several times in coordination with the Politics, Law and Human Rights Coordinating Ministry. The Government responded by conducting a symposium on human rights violations in 1965. Hence, to organize the symposium was a small step in disclosure cases of human rights violations and will take other steps.
In a report submitted to the House of Representatives of the Republic of Indonesia in a hearing, Komnas HAM delivered several obstacles in 2016, namely:

1) The inclusion of Komnas HAM presence in the 1945 Constitution so that in case there is a dispute over the authority between state institutions in the Constitutional Court (MK) ,which Komnas HAM will not be ignored.
2) From the perspective of Act No. 9 Year 1999 on Human Rights, Komnas HAM acknowledges that the weakness of the Law for Komnas HAM causes the National Commission of Human Rights can not summon witnesses (subpoena).
3) Furthermore, the weakness of the commitment of Komnas HAM as mandated by Act No. 39 year 1999 caused the recommendations of Komnas HAM to be abandoned by several government agencies / other law enforcement agencies.
4) Komnas HAM does not have its own authority to force the judiciary to hear Komnas HAM's information in prosecuting cases of human rights violations.
5) With regard to budgetary support, Komnas HAM has submitted to the House of Representatives Commission III that budget support in 2016 is insufficient to

support the performance and performance of Komnas HAM's tasks, particularly in relation to the investigation and execution of tasks to the regions.

As a follow-up to the hearing, a conclusion has been reached that is a joint commitment between Komnas HAM and DPR RI, namely:

1) The structural and institutional reform of Komnas HAM, one of which can be done by simplifying Komnas HAM members to discipline internal conflict within Komnas HAM. The greater the number of Komnas HAM Commissioners feared could hinder the performance of Komnas HAM because every Commissioner has different interests in every settlement of cases of human rights violations.
2) Commission III of the House of Representatives urges Komnas HAM to immediately undertake structural and institutional improvements and improve professionalism in carrying out its duties and functions in accordance with legislation and strengthening Komnas HAM through the revision of Act No. 39 year 1999 on Human Rights and open opportunities For the drafting of the Bill on Komnas HAM in National Legislation Program.
3) The House of Representatives Commission III urged Komnas HAM to submit the results of the study and research on legislation that has the potential to trigger human rights violations.
4) The House of Representatives Commission III urged Komnas HAM to submit the results of the study and research on legislation and the Draft Law which have the potential and trigger the occurrence of human rights violations to the House of Representatives.
5) The House of Representatives Commission III supports Komnas HAM to increase its authority in carrying out the investigation function through the amendment of Act No. 39 Year 1999 on Human Rights.
6) Human rights violations have occurred in the government's policy on the moratorium on the granting of remissions, parole, conditional leave, and free-time leave for inmates of corruption and terrorism;
7) There have been allegations of human rights violations in the Mesuji case in Mesuji District (Lampung), Mesuji case in OKI, Palembang (South Sumatra), Bima case, Papua case, Aceh case, Sijunjung (West Sumatera) case Sampang) which will be resolved thoroughly (The House of Representative Report, April, 2017).

Finally, the important point of the joint commitment above was that the House of Representatives strongly supports the efforts to strengthen the protection of human rights in Indonesia and puts Komnas HAM as the leading National Human Rights Institution.

IV. Conclusion and Recommendations

This paper comes to the conclusion that Indonesia is paying close attention to the protection of human rights by adopting the principles of human rights protection in 1945 amendment and establishing many institutions performing the duty of human rights protection. However, these institutions operate independently, not consolidated, and even seem to overlap with authority and

tasks. Therefore , the contribution of the institutions' presence to the protection of human rights is in decline.

Hence, it is necessary to consolidate human rights protection institutions in Indonesia by placing KOMNAS HAM as the coordinator and the leading institution through revision of the Law on Human Rights. The strengthening of KOMNAS to become the leading institution of human resources aspect, budget, and development.

First, Komnas HAM needs to be given the legal standing to file a judicial review to the Supreme Court and the Constitutional Court. Komnas HAM is expected to test the laws and regulations that are considered to violate human rights. This authority is important so that Komnas HAM can provide assurance that the Laws produced by Parliament and Government contain human rights aspects or values.

Secondly, Komnas HAM should be equipped with the authority to conduct investigation and prosecution in every case of human rights violations. At the same time releasing the police from the investigation task of alleged cases of human rights violations because of the security apparatus especially the prone police as perpetrators of human rights violations. During this time when the authority of investigation and prosecution were in the police and prosecution institutions and is in conflict of interest, the result of investigation from Komnas HAM does not proceed to investigation and prosecution.

Third, the Government institutions, Komnas HAM, Komnas Perempuan and KPAI should be consolidated. It is necessary to stipulate the duty of Komnas HAM to coordinate the implementation of human rights protection with Komnas Perempuan and KPAI to handle the existing human rights protection of the Ministry of Justice and Human Rights, the Ministry of Foreign Affairs, the Witness and Victim Protection Agency and the Ombudsman Institution.

Fourth, It needs strong competence and integrity, less number of Commissioners, more professional support staff, lawyers, researchers, and experts.The personal integrity of the Commissioner is very important. For example, the KOMNAS HAM was established during authoritarianism under President Soeharto's pessimism over the formation of Komnas HAM was merely an imaging but with the integrity of Komnas HAM members, KOMNAS HAM was highly appreciated by the civil society.

Fifth, It needs more budget for research, controlling, and mediation function needs. Komnas HAM is mandated by four laws, but it is not given an adequate budget. The Komnas HAM ceiling of FY 2017 is Rp 84.96 billion. The indicative ceiling already includes the budget for Komnas Perempuan. The budget is not enough to carry out all the tasks assigned to Komnas HAM.

Sixth, It needs to establish a Representative Office. The establishment of representative offices is based on the needs of the provincial community. The main function is to give more access for local people in some provinces and regencies to voice their rights to the government. Representative offices will "pick up the ball" against the voices of communities in remote areas, such as offshore, islands, coastal, inland, and mountains. Komnas HAM has six representative offices located in Aceh, West Sumatra, West Kalimantan, Central Sulawesi, Maluku and Papua. New Proposal was coming from West Papua and Lampung Provinces. The West Papuan Representative Office is a sign of the seriousness of the human rights organization in Indonesia's eastern side. Finally, the argument of the importance of the Establishment of Representative Offices are 1) the territory of Indonesia with a vast population and vulnerable to human rights

violations 2) Expanding human rights awareness agencies, 3) Strengthening human rights protection. In fact, there are several obstacles in the establishment of representatives in the provinces, namely 1) budgetary reasons, because it will increase the budget for facilities and infrastructure and the rejection by a group of people from the province concerned such as from Lampung Province. The reason for the rejection is because for the local community the establishment of representative offices shows an image that is not safe and full of human rights violations.

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Komnas HAM; Legal Context and Challenges

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Abstract

Based on some reports of people's satisfaction and assessment of the Indonesia House of Representatives on the performance of Komnas HAM in 2016 that Komnas HAM was one of the State Institution in questions because the Komnas HAM has lack of quick standard handling of the report by public, lack of responses of the Commissioner on the substance of human rights violations reported by the public and many neglect reports and issues internal works among the Commissioners themselves. Besides the internal performance that makes the protection of human rights are left behind, Komnas HAM has constraints to investigate and monitor past human rights violations as well as some recommendations were often a problem, and many institutions do not obey the recommendations made by Komnas HAM. Some tasks have not been resolved, particularly seven (7) cases of past human rights violations which are Trisakti incident , Semanggi I and Semanggi II, Talangsari incident, enforced disappearances, mysterious shootings, massacres after the G30S / PKI incident, and the May 1998 riots. This paper observes obstacles in the implementation of human rights protection in the context of the Constitution, some problems and discrepancies between the Human Rights Laws and related laws in connections with the future human rights protection with the new Commissioners, the weak power of Komnas HAM and its recommendations.

Keywords ; Legal, Human Rights Laws, Komnas HAM

1. Introduction

National Commission on Human Rights (NHRIs) are independent bodies with a constitutional and or legislative mandate to protect and promote human rights. They are considered to be constitutive of the State level (UN High Commissioner for Human Rights, 2007). One of NHRIs in Indonesia is Komnas HAM. The position of Komnas HAM has a strong legal force with the enactment of Law No. 39 of 1999 on Human Rights. The issuance of Law Number 39 of 1999 was a follow up of the issuance of the Decree of the People's Consultative Assembly (TAP MPR) Number XVII / MPR / 1998 on Human Rights. As stipulated in its establishment regulation, Komnas HAM is an independent institution whose position is on the same level as other state institutions. Komnas HAM is enabled with the functions to carry outstudy, research, disseminate monitor and mediate human rights issues. Then, Komnas HAM has the completeness consisting of Plenary Session and Sub-Commission. In addition, Komnas HAM has the Secretariat General as an element of service. Komnas HAM Chairman is held by members with a term of 2.5 years. Next, Komnas HAM performs its functions to achieve the objectives set forth in Article 75 of Law no. 39 of 1999, which are: to develop conditions which conducive to the implementation of

human rights in accordance with Pancasila, the 1945 Constitution, and the Charter of the United Nations, as well as the Universal Declaration of Human Rights (UDHR) and enhance the protection and enforcement of human rights for the full development of the people in Indonesia and the ability to participate in various areas of life. Besides that , Komnas HAM has a mandate in the investigation of gross human rights violations contained in Law No. 26 of 2000 on Human Rights Court and supervisory authority in Law No. 40 of 2008 on the Elimination of Racial and Ethnic Discrimination.

This paper examine the challenges for Komnas HAM based on the fact that only three cases of gross human rights violations that Komnas HAM has recommended to the Court which are ; first is " Abepura " case 7 Desember 2000 on the occurrence of gross human rights violations committed in a systematic and widespread form of torture, summary killings, persecution, unlawful arrest, detention and involuntary displace persons committed by the suspected security personnel. Then the " Tanjung Priok " incident was the siege of mosque officials and the blind shot to the crowd on 12 September 1984. Both gross human rights violations were established based on Presidential Decree (Keppres) No 53/2001 which was renewed by Presidential Decree No. 96 / 2001. Later was the incidents of gross violation of human rights in East Timor which was anarchy conducted widely by individuals and groups with direct testimonies and omissions by the elements of the security apparatus. Hence, Komnas HAM established the Commission of Inquiry on Human Rights Violations (KPP-HAM) in East Timor on 18 September 1999. Komnas HAM has accomplished investigations in some past human rights cases such as Talangsari case (1998), Semanggi I and II cases (1998-1999), Trisakti case (1998) Wamena case (2000) and Wasior case (2001 and recommended that the Attorney General's Office (AGO) establish ad hoc human rights courts for the cases. However, the formation of such human rights courts was hindered by the unwillingness of the Attorney General's Office to prosecute these cases.
Finally, this paper focuses more on analysis of the legal context of the provisions in the problematic human rights laws thus becoming an obstacle in the implementation of the mandate and authority of Komnas HAM in the protection of human rights and the challenge of Komnas HAM's future recommendations.

2. Why is it Necessary to Revise the Human Rights Law (s) ?

There are two (2) reasons for the need to revise the Human Rights Law. The first reason, basically, the 1945 Constitution in Article 1(3) clearly stipulates that Indonesia is governed by the rule of law. In addition to that, the 1945 Constitution states that human rights should be upheld in accordance with the principles of a democratic and law-based state. Hence, the human rights law should contain constitutional issues . However human Rights Law was formulated before the second amendment of 2000 of the 1945 Constitution. The new amendment introduced an expanded list of human rights under Chapter XA articles 28A to 28J which have not been listed in the previous of the 1945 Constitution.

The 1945 Constitution Article 28I paragraph (4) mentions; "*The protection, promotion, enforcement and fulfillment of human rights is the responsibility of the State, particularly the government "* and paragraph (5) states : " *To uphold and protect human rights in accordance with the principles of a democratic constitutional State, the implementation of human rights is*

guaranteed, regulated , and set forth in the laws and regulations. Thus the 1945 Constitution explicitly mandates the State, in particular the government to be responsible for the protection, promotion, enforcement, and fulfillment of human rights on the principles of democratic State law, whose implementation is guaranteed, regulated in Legislation. This is in line with Article 2 of Law No. 39 Year 1999 on Human Rights states;

"The State of the Republic of Indonesia recognizes and upholds human rights and basic human freedoms as rights which are inherent in nature and inseparable from human beings, which must be protected, respected and enforced for the enhancement of human dignity, prosperity, happiness, intelligence and justice. "

Then Article 71 of Law No. 39 of 1999 states:

"*The Government shall be responsible for respecting, protecting, upholding and promoting the human rights provided for in this Law, other laws and regulations and international human rights law adopted by the Republic of Indonesi*a."

Furthermore, Article 72 of Law No. 39 of 1999 states: "
" The obligations and responsibilities of the Government as referred to in Article 71 shall include effective implementation steps in the legal, political, economic, social, cultural, defense and security of the country and other fields. "

The second reason, the Human Rights Law (s) is considered not to meet the standards as stipulated in the Paris Principle. The core instrument relevant to NHRIs at the international level is the United Nations Principles relating to the Paris Principles (GA 48/134, 1993). The Paris Principles establish the minimum international standards (competence, structure ,working procedures) required for the independence and effective functioning of NHRIs. These principles provide guidance on the role that NHRIs are expected to perform and to be independent from government and civil society (Human Rights Report, p.7). They address aspects of promotion and protection of the mandate and even provide some direction about the quasi-jurisdictional competence of NHRIs that own such powers; as a general feature of some NHRIs in Asia. Principle 3 of Paris principle mentions *" A national institution shall, inter alia, have the following responsibilities: (a) submitting opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights, including with respect to: (i) Legislative or administrative provisions: the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights ",* (GA 48/134, 1993).

In article 76 of Law Number 39 Year 1999 states; " (1) to achieve its objectives Komnas HAM carries out the functions of study, research, counseling, monitoring and mediation on human rights " . Then article 89 of Law No. 39 of 1999 stipulates " to perform the functions of Komnas HAM in monitoring, Komnas HAM has the duty and authority to:
a) observation of the implementation of human rights and the compilation of reports of observations;
b) the investigation and examination of events that happen in a society based on the nature or

scope of which are suspected to be human rights violations;
c) calling to the complainant or victim or the complained party to be asked for and heard the statement;
d) summoning witnesses to be heard and to the complainant's witness asked to submit the necessary evidence;
e) review at the scene and other places deemed necessary;
f) calling the parties concerned to provide written information or submit the necessary documents in accordance with the original with the approval of the Chief Court;
g)Local examination of houses, yards, buildings and other places occupied or owned by certain parties with the approval of the Chief Court; and;
h) The giving of opinion based on the approval of the Chief Court of a particular case that is in the judicial process, if in the case there is a human rights violation in the public matter and the examination by the court which later Komnas HAM opinion must be notified by the judge to the parties.

However there is no regulation on the authority of Komnas HAM to call for the parties and there is no sanction for witnesses who are unwilling to be summoned in the articles of the Human Rights Law. Although Komnas HAM has the function of upholding human rights but it is legally limited to enforcing recommendation and has no ability to bring cases to the administrative law bodies or legal enforcement institutions hence required rules governing the explicit position of Komnas HAM in order to provide certainty when Komnas HAM carries out its mandate.

3. Legal Context

3.1 Basic Formation of Komnas HAM

Komnas HAM was established based on Law No. 39 of 1999 on Human Rights and was not governed by a special law or was regulated as only a part of the regulation of other laws. Whereas in some other countries especially in Asia Pacific region, the existence of its human rights institution is regulated by special law, for example in Bangladesh, NHRCB which is NHRI was established under the National Human Rights Commission Act No. 53 of 2009. While in Thailand, the National Human Rights Commission was established in accordance with the Constitution of the Kingdom of Thailand. B.E. 2540 (1997) which was effective on 11 October 1997. In the arrangement of the constitution in section 6 part 8, the National Human Rights Commission consists of a Chairperson and 10 commissioners who were appointed by the King Senate for a six year term and shall serve for one term. Then the Law was issued to the National Human Rights Act B.E.2542 (1999) which is effective on 25 November 1999 (Asia Pacific Forum).

3.2. Mandates

In the Article 89 Law No 39 of 1999 on the Human Rights stipulates that in carrying out Komnas HAM's functions in mediation, the duties and authorities of Komnas HAM through (a) the peace mechanism of both parties; (b) settlement of cases by means of consultation, negotiation, mediation, conciliation and expert judgment; (c) advising the parties to settle disputes through courts; (d) submitting a recommendation on a case of human rights violation to the

Government for follow-up to its resolution; (e) submitting a recommendation on a case of human rights violation to the House of Representatives of the Republic of Indonesia for follow-up.

Therefore , as stipulated in article 89, Komnas HAM may issue recommendations after a mediation process. Outside the mediation process, then the Human Rights Law does not regulate further on whether Komnas HAM may issue recommendations or not. In practice, however, recommendations may be issued after Komnas HAM has conducted monitoring tasks. This poses a problem because the parties can reject the recommendation on the grounds that it is not strictly regulated in the Human Rights Law.

The National Human Rights Commission is not authorized to investigate the findings of human rights violations in the field. The authority of Komnas HAM merely conducts research, monitoring and investigation as well as issuing recommendations. The Human Rights Law does not give any consequences if the party recommended does not carry out the recommendation. Article 95 of the Human Rights Law states that *"If a person who is summoned does not come to face or refuse to give his statement, Komnas HAM may request the assistance of the Chief Justice for the enforcement of forced vocations in accordance with the provisions of the law".* Because the Human Rights Law does not give explicit authority related to the calling of the alleged perpetrators of human rights violations or other parties questioned by Komnas HAM so as not to have the power to force to bring the concerned.

3.3 Gross Human Rights Violations

The importance of the revision of the Human Rights Law is that Komnas HAM is only regulated in Law No. 26 of 2000 on Human Rights Courts and Law No. 40 of 2008 on the Elimination of Racial and Ethnic Discrimination. The Law No. 26 of 2000 on the Human Rights Court in general, regulates two matters, first, the regulation of criminal acts categorized as serious human rights violations, which covers crimes of genocide and crimes against humanity which in articles 7-9 generally derived from the Rome Statute, while the procedural laws governed include arrest, detention, investigation, prosecution, examination in the hearing and the terms of appointment of judges to the provisions of execution . The Law No. 26 in article 18 (1) mentions *" The National Human Rights Commission (Komnas HAM) in conducting investigations may establish an ad hoc team comprising the National Commission on Human Rights and the community element.* With Law No. 26 of 2000, Komnas HAM has the mandate as the only institution with authority to investigate gross human rights violations.

However, the attempts to prosecute gross violations of human rights are hampered by Article 43 of the Human Rights Court Law (2) mentions;

"The ad hoc Human Rights Court as referred to in paragraph (1) shall be established upon the proposal of the House of Representatives of the Republic of Indonesia based on certain events by Presidential Decree."

Furthermore, according to the explanation of Article 43 (2) of the Human Rights Court Law, explicitly stated, "In the case of the House of Representatives (DPR) proposing the establishment of an ad hoc human rights court, therefore the House should be based on allegations of serious

human rights violations restricted to locus delicti or the scene of the crime that occurred prior to the enactment of Law". This means that any serious human rights violations that occurred "before" Law No. 26/2000 was established, the DPR should recommend or propose the establishment of an ad hoc human rights court over the alleged cases of gross human rights violations based on the findings of Komnas HAM and the Attorney General.

In addition to that, Komnas HAM recommendation is hampered by the Attorney General' authority's because it is not followed up with investigation. The construction of Law No. 26 of 2000 mentions Komnas HAM as " pro justitia" (a latin phrase " on behalf of justice") investigator and the Attorney General (AGO) is as investigator of cases of gross human rights violations. The separation between implementing agencies of investigation and prosecution functions such as serious violation of human rights in Law No. 26 of 2000 resulted in a lack of relationship between the two institutions in their function (Enny Soeprapto 2011, pp 23-26.).As can be seen in the table below about restrictions in cases of gross human rights violations;

Table on legal provision of Law No 26 of 2000 on Human Rights Court for the legal process of Gross human rights violations

Mandate/ Authority	**Provisions in Law No 26 of 2000**	**Restrictions by Law**

Investigation by Komnas HAM	Article 18 (1) The investigation of gross violations of human rights is committed by the National Commission on Human Rights. The National Commission on Human Rights in conducting the investigations referred to in paragraph (1) may establish an ad hoc team comprising the National Commission on Human Rights and the representatives of the community. Article 19 (1) In conducting the investigation as referred to in Article 18, the investigator is authorized: a.) to conduct investigation and examinations of events arising in a society which by its nature or scope is reasonably suspected of gross violations of human rights; b).receive a report or complaint from a person or group of people concerning the occurrence of gross violations of human rights, and seek information and evidence;c). call the complainant, the victim, to be requested and heard his or her statement;d).call witnesses to be asked and heard his or her testimony; e). review and gather information on the scene and other places deemed necessary; f). call the parties concerned to provide written information or submit the necessary documents in accordance with the original; g). on the orders of the investigator of Attorney General (AGO) may take the following actions: 1). to examine the mail 2). search and seizure; 3). local examination of the house, yard, buildings and other places occupied or owned by certain parties; 4). bring in experts in connection with the investigation.	Komnas HAM only conducts investigation and relies heavily on Investigators namely the Attorney General (AGO) .

Initial evidence for Gross Human Rights Violations	Article 20 (1) In the event that the Commission on Human Rights is in their opinion that there is sufficient initial evidence of serious human rights violations, then the conclusions of the investigation results shall be submitted to the investigator of Attorney General (AGO) (2) At the latest 7 (seven) working days after the conclusion of the investigation result, the National Commission on Human Rights shall submit all investigations to the investigator of Attorney General (AGO). (3) If the investigator of Attorney General is of the opinion that the investigation result as referred to in paragraph (2) is still incomplete, the investigator of Attorney General shall immediately return the investigation result to the investigator of Komnas HAM with instructions to be completed and within 30 (thirty) days from the date of receipt of the investigation result, the investigator of Komnas HAM shall submit incomplete material.	The investigative authority of the Attorney General in the end to follow up the results of the Komnas HAM investigation's as well as the Attorney General which can state that the investigation by Komnas HAM is incomplete and can not be further processed.

Investigation by Attorney General	Article 21 (1) The investigation of cases of gross human rights violations is committed by the Attorney General. (2) The investigation referred to in paragraph (1) does not include the authority to receive reports or complaints, (3) In the performance of the tasks referred to in paragraph (1) the Attorney General may appoint an ad hoc investigator composed of government and / or community representatives.	The investigation becomes the full authority of the Attorney General.
Prosecution	Article 23 (1) Prosecution of serious cases of gross human rights violations shall be committed by the Attorney General. (2) In the performance of the duties referred to in paragraph (1) the Attorney General may appoint an ad hoc public prosecutor comprising government and / or community elements.	Prosecution becomes the authority of the Attorney General

Detention	Article 12 (1) The Prosecutor General as investigator and prosecutor shall have the authority to carry out further detention or any detention for the purpose of investigation and prosecution. (2) Human Rights Court Judge is authorized and set to do Detention for the purpose of examination in court. (3) Any further detention or a detention order shall be made against a suspect or defendant who is alleged to have committed gross human rights violations on the basis of sufficient evidence, in the event of any circumstances causing concern that the suspect or defendant shall flee, destroy or remove evidence, and / or repeat gross violations of human rights.	The Attorney General's has the strong mandate in investigation, prosecution and detention.

Three cases of serious or gross human rights violations that have been resolved by the Indonesian human rights courts such as the East Timor 1999, Tanjung Priok 1984 cases were handled by the Jakarta Ad Hoc Human Rights Court, and the Abepura 2000 gross human rights violation case was handled at the Makassar Human Rights Court (Komnas HAM reports). The Law also has a fundamental weakness, since the crime of genocide and crimes against humanity is a category of international criminal crimes handled directly by the International Criminal Court and it is not a jurisdiction of human rights courts. Human rights courts are different conceptually with the International Criminal Court. The weakness of Law No. 26 of 2000 is the conceptually deliberately misplaced, incorrect, and even intentional law made to legalize past human rights violations through the court (Marzuki, 2010, pp. 43-55).

Next, in Law No. 40 of 2008 mentions in Article 8 (1); *"Supervision of all forms of efforts to eliminate racial and ethnic discrimination by Komnas HAM". (2) "Supervision as referred to in paragraph (1) shall include:*

a) monitoring and assessing the policies of the government and local government that are deemed to have the potential to cause racial and ethnic discrimination,

b) fact finding and assessment to individuals, community groups or public institutions or private sector alleged to engage in racial and ethnic discrimination,

c) recommendation to the government and local government on the results of monitoring and assessment of acts that contain racial and ethnic discrimination;

d) monitoring and assessment of government, local government and community in the

implementation of elimination of discrimination race and ethnicity, and
e) recommendation to the House of Representatives of the Republic of Indonesia to supervise the government that ignores the findings of Komnas HAM. "

The authority of Komnas HAM with the existence of Law No.40 of 2008 was actually increased its mandate. The purpose of the provisions of the supervisory function of Law No. 40 of 2008 is that Komnas HAM evaluates the central and regional government policies that are conducted periodically or incidentally by monitoring, facts-finding, assess the finding whether or not racial and ethnic discrimination is followed up with recommendations. The Law No. 40 of 2008 is a regulation governing the substance of the Convention on the Elimination of Racial Discrimination which has been ratified by the State. Hence, any State that has ratified an international human rights covenant such as the International Covenant on Civil and Political Rights (ICCPR) should provide the role of Komnas HAM for its oversight and enforcement through legislation. According to the Paris Principles, the NHRI mandate should be as broad as possible. A broad mandate means that the institution possesses the power of human rights. These conditions make Komnas HAM unable to solve the human rights problems that the community complains about. Komnas HAM, should also be given better authority in the mandate and power to act to resolve human rights violations since the majority of human rights violators are committed by the government and armed apparatus, therefore only institution capable of conducting examinations related to human rights violations in government institutions is Komnas HAM.

3.4 Monitoring of Komnas HAM on the implementation of International Covenants on Human Rights

Komnas HAM uses various national and international human rights instruments that are binding and non-binding as its reference in performing functions, duties and authorities. Indonesia has accessed and ratified eight (8) of nine international human rights treaties. These several provisions of international human rights laws that should be the legal references of Komnas HAM are:

1.Universal Declaration of Human Rights (DUHAM), 1948
2. International Covenant on Civil and Political Rights (ICCPR), 1966 ratified by Law No. 12 of 2005
3. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 ratified by Law No. 11 of 2005
4. The International Convention on the Elimination of Racial Discrimination (ICERD), 1965 was ratified by Law No. 29 of 1999
5. The International Convention on the Elimination of Discrimination Against Women (CEDAW), 1979 was ratified by Law no. 7 years 1984
6. The International Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1984 is ratified by Law No. 5 of 1998
7. Convention on the Rights of the Child (CRC), 1989 ratified by Law No. 10 of 2012
8. The International Convention on the Rights of Persons with Disabilities (ICRPD), ratified by Law No. 19 of 2011
9. The International Convention for the Protection of Migrant Workers and their Families

(ICMW), 1990, was ratified by Law No. 6 of 2012

In Article 7 of Law No. 39 of 1999 on Human Rights provides an opportunity for provisions of international law that have been ratified for promulgation into national law. In addition to that, Indonesian citizens can apply national and international human rights mechanisms to claim their rights, as described in the following terms:
(1) Everyone shall have the right to use all national legal remedies and international forums for all violations of human rights guaranteed by Indonesian law and international human rights law adopted by the Republic of Indonesia.
(2) The provisions of international human rights law that have been accepted by the Republic of Indonesia as the national law.

4. Summary and Recommendations

The Law No. 39 of 1999 on Human Rights is the main instrument of human rights in Indonesia to regulate Komnas HAM institution. However, Law No. 39 of 1999 on Human Rights has a fundamental weakness, namely the limitation of the mandate, role and function of Komnas HAM itself. Hence, the law stipulates numbers of authorities possessed by Komnas HAM but the authority is very weak because the Law does not provide recommendations that do not have legally binding power for Komnas HAM.
Moreover, some of the authority possessed by Komnas HAM is perceived as insufficient and ineffective in its efforts to protect human rights. Therefore, to enhance and strengthen the effectiveness of Komnas HAM institution apart from strengthening existing authority, the following legal arrangements must be made;

Firstly; to strengthen the mandate on Subpoena or a mandate to appear in legal proceedings or request for a production document in Komnas HAM. Komnas HAM should be authorized to request assistance to law enforcement agencies to present the concerned person by force.

Secondly; to strengthen Komnas HAM to be able to conduct an investigation into the existence of cases of human rights violations which affirmed that the position of the Attorney General only as a claimant.

Thirdly : to give more authority to Komnas HAM as a recommender to the President for the establishment of an ad hoc Human Rights Court for cases of gross human rights violations in the past and replacing the role of the House of Representatives (DPR) as a political institution which is not appropriate to be involved in the legal process of handling cases cases of human rights violations.

Fourthly, the need for regulation in the Law that the parties receiving the recommendation from Komnas HAM are obliged to implement the recommendation. If the recipient of the recommendation rejects some or all of the recommendations, it shall explain in writing to the National Human Rights Commission about its rejection in a certain period. If Komnas HAM can not accept the reason of the recipients of the recommendations, Komnas HAM may file a court decision.

Fifthly, there is a need the provision on how Komnas HAM is building networks with civil society (NGOs) or other state institutions in coordinating and implementing Komnas HAM recommendations.

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The New Mechanism of Komnas HAM in the Settlement of Land Rights of Indigenous Peoples

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Researcher of Komnas HAM

Abstract

This paper examines cases of violation of their ownership rights of indigenous peoples deprived arbitrarily by the other party. In 2016 the Commission received around 144 complaints lodged by indigenous peoples' right to work cases and land disputes, 93 of those cases were about land ownership rights. Komnas HAM does not limit itself to handle cases concerning civil rights and politics itself, but is also actively involved in the enforcement of the rights of economic, social, and cultural. As the State Institutions Komnas Ham has a function. The function of the Commission is to exercise its authority to examine, research, education, monitoring and mediation of human rights. People really expect the Commission to play a role in ESC rights issues. The role of this commission which will oversee all policy related to ESC rights, and the Ensure the enjoyment of the right to ESC can be progressive realization. Cases concerning land ownership rights are handled by the National Human Rights Commission is closely related to the fulfillment of social rights and culture embedded in a community, especially the indigenous people who put the land as a source of livelihood. It is the 'home' and or also as' Mother'. Therefore, in 2016 alone, Komnas HAM had received 2,539 cases related to the fulfillment of the rights of economic, social, cultural and society at large. Meanwhile, in a way, a lawsuit over ownership of land that has been, is being, and will be handled by the Komnas HAM is a lawsuit by civil society who were dealing with the state and corporations. This paper will provide an overview widely regarding the handling of cases of land rights of indigenous peoples that has been done by Komnas HAM. This paper also Describes the new mechanisms used by Komnas HAM in dealing with land rights for indigenous peoples. Study will use qualitative methods to look at the norms and tasks the Commission in the handling of cases by Komnas HAM.

Keywords: Indigineous People, Land Rights, New Mechanism

Introduction

As a state institution, Komnas HAM has a mandate to encourage the protection, fulfillment and enforcement of human rights in Indonesia. KomnasHAM in handling cases is based on Law No. 39 of 1999 which resulted in recommendation.

These recommendations will be addressed to the relevant parties directly related to the case being. Sometimes the recommendation does not result in justice for the victim. Komnas HAM Recommendations has no legally binding to perpetrator, which lead to difficulties for victims to encourage further settlement of cases.

Komnas HAM works based on Law Number 39 of 1999 on Human Rights. Article 75 to Article 103, regulates provisions for Komnas HAM.[131] In the special arrangement there is a

[131] See Law No 39 of 1999 on Komnas HAM

section on the mechanism of Komnas ham in encouraging the protection, fulfillment and enforcement ofHuman Rights in Indonesia. Komnas HAM has four mandates: research studies, public awareness, monitoring, and mediation.[132]

To carry out its research mandate, Komnas HAM may conduct study and research of various international human rights instruments with the aim of providing suggestions on the possibility of accession or ratification. Komnas HAM may also undertake a review and research of legislation to provide recommendations on the establishment, amendment and revocation of human rights-related legislation.[133] Komnas HAM may also cooperate with other national, regional and international parties in the field of human rights.[134]

To carry out its education and Public awareness mandate,[135] Komnas HAM can disseminate insight into human rights to the people of Indonesia. Komnas HAM can also make efforts to improve community awareness about human rights through formal and non formal education institutions and various other groups. In order to carry out the mandate, Komnas HAM can also cooperate with other parties as well as research and studies.

To carry out Komnas HAM's functions in monitoring and investigation[136]Komnas HAM is authorized to observe the implementation of human rights in the preparation of reports of observations. Komnas Ham is also authorized to investigate and investigate events that arise in a society where human rights violations are suspected. Furthermore, Komnas ham may also call the complainant or the victim or the complained party to be questioned and heard his statements and witnesses. Komnas ham can also conduct a review of the scene and other places deemed necessary.

To carry out the Mediation function,[137] Komnas HAM can make peace on both sides. The settlement of cases through consultation, negotiation, mediation, conciliation and expert judgment. Komnas HAM is also authorized to advise the parties to resolve disputes through the courts. Furthermore, Komnas HAM is also authorized to submit a recommendation on a case of human rights violations to the government and the People's Legislative Council for follow-up

The public has felt that the case handling mechanism in Komnas HAM as regulated by Law number 39 of 1999has not been effective in enforcing human rights in Indonesia.This became the focus of various parties on the weakness of legal provisions regarding Komnas HAM. So far mediation mechanism is the only resort that can facilitate the victim’s case up to the agreement for parties, the victims and the perpetrator. The outcome of the agreement can be

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[132] Law No 39 of 1999 Article 76

[133] Ibid, Article 89 paragraph 1

[134] Ibid

[135] Ibid Article 89 paragraph 2

[136] Ibid Article 89 paragraph 3

[137] Ibid Article 89 paragraph 4

registered to the court and each party must comply. However, in reality some parties ignore the outcome of the agreement.

Komnas Ham has conducted various studies on Rights of Indigenous people, which are produced in the framework of enforcing, fulfilling and protecting communities and indigenous peoples in particula. Those studies were studied on the inventory of indigenous and tribal peoples in Indonesia, as well as Land Rights in Indonesia.

Komnas HAM also handles various cases of indigenous peoples, such as indigenous people Orang Rimba Jambi, Pandumaan Sipituhuta North Sumatra. However, these cases continue to recur and complaints continue to Komnas HAM because there is no settlement that guarantees the protection and rights for the victims.

So, whether Komnas HAM has a new breakthrough in handling cases? What are the steps of Komnas HAM in providing protection and enforcement of the rights of indigenous peoples in the context of indemnification? This paper will describe how the handling of cases in Komnas HAM, related to land rights, especially for Indigenous peoples in Indonesia. This paper will also scrutinize the new breakthroughs by Komnas HAM in the handling cases.

Writing Method

This paper is a narrative descriptive study using a qualitative approach. The author uses the study desk method and literature study conducted at Komnas HAM. The data were collected from Complaint data and National Inquiry data which have been carried out by Komnas HAM. In 2014-2015 Komnas HAM implemented the National Inquiry as an effort in the settlement of various cases of indigenous peoples in Indonesia. In this writing, the authors also conducted interviews with various parties including officers in the complaints, monitoring, mediation and researchers who actively participated in national inquiry.

Land Grabbing, Exclusion and Human Rights

Land grabbing or current land grabs often occur in different parts of the world. Studies show that in recent years between 20-80 million hectares of land have been "deprived," although it is difficult to ascertain because most of the deals are made secretly. Africa appears to be a prime target for this large-scale investment, although there are also numerous reports coming from all over the developing world. Accounting for 134 million hectares of reported deals, of which 34 million hectares have been cross-referenced. The next largest target is Asia with 29 million hectares cross-checked.[138]

Land grabbing phenomenon occurs in several countries, especially in the global south. There are a number of factors that encourage the expropriation of this land. These factors can be analyzed in the context of financial, food, energy and the global climate crisis. The 2007-2008 global food crisis, which pushed up food prices, created political and economic momentum for

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[138] Ward Anseeuw, Liz Alden Wily,(2012) *Land Rights and the Rush for Land Findings of the Global Commercial Pressures on Land Research Project,* The International Land Coalition p4.

land acquisition. Likewise, climate change and the energy crisis create a new urgent need to find land for renewable energy crop production.[139]

Large-scale plantation trends and concentrated contract farming in chronic poverty pockets are issues that have been discussed for a long time in agrarian studies and are well documented.[140] While the general assumption in the World Bank environment is that Foreign Direct Investment flows to areas with good governance and clearly defined property rights, research conducted by the World Bank itself confirms that capital flows into areas where labor and the right to The land is uncertain and not protected by the legislation and the government.[141] When wages are everywhere low, capitalist exploitation and profit maximization are high. Under these vulnerable conditions, large-scale land use projects become very problematic when displacing communities and depriving them of their most valuable asset and resilience, their land.[142]

What happens to indigenous peoples is the process of exclusion of indigenous peoples to their ulayat lands. According to Byrne Social exclusion can be interpreted as a process that prevents or inhibits individuals, families, or groups from the resources needed to participate in social, economic and political activities in a community intact.[143]

Derek Hall, Philip Hirsch and Tania Li (2011)[144] in their book, Powers of Exclusion: Land dilemmas in Southeast Asia, show four power factors that exclude others from access to land in Southeast Asia: (1) regulation, Legitimate regulations of the state; (2) coercion by force, whether by state or non-state actors; (3) the market, which limits access to land through price mechanisms and provides incentives for claims to more individualistic lands; (4) legitimacy, ie various forms of moral justification, such as claims of hereditary rights, scientific considerations, economic rationality, and government claims to regulate. [145]The four aspects of power are right to describe the reality of indigenous peoples being removed from their lands, especially through countries and corporations based on natural resources dredging.

The use of force to get rid of it occurs in six removal processes. (1) the regularization of land rights, through government programs on land registration, formalization and peace; (2) space expansion and intensification through conservation of forests by suppressing agricultural activity: (3) new boom crop in the form of monoculture crop expansion leading to massive land conversion; (4) land conversion after use for agriculture; (5) processes arising from agrarian

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[139]Anna Bolin, Global Phenomenon of Land Grabs, Research studies, (November, 2011) can be accessed at http://www.downtoearth-indonesia.org/id/story/fenomena-global-perampasan-tanah

[140]Little and Watts *in* Borras, S.M. Jr, Hall, R., Scoones, I., White, B. and W. Wolford (2011) 'Towards a better understanding of global land grabbing: an editorial introduction' *Journal of Peasant Studies*

[141]Li, T.M.(2011) *'Centering Labor in the land grab debate'*, *The Journal of Peasant Studies*, pp 283

[142]Oliver de Schutter (2011), How not to Think Land Grabbing, The Journal of Peasant Studies, pp 209-216

[143]Byrne, 2005 in .

[144]See Li, TM (2011) Powers of Exclusion, Land Dilemmas in Southeast Asia, National University Press of Singapore.

[145]ibid

formations within the village involving ropes and village neighbors (intimate exclusions); (6) mobilization of groups to maintain their access to land.[146]

Referring to the formulation of the UN Declaration of the UNDRIP that Indigenous peoples have long experienced oppression of land, and their territory for which the rights of indigenous peoples to their lands, territories and customs must be recognized and respected.[147]

> "*Concerned* that indigenous peoples have suffered from historic injustice as a result of, inter alia, their colonisation and dispossession of their lands,territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interest"
>
> *"Recognizing* the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structure and from their cultures, spiritual traditions,histories and philosophies, especially their rights to their lands, territories and resources"

In solving cases, Komnas HAM can only provide recommendations as a final form in the settlement of a case. If there is no indication of gross human rights violations. Sometimes the settlement does not bring justice to the victim. In this matter, Komnas HAM must be able to provide a new breakthrough in the settlement of cases that also affect the good for the Victim. The principle of remedy is the anticipated work of Komnas HAM in the settlement of cases. For some Indigenous peoples, Indemnification or reimbursement is a highly anticipated aspect especially for justice for victims. The compensation is not only limited to material replacement, but also the restoration of their dignity as human beings when the state has taken it primarily for cases of land grabbing with violence or criminalization of indigenous peoples on suspicion of looting of forest products.

Within the UNDRIP has been regulated as in other Human Rights Laws, that Indigenous peoples are entitled to justice in a fair and independent process.[148] Article 27 of the UNDRIP states.

> "States shall establish and implement, in conjunction with indigenous peoples concerned, a fair,independent, impartial, open and transparent process,giving due recognition to indigenous peoples' laws,traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenouspeoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenouspeoples shall have the right to participate in this process"

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[146] ibid

[147] UN Declaration of the UNDRIP

[148] See Article 27 of the UNDRIP

The UNDRIP also regulates the principle of remedy for victims as referred to in Article 28 paragraph 1 of the UNDRIP

> "Indigenous peoples have the right to redress, by means of which it can be restored, for the lands, territories and Resources which they have taken to be confiscated, taken, occupied, used or damaged without their free, prior and informed consent. "

The UNDRIP also provides that if the land is taken under an agreement, it must also consider fair remedies for indigenous peoples.[149]

> "Unless otherwise freely agreed upon by the peoples concerned, the compensation shall take the form of lands, territories and resources equal in quality, size and legal status of monetary compensation or other appropriate redress"

Article 29 of the UNDRIP also expects the State's role in taking measures in the protection of Indigenous peoples' lands or customary law.[150]

> "Indigenous peoples have the right to the restoration and protection of the environment and the productive capacity of their lands, territories and natural resources. Countries will establish and implement assistance programs for indigenous peoples such as conservation and protection, without discrimination. "

Land Grabbing Threat to Indigenous peoples

In Indonesia, the threat of land grabbing is no less excited by the case outside. In addition to land grabs by industry, plantation companies, even by the state. In 2010, the Government of Indonesia, inaugurated the Merauke Food and Energy Plantation development project in an integrated or more popular way as Merauke Integrated Food and Energy Estate.[151] Food Estate aims to strive for food security for Indonesia. This program is triggered by the condition of the food crisis in the world and in Indonesia due to unstable prices affecting the price of other basic necessities that are feared will bring social impacts on society. For that purpose the government proclaimed a food security program through the Food estate and made Merauke and Papua as areas for big projects. The program has been institutionalized with the issuance of Presidential Instruction no. 5 Year 2008 on the Focus of the Economic Program of 2008-2009 including the arrangement of Food Investment Scale Area or Food Estate. Furthermore, the government also issued Government Regulation number 18 of 2010 on Cultivation of Plants which was used as a legal umbrella mega project food estate.

Food estate requires a large area of land, estimated millions of hectares of land needed for this food estate program. Certainly many people will lose their land and of course the land of

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[149] Article 28 Paragraph 1 UNDRIP

[150] Ibid, paragraph 2 UNDRIP

[151] About MIFEE See R. Yando Zakaria, Emilianus Ola Kleden, Y.L. Franky (2011), *MIFEE Tak Terjangkau Angan Malind (Mifee Not Reachable of Malind People*), Pusaka Foundation, Jakarta

indigenous peoples. From the background, it can certainly cause various problems in Indonesia especially for indigenous peoples. The availability of land for Food estates is huge, the government is projecting hundreds of thousands of hectares for this mega project. So it will be ensured that this Mega project will seize the land of local people or farmers (land grabbing). In addition to seizing the land of local residents and farmers, this Mega project will have problems with indigenous peoples or ulayat lands used to run the program. This is what triggered agrarian conflicts around the country the higher the number.

Besides Papua and Merauke which are used as food estate development projects and energy estate, the government also develops Food estate in east Kalimantan, but in 2013 the project was moved to West Kalimantan by Dahlan Iskan. Thousands of hectares of land have been prepared to run the program. In East Kalimantan or precisely in Bulungan, the food estate program will be run in the delta area of mangrove and wetlands. The absence of land in East Kalimantan caused the project to be moved to West Kalimantan. Development of food estates in West Kalimantan by printing new paddy fields and optimizing the land which all reach 250 ha. Indigenous peoples in Papua, and Kalimantan became the direct victims of this program.

In addition to the above issues, indigenous peoples also face various criminalization issues as they can no longer take food in their customary forests. The state took over and made it a state forest. The process of state control over forests takes place through at least three territorial stages. First, the state claims that all land deemed to be non-land owned by any other person belongs to the state.[152] At this stage, the state intends to derive revenue from the extraction of Natural Resources.[153] Second, the State establishes land boundaries declared as state property to emphasize state control by the state on forests. Once the limit is set, the forest becomes closed and the state forbids anyone to access the area including the forest resources contained therein.[154] Third, the State divides the forest into various functions based on criteria. This program is a zoning of a region to set the type of activity allowed in it.[155]

Indigenous peoples who live in the forest have experienced being criminalized because it is considered a thief on his own land. Whereas the indigenous peoples who live and live in the forest area are the owner of their land and customary territory.[156]Indigenous people who have experienced criminalization such as: indigenous peoples of Semende Appeal in Kaur district, Bengkulu, customary law community of Marga Tungkal Ulu in Musi District, Palembang, customary law community of Turungan Baji in Sinjai District, South Sulawesi, customary law community of Golo Lebo in East Manggarai district, Flores-NTT, Talang Mamak customary law

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[152] Mia Siscawati (2014) , in the introduction of Indigenous Peoples and the Seizing of Forestry Wacana Insist Journal Number 33 of XVI, p7

[153] ibid

[154]ibid

[155] ibid

[156] See Noer Fauzi Rahman and Siscawati (2014), *Indigenous and Tribal Peoples are Right Holder, Legal Subjects and Owners of Their Customary Territories: Contextual Understanding the Decision of the Constitutional Court of the Republic of Indonesia on the Case Number 35 / PUU-X / 2012, Supplement Journal of Wacana, Insist*.

community in Indragiri Hulu Regency, Riau, and Tana Ai customary law community in Sikka Regency, Flores-NTT.[157]

Law No. 41 of 1999 on Forestry uses the term forest management to describe the management of forest resources. Limitations of Forest Management under Law No. 41 of 1999, places forest resources at the national level.[158] In the law, forests are divided into 2, namely, Forest rights and State Forests. The customary forest within the law is still included in state forests.[159]

Since the issuance of the decision of the Constitutional Court, Number 35 / PUU-X / 2012 on 16 May 2013, which has approved the application of judicial review or review of some provisions in Law No. 41 of 1999. Through the decision of the Constitutional Court the customary forest is no longer a State forest. The verdict establishes the existence of customary forest which is an integral part of the customary territory. During this time, conflicts occurred because customary forests are part of custom territory included or claimed as state forest area either in its function as conservation forest, protection forest or production forest. Komnas HAM recorded cases of complaints actually increased after the issuance of the Court's decision number 35. This is due to the weakness of the decision due to the Law on customary law community has not been approved. Then there is a lack of willingness of the government to follow up on the decision.

Komnas HAM and the Case of Indigenous People's Land Rights

Komnas HAM research has indicated, there are human rights violations that originated from several actions and events, including the annexation and expropriation of customary land and loss of indigenous people's resources. Based on Komnas HAM's complaints files, the number of complaints related toindigenous people : in 2013 : 1123 case files and in 2014 : 2,483 case files of which 20 percent were agrarian.[160]Agrarian Issues was included as one of the most issues reported to Komnas HAM in addition to police and employment issuesIn 2012-2014 . The agrarian case occupies the position of the highest ranking cases in Komnas HAM for four consecutive years. The highest number of human rights violations in agrarian cases according to Komnas HAM report in 2012 is land grabbing and seizing, amounting to 622. The number occupies half of all acts that lead to human rights violations in agrarian cases (51%).[161]

Komnas HAM also succeeded in identifying perpetrators who allegedly committed human rights violations. The corporation was ranked first as the perpetrator of agrarian cases which amounted to 558 cases. Local government as many as 167 cases, National Land Agency as many

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[157] The Alliance of Indigenous Peoples of the Archipelago (AMAN) Annual Report Year 2014 in a research report on typology of indigenous peoples' human rights violations (2016), Komnas HAM

[158] Forest Resources Management and Utilization Handbook on Ecosystems Land Payment Mechanism, in Indigenous Forest (2015), The Alliance of Indigenous Peoples of the Archipelago (AMAN) p 5

[159] ibid

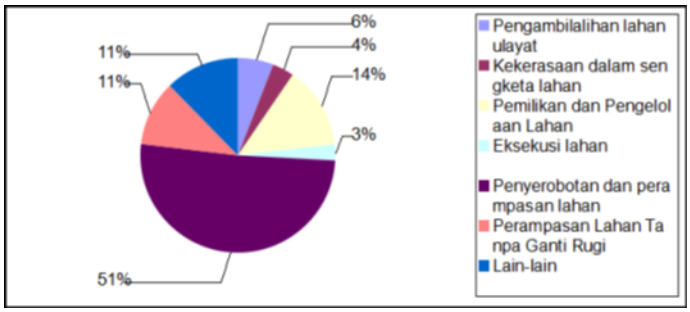
[160] Complaint data of Komnas HAM in the Annual Report Komnas HAM 2012

[161] Ibid

as 156 cases, TNI 66 cases, Police 34 cases, courts 29 cases, State 24 cases, and among individuals 179 cases.[162]

The following table shows cases of human rights violations related to Agrarian issues that Komnas HAM received in 2012 based on Komnas HAM complaints data.

Image 1 Complaint Data



Referring the case to Komnas HAM The potential for conflicts is expected to increase due to data from the Ministry of Forestry and the Environment and the Central Bureau of Statistics (2009), 31,957 villages were incorporated into state forest areas. In fact, about 71.06 percent of the people in the village depend on forest resources.[163] The adat law community complaints files received by Komnas HAM in the 2012-2014 range of 117 files in 2012, 113 complaint files by 2013, and 213 files by 2014. By 2014 there has been an increase of twice the number of complaint files. The increase is due to post decision of MK 35 of 2012, most of indigenous cases registered by Alliance of Indigenous peoples of Nusantara (AMAN) to Komnas HAM. The MK-35's 2012 ruling provides an opportunity for indigenous and tribal peoples to reclaim their forests and customary territories.[164]

The various cases of indigenous peoples which are reported to Komnas HAM, some can not be traced as indigenous peoples cases, this was due to the codification of Komnas ham based on rights and incoming cases, not the complainants. Not to mention the complainant who incidentally as indigenous peoples accompanied by a legal counsel, so that he was recorded as a reporter or a lawyer. Further data is needed on the total number of indigenous cases reported to Komnas HAM.

In order to resolve these cases, Komnas HAM carried out a study on Indications of Pattern of Rights Violations of Indigenous people 2015. Komnas HAM has selected 40 cases of violations of indigenous rights. [165]Those cases based on complaints that reported to Komnas HAM with the precondition that the case had not been resolved, were repeated and registered as cases in Komnas HAM. Another prerequisite was that the case represents the diversity and breadth of massive, systematic violations of the indigenous people; Adequate evidence, facts, history,

[162] Ibid

[163] National Inquiry Report of the Indigenous Peoples' Rights on the Territory law on State Forest (2016) Komnas HAM, p. 2

[164] ibid

[165] ibid

literature, research results and other documentation; Experienced by indigenous people in forest area or former forest area; The presence of victims or witnesses who a were willing to provide information and the existence of a supportive political space,[166] Then these 40 cases were followed up by the National Inquiry mechanism.

National Inquiry: The New Mechanism of Komnas HAM

Komnas HAM until now have not handled Various cases of indigenous peoples properly, and the public waiting for the action. Considering, the land rights case is a very large case reported to Komnas HAM, and as part of the focus of the Komnas Ham issue in dealing with vulnerable groups. Komnas HAM is looking for a new strategy in handling cases. Komnas HAM considers that the series of cases not be resolved one by one. Therefore, it is necessary to consider a new mechanism in handling cases in Komnas Ham, especially those related to land rights and the rights of indigenous peoples. In 2014-2015 Komnas HAM conductsNational Inquiry activities on indigenous issues.[167] This inquiry is carried out not only as a handling of various cases that are received by Komnas HAM but also cases of indigenous peoples as a whole.

National Inquiry is a thorough investigation or systematic study of the problem of human rights that is systemic and massive involving community participation. Unlike most other investigations, this model should be implemented in a transparent and public manner. The work involves tracking general evidence of witnesses and experts, directed toward a thorough investigation to discover the systematic pattern of human rights abuses. It requires a wide range of expertise within the institution, which includes researchers, educators, and people with experience in the field of development of regional wisdom in Indonesia.[168]

National Inquiry is a method or event conducted by Komnas HAM to develop efforts to solve widespread and systematic human rights violations.[169] This method is conducted as a more comprehensive case solution. This effort is also carried out as a case handling model that is not only the completion of the case, but also as well as educational tools and campaigns.[170]

The steps taken by Komnas HAM in National inquiry are:[171] choosing themes, formulating background and scope, identifying and consulting stakeholders, formulating objectives and terms of reference inquiry, resource mobilization, research and evidence collection, public hearings, Public campaigns and media engagement. From thousands of cases of dispute, Komnas HAM then selected 40 cases related to indigenous people in forest areas in seven areas, namely Sumatra,

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[166] Ibid p 17

[167] ibid

[168] ibid

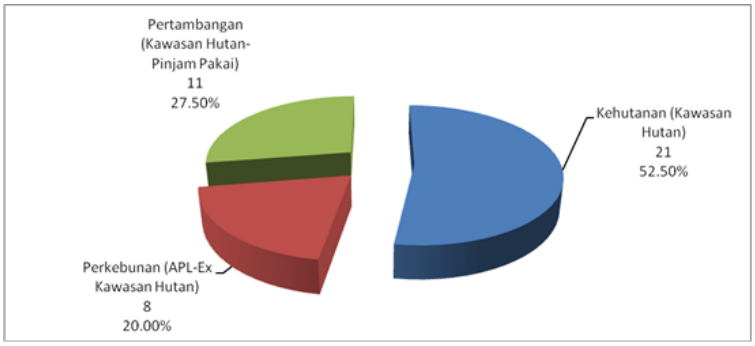
[169] ibid

[170] ibid

[171] ibid

Java, Kalimantan, Sulawesi, Maluku, Bali and Nusa Tenggara, and Papua. The case is mostly acute and has taken place since the New Order era, but continues, even expanding. [172]

Image 2 National Inquiry Database by Sector[173]



Komnas HAM's inquiry team consists not only of the internal elements of Komnas HAM, but also consists of various other parties. The institutions involved in this inquiry are the Witness and Victim Protection Agency, the relevant Ministries, Community Organizations, Academics (Universities), Mass Media both electronic and printed

Komnas HAM realize that research and evidence collection is an important step in National inquiry. So, Komnas HAM has prepared three research designs, namely, reviewing allegations of human rights violations, ethnographic research of indigenous peoples living in forest areas, and policy research in forestry and indigenous communities. This research was worked together with sajogjo institute

Another step in inquiry is to do a Public Recognition List, this method is a forum for listening to victims, government, corporations and other related parties. This method becomes a common forum for victims to share their experiences.[174]

Based on the results of the study, and the study of the case, Komnas HAM found the root cause of human rights violations against Indigenous people. Komnas HAM considers that the absence of recognition as indigenous people affects the uncertainty of their legal status, thus making it unlawful for their customary territory and security of their customary territories. The second issue is that it simplifies the existence of indigenous people and its rights over forest areas and resources only to the extent of administrative matters Or legality. This simplification results in the abandonment of indigenous people rights to its territory in the forest area directly or indirectly[175]

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[172]http://cdn.assets.print.kompas.com/baca/iptek/lingkungan/2016/03/17/Implementasikan-Hasil-Inkuiri-Nasional-Komnas-HAM?utm_source=bacajuga

[173] The graph is taken from data reports forty cases of "National Inquiry for Indigenous People on its Territory in The Forest Area"

[174] Book 1 of National Inquiry report p. 15

[175] Ibid, p 16

National inquiry as a whole generates some recommendations based on remedial principles, and is awarded to a number of related institutions. In essence, the recommendation asks a number of related ministries, the House of Representatives, the President to take immediate steps in providing protection and compliance with indigenous and tribal peoples. General recommendations are given as follows:[176]

1. Governments need to pursue reconciliation efforts among communities to resolve horizontal conflicts due to different views on corporate presence and overlapping customary land claims.
2. The settlement of long-standing land rights conflicts should be carried out in a peaceful manner based on the principles of respect and protection of human rights and the rights of indigenous people
3. To the indigenous people and / or its citizens who are victims of human rights violations to prevent the recurrence of human rights violations need to be remedied
4. Remedies made immediately as compensation (reparation) in the form of:
    a. Restitution given by the corporation or institution that can be considered as responsible for the occurrence of human rights violations to the customary law community both physically, mentally and economically
    b. The compensation is granted by the State if the party responsible for the restitution is unable to provide compensation
    c. Rehabilitation (restoration of the original condition) in the form of restoration of freedom, resettlement, land restoration and repair of other life infrastructure damaged by land reclamation
    d. Sense of justice in the form of effective, effective action to stop and prevent continuing violations. Investigation of events suspected of human rights violations. Public apology for human rights violations. Provision of legal and administrative sanctions against perpetrators.

5. Equal and effective justice access

After the National Inquiry, the Government of Indonesia has taken steps to provide recognition, protection and fulfillment of Indigenous peoples rights. On December 30, 2016 President Joko Widodo submitted a Decision Letter of Acknowledgement of Customary Forest to 9 Customary Law Community (indigenous people) spread in several areas in the country.

The nine indigenous peoples who emit the Decision Letter of Adat Forest Recognition are:

1. Adat Forest Rantau Village Pack 130 ha, Merangin district jambi province (indigenous people Marga Serampas);

2. Adat Forest Ammatoa Kajang (313 Ha) Bulukumba District South Sulawesi Province (indigenous people Ammatoa Kajang);

3. Wana Posangke Traditional Forest (6.212 Ha) North Morowali Regency Central Sulawesi Province (indigenous people Lipu Wana Posangke);

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[176] Ibid, P 81

4. Adat Forest Kasepuhan Karang (486 Ha) Lebak Regency of Banten Province (indigenous people Kasepuhan Karang);

5. Adat Forest Bukit Sembahyang (39 Ha) Kerinci District Jambi Province (indigenous people Waterfall);

6. Bukit Tinggi Adat Forest (41 Ha) Kerinci District Jambi Province (indigenous people Suangai Deras);

7. Tigo Luhah Adat Forest Sixth Permenti (252 Ha) Kerinci District Jambi Province (indigenous people Tigo Luhah Permenti);

8. Adat Forest Tigo Luhah Kemantan (452 Ha) Kerinci District Jambi Province (indigenous people Tigo Luhah Kemantan); and

9. Adat Forest Pandumaan Sipituhuta (5.172 Ha) Humbang Hasudutan District of North Sumatra Province (indigenous people Pandumaan Sipituhuta).

Hopefully, the results of national inquiry can be followed up immediately, including the recognition of indigenous peoples through the ratification of the Indigenous peoples Law which is being discussed in the DPR.

Conclusion

Komnas HAM is expected to be able to respond to the growing issues of both international and national issues today. In responding to the issue, Komnas HAM must be able to stand independently and solve cases impartially. Komnas HAM is also required to have new breakthroughs in the settlement of such cases.

The handling of cases commonly done by Komans HAM has not been able to provide a sense of justice for the victims. Handling the case is also in the sense can not solve the problem to the roots. On the dissatisfaction of the victims in every case handling conducted by Komnas Ham, a new breakthrough in the handling of cases that can guarantee the protection and fulfillment of the rights of the victims.

Another limitation of Komnas HAM is that thousands of cases that have been submitted to Komnas HAM are not all handled properly. This is due to the lack of resources and case resolution mechanisms that the end result is only a recommendation, which of course it can not guarantee that a case can be completed.

The new mechanisms drafted by Komnas HAM, though not yet of widespread impact, can ensure that the government's attention to indigenous and tribal peoples' cases is increasingly open. The wider community became aware of the root of the real problem. So it opens policy makers to take action in handling the problems of indigenous peoples and how to provide protection and fulfillment of rights for indigenous and tribal peoples in Indonesia. National inquiry is a proven mechanism effective for case resolution. Komnas HAM can find conclusions from various cases of similar problems. In addition, this mechanism is also carried out comprehensively with NGOs and communities, making it easier for Komnas HAM to resolve a case.

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From Transition to Government Accountability: Opportunities for the Myanmar National Human Rights Commission.

Francesca Paola Traglia

LWF

Abstract

NHRIs have a significant role to play in advancing the promotion of human rights and in holding governments accountable to their human rights commitments. Although NHRIs are established by the government, they are mandated to be independent bodies that scrutinize government's challenges in the promotion, protection and respect of human rights in their country. Often CSOs insist that NHRIs should take a "watchdog" role on the State, however in emerging democracies and in stages of transition where many are the challenges governments face in advancing human rights, NHRIs can play a crucial role in bridging the divide between civil society and the State. What opportunities are there for the Myanmar National Human Rights Commission under the new semi civilian government? During the 28th Session of the Human Rights Council in March 2015, Myanmar's Deputy Foreign Minister U Thyant Kyaw declared "In order to be more compliant with the Paris Principles, the Myanmar National Human Rights Commission Law was enacted by the Parliament on 28 March 2014". This action by the government already back in 2014 and 2015 shows a clear commitment to move forward on establishing functioning NHRIs in Myanmar, however despite some improvements, the MNHRC continues to be criticized for a perceived lack of effectiveness in Myanmar.This paper will argue that an assessment of the MNHRC against such critiques needs to be placed within a larger context of transition and semi-civilian rule, as well as the detailed implications and gaps of "The Myanmar National Human Rights Commission Law".

Introduction

During the 28th Session of the Human Rights Council in March 2015, Myanmar's Deputy Foreign Minister U Thyant Kyaw declared "In order to be more compliant with the Paris Principles, the Myanmar National Human Rights Commission Law was enacted by the Parliament on 28 March 2014". This action by the government already back in 2014 and 2015 shows a clear commitment to move forward on establishing functioning NHRIs in Myanmar, however despite some improvements, the MNHRC continues to be criticized for a perceived lack of effectiveness in Myanmar.

This paper will argue that an assessment of the MNHRC against such critiques needs to be placed within a larger context of transition and semi-civilian rule, as well as the detailed implications and gaps of "The Myanmar National Human Rights Commission Law".

Often CSOs insist that NHRIs should take a "watchdog" role on the State, however in emerging democracies and in stages of transition where many are the challenges governments face in advancing human rights, NHRIs can play a crucial role in bridging the divide between civil

society and the State. What opportunities are there for the Myanmar National Human Rights Commission under the new semi civilian government?

The Myanmar context

Transition and its implications

The context in Myanmar has changed dramatically since 2008 when the country was hit by a devastating cyclone (Nargis), during which time an amended controversial Constitution (2008) was passed in Parliament. The elections in November 2010 – though widely seen as falling significantly short of international standards - started a remarkable process of change in the country. Key points include the convening of a largely civilian parliament in April 2011, which has since enacted a series of economic and political reforms; the signing of ceasefire agreements with all but one of the ethnic armed groups in early 2012, followed by ongoing talks surrounding a nationwide ceasefire agreement; and by-elections in April 2012 that saw Aung San Suu Kyi's National League for Democracy win 42 out of 44 seats. Aung San Suu Kyi herself took her seat as an MP in parliament in May 2012[177].

Fundamental challenges remain. In a region containing some of the fastest growing economies in the world, Myanmar remains one of the poorest countries in Asia. Data about poverty in Myanmar is difficult to obtain and most of it is unreliable, but there is evidence of widespread poverty and vulnerability. Its Human Development Index rank of 149/186 (UNDP) is the lowest in the region.

Sustained armed conflict has caused widespread displacement. Since 2011, when the long-standing ceasefire broke down, according to the Special Rapporteur, In Shan and Kachin States, unacceptable reports of serious human rights violations allegedly committed by several parties to the conflict including the Tatmadaw and ethnic armed groups have continued to arise. The Tatmadaw, or some elements of it, conduct themselves in violation of human rights. Some of these cases are reported but cannot be verified for lack of access[178]. This figure includes over 50,000 believed to be living in KIO controlled areas and over 20,000 people living in the homes of host families. Subsequent information suggests there could now be more than 120,000 since heavy fighting broke out again, sporadically between September 2013 and April 2014. In addition, an estimated half a million people are also still internally displaced in eastern Myanmar and some 128,000 people (UNHCR) continue to live in refugee camps in Thailand[179].

In addition, inter communal violence between the predominantly Muslim Rohingya and the predominantly Buddhist Rakhine, and discriminatory policies towards Muslim populations, have

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[177] DIFID Operational Plan for Myanmar 2011-2016, Updated December 2014

[178] Statement by Ms. Yanghee LEE, Special Rapporteur on the Situation of Human Rights in Myanmar at the 35th session of the Human Rights Council Agenda item 4, Geneva, 15 June 2017

[179] DIFID Operational Plan for Myanmar 2011-2016, Updated December 2014

led to a segregation of many communities and a deteriorating humanitarian situation in Rakhine State. Outbreaks of inter communal violence – mostly anti-Muslim in its nature - have sprea d to other parts of the country.

The NLD government, after the welcomed landslide victory in 2015 and taking power in early 2016 has failed to become a beacon of hope, failing to fulfill expectations of its own people and that of the wider international community.

Ethnic conflicts have drastically escalated in the past year; the October attacks in Northern Rakhine prompted an army crackdown and critics as well as an OHCHR Report of victims testimonies that fled to Bangladesh say that it may amount to crimes against humanity. More and more an increase of online defamation cases, resulting from the controversial Telecommunications Act , placing strains on freedom of speech in the country. Aung San Suu Kyi and her government have not stepped forward in any meaningful way to address the latter, not showing an interest to engage / improve the situation.

In Relation to engagement with International Human Rights mechanisms, one can notice a reluctance to move forward on accepted recommendations both from the UPR and the CEDAW reviews that took place respectively in 2015 and 2016, with claims that it was the previous governments reports and commitments. The lack of interest in engaging in a meaningful way with Civil Society and the Myanmar National Human Rights Commission, leaves waves of confusion, making it difficult for stakeholders to devise successful strategies for engagement with the current government in order to advance human right as in Myanmar.

The Mandate

The MNHRC was established under a Presidential decree in September 2011, yet with no clear mandate until the Myanmar national Human rights Commission Law MNHRC Law No. 21/2014 was adopted by Parliament in March 2014, no real work had begun. Today the Commission is formed by seven all male Commissioners. Following a recent scandal [180]In 2016 where four Commissioners (two Females) were dismissed, there is great expectation among civil society that new members will be selected to join the leadership of MNHRC, yet the government has not yet requested the selection board to begin a nomination process.

The MNHRC is mandated to promote and protect the human rights enshrined in Myanmar's Constitution. To Monitor the government's compliance with international human rights obligations and to cooperate with regional and international mechanisms, such as the United Nations (UN) treaty bodies and the Universal Periodic Review (UPR).

[180] 2 girls case mediated by MNHRC and scandal in Media for 5mil Kyats pay out for slavery and torture

The mandate of the Commission is outlined in the Law No. 21/2014, and a detailed analysis of if in relations to the 2008 constitution and the current political dynamics in the country during this difficult transition time need to be taken into account in assessing the commissions effectiveness and success.

Critics have highlighted numerous areas of weakness in the Law No. 21/2014, among which the non transparent selection process, a questionable selection board, its witness protection and investigation powers, its complaints handling process as well as its independence. The latter being something that civil society, in my view, spends too much time debating and using as an excuse for non-engagement with the Commission. Whereas I concur with Michael White, when he argues that Independence is not a prerequisite for effectiveness and efficiency. Instead each National Human rights Commission needs to tackle the political reality, the law and the context of its own country.

However one main challenge that interferes with the work of the Commission is that due to existing constitutional provisions, it states that human rights means the rights of citizens rather than the rights of all human beings, which impacts on its work in relation to all persons which the government does not recognize as being Myanmar citizens.

1. Promote and protect the human rights enshrined in Myanmar's Constitution.
2. Monitor the government's compliance with international human rights obligations
3. Cooperate with regional and international mechanisms, such as the United Nations (UN) treaty bodies and the Universal Periodic Review (UPR).

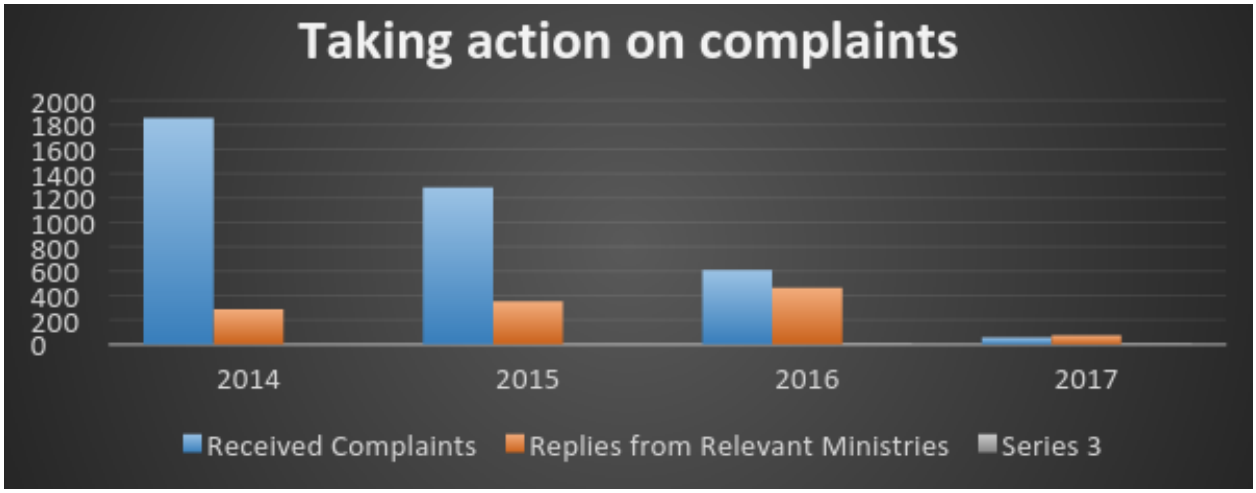
The work of MNHRC

NHRIs have a significant role to play in advancing the promotion of human rights and in holding governments accountable to their human rights commitments. Although NHRIs are established by the government, they are mandated to be independent bodies that scrutinize government's challenges in the promotion, protection and respect of human rights in their country.

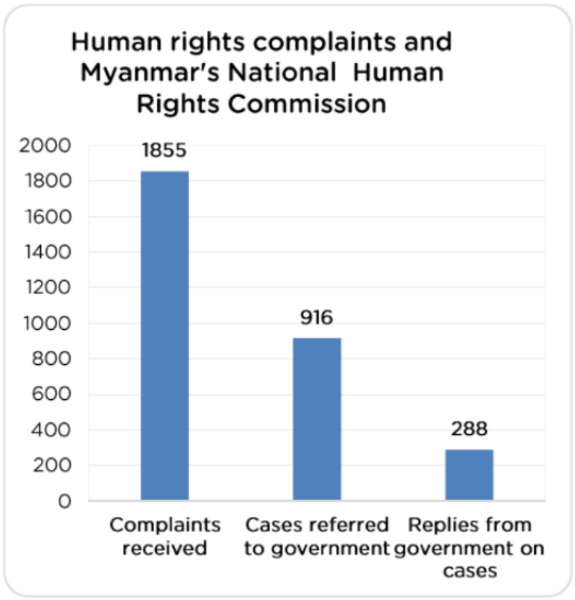
The five departments that carry out the work of MNHRC, include: the International Relations Division, the Legal Division, the Human Rights Promotion & Education Division, the Human Rights Protection Division and the Planning and Finance Division. All the work of MNHRC is rolled out by the current 60 person staff capacity of the Commission, posing important limitations to the amount of attention, time and follow-up needed to deal with a significant caseload, typical of countries in transition, subject still to ongoing conflicts.

Since its establishment under a full mandate in 2014, MNHRC has certainly progressed in its performance. From the tables below we can see that actions taken by relevant Government Ministries in relation to reported cases by MNHRS on received complaints has increased

gradually over the past 3 years. The data from 2016 is very encouraging in relations to the data from 2014. It must be noted that it is a common factor that the year a NHRI opens office and begins operations there is a significant caseload of human rights issues that people seek attention on. With better information dissemination, and development of legal expertise as well as experience and outreach by MNHRC the number of reported, referred and responded to cases will continue to balance out over the next years.



Data from 2014 MNHRC Annual Report, and May 2017 Presentations by MNHRC at LWF Consultation Meeting



Opportunities

National Human Rights Institutions (NHRIs) can play an essential role in promoting and protecting human rights and consolidating democracy, this is also true in countries undergoing complex transition times like in Myanmar. Building closer, more constructive relationships and

partnerships with civil society – as envisaged by the Paris Principles – is crucial to mobilize needed resources to alleviate the workload of the Commission in helping its legal department to make better informed, evidence-based decisions it would allow for more inclusive and participatory policymaking if thematic consultations could be organized.

In the most recent bilateral meeting between LWF and MNHRC, Chairman U Win Mra outlined the desire to increase the capacity of MNHRC via the establishment of branch offices; this will provides the MNHRC with the opportunity to set up regional offices to ensure effective outreach and communication with marginalized communities and minorities. The presence of MNHRC in more decentralized locations would close the gap that exists now between the people and the Commission[181].

I. The Human Rights Promotion & Education Division has been very active this past year and has successfully collaborated with LWF in order to disseminate knowledge on Government Human Rights Commitments and the opportunities with the Universal periodic Review[182]. The Division is also in charge of awareness-raising which can also include a review of the Myanmar legal framework against relevant treaty obligations.
II. Another important area of collaboration where the MNHRC could advance its work with the cooperation of Civil Society, including non-government organizations as well as academic institutions or other experts is on conducting thematic research activities.
    In Bangladesh the National Human Rights Commission conducted a study on state compliance with the ICCPR, it focused on recommendations on how to improve the government's implementation of the treaty. In Myanmar the MNHRC could do something similar on the UPR and CEDAW for which the government has recently undergone review, as well as a study on ratification processes of ICESCR which was only signed in 2015.
III. In relations to its legal powers, the MNHRC has the mandate to investigate human rights violations, for which it can summon witnesses, visit detention centres (with prior notification) and recommend further action to relevant government departments and authorities. The MNHRC should push to have the ability to visit detention centers without prior notification, this will allow the Commission to have a more realistic picture of the situation in detention centers.
IV. In relation to referred cases and responses from relevant government ministries, the MNHRC would gain more credibility and increase its effectiveness with timely responses from relevant government ministries in relation to referred cases. The Government should take responsibility to follow the law that states a response must be provided to MNHRC within 60 days of the case being referred.

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[181] The MNHRC has already informed the President's office on this plan and is waiting for adequate budget allocation to roll out the establishment of branch offices.

[182] LWF facilitated training in 2016 at township level with a number of government departments, including the Township Medical Office, Township Education Office, members of staff from the Administration Department and the Police as well as the Township Land Committee, village tract Authorities and villagers in Chin, Ayewardy and Kayin State.

V. The MNHRC has the mandate for "consulting, engaging and cooperating with other national, regional and international human rights mechanisms" The Universal Periodic Review is a good monitoring mechanism accepted by the government, therefore the MNHRC should use this pathway in order to engage further with the government. Co-designing an Action Plan for the implementation of the accepted recommendations was a great initial step by the MNHRC in August 2017. Follow-up in building a monitoring framework for the implementation of the UPR Recommendations would allow the MNHRC to be further in contact with Civil Society and the government providing a bridge for consultation and dialogue in the process of holding the government accountable to its international Human Rights Commitments[183].

VI. The MNHRC developed a Strategic Plan for 2014-2016 that set out a roadmap for its early life. The four priority areas of the Commission for its first 3 years were: providing human rights information to the public, obtaining accreditation with A-Status at the SCA, engaging and coordinating with civil society organisations in human rights monitoring and providing information on the commission's complaint handling procedures. In view of the fact that the Commission will undergo a strategy development process to frame its work for the next coming years the inclusion of civil society in a coordinated and transparent process would be extremely beneficial to MNHRC. The participatory planning process would help to restore trust in the institution and provide concrete avenues for cooperation with different stakeholders as well as increase awareness about the MNHRC's work, available resources and organizational structure.

VII. The Selection Procedure for the Commissioners of MNHRC is coordinated by a selection board comprising a significant number of members of government and yet there is no quorum requirement in the law. An important step forward in the transparency of appointments could include ensuring vacancies are published broadly, that there is an important promotion of broad consultation in the application, screening and selection process, and lastly selection of Commissioners should be based on predetermined, and publicly-available criteria.

VIII. Strengthening the Legal Department of MNHRC is central to the success of the work of the Commission. Further legal expertise should be secured to ensure that investigatory functions are conducted according to fair procedures and the law. In addition a sub division within the Legal Department could focus on specialised case file management, the latter having the responsibility to ensure information-flow and efficient monitoring of the caseload and follow-up.

IX. Improving the public's understanding about MNHRC would help in countering the bad press the commission has been receiving in terms of criticisms to its work and

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[183] The National Human Rights Commission of Nepal, cooperates with the international non-governmental organisation (NGO), UPR Info and LWF to conduct mid-term assessments of the implementation of UPR recommendations and consultations with civil society and other stakeholders.

The Australian Human Rights Commission, conducts regular briefings for the Parliament of Australia regarding follow-up and implementation of UPR recommendations.

effectiveness. A simple step that can be taken is to improve the internet presence of the Commission. A calendar of relevant events, access to an online library of relevant laws and a simple searchable database of human rights training materials and resources developed by the Commission.

X. To build on the latter suggestion, a good communication strategy that includes how to use press releases and media contacts as well as establishing a presence in social media will further strengthen the public's awareness about the MNHRC's work, helping to promote increased citizen engagement, better use of the complaints process and an improved awareness about the Commission's role in general.

XI. Out of the 7 UPR Recommendation accepted by the government on the establishment of an independent National Human Rights Commission. Recommendation number 143.48 specifically states that the government of Myanmar should "*Provide all necessary assistance in order that the national human rights institution is able to operate at full capacity and continue judicial reforms, including the increased capacity building of judicial institutions*"[184]. In order to fulfill the latter, sufficient funds should be provided to establish branch offices, to ensure that the Commission is accessible to rural areas, minorities and vulnerable groups in the country. In addition funding should allow a robust communication infrastructure that includes complaint filing and information databases as suggested in point IX and X above.

XII. Currently budgetary applications are submitted to the President's office every three months, with funds subsequently disbursed. To increase the autonomy of the MNHRC in making decisions on how to spend the money that is allocated to its budget it would be helpful if an amend to the law would take place stipulating that it shall not be necessary for the Commission to take prior approval from the Government to spend already allocated funds.

XIII. Following Myanmar's second UPR of November 2015, the government indicated that it would consider developing a national human rights plan of action to support the implementation of the UPR recommendations the government had accepted[185]. In this particular situation the MNHRC could work with civil society to identify priority areas for action and a program of work on a national action plan for the implementation of accepted UPR recommendations and its corresponding monitoring framework.

LWF's work with MNHRC

LWF is interested in building a well functioning MNHRC to contribute to the improvement of Government Accountability and the Promotion and Protection of Human Rights in Myanmar

- ✓ Awareness raising workshops and seminars on the UPR process in country, in collaboration with MNHRC
- ✓ Supports the development of a monitoring mechanism for the implementation of
  - o UPR and CEDAW recommendations

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[184] LWF Myanmar Analysis of UPR Recommendations: April 2016, page 10

[185] At LWF/MNHRC Workshop with Parliamentarians from Upper and Lower House, held in Nay Pyi Taw 9-10 August 2016

- ✓ Facilitates exposure visits to Geneva and advocacy work for human rights actors from Myanmar
- ✓ Facilitated the participation of MNHRC Commissioner Dr. Myint Kyi to the NHRI Conference
- ✓ Works to close the gap between:
    - MNHRC and local government departments support township level training for government staff.
    - MNHRC and civil society at the grass roots through supporting township level trainings for village authorities and villagers as well as local organizations.

Conclusion

Reviewing the Effectiveness of the Myanmar National Human Rights Commission (MNHRC) in the Promotion and Protection of Human Rights in Myanmar and its Relationship and Engagement with Regional and International Stakeholders & Mechanisms

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Abstract

This paper will review the effectiveness of the Myanmar National Human Rights Commission (MNHRC) in the promotion and protection of human rights in Myanmar and how its relationship and engagement with several regional and international stakeholders and mechanisms, such as the ASEAN Intergovernmental Commission on Human Rights (AICHR), South East Asia NHRI Forum (SEANF), Asia Pacific Forum of NHRIs (APF), Global Alliance of the NHRIs (GANHRI) and its predecessor, and the United Nations (UN), have influenced this process. The objective of this paper is not only to analyse the legal framework of the MNHRC and whether or not it conforms with international standards but also to analyse its practical work and what it has achieved so far in terms of protection and promotion of human rights. The paper will also take a closer look at the creation of AICHR and SEANF and its influence on Myanmar and the MNHRC as well as how the latter two have engaged with these regional bodies. Challenges will be identified and named but also achievements and progress made in order to come up with constructive feedback for the MNHRC to move forward towards becoming an NHRI that will be in conformity with international standards and also has a real impact in improving the human rights situation in Myanmar.

Introduction

The first section will give some background on the establishment, legal framework, mandate and composition of the Myanmar National Human Rights Commission (MNHRC) and the reasons why the current MNHRC has been determined with a 'B status' by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC)[186] because of not being in full compliance with international standards such as the *Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights* (hereafter: *Paris Principles 1993)*. Then the MNHRC's protection record will be reviewed by looking at some concrete examples of its work. The section thereafter will review the MNHRC's promotion record, which includes its engagement and collaboration with UN mechanisms and UN agencies for promotion purposes such as stakeholder submissions and human rights education programmes for government officials. After having reviewed the MNHRC's protection and promotion record the paper will look at the relationship of the MNHRC and Myanmar with the ASEAN Intergovernmental Commission on Human Rights (AICHR) and the different national human rights institutions (NHRIs) in the region, including through South East Asia NHRI Forum (SEANF) and the Asia Pacific Forum for NHRIs (APF). To conclude the paper, a summary of the

[186] Please note that on 22 March 2016, the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) was renamed to the Global Alliance of National Human Rights Institutions (GANHRI).

progress made, challenges faced and lessons learned will be presented with some recommendations for progress.

Section I: Background on the establishment, legal framework, mandate and composition of the MNHRC and its compliance with international standards

Establishment of the MNHRC in 2012

The MNHRC was formed by presidential decree, *Notification No. 34/2011* (hereafter: *MNHRC Decree 2011*), on 5 September 2011. It then became the fifth NHRI in ASEAN, the other four being from Indonesia, Malaysia, the Philippines and Thailand. The *MNHRC Decree 2011* reads that the MNHRC was formed 'with a view to promoting and safeguarding fundamental rights of citizens described in the Constitution of the Republic of the Union of Myanmar'. It further contains a list with 15 names of retired government officials and academics who would be sitting on the MNHRC. Some of the key members, including Chairman U Win Mra and Vice-Chair, U Kyaw Tint Swe, were past defenders of Myanmar's human rights record in their former functions as diplomats and it was feared by different civil society actors, including myself, that they would continue to do so through the MNHRC (De Lang 2012: 8–11; BP & HREIB 2012: 44–46).

A month after the establishment of the MNHRC it was publicly announced that it would accept complaints either by letter or in person along with some requirements, including that of full name, address, and a copy of national registration card (MNHRC 2011a). In the start of 2012 more details on the MNHRC's mandate started to trickle out into the public, not in the form of legislation or by formal publication but by way of standardised response letter to individuals or organisations making enquiries from the MNHRC (De Lang 2012: 3–4).[187] In summary its mandate included: receiving complaint letters; investigative powers (albeit limited); advising on Myanmar's existing human rights obligations and becoming party to other treaties; collaborating with UN agencies and partner organisations; assisting with human rights capacity building and research programs; and public awareness-raising on human rights promotion and protection (De Lang 2012: 3–4).

Challenges of NHRIs established in wake of conflict/political transition

Renshaw (2017: 229) argued that 'research on the effectiveness of NHRIs across the Asia-Pacific region' has shown that those 'which are established in the wake of conflict or in the midst of political transition experience particular difficulties'. She added that apart from their 'enormous workloads' and 'resource shortages (human, financial, infrastructural)' they face questions of legitimacy from two sets of stakeholders. On one side, civil society groups who 'are inclined to view the new institution with suspicion, as a state-sponsored and ephemeral effort to appease the international community' and on the other side the government, who 'may be sceptical about the wisdom of establishing an institution that has the primary purpose of criticising the government. She concluded that 'without a functioning relationship with both government and civil society, NHRIs cannot play an effective role in contributing to the new democratic political order' (Renshaw 2017: 229).

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[187] A copy of the standardised letter is also on file with the author.

Another author, Kabir (2001: 4) argued that NHRIs in Asia can be a 'double-edged sword', with one edge of the sword able to make an actual difference in the protection and promotion of human rights while the other edge can be used as a tool by governments to protect themselves from international scrutiny by promoting the human rights image of a country on the international and regional levels.

Adoption of the MNHRC Law in 2014

It was not long before the MNHRC ran into trouble because of its initial lack of a democratic legislative document with a clear mandate. In March 2012, Myanmar's Pyidaungsu Hluttaw [Assembly of the Union, i.e. the Myanmar Parliament] refused to approve the MNHRC's budget because it was created by presidential decree and not in conformity with the *Constitution of the Republic of the Union of Myanmar 2008* (hereafter: *2008 Constitution*). In response the MNHRC (2012a) issued a public statement in which it affirmed that in order to be an independent institution and comply with the *Paris Principles 1993*, it needs to be established under an act of Parliament. In that public statement the MNHRC (2012a) also announced that:

> Indonesia, Malaysia, the Philippines and Thailand from ASEAN and many countries of the world have established national human rights commissions to promote and protect human rights. […] According to international reaction, the fact that the MNHRC is the fifth national human rights institution in ASEAN has enhanced the image of the country.

This shows that Myanmar's international and regional reputation is very important for the MNHRC. Two years later, on 28 March 2014, the *MNHRC Law No. 21/2014* (hereafter: *MNHRC Law 2014*) was adopted by the Pyidaungsu Hluttaw. The adoption of the law can be considered an improvement for the credibility and future sustainability of the MNHRC, however, there are some issues with the law which need to be addressed in order for the MNHRC to be considered in compliance with international standards.

Paris Principles

The *Paris Principles 1993* were adopted by the UN General Assembly in 1993. Six main principles with which NHRIs should comply can be derived from the *Paris Principles 1993* (UNDP & OHCHR 2010: 242):

1. A broad mandate, based on universal human rights standards;
2. Autonomy from government;
3. Independence guaranteed by statute or constitution;
4. Pluralism including through membership and/or effective cooperation;
5. Adequate resources; and
6. Adequate powers of investigation.

Reference to UDHR and other international conventions, decisions, agreements and declarations

According to Section 3(b) of the *MNHRC Law 2014,* one of the main objectives of the MNHRC is 'to create a society where human rights are respected and protected in recognition of the Universal Declaration of Human Rights'. Another objective is 'to effectively promote and protect the human rights contained in the international conventions, decisions, regional agreements and declarations related to human rights accepted by the State' (*MNHRC Law 2014,* Section 3[c]). The earlier *MNHRC Decree 2011* merely mentioned the fundamental rights of citizens in the *2008 Constitution* so these reference can be considered an improvement, however, something can be said about leaving it up to 'acceptance by the State of human rights norms' whether or not the MNHRC should protect and promote them. However, it can still be considered in line with principle 1 of the *Paris Principles 1993* which requires '[a] broad mandate, based on universal human rights standards'.

Duties and powers of the MNHRC

The MNHRC has the duties and powers to recommend to the Myanmar government to which international human rights instruments it should become party; to review proposed laws for consistency with international human rights instruments to which Myanmar is party; and recommend legislation and measures to be adopted for the promotion and protection of human rights to the Parliament through the government (*MNHRC Law 2014*, Sections 22[b][i]–[ii]). The MNHRC is also mandated to assist the government in its submissions to international human rights instruments to which Myanmar is a party (*MNHRC Law 2014,* Sections 22[b][iii]). None of these duties and powers are new as they were already included in the MNHRC's mandate when it was established by decree (De Lang 2012: 3–4). The implementation of these, mostly promotional, duties and powers will be discussed below in Section III of this paper.

The MNHRC also has the mandate 'to coordinate and cooperate with international organizations, regional organizations, national statutory institutions' and 'civil society and non-governmental organizations related to human rights' (*MNHRC Law 2014*, Section 3[d]) which can be considered an improvement. However, Section 22(f) of the *MNHRC Law 2014* gives the MNHRC a too wide discretion to choose '*relevant* civil society organizations, business organizations, labour organizations, national races organizations, minorities and academic institutions, as *appropriate*' (emphasis added) which is problematic for principle 4 of the *Paris Principles 1993* on pluralism which requires 'effective cooperation with diverse societal groups' (ICC SCA 2013: 26, as cited in Liljeblad 2016: 440).

Mandate to receive complaints letters and inquiry into human rights violations

The MNHRC already had the mandate to receive complaint letters and to investigate under the *MNHRC Decree 2011* but it was not yet mentioned how far these investigative powers would reach. According to Sections 22(c)–(d) of the *MNHRC Law 2014* it has the mandate to verify and conduct inquiries as well as visit the scene of human rights violations. The rules of those inquiries and handling of complaints are listed in Sections 28–40. For example, according to Section 36 the MNHRC is mandated to 'summon in writing any person or office to produce any documents or evidence in their possession or control' except if the release of those documents or evidence would affect the security and defence of the state or if the documents are classified by the departments and organizations of the government. Both of these limitations are problematic and in

contravention of principle 6 of the *Paris Principles 1993* on adequate powers of investigation, because limitations in accessing information regarding national security cannot be 'unreasonably or arbitrarily applied and should only be exercised under due process' (OHCHR 2010: [33], as cited in Liljeblad 2016: 435).

The MNHRC cannot inquire into complaints that are already under trial before any court, under appeal or revision or have been finally determined by any court (*MNHRC Law 2014*, Section 37). Even though this is not in violation of the *Paris Principles 1993* and it is generally accepted that NHRIs 'should not sit in appeal or review of the courts' (OHCHR 2010: [193], as cited in Liljeblad 2016: 435), it is still problematic in the current Myanmar context where, according to several reports, the judiciary is notoriously corrupt and inefficient (Crouch 2017: 2, 3; Zue Zue 2015; Fuller 2014). A Myanmar Parliamentary committee even reported that 'a chain of bribery is deeply entrenched throughout the judicial system' (Aung Din 2016).

The MNHRC also has powers to 'inspect[…] the scene of human rights violations and, after notification, prisons, jails, detention centres and public or private places of confinement' (*MNHRC Law 2014*, Section 22[e]). Further rules on these inspections are provided in Sections 43–45. There is an issue with the MNHRC's ability to make effective inspections as Sections 22(e) and 44(a) require prior notification to the relevant authorities. In order for such inspections to be effective and prevent any cover up by the authorities they should be unannounced and without prior notice.

Section 42 of the *MNHRC Law 2014* protects complainants and witnesses and Section 66 gives a further obligation for the MNHRC to ensure the name and identifying information concerning witnesses or other persons under examination are not published or disclosed without the MNHRC's authorisation and it 'may also take other measures for the protection of witnesses'. The wording is rather problematic as the disclosure of the identities of witnesses and other persons under examination is solely at the MNHRC's discretion and does not require consent of the complainants, witnesses and victims themselves. In Section II of this paper, an example will be given how in practice this has been problematic as one complainant's identity was disclosed to the military who later arrested and sued the complainant for allegedly giving a false statement to the MNHRC.

Members of the MNHRC and selection process

With regard to the members Section 4 of the *MNHRC Law 2014* provides that the MNHRC shall not consist of 'less than seven and not more than fifteen members'. The President of Myanmar has to form a Selection Board comprised of the Chief Justice of the Union; Minister of Home Affairs; Ministry of Social Welfare, Relief and Resettlement; Attorney-General of the Union; one representative of the Bar Council; two representatives from the Pyidaungsu Hlutaw; one representative from the Myanmar Women's Affairs Federation; and two representatives from registered NGOs (*MNHRC Law 2014*, Section 5).

The Attorney-General and Chief Justice are both appointed by the President of Myanmar (*2008 Constitution,* Sections 237 and 299). The Bar Council is chaired by the Attorney General and is not independent of the government (ICJ 2013: 28). The Myanmar Women's Affairs

Federation is a so-called government-organized non-governmental organisation (GONGO) which in words of critics was 'run by the wives of the Burmese military junta's top generals' (Naím 2007). Therefore, apart from the representatives from the Pyidaungsu Hlutaw and registered NGOs, the Selection Board cannot be said to be truly independent from the Government, nor does the Selection Board reflect a 'pluralist representation of social forces', both factors which are very important for compliance with principles 2–4 of the *Paris Principles 1993* on autonomy, independence and pluralism (Liljeblad 2016: 437-438).

Another issue is that currently a lot of NGOs working on human rights in Myanmar operate without government-approved registration, which is still a cumbersome and complicated process requiring the approval from a registration committee. The registration committee for NGOs that want to be registered at the Union level is chaired by the Minister of Home Affairs and can deny registration if the applying organisation might damage the 'rule of law and state security' (*Registration of Organisation Law 2014*, Section 8).

This Selection Board is mandated to nominate 30 prospective members (*MNHRC Law 2014*, Sections 6–8) and the President, in coordination with the speakers of the lower and upper house of Parliament, shall then select and appoint suitable members from that list (*MNHRC Law 2014*, Section 9). The criteria for the prospective members include (a) Myanmar citizenship; (b) not younger than 35 years; (c) integrity and good character as well as independent and impartial; (d) knowledge or experience of human rights, relevant domestic and international laws or good governance and public administration; and (e) commitment to the MNHRC's objectives (*MNHRC Law 2014*, Section 6). The Selection Board is further required to 'seek to ensure the equitable representation of men and women, and of national races' (*MNHRC Law 2014,* Section 7[c]).

The current MNHRC is composed of seven male members only and it is unclear of which 'national race' they are (MNHRC 2017). When the MNHRC was established by *MNHRC Decree 2011*, it counted 15 members, with three female members. After the *MNHRC Law 2014* was adopted the MNHRC was reshuffled to 11 members, with only six original members remaining, including Chairperson U Win Mra and the former Secretary, U Sit Myaing, who became Vice-Chairperson. The reshuffled MNHRC only counted two female members and they were among the four MNHRC members who resigned in October 2016 due to a scandal which will be discussed below in Section II of this paper.

According to the Sub-Committee on Accreditation of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (hereafter: ICC SCA) in their November 2015 report they 'received conflicting reports regarding whether the most recent selection process was conducted in accordance with the law' and that '[s]everal civil society organisations reported that the recent selection process was not made public' (ICC SCA 2015: 11). One of the former MNHRC members, U Hla Myint, who was involved in the drafting of the *MNHRC Law 2014* and especially the sections on the selection process of new members, criticised the most recent reshuffle and stated to the Myanmar Times:

> Did they do the selection by the law? I'm not so sure … I don't know how much they followed the law' (O'Toole 2014).

The fact that the resignations of four MNHRC staff in October 2016 did not lead to their vacated positions to be filled with persons from the list of nominees according to Section 19 of the *MNHRC Law 2014* affirms the suspicion that this list of nominees did not yet exist, while it should have been drawn already during the reshuffle in 2014 according to Sections 6–8. That being said, even if the selection process of the current MNHRC would have been conducted according to the law, it would still have been in contravention of principles 2–4 of the *Paris Principles 1993* on autonomy, independence and pluralism as these require that the appointment process is public, transparent and civil society organisations are consulted openly which has clearly not been the case.

Financial management

Section 46 of the *MNHRC Law 2014* provides that '[t]he State shall provide the Commission with adequate funding to enable it to effectively discharge the functions assigned to it by this law'. While this seems to be in line with principle 5 of the *Paris Principles 1993* regarding adequate resources the ICC SCA (2015: 12-13) commented that:

> The budget of the NHRC is submitted to the President's Office for approval. Funds are then transferred from this Office on a quarterly basis. The SCA is concerned that this arrangement provides the Executive with substantial control over the NHRC's ability to continue to operate.

Section 47 of the *MNHRC Law 2014* allows for 'unconditional contributions from any individual or organization that do not prejudice the independence of the Commission'. According to MNHRC's 2014 and 2015 annual reports it currently receives funding from the Government, the Raoul Wallenberg Institute of Human Rights and the Swedish International Development Cooperation Agency (MNHRC 2015a; MNHRC 2016a).

Legal personality, privileges and immunities

The MNHRC is given accorded legal personality in Section 60 of the *MNHRC Law 2014,* as it has the 'right to sue and to be sued', and in Section 62 its members have immunity from criminal or civil action for 'any act or omission, or observation made or opinion issued in good faith in the exercise of the functions and powers vested under this Law'. It further contains provisions on non-interference or censorship of documents, materials and information communicated to the Commission as well as a provision on the inviolability of the premises, archives, assets and so on (Sections 63–64). These are all important provisions in line with principles 2 and 3 of the *Paris Principles 1993* on legal autonomy and independence from the government (Liljeblad 2016: 437).

Relation with Parliament and the Belgrade Principles

As was noted by Burma Partnership (BP), Equality Myanmar (EM) and Smile Education and Development Foundation (SEDF) (BP, EM & SEDF 2015: 30) the *MNHRC Law 2014* has attempted to follow the *Belgrade Principles on the relationship between national human rights institutions and parliaments 2012* (hereafter: *Belgrade Principles 2012*). Section 5 of the *MNHRC Law 2014* provides that two representatives from the Parliament should sit on the Selection Board

which nominates prospective members of the MNHRC and Section 9 requires the President to coordinate with the speakers of the upper and lower houses of Parliament to select and appoint suitable members for the MNHRC from the Selection Board's nominees.

The involvement of Parliament goes further than only the selection of the MNHRC members as the MNHRC is bestowed upon a duty to respond to any matter referred to it by the 'Pyidaungsu Hluttaw or the Lower House or the Upper House or the Government'[188] (*MNHRC Law 2014*, Section 22[h]). Also the MNHRC can recommend 'legislation and additional measures to be adopted for the promotion and protection of human rights to the Pyidaungsu Hluttaw through the Government' (Section 22[b][ii]). Furthermore, the MNHRC has to submit 'to the President and the Pyidaungsu Hluttaw an annual report on the situation of human rights in Myanmar, the activities and functions of the Commission, with such recommendations as are appropriate' (Section 22[l]). Lastly, with regard to inquiries into human rights violations and the handling of complaints the MNHRC '*may* report its findings and recommendations to the President and the Pyidaungsu Hluttaw and *may* publish them for public information as *may* be necessary' (emphasis added) (Section 39).

Non-compliance with the Paris Principles and consequences

The above shows that while there have been considerable improvements in the MNHRC's mandate and powers there are also some aspects of the *MNHRC Law 2014* which are not in compliance with the *Paris Principles 1993*. The ICC SCA (2015: 11) recommended to the ICC to accredit the MNHRC with 'B' status which the ICC did in January 2016 (APF 2016). The main reasons for not accrediting the MNHRC with an 'A' status were concerns about its selection and appointment process, its financial independence and lack of female representation and also the lack of interpretation of 'its mandate in a broad, liberal and purposive manner, and promote and protect the human rights of all, including the rights of Rohingya and other minority groups' (ICC SCA 2015: 12).

Liljeblad (2016: 445) argued that the conclusion of the ICC SCA went beyond the text of the *MNHRC Law 2014* or the MNHRC as a body but also went into the sphere of the MNHRC's actions. In the words of Liljeblad 2016: 445):

> The ICC Sub-Committee is reaching out to criticize both the commitment of the MNHRC and the Myanmar state as expressed by their activity levels towards the cause of human rights in their country. […] The ICC Sub-Committee, in essence, may be seeking to ensure that the MNHRC and the Myanmar government are fulfilling roles as active promoters of the international system of human rights protection.

The result of being determined a 'B' status is that the MNHRC is only an observing and not a voting member of the Global Alliance of National Human Rights Institutions (GANHRI) and only an 'associate' member of the Asia Pacific Forum on NHRIs (APF). A further consequence is that 'B' status NHRIs are not given NHRI badges for the UN Human Rights

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[188] The Lower House is the House of Representatives (*Pyithu Hluttaw)* and the Upper House is the House of Nationalities (*Amyotha Hluttaw)*. Combined these form the Assembly of the Union (*Pyidaungsu Hluttaw)*, more commonly referred to as the Parliament.

Council (HRC) and cannot take the floor under agenda items nor submit documentation (GANHRI 2017). An exception with regard to the HRC is the Universal Periodic Review (UPR) process for which also 'B' or 'C' status NHRIs can submit documentation, however, only 'A' status NHRIs will get a separate section in the summary of the information provided by stakeholders and only 'A' status NHRIs can 'intervene immediately after the State under review during the adoption of the outcome of the review' (*UN Human Rights Council Resolution 16/21, 2011*, paragraphs 9 and 13). With regard to the UN mechanism of the core human rights treaties to which Myanmar is a State Party, such as the Committee on the Elimination of Discrimination against Women (CEDAW Committee), Committee on the Rights of the Child (CRC Committee) and the Committee on the Rights of Persons with Disabilities (CRPD Committee), there are no such distinctions based on accreditation as GANHRI (2016: 11) affirms.

Section II: The MNHCR and the protection of human rights and criticisms heard by civil society organisations

In this section the MNHRC's protection record will be reviewed, including some criticism heard from civil society. A complete display of the MNHRC's protection record is outside the scope of the paper and only some prominent and more recent examples will be brought forward while making a genuine effort for a balanced overview by also bringing forward some positive examples. The analysis is based on the MNHRC's 2014 and 2015 annual reports, its official press statements and other materials published on the website and in the government newspaper and reports by the media, civil society organisation and the Special Rapporteur on Myanmar.

Land disputes

According to the MNHRC's annual reports of 2014 and 2015 land issues make up more than half of all the complaints received (MNHRC 2015a: 14–15; MNHRC 2016a: 19–20). When looking at these annual reports it is not clear how much ability the MNHRC has, to do something for the complainants, as often the outcome of the MNHRC's recommendation is that the complainant should resort to the judicial process or await the decision of the court (MNHRC 2016a: 21–23). Advice to complainants to resort to the judicial process in Myanmar is not very helpful and will most likely not lead to a fair outcome as the judiciary in Myanmar is still corrupt and inefficient as was already pointed out in Section I above. Section 34 of the *MNHRC Law 2014* gives the option to 'address the complaint through conciliation' but with regard to land issues it does not seem to be doing so.

Another indication that the MNHRC nor the Myanmar judiciary are the right avenues for people with grievances regarding land confiscations and land disputes is that there are other mechanisms available, such as the Central Committee on Confiscated Farmlands and Other Lands, which was formed in early 2016 (Htoo Thant 2016) replacing a Parliamentary Land Investigation Commission which operated from August 2012 (San Thein, Pyae Sone & Diepart 2017: 2). Also the *National Land Use Policy 2016* instituted a National Land Use Council as well as several decentralised Land Use Committees. Notwithstanding the above, it still remains to be seen how effective these mechanisms will be in addressing Myanmar's huge land issues.

Conflicts in Kachin State and Shan State

There are still ongoing internal armed conflicts in Myanmar's border areas, most prominently Kachin State and northern Shan State where the Myanmar army is conducting campaigns against ethnic armed groups (EAGs) which have not signed the Nationwide Ceasefire Agreement (NCA) such as the Kachin Independence Army (KIA), the Ta'ang National Liberation Army (TNLA), Myanmar National Democratic Alliance Army (MNDAA, also: Kokang Army) and the Shan State Progressive Party/Shan State Army - North (SSPP/SSA-N). This ongoing armed conflict has led to a lot of civilian casualties and displacement as well as severe human rights abuses by the Myanmar military against civilians, including alleged rape and torture (HRW 2012; BP, EM & SEDF 2015: 15–16; TWO 2016). Another problem is the lack of humanitarian access, allegedly blocked by the Myanmar army, to displaced communities (AI 2016).

As early as December 2011, four MNHRC members visited Kachin State where they interviewed internally displaced persons as well as prisoners. Another visit was conducted in July 2012 during which witnesses were interviewed regarding complaints on human rights violations. As a result the MNHRC issued a statement on 14 August 2012 confirmed that 'there were certain violations of human rights of the populations of the villages by the armed groups' and 'strongly urged not to violate human rights under any circumstances and to act in accordance with human rights standards' (MNHRC 2012b). The usage of the term 'armed groups' is curious as it makes it seem the Myanmar army was not involved in human rights violations, while local and international NGOs as well as the Special Rapporteur on Myanmar have reported otherwise (Quintana 2013: 9–10). In the same statement the MNHRC confirmed that 'the Tatmadaw [Myanmar army] arrested and interrogated two villagers' and, while not making comments on the interrogation of those suspects for security reasons, recommended that 'torture during the interrogation constitutes violation of human rights and must be avoided' (MNHRC 2012b). In a later statement on 18 January 2013 the MNHRC also urged 'that the question of humanitarian access to the conflict victims and of how safe passage for humanitarian supplies could be guaranteed, be addressed as an urgent matter in the peace dialogue' (MNHRC 2013).

Burma Partnership criticised these two visits and subsequent statements and claimed the MNHRC did not duly investigate allegations of war crimes or crimes against humanity committed by the Myanmar Army, while human rights NGOs had evidence to support that (BP 2012: 8). The MNHRC Chairman dismissed allegations of war crimes and crimes against humanity in an earlier interview with the media and added that 'the standard allegation is use of rape as a weapon of war, but our mission was mainly concerned with the humanitarian aspects' (Bernstein 2011).

On 27 February 2015 the MNHRC released a statement on the armed conflict in Laukkai area, Shan State, between the Myanmar army and the Kokang Army/MNDAA. The MNHRC noted 'heavy casualties suffered in the combat area by the populace and combatants of both sides' and urged that 'both sides should take extra care not to inflict undue damage to the lives and belongings of the populace' as well as to avoid 'activities detrimental to the efforts for supply of humanitarian relief' (MNHRC 2015b). However, it does not seem the MNHRC has investigated allegations of the Myanmar Army using civilians as human shields (RFA 2015) nor allegations of shooting, killing and torture of at least 10 ethnic Kokang civilians by the Myanmar Army, which was reported by the Shan Human Rights Foundation (SHRF 2015; Lawi Weng 2015).

Rakhine/Arakan State and the Rohingya

One of the criticisms by the ICC SCA towards the MNHRC was that the MNHRC does not interpret 'its mandate in a broad, liberal and purposive manner, and promote and protect the human rights of all, including the rights of Rohingya and other minority groups'. A prominent example is the events in Ducheeratan/Du Chee Yar Tan village, Rakhine/Arakan State which took place in January 2014. According to the UN High Commissioner for Human Rights, Navi Pillay, her office 'has received credible information that, on 9 January, eight Rohingya Muslim men were attacked and killed in Du Chee Yar Tan village by local Rakhine' and that:

> [A] clash [followed] on 13 January in the same village in which a police sergeant was captured and killed by the Rohingya villagers. Following this, on the same evening at least 40 Rohingya Muslim men, women and children were killed in Du Chee Yar Tan village by police and local Rakhine. (UN News Centre 2014)

In response MNHRC formed an investigation team comprised of the MNHRC secretary and three members who visited Sitwe and Maung Taw Township, Rakhine State and visited Ducheeratan village tract from 30 January to 3 February 2014. In the MNHRC statement of 14 February 2014 it concluded that:

> The news of the killing of 8 Bengalis and 40 Bengalis did not emerge in the Ducheeratan village tract and it is therefore concluded that the said news is unverifiable and unconfirmed (MNHRC 2014a)

In response the Special Rapporteur on Myanmar, Quintana, announced that 'domestic investigations have failed to satisfactorily address these serious allegations' and if the investigation did not improve 'I will urge the UN Human Rights Council to work with the government of Myanmar to establish a credible investigation' (Lawi Weng 2014).

Another point is that the MNHRC refuses to use the term Rohingya or Rohingya Muslims in its statements and refers to them as Bengalis which is in line with the Myanmar government's consistent policy to not recognise the Rohingya but to collectively refer to them as illegal Bengali immigrants from Bangladesh which do not have right to Myanmar citizenship. This is in violation of the Rohingya's right to self-identification and there is convincing historical evidence that at least a substantial number of Rohingya living in Myanmar are not Bangladeshi immigrants and do not have Bangladeshi citizenship (De Lang 2017). As a result of this treatment by the Myanmar authorities, which is not challenged by the MNHRC, the majority of Rohingya living in Myanmar are rendered effectively stateless.

Prison visits

The MNHRC has made various prison visits throughout 2014-2016 which is in line with its mandate under Section 43 of the 2014 MNHRC Law. In a presentation given by the MNHRC Chairman in October 2016 during the 21st APF Annual Meeting in Bangkok, Thailand, the Chairman stated that '[t]he most common problem of the prisons was overcrowdedness' and that the MNRHC 'recommended to the authorities to take necessary measures to redress the problem'.

According to the MNHRC Chairman, the Ministry of Home Affairs took the recommendation into serious consideration and would take appropriate action. He added that '[t]his is the first time that the Commission has ever been responded positively by the authorities on such a serious matter' (MNHRC 2016b: 12–13).

Letpadaung mine protest

During a protest on 22 December 2014 against the Letpadaung mine the police opened fire on demonstrators resulting in the death of Daw Khin Win, a 56 year old lady and injuring at least 10 others (Irrawaddy 2015). The MNHRC announced on 31 December 2014 that three MNHRC commissioners went to investigate the incident (MNHRC 2014b) and on 14 January 2015 the MNHRC published a detailed press release on the results of their investigation in which it concluded that '[t]he death of Daw Khin Win by gunshot can be construed as an infringement of her right[...] [to life] as stated under Article 3 [of the Universal Declaration of Human Rights]' and that the manslaughter case which was filed at the Salingyi police station 'should be further pursued according to law'. The MNHRC also concluded that there was a 'dereliction in the supervision of the implementation of the [Security] Plan' by the Sagaing Region Police Force and the 'responsible personnel of the [m]onitoring body should be investigated and due action [sic] taken against them' (MNHRC 2015c). While the MNHRC's detailed report and recommendations are commendable, there have been no arrests or further investigations into the death of Daw Khin Win according to a news report by Frontier Myanmar (Vani Sathisan 2016).

Killing of Ja Seng Ing and conviction of her father for submitting a complaint about his daughter's death to the MNHRC

On 13 September 2012, Ja Seng Ing, a 14 year old girl, was killed in Sut Ngai Yang village in Kachin State. A month later her father, Brang Shawng, sent a complaint letter to the MNHRC alleging that his daughter was shot and killed by Myanmar army soldiers (Fortify Rights 2015). Surprisingly, in March 2013 a legal case was initiated by the Myanmar army against Brang Shawng under Article 211 of the Myanmar Penal Code for making 'false charges'. The evidence used against Brang Shawng was an internal Myanmar army investigation which claimed Ja Seng Ing died because of a landmine set by the Kachin Independence Army (Fortify Rights 2015). Brang Shwang was found guilty and given the choice between paying a 50,000 kyat fine ($50 USD) or serving a six-month prison term, of which he chose the former. It was also reported by Fortify Rights (2015) that:

> Brang Shawng's lawyer, Ywet Nu Aung, reported that armed Myanmar Army soldiers have attempted to intimidate her outside of the Hpakant Township courthouse. Moreover, the MNHRC denied Ywet Nu Aung assistance in the case—MNHRC staff escorted her from their offices in Yangon in August 2013 when she attempted to raise concerns about the case.

After ten Kachin community-based organisations (CBOs) and Fortify Rights, an international non-governmental organisation (INGO) conducted independent investigations into Ja Seng Ing's death, they concluded that Ja Seng Ing 'died as a result of injuries sustained when Myanmar Army soldiers shot her' (Fortify Rights 2015). A detailed report including eyewitness

testimonies was published in December 2014 by the ten Kachin CBOs entitled 'Who Killed Ja Seng Ing' (Ja Seng Ing Truth Finding Committee 2014). According to BP, EM and SEDF (2015: 24):

> Not only did the MNHRC fail to investigate this human rights complaint, they failed to protect the complainant, which resulted in criminal prosecution.

Ko Par Gyi case - inability to act in a case involving the military

In October 2014, a journalist, Aung Kyaw Naing, also known as Ko Par Gyi, was shot and killed while under military custody in Kyaikmayaw Township, Mon State. He was initially arrested a month earlier on suspicions of belonging to the Democratic Karen Benevolent Army (DKBA) while in reality he was a journalist covering the violent clashes between the DKBA and the Myanmar army (Mizzima 2016; Regan & Stout 2014). The MNHRC investigated the case and released a detailed inquiry report on 2 December 2014, recommending that the Myanmar Police Force should investigate the case 'to the very end' and ensure the case is prosecuted in judicial proceedings (MNHRC 2014c). With regard to the judicial proceedings the MNHRC (2014c) explicitly recommended that 'this case should be tried in a civil court'.

Despite these recommendations, it was made public in May 2015 by the Myanmar military that on 27 November 2014 two soldiers who were tried in secret for culpable homicide in a military court were acquitted (Mizzima 2016). When the MNHRC was asked if it would take any further steps, Commissioner Nyut Swe responded:

> The Commission has issued two statements on that matter and all our findings have been reflected in those statements. […] Therefore, we have nothing more to comment. (Artan Mustafa 2015)

Ma San Kay Khaing and Ma Tha Zin case - failure to act in the interest of the victims

In September 2016 a terrible story unfolded in the Myanmar media. Two girls Ma San Kay Khaing and Ma Tha Zin, respectively 17 and 16 years of age, were discovered to have worked, practically as slaves, for five years for a family of tailors in Yangon. According to Swe Win (2016) 'the girls were hidden and kept to work in the tailor shop or in the employer's eight-floor apartment' and 'they were subject to horrible daily abuse, such as beating, cuts with scissors and burns inflicted on the skin with cigarette buts [sic] and lighters'.

The Myanmar Now reporter, Swe Win, alerted the police, but because they did not take action, he alerted the MNHRC. The MNHRC then asked the police to open an investigation which they did. The police report 'advised legal proceedings against the employer and members of his household, if the victims' parents filed an official criminal complaint' (Swe Win 2016). This consent from the parents was important because otherwise the police were not allowed to question the girls and inspect their bodies for physical abuse.

In a meeting at the MNHRC office in Yangon, in the presence of reporter Swe Win, the MNHRC Commissioner, Zaw Win, discouraged the family of the victims from filing this

complaint and advised them to negotiate with the employer and accept compensation. The tailor shop owners were quick to make an offer of 4 million Kyat ($3000) and 1 million Kyat ($750) for the two girls respectively. An extremely low amount considering it was also supposed to include the girls' unpaid salary for at least three years. The victims' illiterate parents, not supported by legal counsel, accepted the compensation deal (Swe Win 2016). In a press conference on 20 September 2016, Zaw Win stated:

> The deal was done with the consent of both parties, the employer and the parents of the abused maids. What we did was just organizing their meeting at our office out of kindness since the family members of the girls would be in great trouble if they have to come to Yangon for court trials (Swe Win 2016).

Swe Win (2016) spoke to a lawyer who informed him that according to the law these types of crimes against minors must be brought before a court: 'This case cannot be settled in such a way. The offenders for this kind of crime cannot even be given bail'. Understandably, many agreed and the Ministry of Social Welfare, Relief and Resettlement filed a lawsuit against the perpetrators under Section 66(d) of the Myanmar Child Protection Law and also the Anti-Human Trafficking Unit of the police filed charges for trafficking and abusing the girls (RFA 2016). Prominent lawyer and legal activist Robert San Aung called the MNHRC's action 'criminal concealment' and 'obstruction of justice' and claimed he would file charges against the MNHRC members involved (RFA 2016). On 6 October 2016, four members of the MNHRC, U Zaw Win, U Nyan Zaw, Dr. Daw Than Nwe and Daw Mya Mya, resigned but both the Myanmar Now reporter Swe Win and lawyer Robert San Aung do not believe that should be the end of it and would like to see accountability of the members who resigned (Shoon Naing 2016).

Letters from the MNHRC to the NHRCT

On 5 November 2015, the MNHRC announced they sent letters to the National Human Rights Commission of Thailand (NHRCT) and the Myanmar Ministry of Foreign Affairs, with regard to a case of two Myanmar nationals of 15 and 16 years old who were arrested by the Thai police in Ranong on the suspicion of murdering an 18 years old Thai student on 28 September 2015. In the letter they requested the NHRCT to contact the Thai authorities to request them to ensure their human rights, including their rights as juveniles, are respected and they receive access to health service and legal counsel (MNHRC 2015d). According to Bangkok Post reporter Wongsamuth (2015) the two suspects were released but four other migrant workers were arrested and they were receiving legal counsel and were also visited by Myanmar Embassy staff.

A month later, on 28 December 2015, the Chairperson of the MNHRC publicly sent a letter to the Chairperson of the NHRCT on another case of two Myanmar migrant workers who were sentenced to death in Kos Moi District Court on 24 December 2015 for the murder of two British citizens on the island of Koh Tao in Thailand. In the statement the MNHRC refers to rumours that there were no eye witnesses, the forensic medical examinations did not yield substantial results and that torture was inflicted by the police during the interrogation. The MNHRC concluded the statement requesting the NHRCT to ensure that their rights are respected including equal protection of the law without discrimination and the enjoyment of their right to

life (MNHRC 2015e). The case is now under the Thai Appellate Court and the defence attorneys had until 23 May 2017 to submit the defendants' final appeal (Coconuts Yangon 2017).

Conclusion

The above analysis of some of the MNHRC's practical protection work shows that, apart from a few positive examples, its protection record is not up to standards. There is surely a very high caseload which can be partly to blame for the MNHRC not being able to address each individual case in detail and pursue it to the very end. However, it seems that in some of the above cases there is also a certain unwillingness or inability to pry too much into the Myanmar government's, especially the military's, sphere of operations and control. It was recommended by the Special Rapporteur on Myanmar, Yanghee Lee, in her report to the UN General Assembly:

> She urges the Commission to act as an independent and objective human rights advocate and not to shy away from issues deemed sensitive to the Government. (Yanghee Lee 2016: 4)

There have also been big blunders which could have been avoided such as the failure to protect a complainant from arrest after he alleged that the military shot his daughter and failing to protect the rights of two underage victims of physical abuse and forced labour. It is also alarming to hear from the MNHRC Chairman at the APF meeting in October 2016 with regard to recommendations he made to the military-controlled Ministry of Home Affairs on overcrowdedness of prisons that this was the first time the authorities 'ever' responded on such a serious matter.

It is understandable that the MNHRC does not have the power to enforce its recommendations, but what it could do is employ its diplomatic skills, ability to engage several branches of the executive government and persuasive reasoning to convince the authorities to follow its advice. It has certainly shown its diplomatic skills when looking at the letters sent to the NHRI of neighbouring Thailand on individual cases.

Section III: The MNHCR's human rights promotional activities and engagement with the UN

This section will discuss the various human rights promotional and educational activities and engagement with UN agencies and mechanisms which the MNHRC has undertaken.

Human rights promotion and education

Throughout 2014–2016 the MNHRC held several seminars, trainings and workshops, such as, in March 2014 a seminar on the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1984*; in August 2014 a training workshop on the *International Convention on the Elimination of all forms of Racial Discrimination (ICERD) 1965*; and in March 2015 a workshop was held on a draft law to prevent violence against women. Participants included Parliament members, several government ministries, representatives from the offices of the Chief Justice and Attorney General and civil society organisations. (MNHRC

2015a: 31–36; MNHRC 2016a: 14–15). Furthermore, in June 2016, the MNHRC organised a two-day workshop in Nay Pyi Taw on minority rights in collaboration with the OHCHR. It was attended by parliamentarians, representatives from regional governments, ministries and international experts on human rights (MNA 2016a).

A prominent training workshop was also held on the Universal Periodic Review (UPR), in which Parliamentarians, government officials and civil society representatives participated, in preparation for Myanmar's then upcoming 2015 UPR (MNHRC 2015a: 37). After Myanmar's UPR, in August 2016, a follow-up workshop on how to implement the UPR recommendations, was organised by the MNHRC in collaboration with the Lutheran World Foundation (LWF). Participants included high-level representatives of almost all the ministries, including those of Defence and Home Affairs, several civil society organisations, OHCHR staff and some diplomats (LWF 2016).

In April and September 2015, two important workshops were organised by the MNHRC and UN Women on 'UN Security Council Resolution 1325 (UNSCR 1325) on Women, Peace and Security and Related Resolutions' (MNHRC 2015f; MNHRC 2015g). Attendees included several government representatives, including the military, the judiciary, parliamentarians and academics. NGOs were notably absent. After each meeting an outcome statement was published with important recommendations on women's empowerment, promoting women in leadership and governance, quotas for women, raising awareness on gender-sensitivity and gender-based violence and the adoption of a law on the prevention of violence against women and girls (MNHRC 2015f; MNHRC 2015g). The MNHRC and UN Women also organised a workshop on Gender and Security for Upper Officials in December 2015 with participants from the Myanmar Police Force, including the Chief of Police, General Administration Department, Bureau of Special Investigation, Prison Department, Fire Services Department and the Department of Social Welfare (MNHRC 2016a: 15).

Starting in 2015 the MNHRC also gave human rights talks, workshops and lectures for officers and staff of Union level ministries and organisations, including military officers, in Nay Pyi Taw (MNHRC 2016a: 15–16). The MNHRC also organised training workshops at the State and Region, District and Township levels with the aim to disseminate knowledge of human rights to lower-ranking government officials. Some of the topics included in the training workshops were: the *Universal Declaration of Human Rights (UDHR) 1948*, the nine core human rights treaties, UN human rights mechanisms, NHRIs and the *Paris Principles 1993*, complaint procedures and the *MNHRC Law 2014* (MNHRC 2015a: 38; MNHRC 2016a: 8). In 2016 the MNHRC continued this trend and also made arrangement to conduct human rights workshops for prison officials in Yangon and Mandalay regions (MNHRC 2016c).

The human rights education activities by the MNHRC to several actors on different hierarchical levels, including the military and other powerful actors such as the police, are very positive. The geographic area seems to be widened as well but it is not clear whether or not human rights education activities are also given to military, border guard forces, police and other authorities that are operating in Rakhine, Kachin, Shan, Kayin, Kayah and other border regions, as those regions have historically been most prone to human rights violations by those actors and in some of those areas civil war and civil strife is still ongoing today.

Throughout 2014–2016 the MNHRC also held several human rights talks for the general public and grass root level workshops for local NGOs and CSOs (MNHRC 2015a: 41; MNHRC 2016a: 9–13; MNHRC 2016c). In 2015 the MNHRC extended its human rights education activities to secondary and high school students and also produced a short documentary on the concept of human rights (MNHRC 2016a: 1, 17–18).

Furthermore, the MNHRC has translated the *UDHR 1948* into Myanmar language and different ethnic minority languages such as Kachin, Mon and Shan and plans for translating it to the remaining ethnic languages[189] (MNHRC 2015a: 11; MNHRC 2016a: 17). It has also translated the *International Covenant on Civil and Political Rights (ICCPR) 1966* in Myanmar language but not yet distributed it (MNHRC 2015a: 12).

Promotional activities relating to international treaties

The MNHRC has made several recommendations relating to Myanmar becoming a State Party to international treaties. The MNHRC recommended on 29 January 2014 to President Thein Sein to become State Party to the *International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966* and after Myanmar signed this treaty on 16 July 2015 it urged Myanmar to take steps to ratify it (MNHRC 2016a: 6). The MNHRC also recommended to the Myanmar government to sign the *ICCPR 1966* (MNHRC 2016c) which unfortunately has not yet ensued.

On 24 March 2015, the MNHRC counselled Myanmar to sign and ratify the *Optional Protocol to Convention on the the Rights of the Child on the involvement of children in armed conflict 2000*, which Myanmar signed on 28 September 2015 (MNHRC 2016a: 6). The MNHRC further recommended in its submission to the CEDAW Committee that the Myanmar Government should consider ratification of the *Optional Protocol of the Convention on the Elimination of all forms of Discrimination against Women 1999* and to remove its reservation to Article 29 of the *Convention on the Elimination of all forms of Discrimination against Women (CEDAW) 1979* (MNHRC 2016d: para. 16). The MNHRC also advocated for Myanmar's ratification of the *ASEAN Convention against Trafficking in Persons (ACTIP) 2015* (MNHRC 2016c) which Myanmar did on 21 November 2015 (ASEAN 2015).

Compliance of domestic laws with international treaties

With regard to the Child Rights Bill the MNHRC recommended that it should be adopted speedily and in line with the *Convention on the Rights of the Child (CRC) 1989* and the *Optional Protocol to the CRC on the sale of children, child prostitution and child pornography 2000*, both to which Myanmar is a State Party (MNHRC 2016a: 6; MNHRC 2015a: 13). Regarding the bill on the Prevention of Violence against Women the MNHRC advised it should be adopted in line with *CEDAW 1979* (MNHRC 2016a: 6; MNHRC 2015a: 13). Another recommendation was that Myanmar should enact the bill on the Rights of Persons with Disabilities in line with the *Convention on the Rights of Persons with Disabilities (CRPD) 2006* to which Myanmar is also a State Party (MNHRC 2015a: 13).

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[189] The present author has already seen a translation of the UDHR by the MNHRC in the S'gaw Karen language.

Apart from the above positive examples there was also an occasion where the MNHRC failed to promote international human rights when commenting on domestic legislation. This was in relation to the widely criticised and condemned discriminatory 'Four Race & Religion Protection Laws'[190], which are in violation of international human rights law (White 2015). According to BP, EM and SEDF (2015: 29-30) the MNHRC Vice-Chair, U Sit Myaing, stated during a meeting with CSOs that these laws 'were in fact in accordance with international treaties such as [CEDAW] and the [CRC].'

Examples of how some of these laws are clearly in violation of international human rights standards are that one law includes measures giving authorities the right to restrict how often women are allowed to give birth and another law restricts religious conversion and prevents Buddhist women marrying outside their faith (Macgregor & Thu Thu Aung 2016). The CEDAW Committee (2016: 15) in its Concluding Observations on Myanmar's state report held that:

> It is concerned, however, at the adoption in 2015 of four so-called "laws on the protection of race and religion", which discriminate against women and girls based on, inter alia, their ethnicity and religion.

Engagement with UN human rights mechanisms

The MNHRC submitted its NHRI report to the Universal Periodic Review (UPR) Second Cycle of Myanmar in November 2015. In the submission the MNHRC recommends to the Myanmar Government to continue cooperating with international human rights mechanisms, both the Special Procedures and the Treaty Bodies (MNHRC 2015h: para. 4). The MNHRC also recommended to the Myanmar Election Commission to ensure free, fair and transparent elections (MNHRC 2015h: para. 8).

In the last paragraph of its submission the MNHRC notes that the *Law relating to the Right of Peaceful Assembly and Peaceful Procession 2011* was enacted in 2011 with an amendment in 2014 and 'urges those concerned to abide by the law' and also that 'censorship on press and media publications has […] been terminated' adding that it 'appeals to the press and media people to uphold the press and media ethics' (MNHRC 2015h: para. 11). It is curious why NHRI recommends Myanmar citizens to 'abide by the law' in its stakeholder submission to the UPR where the Myanmar government's human rights record is being reviewed. Also the claim that media censorship has ended in Myanmar is very premature, as recently Myanmar's press freedom status was determined by Freedom House (2017) as 'not free' and according to a journalist for Frontier Myanmar, Sithu Aung Myint (2017) '[m]edia freedom has not improved in Myanmar under the NLD government'. This has partly to do with the repressive and widely criticised Section 66(d) of the *Telecommunications Law 2013* which can lead up to three years' imprisonment of someone who uses any telecommunications network (including the internet, Facebook, Twitter etc.) for 'extorting, coercing, restraining wrongfully, defaming, disturbing, causing undue influence or threatening to [sic] any person'. Mainly the words 'defaming',

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[190] The 'Four Race and Religion Protection Laws' are: *Religious Conversion Law 2015; Buddhist Women's Special Marriage Law 2015*; *Population Control Healthcare Law 2015*; and *Monogamy Law 2015*.

'disturbing' and 'causing undue influence' are open to arbitrary interpretation and have been used to limit the freedom of expression (PV 2017; Adams 2017).

Another report was submitted by the MNHRC to the Committee on the Elimination of Discrimination against Women (CEDAW Committee) for the review of Myanmar's 4th and 5th combined report during CEDAW Committee's 64th session. In this submission the MNHRC makes recommendations that Myanmar should 'promulgate a Law on the Prevention and Protection of Violence against Women' (MNHRC 2016d: paras. 8–9). The MNHRC also recommends the establishment of a one stop crisis centre where violence against women victims can seek justice, medical treatment and psychological support (MNHRC 2016d: para. 10). The MNHRC also urged the Myanmar government to work together with national NGOs and the international community to formulate an action plan on UN Security Council Resolution 1325 and related resolutions on Women, Peace and Security which prioritises the following activities:

> Empower women economically, promote women's leadership in political processes, introduce quotas for women in different spheres, promote gender sensitive reforms including gender sensitive capacity building for their personnel (police, military, border guard forces, judges, lawyers, etc) at all levels and increase recruitment of women into those sectors and support inclusion of women's priorities and 30% representation of women in all structures and processes in the political dialogue. (MNHRC 2016d: para. 14)

Overall the MNHRC's submission to the CEDAW Committee can be considered quite forward looking and focusing on what the Myanmar government should do to improve, which is good. Unfortunately, a very important point is missing in the submission, which is calling on the Myanmar government to repeal or at least amend the 'Four Race & Religion Protection Laws' as they are in violation of international standards, including CEDAW, which was confirmed by the CEDAW Committee (2016), as was already mentioned above.

Section IV: The interrelationship of Myanmar and the MNHRC with AICHR, SEANF and APF

The engagement and relationship of the MNHRC and Myanmar with AICHR and the different NHRIs in the region, including through SEANF and the APF will be discussed in this section.

The influence of ASEAN NHRIs on the establishment of AICHR

The four Member States of ASEAN which had at that time set up independent and effective NHRIs (Malaysia, Indonesia, Thailand and the Philippines) advocated for a strong and liberal ASEAN human rights body to be established under Article 14(1) of the *ASEAN Charter 2007* modelled on UN mechanisms (Munro 2011: 1198; ABC 2008). The four Member States that were opposed from the beginning were Myanmar, Cambodia, Lao PDR and Vietnam, all states without NHRIs at that time. The 'supporting' States were, at that time, the most democratic in ASEAN while the 'opposing' States were considered the least democratic States of ASEAN (Munro 2011: 1199).

The AICHR was established on 23 October 2009 during the 15th ASEAN Summit in Cha-am Hua Hin, Thailand in accordance with Article 14(1) of the *ASEAN Charter 2007* (AICHR 2012a). One factor that the four initially opposed ASEAN states did vote in favour for the establishment of AICHR could have been that the four supporting States and Singapore had a combined gross domestic product (GDP) which was ten times more than the combined GDP of the four opposing States (Munro 2011: 1200) but it could also have to do with outside pressure and expectations from the international community to set up a regional human rights mechanism.

It is likely the four NHRIs[191], at that time commonly referred to as the ASEAN Four, had a considerable influence on their governments for supporting the establishment of an ASEAN human rights body. To illustrate, the ASEAN Four met with the High Level Task Force on the drafting of the ASEAN Charter on 27 June 2007 and handed them a joint position paper which called for the ASEAN Charter to include provisions on human rights and fundamental freedoms, the importance of the role and establishment of NHRIs and for establishment of an ASEAN human rights mechanism (ASEAN Four 2007a). The ASEAN Four further declared in a joint Declaration of Cooperation that they would 'advis[e] their respective governments to take the necessary steps to establish an appropriate ASEAN human rights mechanism and/or any organ in the ASEAN Charter' (ASEAN Four 2007b).

On 29–30 January 2008 the ASEAN Four agreed to adopt ASEAN NHRI Forum (ANF) as their name. The ANF was consulted in drafting the Terms of Reference for the AICHR on 10-11 September 2008 (ANF 2008) but it seems the ANF was not satisfied with the outcome as they submitted a position paper to the High Level Panel on 28 August 2009, stating that:

> As a regional human rights body, it lacks independence. Any protection power that it may have is severely circumscribed by its ToR. Its promotional functions are dependent upon political will of member governments. (ANF 2009)

Myanmar's representatives to AICHR

The first Myanmar representative was Kyaw Tint Swe who served two three-year terms from 2009-2015 (AICHR 2012b; AICHR 2015). He concomitantly served as Vice Chair for the MNHRC since establishment in 2011 until early 2014 when the MNHRC was reshuffled. As mentioned in Section 1, Kyaw Tint Swe, a career diplomat, was a staunch defender of Myanmar human rights record in the past, especially during his time as Myanmar's ambassador and permanent representative to the UN (Lun Min Mang 2016).

The current Myanmar representative to AICHR is U Hla Myint who has served since 2016 and will continue to do so until 2018. U Hla Myint has worked in different government ministries such as Education, Home Affairs and Foreign Affairs, and several Embassies, most recently as Ambassador to Australia from 2008-2010 before he served as member of the MNHRC from its

[191] The National Human Rights Commission of Indonesia (KOMNAS HAM), the Human Rights Commission of Malaysia (SUHAKAM), the Commission on Human Rights of the Philippines (CHRP) and the National Human Rights Commission of Thailand (NHRCT).

inception in 2011 until the reshuffle in early 2014 (AICHR 2016-2018: 12-13).[192] As was discussed in Section 1, he criticised the most recent reshuffle of the MNHRC which led to his own dismissal. In an interview with the Myanmar Times he suggested that he was one of the more "outspoken" members and stated: "I had disagreement with the other members […]. Maybe they don't like me" (O'Toole 2014).

The Influence of AICHR on Myanmar

When looking at AICHR's actions, or perhaps better formulated, inactions on the situation of human rights in Myanmar there does not seem to be a willingness of the AICHR to urge Myanmar or the MNHRC to step up its human rights protection. The AICHR has been very quiet on the human rights and humanitarian crisis to which the Rohingya Muslims in Myanmar are victims. Tens of thousands of Rohingya refugees have fled persecution in Myanmar to Bangladesh, Malaysia, Indonesia and Thailand (Lefevre & Kapoor 2015). In a report drafted by regional NGOs on the functioning of AICHR it was stated that:

> The key concern that remains unchanged since the establishment of both AICHR and ACWC [ASEAN Commission on Women and Children] is […] the continued silence in responding to human rights violations that occurred in 2015 […]. For instance, the two commissions practically just stood by amid the sharp increase of refugees and migrants from Myanmar and Bangladesh escaping through the Bay of Bengal and Andaman Sea. […] A humanitarian crisis unfolded in May 2015, when 5,000 refugees and migrants were found stranded at sea and an estimated 370 lost their lives. Inland in Malaysia and Thailand, authorities found mass graves containing the remains of over a hundred persons believed to be human trafficking victims linked to the crisis. (SAPA TFAHR 2016: 1-2)

It is not surprising that the AICHR did not take any measures against Myanmar as the *Guidelines on the Operations of AICHR 2012* stipulate in Article 1.5 that decision-making is 'based on consultation and consensus' which effectively gives each representative, including Myanmar's representative to the AICHR, a 'de facto veto power over any decisions, even when they may be supported by a majority of other representatives' (SAPA TFAHR 2013: 10).

The ASEAN Four's and SEANF's activism towards Myanmar

In September 2007, the ASEAN Four, together with Timor-Leste's NHRI, the Provedor (Office of the Ombudsman for Human Rights and Justice), during an annual meeting of the Asia Pacific Forum of National Human Rights Institutions (APF) in Sydney urged Myanmar in a joint statement to observe human rights principles when responding to demonstrations (ASEAN Four & Provedor).

In November 2009 the ANF changed their name to South East Asia NHRI Forum (SEANF) due to an objection by the ASEAN Secretariat because they are not an ASEAN body

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[192] He should not be confused with namesake U Hla Myint former Brigadier General in the Myanmar Army serving from 1971 until 2002, and who served as Ambassador to Argentina, Brazil and later Japan and from 2011 to 2016 as Mayor of Yangon (Mizzima News 2011; Ye Mon & Myat Nyein Aye 2015).

(Collins 2013: 89). This was convenient for the Provedor of Timor Leste who joined the club in 2010, as Timor Leste is not yet an ASEAN member.

During SEANF's 7th Annual Meeting on 15-16 November 2010 a joint statement was issued which praised the release of Daw Aung San Suu Kyi as 'a partial victory for the long struggle of democracy in Myanmar' but the statement also 'called for the release of other political prisoners as well as sustaining fair and democratic political processes in the country' (SEANF 2010).

The MNHRC joining SEANF in 2012

In the words of SEANF (2013) the 8th Annual Meeting of SEANF on 18-19 October 2011 'paved the way for the welcoming of the newly established human rights commission in Myanmar'. Just a little over a week before this, on 10 October 2011, the MNHRC sent an open letter to Myanmar's President Thein Sein, requesting him 'as a reflection of his magnanimity' to grant amnesty and release Myanmar's prisoners of conscience (MNHRC 2011b). The release of these prisoners took place the next day, 11 October 2011, when Myanmar's president granted amnesty to 6359 prisoners (MNHRC 2011c). Considering the fact that the last statement of SEANF (2010) called for the release of political prisoners this could have been a tactical and carefully planned move by the MNHRC aiming for SEANF membership.

Further discussions on MNHRC's membership of SEANF were held when SEANF visited the MNHRC in June 2012 (MNHRC 2012c). Then on 12-14 September 2012 during the 9th Annual Meeting of SEANF in Bangkok, Thailand, the MNHRC joined SEANF as its sixth member (SEANF 2013).

SEANF's decreased activism

It was argued by Collins (2013: 89) that SEANF could be a potential competitor to AICHR as a more robust regional human rights mechanism. However, the reality has proven to be different, as SEANF, similar to the AICHR, is bound by consensus decision-making. So if new NHRIs from South East Asia join SEANF, especially those less prone to criticise their governments, they will be able to block SEANF's more 'robust' actions.

Since 2012, when the MNHRC joined SEANF, there have not been any public statements by SEANF on the situation of human rights in Myanmar, or any other country in ASEAN for that matter, while there have been numerous events, including regional events, which would demand a response from any 'robust' regional human rights mechanism. Examples are the situation of Rohingya in Myanmar, especially the upsurge in violence since 2012; the military *coup d'état* in Thailand in 2014 and subsequent arbitrary arrests and limitations of freedom of speech and the press; the 'war on drugs' in the Philippines, which has led to thousands of deaths; and intimidation, harassment, detention and attacks on rights activists in Cambodia and Vietnam (Corben 2017). Most recently the UN Human Rights Council decided to dispatch an international fact-finding mission to Myanmar 'to establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in

Rakhine State' and also to extend the mandate of the Special Rapporteur on the situation of human rights in Myanmar (UNIS 2017).

Another factor for SEANF's decreased 'activism' apart from the MNHRC joining the club can be linked to the fact that since 2013, Thailand's NHRI, the NHRCT, has not been performing well. It was initially warned by the ICC SCA in October 2014 for no longer being in compliance with the Paris Principles and giving it one year to improve. After that did not happen the NHRCT was downgraded from an 'A status' NHRI to a 'B status' in November 2015 (GANHRI 2017: 9; Draper & Kamnua 2016).

The MNHCR's activities in SEANF

SEANF has been organising annual regional conferences on 'Human Rights and Agribusiness in Southeast Asia' in collaboration with the Forest Peoples Programme (FPP) and various national NGO partners since 2011. In 2014 it was the MNHRC's turn, when it hosted the 4th Regional Conference on Human Rights and Agribusiness in Southeast Asia from 4-6 November 2014, together with the FPP and the Center for People and Forests (RECOFTC). The conference included a wide range of participants including the SEANF members and CSOs from most ASEAN countries. As an outcome of the conference a joint statement was adopted by the participants expressing, inter alia, the need for improved adoption of NHRI's recommendations by governments, the need for an ASEAN Human Rights Court and national level complaints and redress mechanisms (*Yangon Statement 2014*: 3). This statement can be considered quite progressive and was most likely heavily influenced by wishes of the CSOs present at the conference.

The MNHRC was Chair of SEANF from 29-30 September 2015 until 26-27 September 2016 when the Chairmanship was handed over to the CHRP for 2017 (MNA 2016b). During the time that the MNHRC assumed Chairmanship it organised two technical working group meetings and two special meetings (MNHRC 2016b: 10). The technical working group meetings were held in Yangon on 27-28 January and 2-3 June 2016 respectively and items discussed during those meetings were SEANF's permanent secretariat, developments in GANHRI, the Sustainable Development Goals, the rights of older persons and the *ASEAN Convention against Trafficking in Persons 2015* (Khine Khine Win 2016; MNHRC 2016e; MNHRC 2016f). One of the special meetings was held on 1 June 2016 and the strategic plan for 2017-2022 was discussed there (MNHRC 2016f). The other special meeting was the 13th Annual meeting on 26-27 September 2016, during which SEANF issued a statement on the rights of older persons (MNA 2016b). In the same year the MNHRC gave comments and recommendations on the Older Persons Bill to Myanmar's Parliament (MNHRC 2016b: 8).

MNHRC and the Asia Pacific Forum of National Human Rights Institutions (APF)

The APF is the bigger brother of SEANF, with 24 NHRI members from the Asia Pacific region, including all the SEANF members. Apart from the SEANF members from South East Asia, its members include NHRIs from Central Asia, the Middle East, South Asia, Australia, New Zealand and East Asia. What makes the APF different from SEANF in terms of its members is it distinguishes between full and associate membership. Full membership is equivalent to a GANHRI accreditation of 'A status' and associate membership to a 'B status' (APF 2017a).

NHRIs with full membership status of APF can nominate a senior representative as voting councillor on the APF Forum Council which is the decision-making body of the APF (APF 2017b).

The MNHRC applied for membership of APF in October 2012 (APF 2012a) and on 5 November 2012, during the 17th Annual Meeting of the APF in Jordan, the MNHRC was admitted to the APF as associate member, pending its application to the ICC for membership (APF 2012b). The APF noted in its assessment of the MNHRC application a number of concerns related to its establishment by decree, the absence of a clear selection and dismissal process, a large number of (government) seconded staff and lack of financial independence (APF 2012a). In response, the APF has supported the MNHRC in drafting the new MNHRC law (APF 2012a; APF 2017c).

Conclusion

This paper started with an assessment of MNHRC's legal framework and composition and concluded that, while recognising the improvements made, there are still issues that need to be addressed with the current MNHRC Law 2014 in order for it to be in compliance with the Paris Principles. It was also noted that for the MNHRC to be recognised with an 'A' status by the GANHRI Sub-Committee it will have to go beyond amending the text of the MNHRC Law 2014 and interpret 'its mandate in a broad, liberal and purposive manner' and make sure that its actions 'promote and protect the human rights of all, including the rights of Rohingya and other minority groups' (ICC SCA 2015: 12).

The second and third sections of the paper assessed whether the MNHRC's practical work over the years, and especially in recent years, has shown evidence of an interpretation by the MNHRC of its mandate to protect and promote human rights. With regard to the MNHRC's protection record it was concluded that it is not up to standards. It was recognised that the MNHRC has a very high caseload and it might not be able to address each individual case in detail, however, this may not be an excuse to only pick up certain cases and leave others as those would interfere too much in to the domain of powerful actors, such as the Myanmar military. However, this unwillingness or inability to address certain cases was not the only issue for the MNHRC's protection record, there have also been considerable blunders which could have been avoided by following common sense human rights standards, such as keeping the identity of complainants confidential and offer special protection and consideration for victims of human rights abuse.

The promotion record of the MNHRC was found to be fairly positive with some examples of the MNHRC organising important conferences, meetings and workshops where meaningful discussions were held, very often involving several civil society actors. The human rights education activities by the MNHRC for several actors on different hierarchical levels, including the military, police and other powerful actors is also positive. The geographic area seems to be widened as well but it would be good to hear more about human rights education activities to military, border guard forces, police and other authorities that are operating in Rakhine, Kachin, Shan, Kayin, Kayah and other border regions, as those regions have historically been most prone to human rights violations by those actors. With regard to international treaties, the MNHRC has made some efforts to convince the Myanmar government to sign and ratify the remaining

international human rights treaties, but it could do more to convince the Myanmar government to ratify important core treaties such as the *ICCPR 1966*, *CAT 1984*, *ICERD 1965*, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) 1990* and *International Convention for the Protection of All Persons from Enforced Disappearance (ICPED) 2006*.

The MNHRC has also given recommendations to the government and Parliament to enact certain laws speedily and in line with international treaties, but unfortunately, not all of these efforts were positive. When it came to the 'Four Race and Religion Protection Laws', the MNHRC, or at least one of its members, has claimed that it was in line with international standards, while it is not. The MNHRC should have given a much stronger opinion or recommendations to the Myanmar government and Parliament on these controversial laws and why it is not in compliance with international human rights standards. Furthermore, the MNHRC's UPR submission was not only used by the MNHRC to give recommendations to the Myanmar government but also to recommend to its citizens to abide by laws and to make premature claims that media censorship has ended in Myanmar, which was shown to be inaccurate according to an independent international media censorship monitor, Freedom House.

In the last section, the interrelationship of the MNHRC and/or Myanmar with the AICHR, SEANF and other regional actors was described. It was shown that while the ASEAN Four, before MNHRC joined the club, have been actively promoting for a strong AICHR with strong enforcement powers, less democratic states, such as for example Myanmar were not so keen for AICHR to be established and only reluctantly accepted it, after the economically stronger and more democratic states, most of which had NHRIs at that time, supported it. The ASEAN Four were not fully satisfied with AICHR as it lacks independence from the will of ASEAN's member governments. With regard to the AICHR it was concluded that it is limited by its consensus decision-making process, meaning that if one of the AICHR Commissioners is unwilling to support an action or statement, that Commissioner has effective veto power.

Furthermore, it was noted that the ASEAN Four, which later formed ANF and then SEANF, filled some gaps left by AICHR when speaking out on human rights issues in Myanmar. One author even argued SEANF could be a potential competitor to AICHR as a more robust human rights body. However, this potential was short lived, as since 2012, when the MNHRC joined SEANF, which could have been a strategic and coordinated move, the activism of SEANF towards Myanmar and other ASEAN states diminished, even though there were indeed plenty of human rights issues, some of them regional in nature or of such severity, that at least some action was warranted. The reason for this was given that, similar to the AICHR, the SEANF can only take action by consensus, when all of its members agree. The section also briefly outlined the activities that the MNHRC did undertake after joining SEANF, such as organising a conference on agribusiness and human rights in 2014, during which a statement was adopted by SEANF and CSO participants, which expressed, inter alia, the need for an ASEAN Human Rights Court.

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Expanding the Mandates of National Human Rights Institutions to Protect Human Rights Defenders: The Cases of Indonesia and Thailand

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Abstract

With the adoption of the so-called "Paris Principles" on 20 December 1993 the United Nations General Assembly (UNGA) endorsed the international standard baseline for the mandate and role of national human rights institutions (NHRIs) in the promotion and protection of human rights. However nowhere in the principles it is mentioned the role these bodies should play in the protection of those individuals or organisations that defend human rights. In recent years, such international standards have been expanded and clarified with different UNGA and Human Rights Council resolutions, as well as special procedures reports, allowing for a more active role of NHRIs in monitoring the situation and protecting human rights defenders (HRDs). Performance of NHRIs on this front has usually been poor due to a number of factors: weak normative frameworks and mandates, patronage, absence of political will and accountability of commissioners, lack of resources, etc. This paper addresses how some constituencies of NHRIs in two South-East Asian countries have been able to push the boundaries of their action beyond their formal mandates and go the extra-mile to protect HRDs. By examining the experience of Protection International[194] in its interaction with the National Commission on Human Rights Indonesia –Komnas HAM– (A status) and National Human Rights Commission of Thailand –NHRCT– (B status), this paper aims to shed some light on the internal mechanisms (i.e. new norm interpretation, conceptual ambiguities and institutional openings – "wedges" promoted by "entrepreneurial" commissioners) and external dynamics (i.e. international norm setting and social mobilisation) that have favoured such institutional behaviours.

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Introduction

In the context of SouthEast Asia, and with the creation in 2010 of the ASEAN Intergovernmental Commission on Human Rights (AICHR), which focuses on the promotion of human rights, the presence of Paris Principle abiding national human rights institutions (NHRIs) holds the promise to advance the protection of human rights (Gomez & Ramcharan, 2016). This holds true when NHRIs enjoy independent capacity to investigate complaints of alleged human rights violations, conduct serious investigation to determine the validity of the claims and the issuing of recommendations aimed at securing justice and remedies for the victims consistent with international human rights standards (ibid). These elements notwithstanding, the Paris Principles (issued in 1993) do not mention the role NHRIs should play in the protection of those individuals or organisations that defend human rights (as the UN Human Rights Defenders Declaration was issued in 1998).

It has only been in recent years that the international human rights standards set in the Principles have been expanded and clarified with different UN General Assembly and Human Rights Council resolutions, as well as special procedures reports, allowing for a more active role of NHRIs in monitoring the situation and protection human rights defenders (HRDs). However, performance of these bodies has usually been poor due to a number of factors: weak normative frameworks and mandates for the purpose of protecting HRDs, patronage, absence of political will and accountability of commissioners, lack of resources, etc.

From a historical new institutionalist standpoint, Pierson (2004), Streeck and Thelen (2005) and, more recently, Mahoney and Thelen (2010) have accurately pointed out that those institutional arrangements, which have persisted over time, can be subject to gradual change and transformation from within. These authors emphasize that institutions are open to change not just in moments of crisis – which generally are the product of exogenous shocks – but on a more ongoing basis. Institutional arrangements not only emerge and break down across time; important incremental changes, which in no way equate to institutional continuity through reproductive adaptation, often take place and can cumulate into significant institutional transformation (Mahoney & Thelen, 2010:xi; see also Pierson, 2004). Institutional veto points are far from failsafe. “The enactment of a social rule and norm is never perfect and there is always a gap between the ideal pattern of a rule and the real pattern of life under it” (Streeck and Thelen, 2005:14). New interpretations of the rules and norms can be discovered, invented, suggested, rejected or adopted. (Ibid: 16) Also, actors can strategically act by introducing conceptual ambiguities and institutional openings, or wedges, which can, in the long term and depending on future events and struggles, be used to change the logic of institutional functioning (Todd, forthcoming: 4, 7). All these suggest that eventually institutions attain a level of relative autonomy, making them less dependent on veto players (i.e. power holders) and more open to relatively smooth gradual change dynamics from outside and from within.

This level of institutional autonomy notwithstanding, change is also the fruit of heated political struggles and compromise among diverging actors. Institutions shape the goals political actors pursue, and structure power relations among contending groups of actors, privileging some and putting others at a disadvantage (Steinmo et al., 1992; Peters, 1999; Mahoney & Thelen, 2010). Thus, social movements unsatisfied with the prevailing institutional arrangements designed by

other – and usually more powerful – actors may mobilise to challenge such arrangements (Tilly & Tarrow, 2008: 52-53).

This paper addresses how some constituencies of the National Commission on Human Rights Indonesia –Komnas HAM– (A status) and the National Human Rights Commission of Thailand –NHRCT– (B status) have been able to push the boundaries of their formal mandates and develop actions aimed at protecting HRDs. In this sense, we aim to understand how emerging international human rights standards are being interpreted and implemented at national levels; and also how some mechanism of gradual and incremental norm transformation and change are at work.

National human rights institutions NHRIs: new international standards for HRD protection

The United Nations General Assembly (UNGA) adoption of the so-called "Paris Principles" on 20 December 1993 (A/RES/48/134) provides the international standard baseline for the mandate and role of NHRIs (e.g. national commissions, ombudsman's offices, etc.) in the promotion and protection of human rights. NHRI responsibilities cover a wide range of actions: provide opinions on the situation of human rights to different government and state institutions; examine legislative and administrative provisions in force and issue recommendations for their abidance to human rights standards; take up any situation of violation of human rights; prepare reports on the situation of human rights; draw to the attention of the government the situation of human rights in any part of the country; promote and ensure harmonisation of national legislation, regulations and practices with the international human rights instruments; encourage ratification of the latter and ensure their implementation; contribute to reporting to UN bodies and committees, and to regional institutions by the state; cooperate with the UN and other international and regional bodies, as well as national institutions of other countries that are competent in the areas of the human rights protection and promotion; assist in the formulation of programmes for human rights education; and engage in efforts to combat all forms of discrimination.

In recent years, some international standards have been expanded and clarified with different UNGA and Human Rights Council (HRC) resolutions, allowing for a more active role of NHRIs in monitoring the situation of human rights defenders (HRDs) and their protection. Something that goes in line with the content and spirit of the 8 March 1999 UN General Assembly Declaration on the Right and Responsibility of Individuals, Groups and Organs of society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (also known as the UN Declaration on HRDs). (A/RES/53/144)

To start with, the HRC Resolution 22/6 of 12 April 2013 has underlined the importance of NHRIs "in the continued monitoring of existing legislation and consistently informing the State about its impact on the activities of HRDs", with the aim to create an enabling environment for the latter's work. The Council has also underlined the important role NHRIs play in the protection of HRDs given their independent status from other state institutions (A/HRC/22/47).

UNGA Resolution 68/181 of 18 December 2013 has addressed the need to protect women HRDs (WHRDs), highlighting the need of state authorities to provide adequate support and resources for those working to protect WHRDs, such as government agencies, national human rights

institutions and civil society; and has encouraged NHRIs to support the documentation of violations against WHRDs and to integrate a gender dimension into the planning and implementation of all programmes and other interventions related to HRDs, including through consultations with the relevant stakeholders.

UNGA Third Committee –on social, humanitarian and cultural issues- has encouraged NHRIs to pay due attention to the situation of HRDs, "including through consultations with relevant stakeholders on issues such as legislation, policies and administrative measures that affect the defence of human rights, and to develop and support the documentation of violations and abuses against HRDs and their legal representatives, associates and family members". (C.3/70/L.46/Rev. 1 §22, 18 November 2015)

UN special procedures have also contributed to this new set of emerging human rights standards: in the HRC resolution 31/55 of 1 February 2016, Special Rapporteur on the situation of HRDs Michel Forst addressed and emphasised what can be considered as good practice for HRD protection by NHRIs:

> "[T]hey support the creation of an enabling environment through human rights awareness, human rights education and human rights monitoring, including the situation of HRDs. They connect advocacy at the national level with regional and international mechanisms, and participate in the work of the Human Rights Council, including the universal periodic review process. National human rights institutions receive and investigate complaints of violations, raise systemic and constitutional concerns with the judiciary and assist in training defenders about their rights and security. They may also observe public demonstrations to safeguard the freedom of assembly by documenting police abuse". (ibid, §94)

In the same resolution, Mr. Forst issued specific recommendations to NHRIs: (a) develop plans of action to protect defenders, establish focal points to coordinate their implementation and interact with defenders on a regular basis; and (b) monitor and investigate complaints received from defenders on the violations of their rights. (ibid, § 117)

Therefore, if the primary role of NHRIs is to promote and protect human rights, and the Paris Principles also indicate that their mandate should be as broad as possible, such institutions' realm of action should also incorporate the protection of HRDs – which can also be expressed as the promotion and protection of the right to defend human rights.

The NHRIs of Indonesia and Thailand

Indonesia

- *Description of the mandate and role of Komnas HAM*

The National Human Rights Commission of Indonesia (or Komnas HAM) has a mandate with six main areas of work (Laila, 30 May 2017):

- Evaluation and research;
- Education and counselling;
- Monitoring and investigation;
- Mediation (or 'function'), based on Human Rights Law N° 39 of 1999, art. 76;
- Address grave human rights violations, based on Human Rights Court Law N° 26 of 2000; and
- Supervision, based on the Law on the Elimination of Discrimination on Race and Ethnicity N° 40 of 2008.

On December 30th, 2014 Komnas HAM obtained A accreditation status from the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) with regards to the Paris Principles on 30 December 2014. But it is important to highlight that the role of a more conventional NHRI in other countries, where all activities related to human rights promotion and defence are integrated in a single institution, does not occur in Indonesia. (ibid; Venny, 31 May 2017) There are three similar institutions covering similar NHRI roles: Komnas Ham, Komper and Child Protection National Commission (CPNC). But often their respective political perspectives on some issues appear to be in contradiction; also their compliance with human rights principles and instruments (ibid).

For the period 2012-2017, there are 13 commissioners at Komnas HAM, including nine men and four women; in late 2016 one of the commissioners was forced to resign due to a corruption scandal. Komnas HAM has six representation offices across Indonesia (Aceh, West Sumatera, West Kalimantan, Central Sulawesi, Maluku and Papua). And while there is no specific structure to deal with the protection of HRDs, one commissioner has been appointed as special rapporteur on HRDs.

While nowhere is it explicitly mentioned the term 'human rights defender (HRD)' or 'HRD protection', in its chapter on civil society participation, article 100 of the Human Rights Law N° 39 of 1999 makes an allusion to the role of HRDs along the same lines as the UN Declaration on HRDs: 'each person, groups, political organisations, community organisations, non-governmental organizations or other public institutions, are entitled to participate in the protection, enforcement, and promotion of human rights'. In the current discussions between Komnas HAM, the Anti-Violence against Women National Commission's (Komper) and NGOs on the draft amendment of the Human Rights Law prepared by Komnas HAM in October 2016, the term HRD fails to be explicitly mentioned, despite arguments in its favour to incorporate 'HRDs' and their protection in the language of the soon-to-be-amended law. But Komper has instituted protection for WHRD with the protection programme for women defenders and the focus of their work is creating a safeguard mechanism for WHRD with the involvement of two of Komper's sub-commissions (recovery and public participation) and two commissioners responsible for WHRD.

- *NHRC initiatives for the protection of HRDs*

The National Human Rights Commission or Komnas HAM has undertaken several initiatives for the protection of HRDs. For many years, the protection of HRDs by Komnas HAM has amounted to a number of rather informal, unorganised actions in favour of specific HRDs. This includes the

issuing of letters of support to HRDs when they face threats or harassment coming from police or non-state actors such as private companies. Or calls by Komnas HAM representatives lobbying to the police for ensuring the release of imprisoned HRDs. (Laila, 30 May 2017) With the appointment of a Special Rapporteur on HRDs at Komnas HAM, Commissioner Laila has been using her attributions to give new meaning to the type of letter mentioned above (ibid):

i) Information letter for HRDs when dealing with the Indonesian Witness and Victim Protection Agency (LPSK): This type of letter can be used to refer a HRD at risk to LPSK to request protection, although it is LPSK that decides in the end whether to provide protection or not. The letter takes advantage of the standing memorandum of understanding between LPSK and Komnas HAM for victims of human rights violations to get support from LPSK as part of the right to reparations. Normally, such a letter has to be issued by the police, but in the context of HRD protection, the letter from Komnas HAM replaces the letter issued by the police. This can be helpful in cases where security force officials are also the sources of threats.

ii) Human rights opinion (verbally or in written) with the permission of the Head of Court based on the Human Rights Law N° 39 of 1999: In cases involving the criminalisation of HRDs, the Special Rapporteur (Commissioner) has made use of Article 89, paragraph 3(h) of Law No. 39 of 1999 on Human Rights, that gives Komnas HAM the duty and authority, "on approval of the Head of Court", to "provide input into particular cases currently undergoing judicial process if the case involves violation of human rights of public issue and court investigation, and the input of the National Commission on Human Rights shall be made known to the parties by the judge". This was the case when Commissioner Laila intervened in the case of Gusti Gelombang, community leader and HRD in Central Kalimantan, and he was acquitted in court.

iii) Report on the situation of human rights defenders (2012-2015): This report was the first of its kind; it was launched in September 2015**.**

Thailand

- *Description of the mandate and role of NHRCT*

The functioning and mandate of the NHRCT are framed by the 1999 National Human Rights Commission Act. Its major responsibilities include the following areas (NHRCT)

- Promoting the respect for human rights domestically and internationally;
- Examining acts of human rights violation or those which do not comply with the country's international human rights obligations and propose remedial measures to individuals or organizations concerned;
- Submitting an annual report on the country's human rights situation to the Parliament and the government;
- Proposing to the Parliament and the government revision of laws, rules or regulations, and policy recommendations for the purpose of promoting and protecting human rights;
- Disseminating information and promoting education and research on human rights;
- Cooperating and coordinating with government agencies, NGOs and other human rights organizations.

The Commission's mandate was broadened with the 2007 Constitution by allowing the NHRCT "to submit cases together with opinions to the Constitutional Court or the Administrative Court as the case may be where any provision of laws, rules, regulations or administrative acts is detrimental to human rights and begs the question of constitutionality and legality for the purpose of promoting the respect for human rights; and to file a lawsuit on behalf of a complainant for the purpose of redressing the problem of human rights violation in general" (ibid).

While the NHRCT was first accredited "A" status in 2004, it was downgraded to "B" status – partially compliant with the Paris Principles – by the ICC in October 2014. This was the result of "raising a number of concerns about the NHRCT's structure and functions, including the selection process (of the commissioners) since it was modified under the 2007 Constitution". (OHCHR, no date, p. 2) Such concerns included not addressing human rights violations in a timely manner, operational ineffectiveness due to the presence of staff seconded by national ministries in its secretariat. Subsequently, the OHCHR Regional Office for South-East Asia raised additional concerns about a proposal by the Constitution Drafting Committee (CDC) to merge the NHRCT with the Office of the Ombudsman, as part of the drafting process of the new constitution of Thailand, and which would result in further weakening of the NHRI in Thailand (ibid).

On 19 June 2017, 157 civil society organizations and individuals signed an open letter to the Constitution Drafting Committee, which also drafted the Organic Law on the National Human Rights Commission. Such a law shall be proposed for reading by the National Legislative Assembly. While the organic law contains certain provisions by virtue of the newly approved 2017 Constitution of Thailand, it fails to comply with the international standards set in the Paris Principles. Moreover, the draft organic law has been elaborated without comprehensive public consultation. (UCL et al., 19 June 2017).

- *NHRCT initiatives for the protection of HRDs*

There is no comprehensive legal framework for the protection of HRDs in Thailand. Moreover, many HRDs in Thailand continue to face harassment, threats, physical violence, criminalization, prosecution and imprisonment, for their peaceful work; such attacks come from both state and non-state actors. (AI, 2017) In the May 2016 Universal Periodic Review (UPR), 11 recommendations encourage the NHRCT's full compliance with the Paris Principles while five other recommendations encourage Thailand to create appropriate measures for the protection of HRDs and to ensure that their rights are duly respected (UPR-Info). However, as yet no concrete measures have been put in place yet, and despite its current shortcomings, the NHRCT is one of the few mechanisms available to HRDs.

According to Angkhana Neelapaijit, lead Commissioner for the Sub-committee on Civil and Political Rights, HRD protection has become one of the most important elements the NHRCT wants to tackle, together to issues concerning natural resources and land and business and human rights, (Neelapaijit interview, 20 June 2017).

The minimum standards for investigations by the NHRCT require that they must be based on listening and gathering information from all parties; exposing the issues; exploring the

conclusions and holding an open public inquiry. After the completion of the investigation, a report containing a number of recommendations must be issued (ibid). However, according to the experience of Protection International in its work and interactions with the NHRCT, the application of this minimum standard alone provides neither for a robust investigation, nor for inclusive participation or strong recommendations. In light of these shortcomings, proactive behavior by Commissioners has proven vital in pushing for making the connection between rights under national law and human rights; also in promoting action by those fearing the consequences of doing so from the National Council for Peace and Order (NCPO), under the control of the military.

Between 2016 and 2017 the NHRCT's Sub-committee on Civil and Political Rights has investigated 17 complaints made by HRDs, including 10 WHRDs. As part of her duties, Commissioner Neelapaijit has undertaken the following actions (ibid):

i) Monitoring and rapid responses in the field: The importance of conducting timely field visits by Commissioners to communities where the HRDs live and work is key for assessing their situation and addressing their concerns before meeting the relevant authorities. Commissioner Neelapaijit has been able and willing to respond rapidly by travelling to visit HRDs and their communities. She also has accompanied HRD when they go to make complaints to police or other relevant authorities as necessary, providing increased protection and credibility (PI, 7 November 2016).

The Commissioner has also undertaken special monitoring missions to investigate or prevent violations and conducted action to engage proactively on emergency human rights issues. *This was the case,* for example, of her immediate response to the targeted shooting of community-based HRD Supoj Karasong of the Southern Peasants' Federation of Thailand (PI, 8 April 2016).

ii) Working with authorities and other key stakeholders: The sub-committee increased the capacity of the NHRCT to investigate cases professionally through stepped-up dialogue and collaboration with relevant state agencies, including the Royal Thai Police, the Army and other security agencies. They initiated a process of inviting and providing space for the relevant authorities to meet at NHRCT office in Bangkok where they issued their recommendations. Rather than wait for an incident and complaint to occur, the Sub Committee takes advantage of the information provided by civil society groups and victims to identify those issues that require sustained monitoring and attention throughout the year.

In other instances, Commissioner Neelapaijit has facilitated for community-based HRDs to receive bail and legal assistance fees from the Justice funds of the Ministry of Justice.

In October 2016 land right defenders Sarayuth Ritthipin and Chadet **(**Jadet**)** Kaewsin were charged with libel offences and computer-related violations against government authorities, specifically 'bringing into computer system false or forged information, partly or as a whole', under Thailand's Computer Crimes Act. After visiting the community Commissioner Neelapaijit invited the military complainants to travel to the NHRC Office in Bangkok for mediation and recommendations. In response to her invitation the HRDs were informed in writing that they will not be prosecuted and all charges were dropped (PI, 11 January 2017).

Commissioners can also issue statements in favour of HRDs: Former Commissioner Dr. Niran Pitakwatchara (2009-2015) who was chair of the Sub-Committee on Land Rights and Forestry, responded rapidly to the situation faced by a HRD of the Southern Peasants Federation of Thailand (SPFT) who was placed on the authority's surveillance list which categorized him as an "Influential Person of Interest". Dr Pitakwatchara made clear in his communication with the authorities that SPFT members were human rights defenders with whom the NHRC was working, and he dismissed all accusations against the HRD.

Furthermore, the Sub-Committee produces important documentation to make issues more visible and to contribute to holding the State accountable. For example it submitted reports for the ESCR, ICCPR, UPR and CEDAW (OHCHR, 3 July 2017); provided information to the public via mainstream media; or informed foreign diplomats based in Thailand as well as the Bangkok Office of the UNHCHR.

iii) Access and awareness: Another initiative worth noting is the use of social media. Commissioner Neelapaijit writes a weekly diary on her work and posts it on her Facebook page, accessible to the general public and the media. This exercise of transparency allows for raising awareness about human rights struggles and the situation of HRDs.

iv) Linking HRDs with other issues: Commissioner Neelapaijit also was the lead Commissioner on the Sub-Committee on women rights. She created opportunities to integrate the issues and work of the two sub-committees by raising the profile and visibility of WHRDs in investigations and also publically when the Sub-committee hosted the award for WHRDs (PI, 10 March 2016).

v) Working with civil society: Supporting and accompanying civil society mobilization allows for increasing visibility of issues. An example of this is Commissioner Neelapaijit's support in the organization of PI's photo exhibition *"*For Those Who Died Trying*"* around the country with support from the Canadian Embassy.

Comparative analysis of the two cases

Drawing from the cases of Indonesia's Komnas HAM and Thailand's NHRCT, we can identify the following elements:

These two NHRIs neither have a strong normative framework nor mandate to protect HRDs. Furthermore, qualifications according to compliance with the Paris Principles do not seem to make a difference in this sense.

Despite ongoing concerns by the ICC and civil society in Thailand regarding the strong influence of Government in staffing the commission, our experience working with both NHRIs and recent interviews show that some Commissioners have been able to push the boundaries of their action beyond the formal mandates for HRD protection.

The examples brought in each country case show that some Commissioners have introduced innovative interpretation of their mandates, and taken advantage of some institutional openings to work more decisively on HRD protection. In Indonesia, the interinstitutional agreement between

Komnas HAM and LPSK has allowed support to HRDs at risk. In the case of Thailand, the Commissioner has received support from staff who also have background as HRDs themselves, and provide the necessary expertise.

External pressure, such as in the case of the UPR recommendations to Thailand, however important, does not appear to have a key role regarding institutional change.

Finally, we think that the usually broad, poorly defined mandate of NHRI (criticized by some experts, see for example Beco and Murray 2014) may also affect negatively their capacity to engage with concrete actions to improve the protection of HRD (beyond individual initiatives as the ones we have described). Same comment would apply to other frequent problems NHRI faces, like lack of independence. But of special importance for HRD could be some omitted topics in the Paris Principles, namely gender, ethnicity and minorities (Welch 2017, 97).

Conclusion

Despite the differences in the countries' socio-political contexts and the mandates of the NHRIs, the Indonesian and Thai cases show how both civil society mobilisation to engage with the Commissions and the proactive behaviour of specific Commissioners have been playing a key role in pushing the boundaries to NHRI action regarding HRD protection, thus contesting institutional inertia and other factors that have been preventing more forceful action from these institutions.

But beyond the initiatives undertaken by some Commissioners in relation to the protection of HRD, and returning to our introduction about change within State (and NHRI) structures, more research would be needed to understand better how those initiatives could lead to more stable developments in the way NHRI engage with the protection of HRD. Furthermore it should be explored how Commissioners committed with the right to defend rights could promote institutional changes and policies in line with international standards on the protection of human rights defenders.

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Advocating for LGBTQ Civil partnership act in Thailand: The Role of National Human Rights Commission and Civil Society

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Abstract

Thailand is internationally perceived to be a LGBTQ-friendly country and well known for its tolerance towards diverse sexualities. The country has perceived the growing visibility of LGBTQ people and there has been a noticeable increasing trend among civil society and LGBTQ community to support the LGBTQ movements and campaigns calling for gender equality as well as LGBTQ legal protections. Despite these positive atmosphere, the improvement of legal law and regulations for LGBTQ rights are not presented which affects to the same sex partner silently. Evidently, in 2012, one of lesbian couples lost her partner due to the permission of signing a consent form for treatment because they are not the consanguinity relative. Moreover, civil partnership act for same-sex partners in 2014 are postponed until the present time in 2017 although there are various civil society groups such as the Anjaree Group, Bangkok Rainbow including Rainbow Sky Association who try to create the campaigns for this issue. This certainly led to several questions toward LGBTQ protection in Thailand, particularly the role of National Human Rights Commission (NHRC) and campaigns mobilized by civil societies towards the matter of civil partnership act. Hence, this paper aims to examine the roles of NHRC as well as civil societies for LGBTQ rights protection in Thailand on civil partnership act 2014. Also, the paper will highlight the LGBTQ movements, campaigns and activities from 2009 until present days. It also argues here that legal protections of LGBTQ persons such as same-sex marriage which is considerably important concern for various groups, yet these campaigns are still face several challenges. This reflects NHRC and NGOs in Thailand having less power to launch and pressure the state to enforce the policy in protecting LGBTIQ rights within Thai state.

Keyword: LGBTQ, Civil partnership act, Human Rights, NHRC, Civil Society, Thailand

Introduction

In the 21st century, gender and sexuality are more brought up to research and debate in academic terms. The word of gender and sexual diversity are introduced to the world, especially gender expression and homosexuality. In the Western world, there is the group of people who assemble together and create the movement to call for the right including increasing the understanding towards society about gender and sexual diversity. They call themselves as "LGBTQ" people which stands for Lesbian, Gay, Bisexual, Transgender and Queer. This issue is spreading to the other parts of the world and motivates people to recognize the right and equality of these groups of people since they were ever looked at as abnormal people or mental illness in the past. Similarly, Thailand also awakes about the issue of LGBTQ. Thailand is well known as the friendly country towards LGBTQ people. The foreigners have the idea as people in "Land of smile" are kind and willing to welcome everyone without any discrimination. LGBTQ in Thailand

are not discriminated against and lived happily. (Matzner 2004, p.1) Hence, it possibly becomes the reason that several LGBTQ foreigners come to this country to receive the warm welcome and experiences in various places which are called "gay paradise". The reputation of Thailand about tolerance and welcoming LGBTQ people is highlighted by the Tourism Authority of Thailand under the campaign "Go Thai, Be free".[195] Interestingly, in the website "gothaibefree.com" remarks about Gay life in Thailand about the acceptation from the society as being LGBTQ is explained simply under the word "*Mai pen rai*" or "No problem", which is the philosophy word for Thais. Moreover, in Thailand has no law and regulations to against homosexuality or LGBTQ and there are several places in the country that have gay hot spots such as Bangkok, Chaingmai and Phuket. From this point, it probably states that this campaign presents to the visitors about the tourist attractions in Thailand along with supporting the image of this country about the opening freely to everyone. (Kapook 2013)

However, the truth of LGBTQ people in Thailand is possibly bitter than the image that the nations try to support. Although the country is opening freely for them to live, there are less regulations which are provided to them including the stereotype towards these people in negative ways. It activates LGBTQ civil society and organisations in the country call for the right and equality of them in many issues such as employment and currently, "Civil Partnership Act" which has been processed since 2013 until the present time without any conclusion or results. It turns into the question about the role of civil society such as Anjaree foundation and others including NHRC, the independent organisation who related to the government for human rights, towards the issue of Civil Partnership Act process in this country. Hence, this paper aims to examine the right and equality of LGBTQ in Thailand, exclusively about the civil partnership act 2014, the role of LGBTQ civil society and NHRC including the challenges of the process to achieve the goal of the campaign with the conclusion.

LGBTQ in Thailand: *who are they and how they are*

As mentioned above that LGBTQ stands for Lesbian, Bisexual, Transgender and Queer which shows that there are mixed with the diverse of gender and sexual orientation. (The Joint Commission 2011, p.90) In Thailand, there are the group of people who have the diverse gender and sexuality appear for a long time as well. In this part provides the history of their identity along with the living life of them for understanding about the background and overall image of LGBTQ people in Thailand. Before 1960s, Thailand has only three types of gender (*phet*) as masculine male, feminine female and the intermediate group were called *kathoey*. After 1960s, there were the proliferation of new *phet* in Thailand which came from the unequal blending of masculinity and femininity. It became the image of truly man (*chai thae*), truly woman (*ying thae*) and truly *kathoey* (*kathoey thae*). From the identity of *kathoey*, it split into various types of them such as *kathoey thae* (true hermaphrodite), *kathoey thiem* (artificial kathoey – feint hermaphrodite or cross-dressing man), *kathoey nhum* (young kathoey – a masculine young homosexual man) and *kathoey phu-chai* (a masculine adult homosexual man). By 1970s, type of masculine young and adult homosexual man (*kathoey nhum and kathoey phu-chai*) were replaced by the word "gay" from English word. At the same time, masculine women also did not use the word kathoey but

[195] "Go Thai, Be free" is the official travel blog for LGBT life in Thailand. In the website provides the information and updated events about LGBT in the country for welcoming foreigners to visit including post about gay life. See further on: http://gothaibefree.com/

rebelled as *lesbian* and *dai* instead. After that they changed the word to be *tom boy* and in 1980s, the word was shortened to be *tom* and the partner of them was called *dee* from "lady". Moreover, the word for male bisexual was also occurred in this time as "*suer bi*". (Jackson 2000, pp. 409-411) From this point, it can see that the words which are used to call the people in diverse gender and sexuality group in Thailand had been occurred and changed several times. Furthermore, it was linked with the sexual orientation as the homosexuality. For being *kathoey* and homosexuality in Thailand, it had been recorded for a long time. This issue was related with the religion as Buddhism that it influenced people's perception towards being *kathoey* or transgender was because of the karma that they did in the prior life (in Thai calls *chat*). Moreover, the issue of homosexuality in Thailand also happened since the period around 1800s but it had no any heavily punishment. However, in the period of World War II, the coming of western world influenced the idea of Thailand towards homosexuality as the mental illness. While there were the opening of transgender or kathoey more with being prostitution to American soldiers along with women. At this time, there was the introduction of sex-reassignment surgery and the increasing number of gay magazine. (Rumjumpa 2002, pp. 315-330) Nevertheless, even though homosexuality and transgender were specified as mental illness, there were no strongly punishment towards them. It possibly related to the teaching of Buddhism about the karma and being born in the next life. Also, it represents the idea of people that being transgender and homosexuality is abnormal and different (in negative way).

From the information, it can see that Thailand also has the history of gender and sexual diversity before becoming as LGBTQ people at the present time. However, it presents that their lives possibly are not fully welcome from the society as well. LGBTQ people in Thailand have faced various discrimination and overpassing in many terms since in the past. The gender expression which is different from birth sex is viewed as abnormal or weird which affected to their lives directly. As mentioned that the law and regulations which support LGBTQ rights and equality are limited in Thailand, it makes LGBTQ face many challenges. For the example, the title name of male and female which specify clearly that male uses Mr. and female use Miss or Mrs. Nevertheless, there is only female that can select to use Miss or Mrs voluntarily with the inform to officers. (For female who are married, they can select to use freely) (Female title act B.E.2551, section 5-6) Even intersex people have to show the medical certificate before changing the title name. So, even though the appearance of LGBTQ people are different from their birth sex, such as transgender or transsexual, they still cannot change their title names freely and that affects to them as the discriminated execution from the society. (iLaw, 2012) In terms of job and employment, they also faced the challenges, especially tom and transgender. Some of them are unemployed since the regulation of wearing uniforms that strict followed with the birth sex and the prejudice to LGBTQ people in work place such as the verbal abuse. (Suriyasarn 2014, p. 94-96) It affects to the limitation of works area for LGBTQ in the country that limited to work only as freelance or in beauty sector such as fashion and cosmetics. Moreover, the problem of wearing uniform regulation and verbal bullying also happens in school and University, many LGBTQ students are forced to wear uniforms different from their gender along with the verbal abuses from classmates, especially in school. For University student, some of them are prohibited to join the graduate ceremony if they cannot wear the uniforms followed their birth sex. (Tang 2017) Moreover, the image of LGBTQ in Thailand is mostly represented by the media, such as movies, TV dramas and news, in negative ways. For the example, most of transgender are presented as the funny, rude and focusing only about love and sex characters. Meanwhile, the

news about LGBTQ people usually presented that they are emotional, cruel and cheat. (Isarabhakdi 2015, p.47) Regarding to the information above, it displays that this country still limits many benefits and regulations for LGBTQ group which highlights on the statement that Thailand is tolerant towards homosexuality and gender diversity issue. There are no anti, or sanctions obviously but the unacceptability still occurs in the practical terms. (Jackson 1999, p. 239-240) It also includes the issue of same-sex partners who are marginalised from the law and society which motives the civil society of LGBTQ human rights along with the organisation involved call for the rights and equality for LGBTQ group at the present time.

LGBTQ movement in Thailand: ***purpose of civil society and 2009 incident to Civil Partnership Act***

There are a number of civil societies in Thailand who are active for the rights and equality of LGBTQ people including the health services. At the present time, most of them are focusing on the support for Civil Partnership act together. In this paper, it presents some of LGBTQ organisations such as Anjaree foundation, Rainbow sky association and Bangkok Rainbow organisation who are the big drivers for most of LGBTQ movement in the country. All of their purposes are similar to each other which is about to increase better understanding towards homosexuality and LGBTQ people including the health care and services. As Anjaree foundation[196], they have worked since 1986 with the purpose as opening the space for female loving female group and eliminating the prejudice and bias towards homosexuality from the society. (Wanichayachart 2001, p.39-41) While Rainbow Sky Association[197] also has the purpose to increase the strength to LGBTQ and male homosexual community since the higher number of people who infected HIV. It creates the discrimination and labelling from the society towards these group. So, Rainbow Sky Association of Thailand promotes healthcare and services including the understanding to LGBTQ groups and society about HIV infection. (RSAT n.d.) Another organisation is Bangkok Rainbow which has the purpose for campaigning the correct information about HIV infections and gender identity through the activity and working with other organisations involved both in the government and private sectors. All of them are active in the different areas but achieve the goals for LGBTQ society such as the announcement of withdrawal 'homosexuality' from the ICD-10 followed WHO by Department of Mental Health in 2002, which was motivated by the cooperation of Anjaree foundation as the main diver with the support from RSAT and others.[198] Meanwhile, Bangkok Rainbow also creates the activity and campaign for the better understanding of gender identity and sexual orientation including the emphasising on the right of LGBTQ people such as Gay Parade. From this point, it can see that they mostly try to create a better understanding towards LGBTQ as well.

However, the incident which happened in Chiang Mai represents the perception of some society towards this group that they still cannot accept. In 2009, Gay Pride Festival, which was

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[196] Anjaree Group was formed by a small group of lesbian feminist activists with the leader as Anjana Suvarnananda for articulating lesbian issues in the women's movement and the society at large including the understanding towards homosexuality. They are the first organisation who campaign for LGBTI people.

[197] Rainbow Sky Association is formally found in 1999 and becomes the first organisation who provided the condom and knowledge documents for the understanding to society

[198] Wanichayachart, ibid.

created by RSAT with the cooperation of LGBTQ organisations, was forced to shut down from the red shirts group under the name “Rak Chaingmai 51” with the reason that this parade destroyed the image and culture of Chaingmai. They also remarked that Chaingmai people cannot accept this parade and if the parade insisted to hold, they have to delete the word “gay” from the name or else stop by mean, even the violence. While the protest was going on, the protestors shout the insults with the megaphones and blockaded LGBTQ group. (Rojanaphruk 2009) After this situation, the chairman of RSAT filed the petition to NHRC for examining Chaingmai cultural council and protestors since it was the discrimination and violated to constitutional law section 30 of Thailand.[199] From this incident, it reflects the idea of people towards the diversity of gender and sexuality which are in the negative and limited ways. Moreover, it was related with the political incidents and bias from the protestors. However, it became the starting point for another group of LGBTIQ and turned into the Foundation for SOGI Rights and Justice (FOR-SOGI) who is another main diver for civil partnership act process. Furthermore, 21st February of every year becomes the day to stop violence against LGBTIQ people in Thailand. (Yodhong 2017) Also, it became the point for other LGBTQ organisations to activate other campaigns for the rights and equality with the support of NHRC through the activities such as public forum and discussion towards the issue of LGBTQ laws and regulations. For the example, the public discussion under the topic “Gender Equality Act, B.E. 2558 (2015) and the rights of LGBTI" which brainstorm the idea of various group of people to promote the gender equality act which had been declared in 2015 to protect the rights of people including LGBTQ group along with the discussion about benefits of it. From this point, it can see that civil society and NHRC work together for the support of rights and equality to LGBTQ groups and others in many issues. Moreover, the roles of civil society also highlight the understanding of diversity of gender and sexual orientation for a long time. However, the 2009 incident is the thing that still reflected the idea of society towards LGBTQ issue. On the other hand, it also becomes the point that makes all organisations try to promote more gender and sexuality with the foundation of FOR-SOGI. All of these things lead to the support and pushing forward to the civil partnership act in Thailand afterwards.

Civil Partnership Act in Thailand Part I: ***Its process with the role of civil society and NHRC***

On 26 June 2015, the world was celebrated with LGBTQ in United States since the Supreme Court ruled that same-sex couples finally can marry nationwide along with the statement of Justice Anthony Kennedy that remarked "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice and family.” (Vogue and Diamond 2015) It is great news for not only LGBTQ in the US but also around the world since it is the hope for their countries to shift the major step of LGBTQ movement and human rights issue. For the same-sex marriage topic, there are several countries around the world who allow same-sex partner to married or register as the legal couple under the law through the bill which is called “Civil Partnership bill”, “Civil Union” and “Civil Partnership Act” such as United Kingdom, who has both of same-sex marriage law and civil partnership bill for granting the status of same-sex partners legally under the law of the country. For Thailand, recently, this country also has the campaign which supports the civil partnership for same-sex couple and there are the drafts from both of government and civil society. The process has been started since 2013 until the present

[199] Article 30 in the Constitution of the kingdom of Thailand, B.E.2550 (2007) stipulated that all people are equal before the law and shall enjoy equal protection under the law. See further on: https://www.unodc.org/tldb/pdf/Thailand_const_2007.pdf

time. The turning point is when Natee Teerarojjanapongs, gay activist took his same-sex partner to register the marriage bill at district office in Chaingmai province and were refused since the Civil and Commercial Code of Thailand stipulated that the marriage can be done for only men and women partner[200]. Hence, Natee filed the petition to NHRC for the support and NHRC suggested him to send this issue to Department of rights and liberties protection, Ministry of justice which became the coming of civil partnership act. (Horatanakun 2013) For the law that limited to only man and woman marriage turns into the problem for most of same-sex partners in Thailand since there are no regulations to grant their status to be legal so they cannot protect or manage their couple life in many issues. As in emergent time, LGBTQ couple cannot sign any consent certificate for treatment since they are not the "spouse" who are married under the law. For the example, the story of Thai government official who almost lose her partner due to the motorcycle accident and she was refused from the hospital officers to sign the consent certificate for treatment because they are not relative by blood. Moreover, she was restricted from the government office to use her state benefits for her partners with the reason that the Ministry of Finance's regulation rejected to give the benefits for same-sex partners which affects her to pay the medical treatment fee in fully prices by herself. (Mosbergen 2015) For the financial and insurance also has the problem. LGBTQ couple cannot sign any investment or contract for each other in the status of "spouse" even the benefits from insurance. As the story of "Pat" and "Phol", same-sex partner who were denied to give the benefits for each other since the company's regulation allowed only the relative related by blood. The reason that they were told from officer was about to protect the people who were possibly cheated to make the insurance for benefits. They said they felt disappoint so much since they are not "other". They have no any relative to look after for them. They have only each other. (Boonprasert 2011, p.10) From this point, it can see that same-sex partners have to face the instability and insecurity in their lives and relationship. Also, it reflects to the discrimination towards same-sex partners and LBGTQ people which become the reasons that civil partnership act in Thailand are supported by various group in the society. For the act, the first draft is come from Department of rights and liberties protection, Ministry of justice in 2013 which is presented with the benefits that same-sex partners will receive such as the right for financial business, treatment and signing the consent certificate in emergent time. However, this draft is not covered to the right of same-sex partner to adopt the child and the age for signing is twenty years old while men-women marriage is seventeen. Hence, LGBTQ civil society decided to create another draft of civil partnership act for the society with the cooperation of Law reform commission and NHRC as "people version" in 2014. This draft version is different from the version of the Ministry of Justice as it opens to everybody to sign without specifying gender, the right for adopting the child and the age is 17 years old as same as the marriage condition of men and women. (Nation TV 2015) The important step for the process is the support from the society as the collecting name of supporters and brainstorming with the people for the understanding in the society. After that, both of two drafts will be filed to be considered by the Privy Council in the House of Parliament and announced to use later.

Regarding the process above, it can see that civil society and NHRC also play an important role to support the civil partnership act in 2014 or the people version. For civil society,

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[200] Section 1448 of Thailand Civil and Commercial code stated that "A marriage can take place only when the man and woman have completed their seventeenth year of age. But the Court may, in case of having appropriate reason, allow them to marry before attaining such age." See further: https://www.samuiforsale.com/law-texts/thailand-civil-code-part-3.html#1434

there are various organisations such as FOR-SOGI foundation, Anjaree foundation, Rainbow Sky association; Bangkok Rainbow and others become the main drivers for pushing and following the process of civil partnership act. Although the process was halted by coup d'état in 2014, LGBTQ civil society still informs people about the news and updates for this issue. Moreover, they also insist not to file the act in this government with the reason that junta violates the human right, and civil partnership act is about human rights directly. (Mitsunaga 2014) While some organisations such as Rainbow Sky association updates the news about civil partnership bills as two drafts from the Ministry of Justice version and people version are still not sent to consideration in the parliament. All of LGBTQ civil society urges to support and spread the information of gender and sexual diversity including the civil partnership act to the society for the better understanding of people. (JR-RSU 2016) For the role of NHRC, the commission supports the cooperation with civil society and is the first place for filing the petition about human rights. It can see that there are many cases of LGBTQ people which were sent to NHRC for examining and investigating the issue. For the example, the petition of transgender student who is prohibited to join the graduate ceremony is one of the case that NHRC examined and suggested to the university that students have the right to wear uniform followed their genders. The restriction towards them violated Human Rights and human dignity. (Thai PBS Reporters 2014) Similarly, for civil partnership act, NHRC also give the pushing and support to the process through the opening of public forum and discussion with LGBTQ people and other sectors such as Department of rights and liberties protection, Ministry of justice in order to brainstorm and share the comment of this issue for the improvement in the draft of act. For example, the public forum under the topic "Life Mate Bill B.E. … Is it really giving rights?" in 2013 which held for the sharing of comment and ideas towards the first draft of civil partnership act. (NHRC n.d.) Moreover, the chairman of the commission as Doctor Taejing Siripanich also mostly joined in the academic discussion about civil partnership act in four provinces which was held for receiving the comment and ideas from LGBTQ people in each area such as Khon Kaen University. From this point, it can see that NHRC gives the full support for giving the idea of human rights to people and works with LGBTQ civil society as well. Hence, it probably said that both NHRC and civil society work with each other for gaining the support and reaching the goal at the last. Nevertheless, although there are the supports from several sectors, the challenges of civil partnership process are still occurring, especially for the role of civil society and NHRC including the situations in Thailand. Next part will discuss the challenges of the process to achieve the goal in this issue.

Civil Partnership Act in Thailand Part II: *Challenges of its process*

Thai LGBTQ people have the hope with the waiting towards civil partnership act since it possibly improves the living life and relationship to be more stable and secure. However, the challenges are clearly seen which affects the process of civil partnership act. First, the political situation in Thailand as the coup d'état and the changing of parliament affect the process as the delay of management since there are the moving and changing of authoritarians in position.[201] Moreover, even though the civil partnership has the high possibility of passing the National Legislative Assembly, it does not guarantee transparency and accountability. At the present time, the human rights situation in Thailand is worse since the higher degree of censorship and restriction towards the people. Furthermore, there are the numbers of political activists or some

[201] JR-RSU, ibid.

group of people who are arrested and sent to military court instead of civilian court or some of them are called and receive the program which they called "attitude adjustment" (Roth 2017) From this point, it shows that this time, people hardly access and check about the process or argue the results that government ordered. Hence, the passing of regulations which is related to the issue of human rights possibly presents with some conditions and limitations. Also, this point is linked with next challenges as the conception of society and authoritarians themselves towards gender and sexual diversity issues. Thailand is one of the countries that have the perception of a patriarchal world. There is the cultivation of "problematic thinking" which comes from the background of people in each generation such as religion, family and education. It affects the idea of gender as it becomes the gender binary system. (Coney 2015, p 85-87) This binary concept refers to the typical masculine male or feminine female having to perform their behaviour and follow their gender roles throughout their lives. (Wiseman and Davidson 2011, p.529) These perspectives also have been cultivated in the idea of Thais people for a long time which become the limitation of LGBTQ lives. Several incidents show that the society possibly does not open widely for the diversity of gender and sexual orientation even though the world is more open. For the example, the Gay Pride Parade in Chaingmai and the marriage of policeman with his same-sex partner, which the latter turns into the hot topic and ended with the investigation from the commander since the reason that it possibly affects to the image of policemen. (Charuvastra 2017) From the news, it reflects the idea of authoritarians towards gender diversity which are not fully understood by people, particularly in generation silent, baby boomer and x.[202]The limited acceptation for LGBTQ group from these generations probably affect to the decision and consideration within the parliament including the support from the society. Furthermore, the group of people who are conservative and cannot accept this issue are another problem for pushing the process since the government and authority mostly focus on the effects towards the society afterwards than the point of people who face the problem. It also makes the law and regulations have the limitation that did not provide fully rights and equality as happened in Thailand Gender Equality Act 2014 with the exemption of religion and others including Commercial Surrogacy regulations which restricts for LGBTQ group. (Likhitpreechakul 2017) For the example, every draft from RLDP version limited the rights for LGBQ to adopt the child with the reason that it is too far and society possibly cannot accept. (Suprawattanakul 2017). This point reflects the lacking of human rights cultivation and gender binary system towards the family institution. So, in author's point of view, as long as the society still has the rigid gender binary perception, the real rights and equality for LGBTQ people are possibly hard to achieve even though it has the law to guarantee. Additionally, the technology and internet website which are the important tools for promoting this campaign possibly are not fully accessed for everybody in the country. Most of adult, watch the television or films which still reproduce the representation of LGBTQ in the same ways. Hence, although the act is passed, if people still have the stereotype and prejudice towards them, it is difficult to achieve the real goal for LGBQ society.

Another challenge which is very important for promoting and pushing civil partnership act is the limitation of LGBTQ civil society and NHRC power. For civil society, the number of LGBTQ human rights organisations when compared with HIVs issue. Moreover, the conditions of founding the foundation or local organisation are difficult if they have the funding from supporters. For example, they have to prove the ability to sustain themselves with proof of

[202] Isarabhakdi, ibid.

financial capacity at least 200,000 Thai baht. Moreover, most of the organisations have the least number of staff which make them work hard and some of them cannot afford. (UNDP, USAID 2014, p.43-44) Furthermore, the governments mostly overpass the issue of LGBTQ which affects their achievement and directions. They also do not have the power much more for forcing or launching the things towards the authoritarians. It can see that the process of civil partnership act is halted and most organisations have no power to do nothing except the promotion and spreading the support and information of LGBTQ and civil partnership act to the society. Meanwhile, NHRC is the independent organisation who concern and focus on human rights issues also face the problem about being defaulted and ignored including the less power to confront with the domestic issue in the country. The mandate of NHRC is to promote human rights, examine the human right violation cases, submit the annual report, propose the revision of laws and regulations to the government for protecting human rights while cooperating with every sector involved. (NHRC n.d.)It can see that the mandate and duty of NHRC has to work along with the government and civil society including NGOs to reach the achievement. However, when the government ignores the issue of human rights, NHRC in Thailand also does not have enough power to enforce any actions towards them. Moreover, recently, NHRC in Thailand faces the problem about downgrading from "A" to "B" rank which are done by ICC due to the political situations and incidents during the coup d'état and junta period. (Draper and Kamnua 2016) It reflects the working of NHRC which is possibly quite delayed and loose. However, it can link to the first challenge that present as the political incident in Thailand which is unstable and hard to guess. This affects the whole society, especially towards the human rights issue. The limitation of power in civil society and NHRC with the ignorance of government possibly affects the working for civil partnership act process as well. Nevertheless, from the situation at the present time with the authoritarians who violate the democracy system and human rights, LGBTQ groups of people probably have to wait for a little longer to get the perfect result.

Conclusion: ***What we should do and how it should be***

Thailand is a friendly country towards LGBTQ people is possibly only for the tourists and travelers who come for receiving the warm welcome for a short period. However, when living in this friendly country, it presents that there are fewer regulations which provide the rights and equality for LGBTQ people. They have to face the discrimination in many terms such as the job and employment. While same-sex partners also have the similar problem that there are no laws to grant their relationship legally under the law. It affects their lives as the instability and insecurity when the incidents happen in the emergent time. However, the coming of the "Civil Partnership Act" from both the Ministry of Justice and LGBTQ civil society become the new hope for LGBTQ people to have the equal rights and stability to their relationship with the working of civil society and the role of NHRC in this campaign. However, in the author's perspective, I do agree with Mr. Danai Linjongrat, director of the RSAT who remarked that marriage is one of the big events in life and it is culturally significant to Thai society. Hence, it should be accepted by all around them, so the law can be a symbol of society. (Mitsunaga 2013) As mentioned above, living together under the law possibly becomes a good thing for LGBTQ people. Nevertheless, if society still has the stereotype and perception towards LGBTQ in the old images, the relationship and living life have probably reached the real goal of peace and stability. Plus, the civil partnership act for same-sex marriage is possibly new thing for the male dominant country as Thailand, so it has to be concerned carefully besides the cooperation with every sectors, especially authority. The things that people, especially family institutions and government, should do is the opening and

cultivating of human rights and information about LGBTQ people impartially. For the government, they have to be more about human rights issues since it is the important thing to motivate the country to improve so far. The attention to civil society and suggestions of NHRC are important and cannot be avoided. Human rights should be included with every policy which makes the country better. If the government supports good governance, they have to support the equality of people in their country. The civil partnership act is one of the things that ensure the human rights and equality of LGBTQ group. However, it also has to be aware and transparent. The law and regulations which are passed in the rush hour and from the authoritarians who violate human rights possibly have limitations which do not really respond to the point of people. Moreover, even though they have the high possibility of passing the act, people should be aware that the act is not written by the representative from any civil society or LGBTQ people. From this important point, people have to beware about the process and regulations which have to receive the huge support from society. However, whether each one of them is passed and announced, this act will be the huge and significant step for Thailand about human rights issue, exclusively the image of “real” friendly country for LGBTQ people

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The Role of Nahdlatul Ulama Women in Fighting Against Marginalization and Discrimination on Religious Minorities

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Abstract:

There is a growing acceptance that women, as individual and institutional, have played a significant role in understanding powerlessness and marginalization. It is worth noting that Indonesian women pushed the idea of emancipation and nation building that is based on ethics in order to eliminate marginalization. For years, interreligious relation issues have been accused as the source of discrimination. In addition, religious movements are more often related to the terrorist threats. People tend to ignore the fact that the religious grassroots movement in Indonesia has so many positive contributions. The birth of this archipelagic republic has had a strong relationship with the religious movement, particularly the role of Nahdlatul Ulama. The regime shifts had influenced the religious grassroots and organizational activities, specifically during the Soeharto Era. After the reformation, the voices of religious communities had regained their impacts on statehood life. They have chances to develop various movements based on the issues or the dynamic vision, and all together preserving the long tradition of organization. Women movements and wings have also been getting more substantial roles. Nahdlatul Ulama has Fatayat, Muslimat and Korp Putri PMII who run the campaign of gender and socio-political marginalization issues. Being one of the most influential religious organisations in In Indonesia, they have been consistently standing alongside the religious minorities - such as Christian, Shia, Ahmadi, and indigenous spiritual traditions communities - to fight against the discriminations and marginalization both by state and intolerant groups. In this fashion, the role of NU women wings are crucial to the pluralistic society. They have also influenced human rights discourses as they have been actively engaged with national human rights institutions such as Komnas HAM, Komnas Perempuan and Komnas Perlindungan Anak Indonesia.

Keywords: Nahdlatul Ulama women, national human rights institution, religious movement, marginalization, discrimination, religious minorities, Indonesia.

Introduction

Nahdlatul Ulama is one of the key partners for governments and non-governmental organizations that are concerned with issues of discrimination and marginalization especially against minority groups. NU moves from all directions, from awareness building, advocacy and rehabilitation, from theological, academics and praxis, from da'wah to public policy. All the wings of the NU work in their respective capacities, including women's wings. NU is always expected to be the strongest in facing the onslaught of ideas and practices that neglect human rights especially in relation to interfaith relations in Indonesia.

NU women always have their equal recognition in the context of organizations and society. In this context, their roles in so many issues are admitted as important and not subordinate. NU women are also characterized by high appreciation to education as the core element of emancipation. Their roles are also dominated with educational activities from the grassroot to higher academics sphere. NU women is a portrait of how Indonesian women build their independent characters without losing their cultural and spiritual identities.

This paper will take the notion of politics of diversity as a main framework to analyze the problem of discrimination and marginalization. A brief history regarding Islam the interfaith relation in Indonesia can support the argument on the origin of religious minority issues. Subsequently, I will discuss the role of NU woman wings as the most active civil society organisation whose linkage with National Human Rights Institutions (NHRIs) in Indonesia

Defining Discrimination and Marginalization in the Cultural Diversity

Diversity forces the society to engage with "spatial relation" whether "physical space" or "social space". Nation-state concept is basically to manage the ideal and fair distribution of physical and social space among the citizens. Identity recognition is basic human rights. Every single human being needs to be acknowledged by their own special characteristics, at least called by a certain name. Furthermore, human beings cannot be separated from the traditions and values which are internalised in their personal characteristics including race, ethnicity, religion and gender. Conflict and War usually put all the aspects of social and physical space at risks.

Identity is one of the central issues in "spatial struggle" due to the inevitable human diversity. Identity is always relational. Therefore, as Charles Taylor also said, Identity and Recognition is supposed to have an inherent relationship with each other. For whom identity and recognition are important? All humans, primarily for those who experience or encounter obstacles in their identity recognition process such as minorities and subalterns (Taylor, 1994). Therefore, diversity becomes clearly important and always present in human relationships. This is the justification for the state obligation in fulfilling their basic citizen rights. Therefore, when the state authorities failed in recognizing its citizen identity, It is usually the sign of occurrence discrimination and marginalization by the state.

On the one hand, according to Iris Young, diversity is a factual reality that actually or potentially gives rise to oppression in various forms, among others: exploitation, marginalization, powerlessness, imperialism and cultural violence (Cooper, 2004). On the other hand, it is positively pushing a new understanding of a comprehensive picture and policies capable of realizing justice for all parties both individuals and groups in such complex social relationships by accommodating diversity. In this context which often appears to be a crucial issue is the question of equality. And it seems that this issue has become even more important as well as sensitive from the start of definition to the problem of praxis.

Efforts to address equality contexts have been arising from diversity and culture as well as individuals are large and complex projects. The Declaration of Human Rights with a strong character of liberalism originally gave hope for a system capable of guaranteeing human freedom, including all its differences. However, the universalization of human rights in human rights also reduces various aspects of human life, including cultural life. Equality is one of the main claims of liberalism in recognizing individual freedom. The model of equality from the liberal point of view has somehow become a dominant model, which is formal equality. This model can be understood as an elimination towards forms of arbitrary and unjustifiable discrimination among individuals, and is generally facilitated by a legal system governing matters relating to the forms of individual relationships and their implications. This model has been widely debated, one from the point of view of who determines the judgment of who owns and is also capable of exercising liberal freedom. The politics of multiculturalism always presuppose a group with certain cultural boundaries. As liberalism is inadequate to understand cultural particularity, multiculturalism is also inadequate to understand the particularity of individuals in both intra-cultural and intercultural relationships. Multiculturalism views are often neglected by intra-cultural injustice and violence.

In the context of liberal law and the argument of equality we can take the example of the problem of banning the use of religious symbols in public spaces in France. Government arguments at some level may be logical, that it is to prevent potential violence that may arise from the stereotypes contained in these symbols. But this raises a big problem because it does not only relate to certain communal traditions, but also personal-individual choices in appreciating a symbol. And this is clearly a cultural as well as individual violence. In the name of equality both the authority and society can create new form of discrimination and marginalization. In Indonesia the religious minorities are forced to identify themselves to the existing legal religion in order to claim their citizen rights.

The new discourse has been echoed to overcome the problem of individual and cultural identity rights. Politics of diversity is claimed able to cover all issues in the context of differences and/or diversity. Differences can take shape in individual and cultural contexts that may appear separately, but more often a package that cannot be separated from one another. This should be

considered because it affects the relationships among individuals within and outside of culture, or among cultures.

Davina Cooper offers an approach that is built from an eclectic framework. She emphasize that the politics of diversity as a flexible discursive understanding that accommodates and combines certain arguments from several significant paradigms concerning the discrimination and marginalization issues. It allows an understanding of the rights of individual and cultural identity expression in various public spaces with freedom and protection against violence.

> "The Politics of diversity identifies a discursive space of considerable plasticity and range, produced from the particular admixture of post-Marxism, feminism, queer politics, liberalism and post-structuralism. In short, diversity politics names an analytical, critical and visionary space oriented around the constitutive role of power in producing social difference and identity, the expression and realization of human agency, the value of diversity – both for individuals and society – the moral entitlement to freedom, the right to express difference in public sphere and the disavowal of domination and oppression." (Cooper, 2004)

Diversity presupposes a plural identity. That every individual as well as the group has a unique identity that cannot simply be compared (the principle of incommensurability). But it does not mean to be isolated from each other, in this case Cooper uses metaphor **pathways** to analyze the possibility of dialogue all the diversity as well as make it a strategy to overcome the obstacles faced by liberalism and also multiculturalism in applying politics of difference in praxis. To understand **pathways**, we can imagine that our identity is expressed in how we live our days from waking up to sleeping again. What rituals do we always do in the morning, for a devout Muslim he will not miss the Fajr Prayer. For the workers who have to work at night, usually they just go home to rest. Throughout the day we generally meet with one or two others depending on the context of our routine, often engaging in a chat about work and other things. **Social Pathways** more or less see every individual having a routine with regard to personal and communal disclosures that surely allow meeting with other routines, this by Cooper called intersection. *[4]*

> "What does **pathways** mean? Firstly, pathways emphasize the diachronic connection that people create, articulating different activities across time and space. Pathways therefore complements the concept of practice which tends to emphasize less personalized synchronic connections within a field. Secondly, paths lead towards and away from places, although some may just exist for the enjoyment of the walk itself or the feature along its route. Paths intersect, creating opportunities and demanding choices, risks, and gambles, as the direction may not always be clear or knowable. In disuse, paths become overgrown and can vanish from sight." (Cooper, 2004)

Thus Social Pathways can be understood as a way both individuals and communities (institution) in establishing identity in the space relation through a system directed by the choice both in responding to the environment and building the environment. Social pathways in particular include daily routines that live as a self-disclosure. Such routines can be understood in the legal, professional and personal context of waking up to sleeping again. The existing pathways in legal form (De Jure) is characterized by political effort or strategy that is generally legal because it involves the government as an agency or advisor. For example, the people of Quebec in Canada, the Sabath Group in England, the Gay and Lesbian in the Netherlands, etc. The pathways in De Facto sense can be found in so many aspects of everyone's daily lives such as: Single Parents, Refugees, Vegetarianism, Full Housewives, Transvestites, etc. Social pathways is one of the strategies to enable identities to be recognized. For example, a person from the complexity of individual and group routines there are many possibilities for finding relational nodes that will open dialogue and further understanding. By seeing that social pathways indicate an open process of identity formation, it is precisely through a particular routine/ individual habits of individuals or groups to be different from each other, but having the same goal of becoming a "different" person every day. So a simple but effective understanding is through the daily from moment to moment.

- Sample Case 1: Does gender really matter?

  If two accident victims enter the emergency room of the hospital medical personnel are not required to put victims based on gender, but prefer who is more critical. In another case, if there is a pregnant mother in a full bus, then she should not be allowed to stand, because the conditions and risks that are being borne should be noted.

- Sample Case 2: Ramadhan Month and Hari Nyepi in Indonesia

  When Muslims perform fasting, those who do not fast because of non-Muslims or because they are absent, as well as restaurants or entertainment venues are encouraged to respect by arranging their routines in a special way different from regular month, such as install windows cover during the day and provide the special menu for breakfasting in the evening. The same attitude is applied on Hari Raya Nyepi (Seclusion Day) in Bali. All non-Hindu people in Bali in particular must respect the Hindu rituals for not traveling, not talking, and not setting fire to that day. The local government formally shuts all the airport activities in Bali during Nyepi.

Social pathways play a role in raising diversity as a basic value. Pathways analysis is often used to examine the influence of the environment in shaping a person's personality, or it is also used to map the community within a range of issues for strategic policy purposes, such as literacy rates, the composition of the population according to religion, or type of work. Cooper will use this analysis in somewhat different contexts. From the above case we can see that by acknowledging our other way of life at the same time we cannot avoid doing the reduction. In this

case reduction can be understood positively. One of them by placing it as a cross between our routines, such as the doctor and the patient, a Muslim or Hindu who are neighbour etc.

The religious minority groups in Indonesia can be named as legal social pathways (Christians, Hindus, Budhhists and Confucians) and also factual pathways (Ahmadhis, Shiites, Bahaais, Sunda Wiwitan, Parmalim and many more). This approach can be found in NU wings activities in combating the discrimination and marginalization on religious minorities.

Islam and Interfaith Relation in Indonesia

Indonesia has been known as one of the largest Muslim population country. As the Huntington prognosis about the clash of civilization, Indonesia has been expected to restrain the conflict and play as the peaceful face of Islam. Nevertheless, there are critical discourses whether the view is correct or not considering the emergence of conflicts such as Aceh, Ambon, Poso and so on. In general, compared to countries with similar demographics, Indonesia is still considered capable of managing issues arising from differences in racial, ethnic and religious identities.

In the historical record, Nusantara (the archipelagic region before the birth of the Republic of Indonesia) has been known as a multicultural region. Various historical artefacts and sites provide the evidences of the multicultural societies were living in respectful and tolerance to each other. Even though the various conflicts and power struggles that occurred, none of them had caused of destruction or abolition of the enemies sacred places or temples. Indigenous spiritual traditions have been also playing the important key. They can manage living together with Hindus, Buddhists, Christians and Moslem as the foreign religion in the first place.

The new racial conflict began to emerge when colonialism entered the region. From here then began to emerge various social structures made by colonial authorities that directly show marginalization and discrimination. Separation and segregation among different ethnic group are the core strategies for "*devide et impera* policy." The structure of Indigenous and Non-Indigenous communities, *Priyayi (*noble families) and commoners has become grand narratives implanted, and still seems to be found in the collective consciousness of Indonesian society until now. Those strategies had worked effectively in managing their colonialism power for more than 3.5 centuries.

Indonesia as an imagined community was born from the complex dialectics of historical process among various ethnic and religious groups presents a dynamic life in statehood. Challenges and obstacles arise in managing inter-identity, cross-community relations. The lessons from the founding fathers have been traced back as the source to build a strong, peaceful yet pluralistic society through the making of Pancasila. In 1945, Muslims had already become the majority population. Nevertheless, the Muslims leaders showed great historical gesture to

compromise with their fellow non-Muslims to change the words “according to sharia law”. Pancasila is the evidence of Indonesian faith on unity in diversity.

The nation building process is in line with what Denys Lombard suggested that every tradition has several layers which form an identity whether it is ethnic or a nation, especially in the context of Indonesia. To understand Betawi, we must also explore the layers of Malay, Chinese, Arabic and other traditions as well as the Dutch colonial history that forms the identity of Betawi. Human beings themselves consist of layers of identity that cannot be separated and mutually influence either the psychic layer (reason, feeling and instinct), the biological layer, and of course the social layer that we have always lived with others, I am what I am, as well as others for others. Identity is always a mosaic, furthermore it is a mosaic that is not yet finished and can change any time. Communal layer, cultural. Layer by layer will form in time along with space and time we use and experience as we live with others. (Dahana, 2007)

The layers mentioned form the preconditions for the emergence of patterns of interaction as well as new awareness. From this we see that the establishment of the Republic of Indonesia was partly the reconciliation of various groups that had been separated by artificial borders. Nevertheless breaking down the big narrative is not an easy thing, it becomes a separate dilemma for postcolonial society. Project of independence does not necessarily encourage postcolonial society to remove these barriers. In some cases such as India, Pakistan and Bangladesh exemplify the strengthening of the division of religious identities that encourage horizontal and vertical conflicts that are no less frightening than the colonization itself. In Indonesia's context, the rise of tribal and religious based rebellions has also been a tough test for the idea of nationalism. Communism with all its controversies have been a common enemy for decades and have spawned groups which are legally subjected to discrimination and marginalization by the state.

The issue of human rights internationally strengthened at the end of World War II through the trials of the Holocaust. The UN makes human rights the main norm. But the Cold War made this issue subordinate to the issues of security politics in the context of bipolar competition. Human rights issues are starting to reoccur with the Balkan conflict, where genocide takes place in modern Europe. The end of Apartheid politics in South Africa, the Rwandan conflict marked the re-enforcement of human rights discourse in the global sphere. Indonesia itself was affected by Timor Leste case, and also the 1965 case which was linked to the eradication of communism. Human rights issues became one of the triggers of the collapse of the New Order regime. Unfortunately, the spirit of reform does not necessarily succeed to infuse awareness of human rights in the context of socio-cultural relations. The Ambon conflict has become a signal of the fragile phenomenon of interreligious relations. This has actually become a common phenomenon in the region of Southeast Asia in the same period.

> “Ethnic and religious conflicts in Southeast Asia Region have taken place in particular circumstances of state and civil society relations in the region that are generally characterized by authoritarian states, on the one hand, and fragile civil society, on the

other hand. To some extent, these typical circumstances create difficulties for the region to achieve long-standing peace and social harmony. In addition, the globalization process into the region has also shaped state and civil society relations to be more prone to ethnic and religious conflict, as indicated by the emergence of religious fundamentalism in the region. Within this specific context of Southeast Asia region, we are well equipped with three main issues of ethnic and religious conflict in the region, namely, inter-ethnic and religious conflict or civil war, self-determination of ethno-nationalism movement, and religious fundamentalism conflict." (Trijono, 2008)

The New Order government under Soeharto was responsible for the redefinition of nationalism that practically delayed the process of reconciliation as unity in diversity (Bhinneka Tunggal Ika) which was initiated by the founding fathers. The first symptom is the maintenance of the segregation of indigenous and non-indigenous identities. Next, on the basis of nationalism, plurality is considered threatening, diversity was translated as uniformity according to government narratives. The progress of the nation is measured solely from economic growth. More education is directed to the interests of economic growth, so as far as possible could produce the workforce in accordance with the needs of development, regardless of the diversity of human resource potential. The repressive state is clearly felt, coupled with the anti-subversion law. The narratives of the postcolonial society are transformed into a justification argument for the government to perpetuate various discriminatory patterns.

The following regime shifting also contributed to a further complicated realm through policies in dealing with these issues. The end of the new order regime and the start of the reform era encouraged the establishment of various institutional tools that ensure the guaranteeing of human rights. Komnas HAM (National Commission on Human Rights), Komnas Perempuan (National Commission on Women), KPAI (National Commission on the Protection of Children) along with other aspects of National Commissions became the most important part of the effort. The existence of these institutions gives hope for the establishment of an Indonesian society that builds a multicultural democracy. However, these institutions cannot work alone. Other obstacles arise because these institutions are limited in scope with limited human and budgetary resources. While various issues of marginalization and discrimination occurred in various regions of Indonesia that stretches from Aceh to Papua.

The rising of Islamic fundamentalism and radicalism are admitted of the toughest challenges. The label of Islam is burdened in addressing the phenomenon. It apparently has potential conflict, the peaceful harmony is at stake, even among the Muslims. The radicalism and fundamentalism provide the justification for the violation of human rights, especially by society which accepts that universal human rights is not Islamic values.

The demographic composition is often referred to in determining the understanding of the majority and minority. Although there is a debate about defining the majority of minorities,

there seems to be a general presumption that quantity is the primary measure. What is interesting is the perception of the majority or minority against himself. In the early days of the reformation there were three key figures also considered to represent Islamic groups in Indonesia: Abdurrahman Wahid and NU as representatives of traditionalist Islamic groups (30-35 million followers), Amien Rais and Muhammadiyah as representations of modernist Islam (20-25 million Followers), and Megawati representing an abangan-Muslim group that still has a relationship with traditional minority groups from the spiritual tradition of the ancestors. (Aspinall, 2010)

Initially those three groups later became equilibrium for a tolerant religious life. The revival of fundamentalist Islamic ideas through various channels, whether the movement of radical groups in some conflict areas, as well as the spread of ideas over the internet has changed the map of Islamic groups in Indonesia. The most extreme is that radical groups not only infiltrate into existing Islamic groups or organizations, even they are detected trying to enter into government institutions, education and even national human rights institutions.

Nahdlatul Ulama Women fighting discrimination and marginalization through the Religious Minorities Pathways

The Realm of interreligious Tolerance in Indonesia shows that we still have a lot of work to be done. The Recent "Ahok blasphemy case" (and his downfall in Jakarta governor election) indicates the complexity of tolerance issues. The case has been indicated as the tip of the iceberg of various issues of tolerance and marginalization. The pessimistic views point that Indonesia is never going anywhere in addressing the minorities rights. Some are still optimistic and encourage a more intensive discourse on awareness-raising efforts for solidarity and the strengthening of egalitarian national identity through Pancasila as a national doctrine. Nahdlatul Ulama is one of the foremost to build that optimism.

In the context of organisational structure, there are three women wings in NU:

- Muslimat is the senior women wing. Their activities vary from grassroot movement, academic and political discourses. Khofifah Indar Parawansa is now the chairperson of Muslimat NU, she is also Indonesian Minister of Social. Muslimat's major battlefield is organizing the grassroot from household to household on a daily basis. Pengajian (preaching and holy Quran recitation) is the key process in sending the message of humanity and empowerment. Nowadays, they are facing the challenge from the spread of hardliner teaching which uses the same method.

- Fatayat is attended by women from age 20s-40 who come from professional or academic backgrounds. They usually deal with the intellectual discourse through discussion with the groups with similar concern including NHRIs, other government bodies and CSO.

- Korp Putri PMII (Korpri PMII) is the college or university student wing. They organize the activities in their capacity as students.

We can also find the strong characteristics of NU Women in Wahid Women. Shinta Nurriyah Abdurrahman Wahid and her daughter's hand in hand with female clerics, students and intellectuals are relentlessly working on helping those who are being discriminated against and marginalized. Their powerful role models has been energizing NU autonomous women wings to set the proactive actions againts any kind discrimination both by state and society.

Discrimination and marginalization by state or authorities are serious danger for the human rights. Most of worst war crime such as genocide and etnic cleansing based on the systemic state policy supported the discrimination and marginalization activities by state apparatus. Discrimination and marginalization of minority groups by the state occurs within the context of restrictions on citizenship rights. One of the most prominent is the issue of religions that are officially recognized by the state and may be included in the National Identity Card. This has serious implications as it becomes the basis for certain parties to deny the fulfilment of basic rights for holders of identity cards whose religion or beliefs have not been acknowledged. This issue has begun to be decomposed in the era of Abdurrahman Wahid by incorporating Confucianism as part of a recognized religion, but the steps of recognition of other minority groups have until now not yet materialized and still continue to get fierce resistance from various parties.

Among the most significant legal obstacles to religious freedom in Indonesia are:

- The 1965 blasphemy law, enacted under President Sukarno;

- A joint ministerial decree regarding proselytizing of religion signed by the ministers of religious affairs and home affairs (No. 1/1979), titled “Regulating Missionary and Foreign Aid to Religious Organizations”;

- Child Protection Act No. 23/2002, enacted under President Susilo Bambang Yudhoyono, which includes articles “to protect” the faith of a child even when adopted;

- A joint regulation issued by the ministers of religious affairs and home affairs (No. 8 and No. 9/2006), titled “Guidelines for Regional Heads and Deputies in Maintaining Religious Harmony, Empowering the Religious Harmony Forum, and

- Constructing Houses of Worship”;

- A joint decree issued by the minister of religious affairs, the attorney general, and minister of home affairs (No. 3/2008) ordering the Ahmadiyah to stop spreading their teachings. (HRW, February 2013)

In the interview with Sunda Wiwitan community (one of indigenous spiritual traditions in West Java Province), they told a cycle of discrimination in claiming their basic citizen rights. They have to experience a complicated process to get their national ID card (KTP), it is caused by the empty column of religion association. Because their ID cards are special, they are also facing difficulties to legalize marriage. The marriage certificate is required in issuing birth certificates for their children. The birth certificate is mandatory for the children in school admission. The children have to deal with another problem at school. They have to attend *Pelajaran Agama* (Religion Class), in West Java usually *Agama Islam,* in every single semester. They need to get the credit to pass their grade. After they graduate, they have to proceed with a national ID Card.

Some products of government policy are increasingly cornering the position of minority groups. One of them is the Joint Decree of 3 ministers related to Ahmadiyah which actually increasingly isolate the followers. Similarly, it also happened in Sampang against the Shi'ite group who were evicted from their home. For Ahmadhis and Shiites, they are not allowed to talk freely about their faith, even just to explain that their faith is not harmful for the other. If they do that, they will be accused of spreading their teachings and violate the decree. It is enough to prosecute legally.

In another context, government policy that is related to the establishment of worship sites tend to be more complicated for the minorities than Muslims, even for those legal religions. The case of GKI Yasmin and Filadelfia congregation who cannot perform their worship in their proper place of worship has attracted attention. Muslimat and Fatayat became actively critical of this policy. With the Gusdur family the wings of the NU organization including Muslimat and Fatayat consistently showed their gesture by attending their worship, including Christmas activities. Central and local governments are held responsible for abandoning the rights of GKI Yasmin, Filadelfia congregation and other cases in various regions.

Unfortunately the discrimination and marginalization by society are also experienced at the same time by religious minorities. The first factor of horizontal discrimination and marginalization cannot be separated from the inability of the government to guarantee the rights of religious minorities in law and politics. The omission of acts of violence by the government justifies the intolerant group to continue its action. The second most prominent factor of discrimination and marginalization are seen in the spread of hate speech against minority groups. Social media has become one of the main channels of spreading hate speech and discrimination. This trends is strongly related to the values of radicalism and fundamentalism, especially their identification of Muslim and Kafir.

Events and attitudes which are associated with ongoing discrimination and marginalization activities can create what Hannah Arendt calls banality of evil. So much so that the society with such patterns of action ultimately regards the commonplace. The greatest danger is when society itself considers discrimination and marginalization not wrong.

Human Right Watch also argued that NU and Muhammadiyah as two largest muslim organisation has played inconsistent roles. (HRW, February 2013) In general, the attitude of PBNU upholds the protection of the rights of minorities including Ahmadhis and Shiites. However, at the level of the regional administration, NU parties participated in discriminatory activities. This becomes an internal NU problem that becomes homework to unite vision and mission at the national and local level. NU takes this inconsistent pattern seriously and put several efforts to overcome the problem. In this case, Wahid Institute as one of NU affiliated think-tanks seeks to raise awareness of minority rights. Furthermore, they emphasized the obligations of NU citizens to help protect it. Various training and accompaniment were conducted including by involving NHRIs. Muslimat, Fatayat and Korpri PMII are usually the main target for the training, simply because they have been major actors in the field. (Institute, May, 2015)

NU women's wings play a crucial role and it becomes the key for NU tolerance building. Muslimat, Fatayat and Korpri PMII have also paid attention to other aspects of the conflict on religious minority issues. They were involved in helping women and children as the most vulnerable victims in the safe house or the refugee camp. The strongest evidence that NU women wings really have a pathway approach are their support and present in some religious activities which are held by minority groups and invite the minority groups to Muslim religious event such as breakfasting during Ramadhan. Those activities are a form of peaceful message in raising the awareness among the religious societies to respect and cherish their coexistence with each other without losing their faith. In this regard, Shinta Nurriyah and her daughters are the most notable supporters.

NU women wings recently supported the International Congress of Women Ulema/ Clerics which was held in Cirebon, one of the significant NU basis in West Java. The women clerics from different countries create joint declaration named “Ikrar Kebon Jambu” which included the clause:

“As a male cleric, female clerics are responsible for carrying out the prophetic mission to eradicate all forms of cruelty of fellow beings on any ground, including religion, race, race, And sex. As the bearer of this responsibility, female clerics have the right to interpret Islamic texts, bear and disseminate relevant religious views.” (KUPI, 2017)

It has become an important breakthrough for women ulemas to contribute in a deeper and broader sense peaceful, constructive Islamic views for better harmony in diversity.

Pathway approach is shown in political activities. In fighting discrimination and marginalization NU women wings are the contributors to for the Komnas HAM, Komnas Perempuan dan KPAI. They also encourage the protection for religious minority bills. NHRIs roles are bridging the state and societies. NU women wings are the voice for those voiceless religious minorities. They are connecting the most voiceless and marginalized with NHRIs.

Conclusion

The fundamental fact is that humans consist of completely different individuals and cannot substitute for each other in their individuality. Thus the problem of diversity becomes something deeply rooted in human experience. One that may be and should be mutually agreed upon, that all human beings are entitled to be treated respectfully and not to be harmed because of their differences or special characters. Religious minorities have always been the vulnerable groups in social, cultural and political spheres. Indonesia has so many challenges to ensure the religious minorities are able to express their faith and feel safe in their daily activities.

Nahdlatul Ulama has a large contribution both positively and negatively in the context of national identity. As one of the Islamic organizations that consistently supports the idea of Indonesian nationality, NU is not immune from any process of forming national identity. On the one hand, NU and its leaders are part of freedom and peace fighters. On the other hand, NU is actively involved in the eradication of communism. In the reign of Abdurrahman Wahid, NU acknowledged and apologized for NU involvement in the dark history. This marked the strengthening of NU as the main guardian of the idea of nationalism with justice and humanity. NU increasingly asserted to be one of the icons of tolerant Indonesian Muslims, a hope not only in the national context, but also in the midst of international radicalism and Islamic fundamentalism that continue to damage the face of the Islamic world.

NU women wings have become an inseparable part of NU movements in various aspects of the issue. They are relentlessly working hard combating discrimination and marginalization of religious minorities, both by the state and the societies through so many methods and approaches. Their understanding and respect to minority values and way of life had characterized their activities as example pathway approaches creating the liveable social space for everyone, especially for the religious minorities in Indonesia. Muslimat, Fatayat and Korpri PMII - As notable civil society organisation representatives of Indonesian Muslim Women – will always be the valuable actors in promoting the human rights and also key partners for the NHRIs in managing the issues in this largest region and most diverse social space in Southeast Asia.

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Provedoria for Human Rights and Justice (PDHJ) in Timor Leste: Between Human Rights Activism and Limitations

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Abstract

National Human Rights Institutions (NHRIs) are often criticized for their limitations in human rights protection. One of the main reasons is the fact where the NHRIs are established by the state. It is challenging to have any states to create institutions that are independent enough and with adequate mandate to meaningful redress on human rights violations. As a state institution, the key challenge for these NHRIs is how to maintain their unique role by securing their independence and at the same time, utilise their "advantages" in enhancing the human rights protection. Compared to the other five NHRIs (Indonesia, Thailand, the Philippines, Malaysia and Myanmar) in the Southeast Asia region, the Provedoria for Human Rights and Justice (PDHJ) in Timor Leste is set up as an ombudsman institution. The PDHJ was established in 2004, two years right after Timor Leste achieved its independence in 2002. Suffering from some forms of structural constraints similarly as other NHRIs in Southeast Asia, the PDHJ although was set up with limited resources but it comes with specific mechanisms in addressing human rights violations. The PDHJ in Timor Leste is particularly important, as it does not only provide a channel for human rights activism for the local human rights non-governmental organizations (NGOs); it is also an active actor that responds to human rights claims. This paper therefore examines the potential of the PDHJ in creating incentives for human rights activism, and at the same time, its limitations in human rights protection in Timor Leste.

Introduction

Timor Leste became a fully independent republic with a parliamentary form of government on 20 May 2002. Prior to the Indonesian occupation from 1975-1999, Timor Leste was colonised by the Portuguese. Timor Leste declared itself independent from Portugal in November 1975, however it only lasted for a brief nine days, then it was invaded by Indonesian military and continued to be occupied by Indonesian until 1999 for a period of 24 years. On 30 August 1999, a major independence referendum or Popular Consultation was held assisted by the United Nations (UN) mission. That referendum witnessed 78.5 percent of the East Timorese favoured to be separated from Indonesia and that paved the way for full independence. This result however led to widespread violence from the pro-Indonesian groups that later on required the intervention of UN peacekeepers. It is reported that as much as 70 percent of the country's infrastructure was destroyed. An UN-administered transition government was effected through the UN Security Council Resolution 1272 to restore order, and that led the way for the mandate setting for the UN

Transitional Administration in East Timor (UNTAET). Subsequently, Timor Leste restored its full independence on 20 May 2002.

On the human rights front, it is with much admiration that the Provedoria dos Direitos Humanos e Justiça or the Office of the Provedor for Human Rights and Justice (PDHJ) has been established as early as in May 2004 in this post-conflict small country. National Human Rights Institutions (NHRIs) are statutory bodies and state-funded. It can be varying significantly in their composition and structure under several forms, such as ombudsmen, hybrid human rights ombudsman and human rights commissions (Cardenas, 2001; Burdekin and Naum, 2007; Pegram, 2010). The PDHJ is Timor Leste's NHRI but in the form of an ombudsman. It is empowered to review complaints, conduct investigations and forward recommendations to prevent or redress illegality or injustice to the competent organs. Different from the other five NHRIs in the region, the PDHJ has a two-fold mandate in the areas of human rights and good governance. Regionally, it is a full member in the Asia Pacific Forum of National Human Rights Institutions (APF) and sitting in status "A" by the Global Alliance of NHRIs (GANHRI) or formerly known as the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC).

Human Rights in Timor Leste

Timor Leste's Constitution has adopted all basic and fundamental human rights. Timor Leste has endeavoured to protect human life until natural death as enshrined in Article 29 (2) of the Constitution which declares that the State recognizes and protects the life of all citizens, and Article 32 (1) of the Constitution on limits on sentences and security measures states that there will be no life imprisonment, no sentences or security measures lasting for unlimited or indefinite period of time. In 2014, based on an instruction from Prime Minister, No.17/X/2014, the National Directive Commission (KDN) was established, led by the Ministry of Justice. The KDN comprises representatives from UN agencies in Timor Leste, the Ombudsman, representatives of civil society and ministry human rights focal points, and maximum support from a technical team from the Ministry of Justice. The main objective of establishing the KDN is to design and draft the Human Rights National Action Plan. Now the team has completed its desk research and has a plan to conduct field research to provide equate and credible information to produce a quality National Action Plan on Human Rights (Timor Leste UPR National Report). Timor Leste also has the following action plans such as a national action plan on gender-based violence, a national action plan for zero hunger (Timor Leste UPR National Report) and a national action plan for persons with disabilities. In 2016, the government launched an action plan on women, peace and security.

Internationally, the Timor Leste government has ratified all seven-core international human rights treaties without reservation as well as the Rome Statute on the International Criminal Court. As provided by the Constitution, the ratified treaties now form part of national law. Of the eight fundamental International Labour (ILO) Conventions, Timor-Leste has ratified six, with Conventions C100 and C1113 acceded to in 2015. The remaining two main international instruments that it had not ratified are the Convention on the Rights of Persons with Disabilities (CRPD) and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) (Timor Leste UPR National Report).

Overview on PDHJ

The PDHJ is formally established in 2005, under legal provisions in the National Parliament's Law No. 7/2004 in compliance with Article 27 of the Constitution of the Democratic Republic of Timor Leste stipulating the establishment of an 'an independent organ in charge of examining and seeking to settle citizens' complaints against public bodies, preventing and initiating the whole process to remedy injustice'. Law No. 7/2004 defines all of the specific details, processes and procedures of the PDHJ. As an Ombudsman, the PDHJ has the role to protect and promote human rights and fundamental freedoms of natural and legal persons throughout the national territory and prevent maladministration. It has a mandate to cover human rights and good governance. Within its two areas, it discharges its mandate within a three activities-approach: education and promotion, prevention or monitoring and investigation.

Initially, the PDHJ was made up of a Good Governance Division, a Human Rights Division, and an Anti-Corruption Division. The mandate of the latter division came to an end sometime in 2010, following the approval of the Anti-Corruption Commission (CAC) in 2009. In 2011, the Government established Decree Law No. 25/2011 on the organic framework and status of the PDHJ, which establishes the rules necessary for the PDHJ to achieve its objectives as a specialised institution, with technical services in the areas of human rights and good governance.

Article 23 of the Law No. 7/2004 outlines the mandate of the PDHJ: It is mandatory for the PDHJ to investigate violations of human rights and freedoms and guarantees, abuses of power, maladministration, illegality, manifest injustice and lack of a fair trial as well as cases of nepotism, collusion, trafficking influences and corruption. The Ombudsman undertakes a series of functions, including receiving and dealing with complaints, monitoring the activities and performance of public authorities, reviewing draft legislation, requesting the courts to pronounce on matters related to the constitutionality of legislation and implementing educational and promotional activities. It regularly reports on its work, ensuring that the public is informed of its activities and the results accomplished in promoting human rights and good governance in Timor Leste. Among others, the Ombudsman could subpoena people and documents and to enter public offices and other public buildings and provide recommendations to public authorities (PDHJ website). The PDHJ however just like any other ombudsmen does not have executive powers and only the mandate to collect and access information in identifying the human rights and good governance violations.

The Parliament nominated the first Provedor, and two Deputies for different mandates, which are human rights and good governance, and they were sworn in the Parliament in July 2005. The Provedor is elected by the Parliament for a four-year term and it could be extended for one more term. As a new institution back then, the PDHJ faced a lot of difficulties and challenges because there were only a Provedor and two Deputies as staff. In the first year, the PDHJ received support from the United Nations Development Programme (UNDP), from the United Nations (UN), and also from the Human Rights Commission of Malaysia (SUHAKAM). The first year was spent with tasks to strengthen the institution, including recruiting staff and establishing its internal procedure (personal interview with Silverio, 11 August 2016).

From 2005 until mid of 2016, the PDHJ's work was divided into two divisions, which were Human Rights and Good Governance. Each division has three different departments, namely the Promotion and Education Department, Investigation Department as well as Monitoring and Advocacy Department. The most recent Decree Law No. 31/2016 have restructured and merged both divisions. Some of the departments are investigation, promotion, monitoring, legal, and administrative and policy. The department of public assistance's role for example is to receive complaints as well as mediation and reconciliation, and to monitor follow up recommendations (personal interview with Silverio, 11 August 2016). The structural organizational change is based on the recommendations from the International Coordinating Committee of National Human Rights Institutions (ICC) based on the Paris Principles, and from the assessment conducted by the UNDP (personal interview with Silverio, 11 August 2016).

In 2014, the PDHJ with the support of the Office of High Commissioner for Human Rights (OHCHR) through the UNDP developed a new website with lots of useful information. This included information on the method for making complaints, online complaints, complaint handling, reporting on complaints, a case map, and access to justice for vulnerable groups. In their role as Timor-Leste development partners, the OHCHR and UNDP, besides providing technical support to the PDHJ, also have provided other support through mentoring, training, workshops and courses, in order to consolidate the abilities of staff, and the improve the institutional structure of PDHJ (Forum Asia, 2015).

With a total of 95 staff, the PDHJ maintains its four Regional Offices with the Central Office based in the capital Dili. These four others Territorial Delegation Office headed by one Director are located at:

(i) in the Eastern side, which is the Office in Baucau;

(ii) in the Southern side, in Manufahi;

(iii) in the Western side, which is the Office in Maliana, Bobonaro; and

(iv) another one in the enclave Oecusse and Ambeno (RAEOA).

There is not much issue on budget for the PDHJ, but it also depends on the proposal and their lobby to the Parliament. They have to advocate and to approach the government as well as to the Parliament to give more budget, apart from receiving the support from UN agencies, international organizations such as the United States Agency for International Development (USAID) and the New Zealand Aid Programme, and from embassies based in Dili.

The scope of the power of the PDHJ in complaint handling, investigation and recommendations is in the provision of Article 28 of the Law No. 7/2004 as the following:

a) Receive complaints;

b) Investigate and inquire about matters within its competence;

c) Allow or disallow the complaints submitted to it under paragraph 3 of Article 37;

d) Summon or call any person to appear before himself or another location that is deemed most appropriate, if it considers that it may have relevant information for a investigation started or start;

e) Enter any premises, sites, equipment, documents, goods or information and inspect them and interrogate any person in any way related to the complaint;

f) Visit and inspect the conditions of any place of detention, treatment or care and conduct confidential interviews with detainees;

g) Forward complaints to the competent court or other mechanism of action;

h) Request permission from the National Parliament to appear before a court, administrative tribunal or commission of inquiry;

i) Mediate or reconcile the complainant and the agency or entity subject of the complaint, when they agree to undergo such a process;

j) Recommend solutions to complaints submitted to it, including proposing remedies and reparations;

k) Advise and give opinions, proposals and recommendations to improve compliance human rights and good governance by the entities within its area of jurisdiction;

l) Report to the National Parliament the findings of its investigations and its recommendations. Investigation can only be conducted on cases within the powers mandated to PDHJ. The cases that are outside of this power will be referred to other relevant institutions (Forum Asia, 2015).

Activism Role: Bridging between the Civil Society and Government

On 20 March 2006, the PDHJ started to receive complaints from the public (personal interview with Silverio, 11 August 2016). In 2006, tensions between the national police (PNTL) and the military forces (F-PDTL) resulted in open conflict between the two institutions, a breakdown of law and order and the displacement of more than 150,000 people. That situation posed a huge challenge to the PDHJ as a new institution due to several issues such as the lack of staff and skills. In order to overcome the challenge, the PDHJ opted to work together with the civil society and the non-governmental organizations (NGOs) and they formed a joint network that was termed as the Joint Monitoring Team (personal interview with Silverio, 11 August 2016).

Since 2006, the PDHJ has received support for the capacity building project from the UNDP. At

that time, they focused mainly on petitions because there were a lot of internally displaced persons (IDPs) and activists stayed in the camp during the 2006 political crisis. The PDHJ at that time worked with the civil society to continue monitoring the petitions and provided information to the government (personal interview with Silverio, 11 August 2016). Since then, the PDHJ continues to receive the complaints related to human rights abuses or maladministration.

Article 33(6) of the Law No. 7/2004 has defined and obliged the PDHJ to engage with other organs or organizations, including civil society. "The Ombudsman for Human Rights and Justice should maintain close contact and consultation and cooperation with other persons and organs or organizations geared to the promotion and protection of human rights and justice, combating corruption and traffic of influence and protection of vulnerable groups". As mentioned by the current Provedor, Silverio is the interview (2016), there is not much issue in terms of the independence of the institution. But, occasionally they do receive criticism from colleagues from the civil society. But the working relationship with civil society is considered harmonious. For example, the PDHJ and civil society prepared one report under the section for National Institution for Timor Leste's first Universal Periodic Review (UPR) in 2011 (personal interview with Silverio, 11 August 2016).

In the 2015 Annual Activity Plan submitted to the National Parliament with the proposed budget, the PDHJ described the type of cooperation that has been undertaken in conjunction with civil society. The cooperation has mostly involved the creation of reports on the obligations of Timor-Leste under international treaties and conventions, organizing seminars and socialization on human rights and justice, with civil society providing comments and appreciation in draft reports in respect of the PDHJ. However some information remains not being made available such as measures which have or have not been taken by the institutions to which the PDHJ has directed its recommendations. Also not available is specific information on the results of monitoring the human rights violations, which occurred during the joint police and military operation in 2014. The PDHJ has submitted the report to the National Parliament, but did not make the information available in public (Forum Asia, 2015).

Among the other criticisms from civil society is that they want the PDHJ to act more. Dr. Silverio Pinto Baptista, the Provedor of the PDHJ was first appointed by the National Parliament to the position of Deputy Ombudsman in 2005 and was then sworn into office as the Provedor in 2014. During his student day, he participated in student organisations supporting Timor Leste's independence. Prior to his appointment, Silverio worked for the Association for Rights (HAK) to provide legal assistance to Timorese captured by the Indonesian military. His background in the NGO gives him a privilege in working better with civil society. However, as emphasized by Silverio (personal interview, 11 August 2016), there is a need to make a difference or distinction between the civil society and the PDHJ. For example the steps and procedures that the PDHJ needs to adhere to in monitoring and producing the final report. I quote, "as a state institution, I have to make sure each recommendation we send to the state institution, we send our recommendation to the Government institution, as a Provedor and as a Chair, I want my recommendation to be followed up, not to be put under the table. That's why, before I send the recommendation, I have to make sure the facts are correct and the accuracy of the data. So, of course, it takes time."

Overall, the PDHJ has a fairly good partnership and cooperation with the civil society. The new council as established under the Statute and new decree, the Consultative Council for the Provedor chaired by the PDHJ Provedor also included members who come from the representatives from the NGOs. The intention of the council is for the civil society to submit any issues that they would like to discuss. And, one extraordinary meeting is possible depending on the circumstances or depends on the decision by the Provedor (personal interview with Horacio, 11 August 2016).

Articles 47(3) and 47(4) of the Law No. 7/2004 have clearly stated that within 60 days, the institutions that the recommendations are addressed to are obliged to inform PDHJ on the measures taken to implement recommendations. The provisions also state that if an institution does not take any measures to implement the recommendations, the PDHJ can report the institution to the National Parliament. In the first 30 days, the PDHJ will send a reminder if there has been no response. This will follow-up by a high-level meeting with the relevant government agencies for a discussion. A week before 60 days due, the PDHJ will send another reminder. In any occasion if there's no response after 60 days, the recommendations will be included in the PDHJ's annual report and sent to the Parliament for debates. The PDHJ's annual report is due every June (personal interview with Silverio, 11 August 2016). The PDHJ is obliged by law to submit its annual report on 30 June every year, regarding its activities from 1 January to 31 December of the previous year.

According to Silverio (personal interview, 11 August 2016), until today, the government agencies have been responsive. Working relationships with the government institutions is at times informal as many meetings take place in coffee shops. I quote, "We also work with each Minister directly because everyone knows each other. We know each other. We know each Minister. Sometimes when we work, we meet, and drink coffee together to discuss." The law obliges engagement of the PDHJ with the National Parliament. When the PDHJ wishes to provide a legal opinion or testimony before court, it must first request permission from the Parliament. The PDHJ also should inform the Parliament of the findings of its investigations and recommendations. The cooperation between the PDHJ and Parliament, particularly the Committee A, who has the competence to oversee the PDHJ, also includes providing opinions or submissions related to any draft law prepared by the Parliament, apart from dealing with legislative issues and the budget. There is a plenary session in the National Parliament for the presentation and debate on the report. As mentioned in the Forum Asia report (2015), the PDHJ could have made use of the existing mechanism to make its recommendations more effective in bringing changes to the institutions that often commit human rights violations. For example, the PNTL since its inception has committed lots of human rights violations and has received a number of recommendations; however the number of human rights violations occurring in Timor-Leste remains the same or has even increased.

One independence issue is related to the PDHJ's staffing policy. According to Horacio (11 August 2016), the PDHJ staff mostly came from the civil servant and are submitted to the Civil Servant Law. But he further emphasized that the PDHJ however is able to work independently and not under the control of the government as they report to the Parliament every year. Only that at times, the challenge is mostly on the lack of follow-up actions. One of the reasons for this is because the state institutions do not have a proper mechanism to follow up with the PDHJ's

recommendations.

Gaps in Activism, Advocacy and Implementation

The PDHJ, despite its active role in Timor Leste, the institution faces several challenges in carrying out its mandate. One major barrier to the Timorese general public understanding the human rights provisions in national legislation is the fact that laws and legal documents are mostly written in Portuguese despite the fact that the overwhelming majority of Timorese do not speak or understand Portuguese.

Although Article 54(1) of the Constitution states that every individual has the right to private property and can transfer it during his or her lifetime or on death, in accordance with the law. But land rights remain a major issue in Timor Leste. Most Timorese in the countryside access and hold land through customary and informal systems and informal schemes that means there is no legal recognition. Without a land title, the land rights are not recognized under the current Law 1/2003 (Almeida and Wassel, 2016). 15 years after independence, a comprehensive legal basis for determining land ownership remains lacking. These challenges including landlessness and forced displacement, disputes caused by the massive land occupation, and the legitimacy of formal land titles issued during the Portuguese and Indonesian administrations originated from its post-colonial and post-conflict legacies (Almeida and Wassel, 2017).

A number of relocations and evictions had increased since the first UPR in 2011, particularly in Dili, on the south coast and in the Special Administrative Region of Oecusse, whereby large infrastructural projects are currently developed (OHCHR UPR Report, 2015). Forced eviction is particularly rampant in Oecusse as the government is currently undergoing development projects. In some cases, the authority took the land of the community without compensation. That's when the community filed the complaints to the PDHJ and subsequently the PDHJ sent a monitoring team, however the follow-up action have not been very well responded (personal interview with Silverio, 11 August 2016).

After the restoration of the independence in 2002, there have been efforts by UN agencies and the PDHJ to deliver training to the PNTL and F-FDTL on human rights and justice, in order to improve their knowledge and ability to respect human rights and prevent human rights violations. The PNTL and F-FDTL are considered to be the state institutions, which have been most often responsible for major human rights violations compared to others. In Timor Leste, the military are regularly involved in joint operations to address what the government considers as serious disturbances of law and order. According to the PDHJ Annual Report (2015), the state institutions that commit most human rights violations are the PNTL and military forces (F-FDTL). The number of cases of human rights violations committed is around 70% by PNTL and 50% of cases concern inhuman and degrading treatment.

The operations with most serious human rights violations took place in 2014 and 2015. In March 2014, the National Parliament approved resolution No. 4/2014, which "authorized the PNTL to disband all illegal organisations existing in the territories", including the Maubere Revolutionary Council (KRM) and the Popular Democratic Council of the Democratic Republic of Timor-Leste (CPD-RDTL). The aim of the resolution is to prevent and respond to political instability, and

threats to the rule of law. The operations then were conducted based on government resolution No. 8/2014 and No. 9/2014 and Parliament Resolution No. 4/2014. Among the demands of the KRM and CPD-RDTL are constitutional reforms and election of a new government (ANNI Report, 2016). In 2015, Government Resolution No. 11/2015 and Resolution No. 12/2015 were produced to authorise joint military and police operations to stop the actions of these armed groups in opposition to it. These resolutions were then promulgated in Presidential Decree No. 41/2015. Based on these resolutions, the "Hanita Command Joint Operation" was conducted to capture the leader, Mauk Moruk and his followers (ANNI Report, 2016). That was when a lot of human rights violations occurred. The types of human rights violations were deprivation of freedom of movement, ill treatment during arrest and detention, torture, arbitrary arrest and detention and arbitrary interference with privacy and home including destruction of property.

During the operations, there were numerous human rights violations committed by both police and military. Although the government produced resolution No. 12/2015 on the rules of the operation, which called for respecting the freedoms and human rights of citizens (Forum Asia, 2015), reporting on the operation involving rampage and destruction of properties belonging to innocent people in the villages happened. The PDHJ conducted monitoring and produced a report with several recommendations to commanders of the joint operation. Nevertheless, the civil society has criticised the PDHJ that during the monitoring, PDHJ rarely entered the areas that were most affected by the joint operation. It is also reported that the PDHJ also did not make an effort to meet or contact victims of the operation even when they receive clear information on the whereabouts of victims (Forum Asia, 2015).

The PDHJ started monitoring on the first day of the operation on 21 March 2015 until 16 April 2015, almost one month, the same as done by the NGOs. The report produced by the NGOs such as AJAR, HAK Association and Belun described in detail the types of violations committed by PNTL and F-FDTL. The NGOs reported that the results of monitoring however are not the same with that of the PDHJ. The divergence of findings between PDHJ and NGOs could be due to the fact that PDHJ did not conduct monitoring of all of the locations where the joint operation took place. This has demonstrated the limitations, weaknesses and ineffectiveness of PDHJ in monitoring human rights violations. The PDHJ also has never produced any reports on the results of the follow-up of the recommendations to outline how many institutions have taken measures to implement the recommendations, and how many of them have refused to comply (Forum Asia, 2015).

The PDHJ has several methods by which members of the public may make complaints. This includes making complaints online, by phone call, mobile service, or directly visiting the central office in Dili and regional offices in Baucau, Maliana, Same and Oecusse. Another option available in all 13 districts lodging a complaint in one of the designated complaint boxes, which are located at the offices of each District Administration. The mobile complaint service in 2014 integrated into PDHJ's socialisation session. In 2014, the PDHJ held 60 socialisation sessions in the whole territory to 4337 people and received 6 complaints on human rights issues. The PDHJ has established complaint handling by providing complaint boxes located at the offices of the District Administrations in 13 districts. Even though the PDHJ has established complaint boxes in all 13 districts, the number of complaints received remains very low (Forum Asia, 2015). As analysed by the Forum Asia (2015), one of the reasons could be a result of limited information

disseminated amongst the public regarding the existence of the complaint boxes. At the same time, the lack of public confidence in the security of this method is also possible.

The provisions of the Article 4.1, Article 29 (c) and (e), Article 42.2 (a) of the Law No. 7/2004 also have placed restrictions on the PDHJ in terms of its powers of investigate and oversight, so as to not to include the functional activities of the courts and matters or cases pending before a court, except matters related to administrative activities. The law only gives PDHJ power to request permission from the National Parliament to appear before a court, administrative tribunal or commission of inquiry to provide legal opinion or testimony in the form of *amicus curiae*. The law also provides restriction to courts to not interfere in the work of the PDHJ. The Article 43 describes in detail as the following: "The courts can not interfere arbitrarily with the investigation of Human Rights and Justice Ombudsman or issue any injunction to delay the investigation, unless there are strong indications that these are being conducted outside the scope of its competence, existence of bad faith or conflict of interest" (Forum Asia, 2015).

Under Article 45 of Law No. 7/2004, the final report of the investigation has a clearly defined procedure with regards publishing the final report of the investigation. The provision cites that the after the investigation, the PDHJ is to send the complainant and the person called into question a draft report containing the results of its investigation and its assessment, conclusions and recommendations, before publication. The litigants then have the opportunity to submit comments within 15 days from the date of receipt of the draft report. After this period, the PDHJ can publish the results of the investigation and its opinions, conclusions and recommendations. The PDHJ should not keep secret the results of the final report on the investigations, opinions, conclusions and specific recommendations based on specific cases of human rights violations; only the individual right to privacy can be protected. There have been recommendations made and directed to institutions responsible for violations committed. In some cases, the PDHJ also referred the cases considered under the mandate of the Public Prosecutor for further investigations and proceedings in court, as it has limitations in respect of undertaking interventions in judicial process. This has shown the weakness of the PDHJ's legal power to recommend or propose remedies and reparations to victims of human rights violations (Forum Asia, 2015).

Conclusion

The PDHJ has established working relationships regionally with other Southeast Asia NHRIs such as the Indonesia National Commission on Human Rights (Komnas HAM). 15 years after Timor-Leste's independence, many of the Timorese stolen children are now adults who have settled in Indonesia without any contact with their families. Many have new names, and have adopted the culture, language and religion of their new homes. Together with civil society groups from both countries such as Komnas HAM, Asia Justice & Rights (AJAR) and the Ministry of Social Solidarity (MSS), the joint effort to bring these stolen children to be united with their families include cooperation with the Commission for the Disappeared and Victims of Violence (KontraS), Association of the Families of the Disappeared in Indonesia (IKOHI), Kontras-Sulawesi in Indonesia, and in Timor-Leste, Asosiasaun Chega Ba Ita (ACBIT), Asosiasaun HAK, Fundasaun Alola, and Timor-Leste Red Cross (CVTL).

Today, six NHRIs have been established in the Southeast Asia region including Malaysia,

Indonesia, the Philippines, Myanmar and Thailand. Although the PDHJ is not part of the ASEAN, the PDHJ and the other five NHRIs formalised their network and renamed it the Southeast Asia National Forum (SEANF) in 2009. Yet, the question arises on whether these government-sponsored NHRIs could have significant roles in human rights protection in the region. For the case of PDHJ, it is established in a form of ombudsman and in many areas, as highlighted above, its modus operandi is slightly different compared to the others. The formalisation of SEANF is considered a commitment of the Southeast Asia NHRIs in contributing their roles in transboundary human rights issues. Though, it is clear that their incorporation into national human rights struggles cannot be ignored (Cardenas, 2001).

Quoted from Silverio's interview with the Asia Pacific Forum (4 August 2015), 'human rights work is not only about remedying violations but also about changing people's attitudes". One major challenge in a post-conflict small country like Timor Leste remains the literacy rate and that is closely linked with the human rights awareness that can eventually lead to rising demands and claims for human rights protection. Additionally, the role of individual leadership should not be missed. It is a common fact that many NHRIs, just like any other organizations shine under the independent-mindedness or dedication of particular commissioners or, alternatively, struggle if they face passive leadership.

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The Advisory Commission on Rakhine State in Myanmar: An Introduction

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Abstract

The escalation of long standing conflicts between the Burmese military and armed ethnic forces continued to taint Myanmar's human rights record and international image. In September 2016, in response to international criticism, the new Burmese National League for Democracy (NLD)-led government, through the Ministry of the Office of the State Counsellor of the Republic of the Union of Myanmar, and in collaboration with the Kofi Annan Foundation, established the Advisory Commission on Rakhine State (ACRS) to deal specifically with the Rohingya issue. Composed of six local and three international experts, and chaired by Kofi Annan at the request of State Counsellor Aung San Suu Kyi, the ACRS is intended to be a neutral and impartial body which proposes measures for improving the welfare of all people in Rakhine. This paper explores the workings of the ACRS and its relationship with Myanmar National Human Rights Commission (MNHRC). The paper focuses on the complementarities between the two entities and how the MNHRC engages and informs the work of the ACRS. It also looks into whether the ACRS can push the MNHRC towards addressing squarely the problem of the Rohingyas, which it has been reluctant to do in the past. In doing so, this paper also looks at the ways in which the ACRS explains the government policies toward the Rohingya people, widely recognized to be one of the most oppressed peoples in the world. This paper also examines the ways in which the ACRS, instead of protecting the Rohingyas, has operated to contain, insulate, and ward off international pressure for Myanmar to comply with Western or international standards of human rights. This further begs the question of the role of the MNHRC in providing protection for the Rohingyas.

Introduction

On 31 March 2011, Myanmar's first nominally civilian government in nearly 50 years was inaugurated. Created by flawed elections held in 2010, the government was led by a new president, Thein Sein, who had been prime minister in the previous SPDC (State Peace and Development Council) military regime. In August 2011, Thein Sein met with Aung San Suu Kyi, who had been released from house arrest the previous November. The Burmese government released thousands of political prisoners to "sell the government as something demonstrably 'new' to the international community" (Turnell, 2011: 160). In the 2015 elections, the National League for Democracy (NLD), led by Aung San Suu Kyi, won more than 80 per cent of contested seats in parliament. Aung San Suu Kyi became the State Counsellor of Myanmar in nominal control of the

Burmese government; the Union Solidarity and Development Party (USDP, led by members of the highest ranks of the former military junta), was guaranteed 25 percent of parliamentary seats by an earlier 2008 constitution.

Despite the apparent democratization of Myanmar, the escalation of long standing conflicts between the Burmese military and armed ethnic forces continued to taint Myanmar's human rights record and international image—a triumphant narrative which both the Burmese government and the United Nations are trying to maintain. Ethnic leaders boycotted all the national elections held since 2010 and expressed their distrust of the military regime, which in their opinion had reincarnated as the NLD government and, when still in power, had rejected their proposal of forming political parties to participate in future elections. While courting the West, the government formed in 2011 launched offensives against ethnic armies in the Kachin, Karen, and Shan states in its plan to convert armed ethnic groups into border guard forces (Hlaing, 2014: 58-59). Human rights abuses were reported. In September 2016, in response to international criticism, the NLD government, through the Ministry of the Office of the State Counsellor of the Republic of the Union of Myanmar, collaborated with the Kofi Annan Foundation and established the Advisory Commission on Rakhine State (ACRS) to deal specifically with the Rohingya issue.

In Duncan McCargo's words, the creation of the ACRS was a "classic political ploy" used to make a gestural concession to critics, especially foreign ones, of government policy (McCargo, 2012: 69). The formation of the ACRS was necessitated by the protracted tensions between Buddhists and Muslims in the wake of the 2012 violence between Rakhine and Rohingya groups, which observers say had culminated in a genocide. The Rakhine and the Burmese army had systematically stripped the Rohingya of basic human rights and restricted their freedom to move and work. The persecution of the Rohingya was broadly aligned with the former military junta's perspective, which emphasised the Muslims' alleged penchant for violence and their clerics' resistance to peaceful reconciliation. However, as Andrew Schaap suggests, reconciliation is an ideology that "tends to inscribe an enforced commonality" (Schaap, 2008: 259) which is now the case in Myanmar.

Composed of six local and three international experts, and chaired by Kofi Annan at the request of Aung San Suu Kyi, the ACRS is intended to be an impartial body which proposes measures to improve the welfare of all people in Rakhine. Annan's involvement in the ACRS was timely—it occurred when the attention of the international community, including the media, was relatively focused on Myanmar. On 31 August 2016, the 21st Century Panglong Conference was held, in which the Burmese government sought reconciliation with Myanmar's ethnic minorities. Dignitaries such as former UN secretary general Ban Ki-moon attended. The Panglong Conference came days before Aung San Suu Kyi's visit to the United States, where she met Barack Obama and addressed the 71st session of the UN General Assembly. The Burmese government was hoping to convince the international community of its gradual but positive steps towards democratisation and to urge patience and continued support for it (Kipgen, 2016).

This paper highlights the ways in which the ACRS was founded as Myanmar's response to the humanitarian concerns of the Western world. It also examines the ways in which the ACRS, instead of focusing on protecting the Rohingya, has helped contain, insulate, and ward off

international pressure for Myanmar to comply with Western—or international—standards of human rights (Goodman and Pegram, 2012: 18).

Myanmar's "Democratic" Governments

Power in the NLD government is not concentrated in one person, as it was under the SPDC. Under the new political arrangement, the USDP, the parliament (comprising Upper and Lower Houses), and the armed forces share power. In the past, nothing could happen without the SPDC's approval. After 2010, the NLD became a legitimate, registered party and eventually formed the government after the 2015 elections, but it had to secure the support of leaders of at least two or all three power centres before it could implement any policy. The NLD government pledged to cooperate with civil society in developing Myanmar and to diffuse political power even further (Hlaing, 2014: 41-43).

Despite the positive developments in the democratic process and civil society, state-ethnic relations remain troubled. Minority leaders argue that British rule was more benign than the majority indigenous rule of the Bamars and have been apprehensive about conceding their political autonomy. Government soldiers and local militias have reportedly looted ethnic minorities in military operations. More importantly, even under the new political arrangement, the central government has not been able to provide ethnic minorities with more economic and political rights. The Bamar leaders' practice of dividing revenue among ethnic regions according to the size of the population has not endeared them to ethnic minorities. Minority leaders argue for state revenues to be divided equally among the different ethnic groups, a proposition rejected by the central government, which does not possess the fiscal capacity to fully satisfy the demands of both the Bamar and ethnic minorities. The Bamar leaders argue that stripping ethnic leaders of power is in the interests of democratising the political system, which in turn has augmented the ethnic elites' discontent with the government (Hlaing, 2014: 52-53).

When Buddhism was made the state religion in 1961, ethnic minorities, including Buddhist ones, concluded that, to win over its own people, the Bamar-dominated government was prepared to abandon the merest pretence of secularism and freedom of religion. Although ceasefires have been negotiated with the ethnic groups that took up armed resistance, a permanent, mutually acceptable agreement is nowhere in sight. Despite the government's political reforms, the domination of Bamar Buddhists indicates that the ongoing project of national reconciliation is meant to establish a homogeneous Myanmar under one ethnicity, one language, and one religion, not a federal, inclusive union where ethnic groups from diverse cultural, linguistic, and religious backgrounds can coexist (Sakhong, 2014: 206).

The Rohingya in Rakhine

According to Jacques P. Leider, the "Rohingya" were Bengali Muslim immigrants from Chittagong who settled in the north of Arakan. Their leaders, after the Second World War ended in 1945, called for regional political autonomy in the independent Union of Burma (1948) but have struggled since the 1950s to define themselves and obtain recognition as a separate "ethnic" group (Leider, 2015: 204).

In the 1970s, Ne Win (1910-2000), the military leader of Myanmar, restructured citizenship laws to exclude the Rohingya categorically after the nominal unification of insurgent groups and a global economic crisis that hindered economic growth. Tens of thousands of Rohingya refugees flooded the Bangladeshi border to escape prosecution. Following another economic crisis, the late 1980s and early 1990s saw a wave of Rohingya expulsions as the State Law and Order Restoration Council (SLORC) took power and sought to minimise ethnic politics. The military government set up the Burmese national project as under the threat of domination by foreign and non-Buddhist elements. The "foreign" Rohingya fulfilled both criteria, and their vilification provided a common ground to draw the Bamars and other non-Rohingya ethnic groups together against the Rohingya (Bjornberg, 2016: 151-152).

Distrustful of the government and dispossessed of their basic rights and property, the Rohingya have refused assimilation and resettlement. Unlike the Kachin, Karen, and Shan peoples, the Rohingya pose no military threat to the government. The persecution of the Rohingya is remarkable for the near-absence of resistance by the Rohingya against the "slow genocide" being levied against them, if we follow Raphael Lemkin's definition of genocide: "acts committed with the intent to destroy, in whole or in part a national, ethnical, racial, or religious group" (cf. Naimark, 2017: 3). Their rumoured social depravity—abuse of women, polygamy, and illicit trade in drugs and other contraband—justifies the government's racial and religious persecution of the Rohingya (Bjornberg, 2016: 152).

In 1982, Ne Win launched Operation Dragon King to attack the armed ethnic groups and revoked the Rohingya's citizenship. The government created a three-tier system of citizenship, giving colour-coded identity cards to three groups: indigenous Burmese; resident citizens, including pre-1948 immigrants who had applied for citizenship in 1948; and naturalised citizens who had not applied for citizenship in 1948 but who would have qualified for the status. In 1988, through the extraction of Rohingya labour, the SLORC started to build military camps in Rakhine, where the Rohingya were the majority. The threat of being conscripted for hard labour to benefit the military and the risks of beatings, death, and retribution against family members are powerful inducements to flee Myanmar (Bjornberg, 2016: 152-153).

The central government and the Rakhine ethnic group claim that the Rohingya are a manufactured ethnicity, maintaining that "Rohingya" was first used only in the 1970s and that the Rohingya are vagrants seeking to mobilise international sympathy for undeserved monetary gain (de Mersan, 2016: 122).[203] Opponents of the Rohingya also argue that the Rohingya were brought from British India to Myanmar to fill a labour shortage. The claim that the Rohingya are illegal Bengali migrants justifies the central government and the Rakhine's discriminatory measures against them (Bjornberg, 2016: 156-157). Not unlike the Thai state in Thailand's southern border provinces, Burmese authorities encouraged the creation of armed militias and hence the militarisation of the Buddhist community in Rakhine in the name of local protection against the belligerent Muslims (McCargo, 2012: 19).

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[203] "Rohingya" was largely unknown to most Buddhist Rakhine until 2012 and was consequently never used except by learned men in specific contexts. The Rakhine do not speak of "Muslims" but of *kala*, a somewhat derogatory term long used in daily life to refer to "people from the West" or "foreigner."

In 1997, anti-Muslim riots in Mandalay began after reports of an attempted rape of a girl by Muslim men. This alleged rape was later disproved and led to speculation that the central government might have orchestrated the incident. On 28 May 2012, the brutal rape and murder of a Rakhine woman by a few "illegal Bengalis" (as described by the government) led to recurrent conflicts between the two communities all over Myanmar. In late April 2013, anti-Muslim rioting broke out in Okkan after an altercation between a Buddhist monk and a Muslim woman. On 28 May 2013, in the Shan town of Lashio, a Muslim man was embroiled in a dispute with a Buddhist female petrol vendor. In August 2013, in Htan Gone village, a young Muslim man was rumoured to have attempted to rape a Buddhist woman. The gendered representation of the conflict is striking. The threat to Buddhist women (whether Bamar or Rakhine) represented by Muslim men, perceived as a threat to the Bamar and Rakhine hegemonies in their respective territories, is linked to the obligatory religious conversion of women who marry Muslims (Boutry, 2016: 102).

In Rakhine, relations between Buddhists and Muslims have been especially unpredictable and took a dramatic and tragic turn amid the nationwide inter-ethnic riots against Muslims in 2012. Violence broke out, leaving hundreds dead, more than a hundred thousand Muslim Rohingya in refugee camps, and many more thousands who attempted to flee Myanmar by boat for Malaysia, only to be funnelled into human-trafficking rackets based in Thailand. More than in previous decades, the plight of Rohingya refugees has come to the notice of the international community, including the United States, the EU (European Union), and the ASEAN (Association of Southeast Asian Nations). This brief description cannot do justice to the complexity of the reasons for inter-ethnic conflict in Rakhine. Perceptions in each community about the cause of conflict vary, abetted by differing renderings of history: are the Rohingya recent Bengali-Muslim border-crossers, or have they been in Rakhine for centuries? A group of Buddhist monks, led by U Wirathu, aims to repel what they perceive as a Muslim threat to the future of Buddhist Myanmar. Wirathu enjoys the support of influential leaders within the armed forces and the USDP, who believe that his articulation of Buddhist nationalism can check the aspirations of the NLD.

Human Rights in Myanmar: International and Regional Responses

As a result of the Rohingya humanitarian crisis, the issue of human rights violations by Myanmar's central government has received renewed attention from the international community. When Aung San Suu Kyi and NLD members were persecuted in the 1980s and 1990s, the EU and the United States used economic sanctions and other diplomatic instruments to force the Burmese government to improve its human rights record. However, the regime successfully resisted the West's demands by securing resources from countries such as China and India, rendering the sanctions largely ineffective. ASEAN member states maintained their diplomatic and economic contacts with Myanmar, in adherence to the "ASEAN Way," which meant respecting the sovereignty of Myanmar and refusing to intervene in what it observed as the internal affairs of a sovereign member nation (Paik, 2016: 417-418).

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he military government had rejected UN humanitarian investigation and aid from Indonesia and Malaysia, ASEAN's predominantly Muslim countries, for the Rohingya. Even after Myanmar's democratic transition, international and regional organisations have not been able to deliver humanitarian aid to the displaced people. ASEAN's lack of punitive, sanction-based compliance mechanisms renders it ineffective in positively influencing Myanmar's human rights

record. ASEAN is more concerned with maintaining a unified position against external pressure than with developing a single policy towards Myanmar. In fact, ASEAN provides Myanmar with the geopolitical protection from external pressure that animated its desire to join ASEAN in 1997 (Davies, 2012). The NLD government has so far proven inadequate in dealing with humanitarian aid from foreign donors, especially with aid for suffering minorities in religiously sensitive regions such as Rakhine (Paik, 2016: 431).

In 2007, due to international criticism of the human rights record and increasing respect for human rights among Southeast Asian civil societies, ASEAN established the AICHR (ASEAN Intergovernmental Commission on Human Rights), a human rights body aimed at enhancing ASEAN's credibility in regional human rights matters. AICHR was not created because of a fundamental ideational commitment. Rather, it was aimed at projecting ASEAN as a legitimate, relevant authority in shaping regional norms for treating alleged violations of human rights. Although the AICHR professes to promote and protect human rights and fundamental freedoms of peoples and to uphold the human rights standards prescribed by the international agreements to which ASEAN states are parties, the AICHR must also demonstrate respect for cultural, historical, and religious heterogeneity and pursue a non-confrontational agenda (Tan, 2011; Poole, 2015).

Although the 2008 ASEAN Charter includes among its "Principles and Purposes" the "promotion and protection" of human rights, the prevailing ASEAN norm of mutual non-interference in internal affairs suggests that the human rights record is excluded as a criterion for ASEAN membership and as a topic of official discussion. To be sure, the principle of non-intervention is not unique in international law. However, ASEAN member states, except Indonesia, Thailand, and the Philippines, are anxious about compromising their security agendas and surrendering their sovereignty to international or regional institutions that might encroach on their instruments or methods of rule on the pretext of upholding human rights (Nasu, 2011: 4). ASEAN has always operated based on ad hoc understandings and informal procedures, rather than within the framework of binding international treaties. By disputing the universal applicability of human rights and highlighting the exceptionalism of Southeast Asia, of which the "Asian values" discourse was a manifestation, ASEAN has unwittingly insulated Myanmar from full international pressure on its human rights record, much to the chagrin of Western human rights activists (Nasu, 2011: 2-4).

Not without some reluctance, Myanmar ratified the ASEAN Charter in 2008. The ratification was accompanied by the statement that there would be no interference in the internal affairs of member states by the ASEAN human rights body. Given that Myanmar defines the Rohingya crisis as a domestic issue, it is uncertain how much ASEAN will be able to help. Moreover, support for human rights from each society within ASEAN depends on the incumbent leadership, the vigour of civil society groups, and the public's awareness of and desire for rights (Tan, 2011: 150). ASEAN hopes that Myanmar will become familiar with the operations of human rights through AICHR activities and form institutions to discuss and work on human rights within its civil society. In 2011, Myanmar established the National Human Rights Commission (MNHRC), whose mandate was to promote and protect the fundamental rights of all citizens, as described in the Constitution.

However, the mandate is problematic because the existing Burmese constitution, which does not recognise the citizenship and rights of the Rohingya and other ethnic groups, violates the fundamental rights of the people of Myanmar and is an instrument to maintain power and oppress the population.[204] The Rohingya are still regarded as "Bengali aliens" and remain unprotected by Burmese law (Bjornberg, 2016: 157). In a way, the "national anxieties" of Buddhist decline, Muslim insurgency, and ethnic conflict were "mapped" on Rakhine, which generated the Rohingya issue (McCargo, 2012). From the Burmese government and Buddhist nationalists' perspective, granting the Rohingya more concessions than what is warranted—no one knows how and where to draw the line—runs the risk of starting a domino effect that will have more non-Burman and non-Buddhist groups calling for outright secession from Myanmar, which is already occurring in the southeastern Shan State.

The Advisory Commission on Rakhine State in Myanmar

MNHRC has 15 members, including former ambassadors and retired civil servants with little knowledge of human rights. They—save for U Aye Lwin—possess questionable experience and understanding of the Rohingya and Rakhine. No representative model exists—there are no representatives of NGOs, professional associations, or trade unions. Even if the existing members are not sycophants of the Burmese government, they may not be inclined to speak out for the Rohingya for fear of being branded as separatist sympathisers. Sceptics see the establishment of MNHRC as a mere attempt on the part of the Burmese government to appease the international community after condemnations of its human rights record. From the outset, the task of the ACRS was to draw a report satisfactory to the Burmese central government and the international human rights regime. However, realities on the ground proved that a quick and smooth tender of the report and long-term solution to the problem were impossible (Gomez and Ramcharan, 2016: 9).

The Commission first convened on 5 September 2016 in Yangon and considered humanitarian and developmental issues: access to basic services, legal questions such as citizenship and the assurance of basic rights, and security for all communities. The Commission aimed to submit its final report and recommendations to the Burmese government in the second half of 2017 but announced in late January 2017 that the deadline for the submission would be extended, with no new date set. Nevertheless, in early May 2017, the Commission announced that it would finish the final report by late August. U Aye Lwin took the opportunity to clarify the Commission's stance: it is "neither the judge nor jury in this matter and we will also not mediate between the two communities [of Rakhine and Rohingya]." Committee members went to Sittwe, the capital of the Rakhine state, earlier in May to meet with both Rakhine and Rohingya leaders. The Arakan National Party (ANP), however, disputes the existence of the ACRS and has declared that it will not recognise any of its recommendations "in keeping with their people's wishes" (Naing and Myint, 2017).

The Burmese government covers part of ACRS's expenses. The Kofi Annan Foundation finances the rest, with support from Denmark, Norway, and Sweden. To develop its

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[204] The complaints handling process required that each complaint be accompanied by a copy of the complainant's national registration card. See James Gomez and Robin Ramcharan, "The 'Protection' Capacity of National Human Rights Institutions in Southeast Asia," Southeast Asia Research Centre of the City University of Hong Kong, Working Papers Series, No. 172 (February 2016), 9, 14.

recommendations, the ACRS holds regular dialogue sessions with community and religious leaders in Rakhine and high-level discussions with Myanmar's neighbours to devise a regional response to issues of joint concern such as cross-border migration and border security (Advisory Commission on Rakhine State, 'About the Commission'). The ACRS's initiatives are particularly well received by the Bangladeshi government, which claimed that Burmese officials had not been proactive in resolving the Rohingya crisis and cancelled diplomatic meetings for that purpose at a whim even though "engagement was the most important thing…and an exchange of information could have helped" (Slow, 2017).

The ACRS is staffed by "national members of the Commission." Among them is U Win Mra, the head of the NHRC. Others include Tha Hla Shwe (a former president of the Myanmar Red Cross) and U Aye Lwin (a chief convener for the Islamic Centre of Myanmar and a core member of Religions for Peace, Myanmar) (Advisory Commission on Rakhine State, 'Members of the Constitution').[205] Like the members of MNHRC, ACRS members are appointed and paid by the president and have no authority over government bodies or the military. Previously, U Win Mra had dismissed complaints about poor living conditions and documented cases of torture of political prisoners at Yangon's Insein Prison, saying that Insein Prison was not the worst in the world. Critics charge that Win Mra's lengthy career as a protector of the Burmese government's interests makes him implausible as an advocate for human rights. Win Mra has described his role as an "international whipping boy" for the NLD government. He sees no point in delving into past actions of both the military junta and the current government, admitting that he does not read critical reports by outside groups "because they lack objectivity."

Win Mra's views were indirectly endorsed by Kofi Annan, who said that accusations that genocide was taking place in Rakhine are serious charges requiring "legal review and judicial determination" and should not be "thrown around loosely." Commenting on the military forces in Rakhine, Annan noted that they have the right to protect the state. During his visit to Rakhine in December 2016, Annan observed the distrust and fear between Buddhists and Muslims. However, there is a limit to how much the ACRS can do. ACRS's work, for instance, does not include investigating the violence between the Myanmar army and "Rohingya Muslim militants," who are accused of attacking three security posts in Rakhine, an action which allegedly forced the Burmese military to retaliate against the Rohingya (Wong, 2016). Despite his aversion to seeing the Rohingya issue as a genocide, Annan drew criticism from civil society groups in Rakhine for referring to the "Bengali" as "Rohingya." The organisations threatened to boycott the ACRS (Coconuts Yangon, 2016).

Despite the ACRS's claim to neutrality, Win Mra is of the Buddhist Rakhine ethnic group, which does not recognise the Rohingya. He blamed transnational human trafficking networks for what the world sees as the Rohingya refugee crisis—a manufactured one from his perspective—which has "nothing to do with a human rights violation." He referred to the Rohingya as "strangers": "As human beings, we have the right to food, health, and other human rights, but when you claim as a Rohingya, that is a different issue" (Paluch, 2015). He also suggested that for most Burmese, human rights are an alien concept. He argued that human rights should not be

[205] The other national members, who are less closely linked to the government, are Mya Thida, U Khin Muang Lay, and Daw Saw Khin Tint.

investigated until local populations in "conflict areas"—the remote regions claimed by armed ethnic groups at different stages of ceasefire negotiations with the government—are educated about them. Nevertheless, he pledged that both the MNHRC and ACRS would be immune to government coercion (Winn, 2012). If the ACRS's aim is to identify a set of protagonists and antagonists in the Rohingya conflict in Rakhine, it seems that Win Mra has already done so before the report is written.

In contrast, U Aye Lwin, the only Muslim in ACRS, has worked to debunk myths about Muslims and Islam through methods such as distributing pamphlets and holding interfaith meetings. In January 2017, an ACRS delegation, led by Win Mra and Aye Lwin, visited Bangladesh to explore Bangladeshi viewpoints on the challenges facing Rakhine and the Rohingya. The delegation was intended to display the ACRS's attention to witness testimony—a primary component of commissions of its kind. During the visit, the members met with Bangladeshi's Foreign Affairs Minister, the Minister of Home Affairs, a chief advisor to the Prime Minister, and former diplomats, as well as core leaders of non-profit organisations. The delegation also visited Rohingya slums in Bangladesh and spoke with Rohingya who had fled persecution in Myanmar and had been staying in Bangladesh illegally. The ACRS delegates did not speak with journalists, but according to the Rohingya whom they had approached, they inquired about torture and repression in Myanmar (*The Daily Star*, 2017). Later, Aye Lwin told *The Irrawaddy*, a website founded by Burmese exiles in Thailand, that the Rohingya refugees in Bangladesh had been living in deplorable conditions: "The place where they live is inappropriate even for animals, not to mention humans. When I asked a child if he had eaten, he just cried instantly." Aye Lwin noted that local Bangladeshis disapproved of the Rohingya refugees' cutting down trees in the border area to build makeshift shelters and were worried about job competition with the refugees (Myint, 2017a).

The credibility of ACRS was put into question when UN Special Rapporteur on Myanmar Yanghee Lee reported that human rights abuses had continued in Rakhine and that foreign observers had not been allowed into the Burmese state (Abedin, 2017). In other words, the non-Burmese members of the ACRS had been the only foreigners directly observing conditions in Rakhine. The furthest non-Burmese observers can go is to the Cox's Bazar in Bangladesh, where many Rohingya refugees reside. Lee raised concerns regarding widespread fear among civilians of potential reprisals as punishment for speaking out. The ACRS's strong links with the Burmese government and military leaders do not instil confidence in the Rohingya refugees that it will work in their best interests. As a result, several international human rights bodies—Amnesty International, Burma Task Force, International Federation for Human Rights, Fortify Rights, Global Centre for the Responsibility to Protect, Physicians for Human Rights, Refugees International, and U.S. Campaign for Burma—have written a joint letter to UN Secretary-General Antonio Guterres, calling for more direct engagement with the Burmese leadership for the immediate and unhindered access of humanitarian workers and international media into Rakhine. They argue that the Burmese national commissions that investigate allegations of human rights violations are neither credible nor independent; the investigations are conducted by the military and police and are headed by Vice President Myint Swe, who had denied most allegations of abuses, raising concerns about the ability of the Burmese national commissions to investigate allegations of abuses within their ranks. The human rights groups urge that "the situation requires more than a series of flawed national investigation commissions to push policymakers to change

course" (GCRP, 2017). The ultimate goal for these groups is to remove all arbitrary and discriminatory restrictions on the Rohingya and hold all perpetrators of human rights abuses accountable, including army and police officers, to guarantee the dignified, safe, and voluntary return of displaced Rohingya to their homes.

For its part, the United Nations Human Rights Council decided on 24 March 2017 to send what it calls "an international fact-finding mission" to Myanmar to investigate reports of widespread human rights abuses in northern Rakhine, seeking "full accountability for perpetrators and justice for victims." The NLD government protested the resolution, which it claimed to be counterproductive. Although Burmese officials did not deny that the human rights of the Muslims in Rakhine had been violated, they asserted that Muslim militants had been threatening and killing villagers. To date, Aung San Suu Kyi has remained circumspect in her views on the Rohingya issue. The NLD government argued that Aung San Suu Kyi had been doing her best to resolve the Rohingya issue in Rakhine and urged that the international community provide support for implementing the interim and final recommendations of the ACRS (Myint, 2017b). In fact, Aung San Suu Kyi's supporters cautioned critics not to cause her "too much political damage" because the generals retained the capacity to return to the political centre stage and frustrate all existing efforts at rehabilitating the Rohingya and stabilising the Rakhine state. Instead of blaming Aung San Suu Kyi, their argument ran, critics should press the generals, who had pointed to the continuing violence in Rakhine as evidence of the NLD government's incompetence, to cooperate with the NLD government, Rakhine leaders, and the ACRS towards peace in the region (Horta and Saffin, 2017).

Facing allegations that it is powerless and biased and has failed to take further, more drastic steps to reach out to the Rohingya in Rakhine, the ACRS also faces strong domestic opposition. The more ardent supporters of Buddhist nationalism wonder why such a commission was formed in the first place. Some of them are frustrated that there is no representation from the sangha councils. The ANP and the USDP dispute the presence of international members and have called for the ACRS to be abolished or for the international members to be removed because the international members cannot be expected to understand the local context. There was also criticism that the involvement of international members amounts to outside interference in what should remain Myanmar's internal affairs. To pacify the Buddhist majority, the USDP, and the Burmese army that the USDP controls, the NLD government has chosen to refer to the Rohingya as the Muslims of Rakhine. The USDP regime of the past had used the controversial term "Bengali"; Thein Sein suggested that the Rohingya leave Rakhine and be resettled to a third country by the United Nations High Commissioner for Refugees, a proposal rejected outright by the UN (Kipgen, 2016).

Conclusion

It remains to be seen if the ACRS, already under intense criticism both domestically and abroad for its practices and composition, can propose solutions that the 2015 democratically elected Burmese government could implement to resolve the Rohingya issue. More problematically, there is no definite deadline for the ACRS's recommendations. The concern is that the ACRS, like the MNHRC, may eventually fail to deliver real change. Although Aung San Suu Kyi did set up a 13-member taskforce to investigate the clashes and the security forces' response to it, the fact that it

is chaired by Vice President Myint Swe, who headed military intelligence under Than Shwe, suggests that this "neutral" task force may have pre-determined that the Burmese authorities have followed the law and acted legally in their response to attackers. Aung San Suu Kyi, under fire for her "gestural politics" and for being evasive on the Rohingya issue, has accused the international community of igniting "bigger fires of resentment" between the Buddhists and Muslims in Rakhine. She has urged the international community to give Myanmar sufficient space and time to resolve the issue (Kuok, 2016).

The NLD government's failure to control the behaviour of Myanmar's security forces, as well as the inability of media, observers, and volunteers to enter affected areas to establish facts on the ground, points to the limits of its power under the new political arrangement after the landmark 2011 elections. However, for the international community, the existence of the ACRS signals a significant break from Myanmar's relatively authoritarian past and is sufficient to convince foreign diplomats, governments, journalists, and observers that the Burmese military—the creator of Myanmar's Buddhist nationalism and bearer of ultimate political power after 2011—and the NLD government are willing to make efforts to resolve the conflict in Rakhine. Human rights activists and NGOs are far less sanguine about the ACRS's ability and willingness to propose positive changes and work towards policy implementation. That said, although it is not completely impartial and independent, the ACRS can still be expected to educate Myanmar's leaders about the proper conduct of human rights and bridge the gap between local perceptions of human rights and the international narrative of human rights as universal. Human rights may well be the formula that cuts across racial and religious divides in Rakhine. How well the ACRS has been, and will be, accepted by the Rohingya is an issue worthy of investigation. However, the ACRS, like the MNHRC, risks becoming a proxy for the unresolved political questions that lie at the heart of the violent conflict.

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A Theoretical Overview of the National Human Rights Institutions (NHRIs) and other like-minded Commissions in Nepal

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Abstract

The National Human Rights Commission (NHRC) of Nepal operates in the context of competing, constitutionally authorized human rights bodies, some of which are responding to new categories of rights in particular socio-economic and cultural rights recently adopted by Nepal. It seems that six other commissions also envisage to look after the promotion and protection of the rights of communities/groups who have systematically been excluded and marginalized. Whereas the constitution has recognized the NHRC as the umbrella institution of human rights alongside six other commissions established as the constitutional bodies. Although there is a provision which talks about the linkages of other commissions with federal structure, there is nothing specified in the constitution in terms of formal linkages to the NHRC. The possible overlap in the jurisdiction and non-mentioning of any linkage will directly affect the enforcement and implementation of socio-economic and cultural rights. Their jurisdictions are likely to overlap. This will undoubtedly lead to jurisdictional conflict between the various bodies. The NHRC has also to increase the direct interface with the transitional justice mechanisms, which were established to look at past abuses in the conflict era. However due to the lack of their strong compliance with the Supreme Court decisions and the human rights standards, the conflicted affected populations are not much encouraged to approach the NHRC. As a result, the various Commission and the NHRC in particular are not able to respond to the tasks envisaged by the current laws. Impunity is yet to be addressed. There are numbers of culprits yet to be convicted and numbers of affected persons yet to get the compensations. This paper will examine the challenges of protection faced by the NHRC in this competitive environment, the jurisdictional pitfalls and select issues of critical importance to peace in Nepal in order to demonstrate the aforementioned pitfalls.

Background

Human rights are inalienable and a basis for development. Human rights encompass civil, political, economic, social and cultural rights. They include everyone and ensures the right to health, sexual and reproductive health and rights, education and safe drinking water and sanitation for all among others. These rights have been formally and universally recognized by all the member states since the Universal Declaration on Human Rights (UDHR) in 1948 and have been reaffirmed through multiple treaties and declarations since. International human rights law sets out the obligation of the states to respect and ensure human rights for all. The international human rights framework can provide guidance on incorporating human rights into policy and practice. Human rights for human development rely on mutual accountability, whereby all actors, including citizens, communities, organizations and the government, are responsible for respecting and

fulfilling mutually agreed human rights obligations[206]. It also enables the environment for positive peace and human development.

Human rights are the basic rights and freedoms that every person is entitled to have equal rights. They apply regardless of where you are from, what you believe or how you choose to live your life. They can never be taken away, although they can sometimes be restricted – for example if a person breaks the law, or in the interests of national security[207]. Hence, human rights needs to be protected for all disrespecting of race, ethnicity, religion, gender, caste and creed. To ensure better protection and promotion of human rights of the poor and vulnerable, there are Economic, Social and Cultural Rights (ESCR) to be looked after. The collective rights are the other sets of rights that contain the rights of groups. In understanding instances and patterns of poverty and deprivation as violations of ESCR – rather than mere misfortune, events outside human control, or the result of individual shortcomings – an obligation is placed on States and, increasingly, on corporations and state actors to prevent and address such situations.

As per the Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act, 2014 has provisioned for the establishment of Truth and Reconciliation Commission and Commission for the Investigations on Enforced Disappearance Persons[208]. Both of the commissions have been extended for one and the victims as per the law. NHRC has been responsible in the selection committee of the Commissioners for the two Commissions and also for the monitoring of the implementation of the recommendations made by the transitional justice mechanisms.

Constitution and Human Rights Protection System in Nepal

As a result of people's tireless campaign and movement for the provision of National Human Rights Institutions (NHRIs) in Nepal, a separate act was enacted in 1997 to establish the National Human Rights Commission (NHRC). The Act was passed after the directive order issued by the Supreme Court of Nepal. Despite the enactment of Act, the establishment of NHRC was delayed for three years. The commission is a statutory body for the protection and promotion of human rights enshrined in the domestic and other national/international laws. The commission was given mandates to investigate and monitor human rights violations on one hand and raise awareness among the people about human rights, conduct research and review laws and policies as well as implement international treaty body recommendations. However, the Commission was earlier confined only to looking into the human rights violations related to personal and civil liberty due to the then ongoing conflict that escalated further. The issues of ESCR were overlooked. Due to

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[206]http://www.gsdrc.org/topic-guides/social-development-and-human-development/human-development-and-human-rights/.

[207] https://www.equalityhumanrights.com/en/human-rights/what-are-human-rights.

[208] Both of the commissions established to bring the facts out to the general public by making enquiry and investigation into the truth about the incidents of the gross violations of human rights in the course of the armed conflict and about those who were involved in those incidents, bring about reconciliation between the perpetrator and victim, and make recommendation for legal action against those who were involved in grave offences relating to those incidents including arrangement for reparation to the victims and investigate into the matters relating to the enforced disappearances as per the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2014.

the incidents of violations largely relating to person's personal integrity at the conflict time and the need to address them promptly, there was a feeling that the issues of ESCR, involving the rights of the vulnerable communities, women and other historically excluded groups were not much looked upon in comparison to the focus on the Civil and political rights.

The Comprehensive Peace Accord (CPA) signed between the conflicting parties and the development of Interim Constitution of Nepal, 2006, following the signing of the CPA, furthered the space for the realization of the ESCR and Civil and Political Rights equally, and incorporated numbers of rights. The Interim Constitution further recognized NHRC as a constitutional body with more inclusive structure to ensure that the commission is in in full compliance with the international standards set under Paris Principles[209]. As a watchdog, the commission changed its modus operandi and focused on the thematic areas of interventions.

The Constitution of Nepal, 2015 promulgated by the Constituent Assembly is more responsive towards recognizing and reinforcing the rights of vulnerable and socio-economic and cultural rights[210]. Out of 30 different rights, more than half of them are related to ESCR while seven of them are entirely for the protection and promotion of the rights of vulnerable communities[211].

Article 245 of the Constitution mentions NHRC and its mandate to ensure the respect, protection and promotion of human rights and their effective implementation. In addition to the general mandates of investigation and monitoring, there are few but strategic mandates provided to the NHRC taking the ESCR and collective rights into account. Their roles and responsibilities include; working jointly and in a coordinated manner with civil society to enhance awareness of human rights, recommend with reasons to the Government that it become a party to any international treaties and agreements on human rights, if it is desirable to do so, and to monitor the implementation of international treaties and agreements on human rights, forward recommendations to the Government for effective implementation of such agreements. The review of the implementation of human rights commitments, coordination and partnership with like minded institutions are the important ones to ensure the collective rights.

There are other commissions established by the Constitution intended to promote human rights as well. The National Women's Commission (NWC) has been elevated as the constitutional body from statutory body, recently. The NWC was established in 2000 by the Government as an executive body to work for the rights of women and passed a legislation for the same. Furthermore, both of the commissions were established to combat all forms of discrimination against women. Article 253 of the Constitution mandates NWC to; formulate policies and programs for welfare of women; review the implementation of statutes related to women's rights, and the compliance of international obligations; carry out research and studies regarding gender

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[209] Paris Principles 1992 which has set the criteria for the independence of the commission. The diversity/pluralism is one of the keys among others.

[210] The right to equality, rights to social justice, right to education, right to social security, right to employment, right to Dalit, rights of women, rights against social exploitation, right to children, right to health, rights against untouchability, right to justice, right to senior citizen's, and consumers rights.

[211] The collective rights include; right to dalit, women, children, rights against untouchability and discriminations, right to social justice, rights against social security etc.

equality, women empowerment, forward a recommendation to concerned authority to lodge a petition in the court.

As an NHRI, National Dalit Commission has also been established as a constitutional body in the constitution. Formerly, it was an executive body established for the protection and promotion of the rights of Dalits. Article 156 of the Constitution has mandated NDC to; carry out research and studies regarding Dalit community of Nepal so as to identify legal and institutional reforms to be made and make a recommendation to the Government; formulate national policies and programs towards ending caste discrimination, untouchability, suppression; monitor, so as to ensure whether the special provisions and laws for Dalit rights have been implemented or not, and to forward a recommendation; review and evaluate the policies and programs implemented by the state and recommend the concerned agencies on filing petitions in court according to the law, against any person or organization if it is deemed necessary.

Likewise, there are four other commissions envisaged as constitutional bodies by the Constitution. They include National IPs and Nationalities Commission[212], National Tharu Commission[213], National Muslim Commission (NMC)[214], National Madhesi Commission[215] and National Social Inclusion Commission[216]. They all are entrusted to look after the rights of respective communities and provide necessary recommendations for their upliftment. These four commissions[217] as mentioned above, are relatively new in nature. However, the commissions namely NDC, NWC and NMC were already in place as the executive bodies except NWC. There was also a body called National Foundation for IPs and Nationalities but it was purely an executive body to provide advisory support to the Government to develop plans and programmes.

So far the objectives behind these separate commissions are concerned, there is a perceived lack of proper address and response from NHRC resulting in failure to address the rights of people belonging to vulnerable and marginalized communities. If we analyze numbers of cases and the policy advices by NRHC in relation to the rights of these vulnerable communities, it seems that they are nominal interventions[218]. The Strategic Plan of the commission only started incorporating the issues of the poor and vulnerable including ESCR as the key strategic actions to protect and promote the rights of these groups. Before as mentioned above, there was a disproportionate focus on civil and political rights only.

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[212] Article 261, Constitution of Nepal, 2015

[213] Ibid

[214] Ibid

[215] Ibid

[216] Ibid

[217]National IPs Commission, National Social Inclusion Commission, National Tharu and National Madhesi Commission.

[218]

International Practices on NHRIs

The NHRIs are supposed to work on the issues of ESCR among others. The Commonwealth Secretariat issued a book on best practices for national human rights stated that NHRIs should employ all available means to respond to inquiries related to the advancement of these rights, whether or not its enabling statute or national constitution recognizes these rights as justiciable; a NHRIs should advise the government on the development and implementation of economic policies to ensure that these rights of people are not adversely affected by economic policies. A NHRI should work towards facilitating public awareness of government policies relating to economic, social and cultural rights and encourage the involvement of various sectors of society in the formulation, implementation and review of relevant policies.

Without sufficient mandates, the human rights institutions cannot fulfil the roles and responsibilities and even respect the international standards set by the Paris Principles in real terms. An institution can hardly be recognized as fulfilling the Paris Principles if one of the first four elements is left out of its mandate, it is facultative to give it the mandate to hear and consider individual complaints and petitions[219]. Further to that, it should also be well equipped with necessary legal expertise to be able to investigate cases not only from human rights perspective but also from legal perspective so that there is confidence and validity in its investigations and recommendations. There is a need to accommodate the court and NHRIs relations towards complementarity. The international practices on the multiple human rights institutions can be described as follows;

An increasingly common phenomenon is multiple institutions in the same country are responsible for promoting and protecting specific rights (e.g., rights related to gender, children or Indigenous Peoples)[220]. Coordination among such NHRIs is recommended so that their functions and powers are used in a way that ensures the protection and promotion of human rights. The International Coordination Committee of the National Human Rights Institutions (ICC-NHRIs)[221] and its Sub-Committee on Accreditation have acknowledged this development, which occurs in several regions of the world, and noted that when dealing with multiple national institutions, there are demonstrated strategies for improving collaboration, including memorandums of understanding or other agreements to address overlaps of competences and handle complaints or issues, and informal arrangements in which institutions transfer individual cases to the most relevant mechanism. This is the case in some countries where ombudsman institutions and NHRIs coexist (although care should be taken to ensure that complainants are not sent from pillar to post)[222].

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[219] Morten Kjærum (2003), '*National Human Rights Institutions Implementing Human Rights':* Danish Institute for Human Rights.

[220] National Human Rights Institutions (2010), '*History, Principals, Roles and Responsibilities':* United Nations New York, Geneva.

[221] This coordinating committee is replaced by Global Alliance of the National Human Rights Institutions

[222] Ibid.

The National Commission on the Status of Women (NCSW) was established by the Pakistan Government with the specific purpose to examine policies, programs and other measures taken by the Government; review laws, rules and regulations affecting the status of women; monitor mechanisms and institutional procedures for redress of violations of women's rights and individual grievances; encourage and sponsor research to generate information, analysis and studies relating to women and gender issues; develop and maintain interaction and dialogue with NGOs, experts and individuals in society at the national, regional and international level.

Their focus is more on; ensuring the development of implementation mechanisms for laws passed in the last five years; setting up complaints mechanism in NCSW; developing monitoring mechanisms for implementations of laws; undertaking select litigations, e.g. against Jirga's, honor killing etc; working with PBS for development of sex disaggregated data; and promoting enactment of pending legislations for women's protections and empowerment.

The National Commission for Women in India is also mandated to; investigate and examine all the matters relating to safeguards provided by the constitution; make recommendations for effective implementation of those safeguards for improving those safeguards; look complaints and take suo moto notice of matters relating to; deprivation of rights, non-implementation of laws, non-compliance of policy decisions aimed at mitigating hardships, and non-compliance of policy decisions, guidelines and instructions; participate and advise on the planning process of socio-economic development of women.

Likewise there is the National Commission for Scheduled Castes. The Constitution of India under Article 338 has assigned to; investigate and monitor all matters relating to the safeguards provided for the Scheduled Castes under the Constitution or under any other law for the time being in force or under any order of the Government and to evaluate the working of such safeguards; inquire into specific complaints with respect to the deprivation of rights and safeguards of the Scheduled Castes.

The National Commission for Minorities is one more commission established to; evaluate the progress of the development of Minorities under the Union and States; monitor the functionality of the safeguards provided in the Constitution and in laws enacted by Parliament and the State Legislatures; make recommendations for the effective implementation of safeguarding laws for the protection of the interests of Minorities by the Central or the State Governments; look into specific complaints regarding deprivation of rights and safeguards of the Minorities and take up such matters with the appropriate authorities; conduct studies, research and analysis on the issues for the overall development of Minorities etc.

There is also a practice of the National Commission for Protection of Child Rights in India mandated to; examine any law or constitutional provisions to ensure that the safeguards of the law protect child rights; provide the central government with recommendations to improve correct the safeguards; inquire into child rights violations; examine the risk factors for children affected by terrorism etc.

The South African Human Rights Commission is explicitly mandated to monitor ESCR, such as rights to access to education, housing, health care, food, water, social security and clean

environment. Every year, the Commission must request relevant state organs to provide it with information on the measures taken towards the realization of socio-economic rights. On the basis of this input a report on the State's realization of ESCR in South Africa is published[223].

The Indian Human Rights Commission has a relatively extensive experience in relation to looking after the issues of ESCR. It has addressed various aspects, including the linking of the issue of child labour with the right to free compulsory education. The basis of such actions is various Supreme Court decisions making the right to education justifiable. The Commission used these decisions, in conjunction with reports on government officials employing child laborers as domestic servants, to issue a set of recommendations for prohibiting such employment in the rules of conduct of government servants. This illustrates the choice of a national human rights institution in adopting a seemingly effective strategic combination of reaction as well as prevention[224].

Some of the NHRIs that exist in South Asia are a mere existence as a token. Strategic and greater reform towards developing robust NHRIs are the need of the day in this regard. They lack of vigilance and understanding about human rights violations and the need of an independent body to watch and advise the Government for better protection and promotion of human rights are the factors impeding or maintaining a status-co when it comes to having a robust national human rights institution

Areas of Partnership

There are numbers of areas of partnership and collaboration among all the institutions established for the protection and promotion of human rights in Nepal. Some of the areas include and are not limited to:

- **Studies and research:** All the commissions including NHRC are mandated to conduct research and studies on different issues of human rights. The commission is also supposed to assess the overall situation of the implementation of laws including treaty bodies. Hence, the commissions can jointly identify the issues and carry out the studies. The credibility of such reports will be higher if they are done jointly. The local NGOs and human rights defenders can contribute in the implementation of those recommendations.

- **Human Rights Monitoring:** The monitoring of the human rights violations and issues is another area where NHRC and all six commissions can work together. So far, they do not have a robust mechanism in Nepal apart from a joint monitoring framework (which is yet to be formalized) formed by NDC. There is no practice of proactive monitoring[225] which needs to be adopted to monitor the overall situation of vulnerable communities. It's a preventive approach to respond to the issues of long standing human rights. It can also help the NHRIs to gather the baseline and assess the progress.

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[223] Ibid

[224] Ibid

[225] For the pro-active monitoring of human rights is different from the reactive monitoring. It requires self-initiative process and preventive measures.

- **Human Rights Treaty based Reporting:** Though the bigger mandate to monitor the implementation of treaty bodies' recommendations has been provided to NHRC in Nepal but other commissions are also supposed to look after the relevant human rights instruments. For example, NDC and NWC are responsible to review and monitor the implementation of International Convention on the Elimination of all Forms of Racial Discrimination and Convention on the Elimination of all Forms of Discrimination against Women. Likewise the commission for IPs can monitor the implementation of the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention 169. Hence, to consolidate the diverse efforts and foster collectivism, the commissions can develop a common strategy to review jointly such treaty body recommendations. Furthermore, they can also develop the shadow or alternative reporting mechanisms against these treaty bodies. An NHRI will also likely encourage the Government to accept the optional protocols to certain treaties and advise it on the impact of doing so. These all institutions can provide regular public updates on the international and regional human rights treaties that the State has ratified, the nature and scope of any reservation it has made and the optional protocols it has accepted.

- **Universal Periodic Review (UPR)/Sustainable Development Goals (SDGs):** The NHRIs have a huge role in monitoring and developing the alternative report for UPR. NHRC-Nepal has a good practice on alternative reporting on UPR. It has been coordinating with NWC and NDC and has been monitoring the implementation of UPR recommendations. And there is a good practice of having a single alternative UPR report. The NHRC led the process and NDC, NWC are fully on board to work together to develop the report and at the same time to be in the joint monitoring system of UPR. As the NHRIs have a significant role in influencing the government agencies to translate ESCR into the actions, they can also contribute in the implementation of SDGs Goals in particular no. 16, 5 and 10. The existence of independent NHRIs is in itself an indicator of sustainable development as NHRIs directly contribute to reaching Goal 16: promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions. NHRIs can play an integral role in translating the SDGs into reality on the ground, given the convergence between the SDGs and human rights standards. The NHRIs can; advise national and local governments, rights-holders and other actors, to promote a human rights-based approach to implementation and measurement; develop and strengthen partnerships for implementation by promoting transparent and inclusive processes for participation and consultation with rights-holders and civil society at all stages of the implementation of the agenda; engage with all stakeholders to raise awareness and build trust and promote dialogue and concerted efforts for a HRBA to implementation and monitoring of the agenda, and safeguarding space for engagement of rights holders and civil society.

- **Human Rights Promotion:** NHRIs are required to create a national culture of human rights where tolerance, equality and mutual respect thrive. The legal roles of NHRIs will always come through enabling statutes or constitutional mandate, or both. Human rights promotion is one more and crucial area for partnership that NHRIs should think of. The promotional activities that can help to avoid the potential human rights violations. All the

commissions are mandated to educate people on the human rights issues. They can at the same time, orient the concerned government agencies to hold them accountable towards protection and promotion of human rights. Hence, the preventive approach can be an avenue to be adopted for the collective efforts. More particularly, they can jointly; assist in the formulation and delivery of education initiatives; publicize human rights; and increase public awareness, including through the media and sensitization. In addition, they can also jointly conduct awareness campaigns; organize trainings for the same and for key groups such as NGOs, journalists and the judiciary; produce various publications, e.g., annual and special reports; and the development of curricula for schools, from primary through secondary and post-secondary studies, in partnership with the education authorities etc. Similarly, sensitization on what constitutes human rights violations can also be simply be trickled down through various local/grass root level structures and trying to incorporate not only one actor but multiple actors including ones, that are potential sources of violations of human rights.

- **Human Rights Advocacy:** The law review and advocacy for the enforcement are the areas where NHRIs can contribute significantly. The NHRC along with all the commissions can work together to conduct advocacy for the revision of laws in line with international human rights standards and at the same time developing campaigns for the implementation of protective laws. For example, to ensure better enforcement of laws related to anti-GBV, NWC can provide more insights and given the broader institutional capacity with the NHRC, both can collectively make a good amount of impact.

- **Civic engagement:** The NHRIs are an important part of the national human rights machinery, but they are only one part. They must work alongside other bodies that also have human rights roles and responsibilities, including the courts, law enforcement, the Legislature and administrators and the human rights NGOs. It is important for NHRIs to establish appropriate and fruitful relationships with these potential partners. At the same time, it is a challenge. There is a need of having a common civic engagement mechanism and installations in all sectors where the Government engages in providing services.

Issues and Challenges

While analyzing the experience of these all commissions dealing with the cases of women, Dalit, Madhesi and other groups, it is found that there is an overlap and lack of coordinated approach. For example, if there is an issue of dalit woman, as NDC is mandated to look into dalit issue, it falls under its jurisdiction. Likewise, since its issue of women, NWC also takes action and since it is the issue about human integrity, the NHRC suo moto takes the action on it. Hence, sometimes it seems overlapping. The overlapping of the mandates is one thing but at the same time, there are some other issues. For example, the conflicting reporting on the same issues, confusion among the government agencies even in responding to the relevant recommendations submitted by different commissions on the same issues of human rights violations. Sometimes, it also happens in the finding of the reports if the research is conducted on the same issues without coordinating with each other. Further to this, there is no clear frame where the engagement of NHRIs could be expanded towards training and certifying all the Government bodies and staffs including security

forces on human rights, to ensure sensitization, awareness and vetting in these services which can contribute to the protection of human rights.

Few of the issues and challenges are given as follows:

- **Lack of clear normative framework:** The Constitution does not speak clearly about coordination among commissions. Neither there is anything clearly mentioned about the leading role of the NHRC in this regard. The NHRC is though responsible to coordinate with other human rights based organizations and CSOs but there is nothing provisioned about the obligation to the NHRC to have partnership with other commissions. The draft bills of the other commissions also do not have any provisions regarding partnership. Since the bills are not yet passed and yet to be submitted to the parliament, there is an opportunity to lobby and inject few of the important provisions that ensure the partnership and collaboration among all the commissions.

- **Overlapping of the jurisdictions:** As mentioned above due to overlapping of the jurisdictions, there is a high chance of weakening the course of remedy. Though the NHRC is only an institution mandated for the investigations with quasi-judicial authorities, still other commissions are also empowered to monitor the situation and issue recommendations. Some of the draft bills for NDC and NWC have also given authorities of monitoring and even investigations to some extent. Hence, there should be a clear framework or the coordination with the NHRC to avoid the duplications. Further, conflicting interests on jurisdictions in case of conflict related cases to be handled by transitional arrangements can also be altered through this injection with clear mention of mandates and jurisdictions in all the situations.

- **Overlooking the genuine human rights issues**: The continued overlap sometimes can create problems in timely and effectively managing the human rights violations. The experience shows that the fight for jurisdictions and reluctance in handling the issue has been a barrier to effectively monitor the human rights violation issues. Sometimes there is also an experience of having differences even in the reporting of the same incident which again contributes in weakening the situation of human rights and more importantly the trust and confidence of people towards it. In one of the serious human rights issues of dalit woman, there were two concerns raised by the civil society workers; i) the separate timing of the monitoring from different commissions and ii) the variance in the reporting. This has in fact, created a lot of confusion and distrust among the people. Therefore, the coordinated approach to foster joint efforts can be an instrument to ensure the rights of people at large.

- **Political ego:** As mentioned above, all the commissions established under the constitution are the constitutional bodies. Though the NHRC has been mandated more and semi-judicial authorities have been clarified, there are overlapping mandates given to other constitutional commissions and it seems that they are also the human rights watchdog for specific rights. And there is nothing mentioned in

the constitution which says that the NHRC is an umbrella institution and requires to coordinate with other institutions of human rights. The same constitutional status will create an ego among these all. Even this can be an issue in the partnership.

- **Confusion/uncertainty:** The lack of continued coordination, will largely affect the trust of people towards the credibility of commission. And it will also create confusion even among the complainants. More critically, it will weaken the rule of law and nurture impunity. People should have clear understanding and awareness about the mechanism.

Way forward

Given the important role in promoting ESCR, addressing the long standing human rights issues and the SDG agenda itself, the NHRIs need to have a robust strategy to collaborate with each other and enhance partnership for the sake of wellbeing of people at large. Hence below actions are to be taken into account to strengthen partnership in this regard.

- **Normative frameworks:** The draft bills for other similar commissions are underway. The bills more or less have included the provisions for monitoring human rights violations at the community levels in addition to other promotion and advocacy related mandates for the protection and promotion of collective rights. The relationship of such commissions with each other has clearly to be mentioned in the bills. However it seems that the draft bills are not fully open on it. Hence, a strong advocacy and joint work would be required to make sure that the draft bills would have something specific in relation to the coordination. Since the drafting of for the NHRC as per the changed context is not yet initiated, it could be the right time that the NHRC takes lead to specify its role as an umbrella institution to enhance coordination and collaboration with all other commissions.

- **Partnership and cooperation:** Even if there is no normative framework, the partnership can still be fostered in the area of policy advice and treaty monitoring. It can be done either by having memorandum of Understanding (MOU) or through working and operational modalities as mentioned below. In developing alternative reports on UPR and treaty body recommendations, there should be a good partnership among all the commissions and given the wide range of authorities the NHRC has been enjoying, it has to take the lead.

- **Joint monitoring framework:** The joint monitoring mechanisms need to be developed to undertake the monitoring and investigation of the relevant issues/human rights violations. Instead of having separate monitoring on the same issue, the establishment of a consolidated approach is important. The joint monitoring framework should be represented by all the key and like-minded commissions and also supervised by the commissioners. The issues need to be looked after jointly and necessary recommendations should be released in a coordinated manner. There is a good practice that some of the commissions have been practicing at the moment in Nepal. The Joint Monitoring Group

(GMG)[226] formed in the leadership of NDC has been an effective platform to collectively address the common human rights issues.

- **Joint studies and review:** The research and studies are the grey area for partnership. The policy advice based on the research can be effective to ensure that socio-economic and collective rights. As the socio-economic and collective rights require continued studies and review of the situation as well as implementation of policies. To better perform this task of assessing the situation in an objective manner, the studies play a very significant role. Hence there should be joint research and studies. Such studies could be the effective basis to develop plans and programmes. More importantly, the references for developing national indicators. Furthermore, the studies can also be useful to develop disaggregated information. In this inception period where the discourse is just initiated to have coordination, the NHRC should take the lead to conduct cooperative research activities with each of the commissions to address the specific, entrenched problem each was established to address, leading to a joint publication and series of booklets and recommendations.

- **Focal points or the partnership unit:** The NHRC requires the lead to assign the senior officials of the commission to look after the partnership with other commissions. Even one of the commissioners can also be assigned at the political level to coordinate with all the other commissions to collectively look after the issues. The focal person should be empowered to conduct continued meetings and interactions. The other commissions will also have an important role in doing the same. A need of having a concrete reporting structure for the commissioners and the focal points is very much essential in this regard.

- **Outreach strategies:** The common outreach strategy would also be the best tool to encourage the partnership. The outreach strategy should outline the areas and modality for the coordination and collaboration. The outreach can benefit the NHRIs by reaching out to the people and strengthening the common framework to collectively address issues of human rights issues.

- **Integrated Human Rights Strategy:** Sector wise approach could be an effective way for ensure complementarity in the area of human rights as well. At least among the diverse national human rights institutions, the common human rights strategy can be a good tool. There are a number of advantages to it. One of them is to avoid duplication of the mandates as well as resources and second one is to promote complementarity with each other and consolidate the diverse efforts. In addition, it can also help the development partners to consolidate their support for the protection and promotion of human rights. As such as an umbrella institution of human rights, the NHRC in Nepal can play a significant role to initiate a discourse and common agenda.

Conclusion

[226] Joint Monitoring Group is led by the NDC and represented by the NWC, NHRC and other key government agencies.

The NHRC operates in the context of competing, constitutionally authorized human rights bodies, some of which are responding to new categories of rights in particular ESCR as well as collective rights recently adopted by Nepal. It seems that six other commissions (NDC, NWC, NMC, and National Tharu Commission, National Commission for IPs and Ethnic Nationalities, National Madhesi Commission etc) also envisage to look after the promotion and protection of the rights of communities/groups who have systematically been excluded and marginalized.

The constitution has recognized NHRC as the umbrella institution of human rights alongside six other commissions established as the constitutional bodies. Although there is a provision which talks about the linkages of other commissions with federal structure, there is nothing specified in the constitution or any regulations made regarding formal linkages/interface of the NHRC with other commissions. The possible overlap in the jurisdiction and non-mentioning of any linkage will directly affect the enforcement and implementation of ESCR along with the group rights. This potential will undoubtedly lead to jurisdictional conflict between the various bodies. The NHRC has also to increase the direct interface with the transitional justice mechanisms, which were established to look at past abuses in the conflict era. However due to the lack of their strong compliance with the Supreme Court decisions and the human rights standards, the conflicted affected populations are not much encouraged to approach these commissions. These mechanisms are non-judicial organs that investigate past human rights violations. They have a restricted thematic mandate and, unlike NHRIs, they are not permanent. NHRIs can support truth commissions by demanding their establishment and independence and by collecting and providing relevant information for the investigation of large-scale human rights violations.

As a result, the various Commission and the NHRC in particular are not able to respond to the tasks envisaged by the current laws. Impunity is yet to be addressed. There are numbers of culprits yet to be convicted and numbers of affected persons yet to get the compensations. This paper will examine the challenges of protection faced by the NHRC in this competitive environment, the jurisdictional pitfalls and select issues of critical importance to peace in Nepal in order to demonstrate the aforementioned pitfalls.

In order to better respond to the issues of group and collective rights including ESCR, all the commission should complement each other. They should have either a focal person or the focal department to look after each other. At the functional level, the joint monitoring framework and joint strategic plan could also be a good avenue to avoid overlap and strengthen complementarity. Given the nature of the issues of ESCR, collective rights and rights of poor and vulnerable groups, the joint intervention could be the strong approach to collectively address the long standing human rights issues.

Bridging Gaps and Hopes: Malaysia's National Human Rights Commission and Rights Related to Sexual Orientation, Gender Identity, and Expression of Sex Characteristics (SOGIESC)

Henry Koh
Fortify Rights

Abstract

As we approach this major historic milestone in celebrating the 50th anniversary of ASEAN's founding, the newly established ASEAN Economic Community envisages to continue fulfilling its ambition in advancing the breadth of economic integration and growth across the region. In contrast, the same echoes of advancement in economic development across Southeast Asia is hardly paralleled in ASEAN's commitments towards human rights, especially under the ambit of sexual orientation, gender identity and expression of sex characteristics (SOGIESC) matters. This paper aims to analyze the successful milestones, best practices, and challenges of the National Human Rights Institutions (NHRIs) across various Southeast Asian countries in their efforts to promote and protect SOGIESC rights – with a particular focus on Malaysia. As an economic powerhouse in the region, Malaysia has been particularly poor in recognizing SOGIESC rights. While the international community has progressed considerably in terms of putting SOGIESC related rights on the platforms of human rights protection mechanisms, Southeast Asian countries, by far and large, remain firmly in opposition to this trend. On the other hand, the sensitivity of LGBTI rights in domestic spheres remains high in, at the very least, certain sections of society in every ASEAN member state. Different patterns of persecution of LGBTI people at the national level leaves sexual minorities at risk to discrimination and deprivation of fundamental rights. Weak enforcement of protective laws and high levels of stigma also pose a significant challenge to LGBTI individuals being able to freely claim their rights. This also constitutes an impediment to the progress of HIV prevention, as stigma and criminalization impacts a person's ability to take charge of their health or access health services. Since the advent of the Yogyakarta Principles, there are a growing number of initiatives from NHRIs in Southeast Asia to tackle the rights violations and discrimination faced by people of diverse SOGIESC. However, there are still members of various SOGIESC communities that lack proper understanding of the complaint systems of their NHRIs. In short, there are promising potentials for Southeast Asian NHRIs to have greater appreciation and understanding for the rights and risks of people of diverse SOGIESC.

Introduction

Malaysia is among 13 countries identified by the World Bank's Commission on Growth and Development to have recorded an average increase in Gross Domestic Product (GDP) of more than seven percent per year for 25 consecutive years or more.[227] This demonstrates that Malaysia

[227] World Bank (2008) *The Growth Report: Strategies for Sustained Growth and Inclusive Development*

can grow and change in ways intended to benefit society and the region. Unfortunately, Malaysia's human rights record has not similarly developed, especially with regard to rights related to sexual orientation, gender identity, and expression of sex characteristics (SOGIESC).

The issue of lesbian, gay, bisexual, transgender, intersex (LGBTI) rights remains polarizing in Malaysia. Sexual minorities face discrimination and violations of their fundamental human rights. Malaysian authorities have failed to enforce protective laws or protect the rights of LGBTI persons, and high levels of anti-LGBTI stigma pose significant challenges to LGBTI individuals in their efforts to claim their rights. Moreover, the government's failure to promote and protect rights related to SOGIESC impedes prevention of sexually transmitted diseases, including HIV, as stigma and criminalization impacts a person's ability to take charge of their personal health or access health services when needed.

Since the advent of the 2006 Yogyakarta Principles — a set of human rights principles relating to SOGIESC intended to provide guidance on preventing violations and protecting the rights of LGBTI people[228] — there are a growing number of initiatives from National Human Rights Institutions (NHRIs) in Southeast Asia to tackle rights violations and discrimination faced by people of diverse SOGIESC.[229] In comparison with NHRIs in other Southeast Asian nations, Malaysia's National Human Rights Institution, known in Malay as *Suruhanjaya Hak Asasi Manusia Malaysia* (SUHAKAM), has at times struggled to take up SOGIESC initiatives due to political and cultural impediments, but SUHAKAM has shown signs of significant improvement in this area. This paper analyses SUHAKAM's efforts to respond to SOGIESC issues, discusses the challenges the rights body faces, and provides recommendations for expanding SOGIESC rights in Malaysia.

UNDERSTANDING SOGIESC

SOGIESC are the fundamental identifiers of a person's personality or identity. Scholars and human rights experts agree that the freedom to self-define one's SOGIESC is one of the most basic aspects of self-determination, dignity, and freedom.[230] Sexual or gender identification is intrinsic to every person's identity, regardless of whether that identification manifests in physical or other ways.

The United Nations (UN) treaty monitoring bodies have spoken out many times against violations of a person's right to physical and bodily integrity, self-determination, and autonomy. For example, the Concluding Observations from the Committee on the Rights of the Child,[231] the

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[228] International Commission of Jurists and International Service for Human Rights (2006) *Yogyakarta Principles: Preamble.*

[229] Asia Pacific Forum, UNDP Asia Pacific (2016) *Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics,* Thailand.

[230] International Commission of Jurists and International Service for Human Rights (2006) *Yogyakarta Principles: Principle 3*.

[231] Committee on the Rights of the Child, (2015) *Concluding Observations: CRC/C/CHE/CO/2-4, para. 43b*, Switzerland.

Committee on Economic, the Committee on Social and Cultural Rights,[232] and the Committee on the Rights of Persons with Disabilities[233] have provided detailed recommendations with regard to the treatment of sexual minorities.

In recent years, a consensus has emerged on using the term "sex characteristics," expanding the original terminology from SOGI (sexual orientation and gender identity) to SOGIESC (sexual orientation, gender identity and sex characteristics). This shift is intended for the protection and inclusion of intersex individuals.[234] Susan Ryan, Age Discrimination Commissioner at the Australian Human Rights Commission explained the importance of using correct terminology to describe a person's identity or characteristics:

> I want to acknowledge that terminology can have a profound impact on a person's identity, self-worth and inherent dignity. The use of inclusive and acceptable terminology empowers individuals and enables visibility of important issues. The [Australian Human Rights] Commission supports the right of people to identify their sexual orientation, sex and gender as they choose. The Commission also recognizes that terminology is strongly contested.[235]

LEGAL AND CULTURAL ATTITUDES TOWARDS SOGIESC IN MALAYSIA

In Malaysia, intolerance towards issues related to SOGIESC is reflected in the predominant use of anti-LGBTI legislation.[236] In a multicultural and ethnically diverse society that is largely socially conservative, Malaysia's strong religious and faith traditions have neglected such diversity;[237] leaving and allowing LGBTI people to be ostracized or punished. In the last few decades, attacks on LGBTI people are largely happening in the context of Malaysia's emerging politicization of Islam.[238] This has manifested, for example, in medical diagnoses that referred to sexual

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[232] Committee on Economic, Social and Cultural Rights, (2011) *Concluding Observations E/C.12/DEU/CO/5, para. 26,* Germany.

[233] Committee on the Rights of Persons with Disabilities (2015) *Concluding Observations: CRPD/C/DEU/ CO/1, paras. 37-38,* Germany.

[234] International Lesbian and Gay Association (2015) *How to be a Great Intersex Ally: A Toolkit for NGOs and Decision Makers, p23,* Switzerland.

[235] Presentation to the Homosexual Histories Conference (2014) – *Pride History Group, November 2014; at* www.humanrights.gov.au/news/speeches/homosexual-histories-conference-2014-pride-history-group-0

[236] UNDP (2016) *Leave no one behind: Advancing social, economic, cultural, and political inclusion of LGBTI people in Asia and the Pacific,* Thailand

[237] Mohd Izwan bin Md Yusof, Muhd Najib bin Abdul Kadir, Mazlan bin Ibrahim & Tengku Intan Zarina (2014) *Malaysian Muslim Gay and Lesbian Community's Perspective on The Concept Of Domestic Partnership and Marriage In The Quran*

[238]Thi Thu Huong Dang (2005) *A Comparative Analysis of the Strategies the New Order and UMNO Regimes in Indonesia and Malaysia adopted to deal with Islam in 1965 - 1998*

orientation and gender variations as illnesses that could or should be cured or fixed.[239] Such approaches are inconsistent with medical science, medical ethics, and international human rights standards.[240]

There is a deeply rooted sociological assumption in Malaysia that individuals are born either male or female and are then attracted to a person of "the opposite" sex. For example, someone born with what is considered to be a "male body" is expected to grow up and identify as a man, have a masculine gender expression, and be solely attracted to women. Similarly, someone born with a "female body" is expected to identify as a woman, be feminine, and only be attracted to men.[241]

Such flawed expectations fail to reflect the lived realities of LGBTI people in Malaysia—or anywhere, for that matter—or uphold their fundamental human rights to dignity, equality, and freedom.[242] These rigid stereotypes perpetuate gender inequalities. When false distinctions determine heterosexuality as superior (heteronormativity), they contribute to the pervasive marginalization and discrimination of LGBTI people.

Ironically, anthropological studies show that diverse sexual minorities, including the third gender (*hijra*), were accepted as societal norms during the era of the ancient Malay Sultanates empire.[243] Anthropologist Michael Peletz documented historical texts from the 15th to 19th centuries that testified to the existence of "androgynous" royal priests or courtiers, both male and female at that time:

> The evidence indicates the existence in the Malay Peninsula in the late pre-modern and modern era of a pre-Islamic class of male-bodied priests or courtiers, referred to by the term *'sida-sida'* … who were said to be involved in 'androgynous behavior,' such as wearing women's clothes and possibly performing tasks generally undertaken by women.[244]

The criminalisation of LGBTI people (especially towards men who have sex with men) under federal laws did not take place in British Malaya[245]—when the Malay Peninsula States were still

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[239] APTN, USAID, UNDP, WHO (2010) *Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities in Asia and the Pacific*.

[240] WHO (2014) *Proposed declassification of disease categories related to sexual orientation in the International Statistical Classification of Diseases and Related Health Problems (ICD-11),* United States of America

[241] Theresa W. Devasahayam (2009) *Gender Trends in Southeast Asia: Women Now, Women in the Future*

[242] Asia Pacific Forum, UNDP Asia Pacific (2016) *Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics,* Thailand.

[243] Michael Peletz, (2009) *Gender Pluralism: Southeast Asia Since Early Modern Times, pp. 58-59*, New York.

[244] *Ibid, p 4.*

[245] Osborne, Milton (2000) *Southeast Asia: An Introductory History. Allen & Unwin.* UK.

part of the British colony—until 1936,[246] when British colonial authorities introduced the 19th century Indian Penal Code in all 42 then British colonies.[247] In Section 377, British Malaya criminalised sexual acts between homosexuals with a maximum sentence of up to 20 years in prison. This provision remains in Malaysia's current Penal Code (Act 574).[248]

Criminalisation under Syariah laws towards sexual minorities also did not take place in Malaysia until the 1980s. In 1968, the National Council of Islamic Affairs was established at the behest of the Conference of Rulers – a council comprising the nine rulers of the Malay states, and the governors or *Yang di-Pertua Negeri* of the other four states out of the 14 states in Malaysia. It was established under Article 38 of the Constitution of Malaysia, and is the only such institution in the world – in recognizing the need for a national body to streamline the development and advancement of Islamic affairs. In 1982, the Fatwa Committee under the Council learned about sex reassignment surgeries (SRS) for transgender people that were carried out at the University of Malaya Hospital. The committee immediately issued a *fatwa* — an Islamic legal pronouncement, issued by experts in religious law such as a Mufti or Imam, pertaining to a specific issue, usually at the request of an individual or judge to resolve an issue where Islamic jurisprudence is unclear[249] — banning the SRS.[250] Although the Fatwa Committee has no legal authority, the hospital's SRS facilities shut down in 1983 due to such pressure.[251]

The issuance of Islamic *fatwas* led to development of Syariah Criminal Offences Enactments in all 14 states[252] in Malaysia and the Federal Syariah Criminal Offences Act 1997 – religious legislation that criminalizes the activities of sexual minorities. In 1996, the restructuring of Syariah courts throughout Malaysia took place to establish the Syariah Judiciary Department and Courts in all states.[253] More recently in 2008, the Fatwa Committee issued a ruling prohibiting "tomboy behaviour" in an apparent attempt to prevent lesbianism among Muslims.[254] The Syariah Criminal Enactments/Acts had already criminalised sexual acts between two females.[255] However,

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[246] Vanja Hamzic (2015) *Sexual & Gender Diversity in the Muslim World: History, Law and Vernacular Knowledge*

[247] Cheong-Wing Chan, Barry Wright and Stanley Yeo (2011) *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform,* UK

[248] Laws of Malaysia (1976) *Act 574: Penal Code, S377,* Malaysia.

[249] Yew-Foong Hui (2013) *Encountering Islam: The Politics of Religious Identities in Southeast Asia, p129,* Malaysia.

[250] Yik Koon Teh (2001) *Mak Nyahs (Male Transsexuals) in Malaysia: The Influence of Culture and Religion on their Identity,* Malaysia.

[251] JAKIM (1982) *Fatwa Issued by the National Fatwa Council Prohibiting Sex Reassignment Surgery,* Malaysia.

[252] Syariah Judicary Department Malaysia (JKSM): *http://www.jksm.gov.my/,* Malaysia.

[253] Syariah Courts (Criminal Jurisdiction) Act 1985, Malaysia.

[254] The Star (2008) *Fatwa on Tomboys; http://www.thestar.com.my/news/nation/2008/10/24/fatwa-on-tomboys/,* Malaysia.

[255] Tan Beng Hui (2008) *Moral and Sexual Offences in Malaysia: The Role and Impact of the Syariah Criminal Offences Enactments. Paper presented at the Second Conference of the Kartini Network, Bali,* Indonesia.

it is important to note that while Muslims in Malaysia are subjected to both federal criminal laws and state-level Syariah enactments, non-Muslims in Malaysia are only subjected to the federal criminal laws.[256]

Intolerance towards SOGIESC diversity in Malaysia escalated prior to the turn of the millennia when anti-LGBTI legislation became pervasive in the country's dualistic legal system. Moreover, local media outlets singled out transgender identities in anti-LGBTI discourses, derogating LGBTI persons as suffering from a social illness.[257]

The attitude of the Malaysian government towards LGBTI persons has also been largely and consistently negative. For example, in 2005, the Royal Malaysia Navy Chief Mohd Anwar Moh Nor stated that the Navy would never "condone unnatural sex acts" and accept homosexuals into its fold.[258]

On 18 August 2015, during an Islamic conference in Selangor, Prime Minister Najib Razak pledged that his administration would not defend human rights issues that are not within the "context of Islam," citing LGBTI advocates as an example:

> Although universal human rights have been defined, we still define human rights in the country in the context of Islam and the Syariah (law). And even if we cannot defend human rights at an international level, we must defend it in the Islamic context. Liberal groups like LGBT advocates are trying to dominate the majority of the country's population. These groups are hiding behind the façade of human rights to approve their acts, which deviate from Islamic teaching.[259]

The Malaysian Prime Minister further added that the country would only uphold human rights within the confines of Islam – in line with the Islamic teaching of balance and *wasatiyyah* (moderation).[260]

Dismayed by the narrow approach of the government, the then SUHAKAM chairperson Tan Sri Hasmy Agam said in a press statement:

> The commission therefore regrets the many myths and misunderstandings that have sprung up on the concept of human rights, and in particular, the construal and superficial

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[256] Laws of Malaysia (1965) *Act 355: Syariah Courts (Criminal Jurisdiction) Act, section 2,* http://www.agc.gov.my/Akta/Vol.%208/Act%20355.pdf, Malaysia.

[257] International Federation of Journalists (2015) *Country Report: "Media and Gender in Malaysia" Part of the IFJ Media and Gender in Asia-Pacific Research Project,* http://www.ifj.org/uploads/media/MALAYSIA.pdf

[258] Today Online (2005) *No Homosexuals in Malaysian Navy, Says Chief, 25 February 2005.*

[259] The Washington Blade (2015) *Malaysia Prime Minister: Government Will Not Defend LGBT Rights,* http://www.washingtonblade.com/2015/08/21/malaysian-prime-minister-government-will-not-defend-lgbt-rights/, Malaysia.

[260] Malay Mail Online (2015) *Najib: Putrajaya will defend human rights, but only in the context of Islam,* http://www.themalaymailonline.com/malaysia/article/najib-putrajaya-will-defend-human-rights-but-only-in-the-context-of-islam, Malaysia.

> understanding of human rights in Malaysia. The commission calls on the government to emulate the best practices of other Muslim countries with regard to the advancement of human rights. The challenges of promoting and protecting human rights in Malaysia does not end with the adoption of a declaration or the establishment of a human rights commission.[261]

It is not surprising that during the UN's Universal Periodic Review (UPR) of Malaysia[262] in 2008 and 2013, the Government of Malaysia refused to accept any of the recommendations made with regard to SOGIESC issues.[263]

SUHAKAM AND SOGIESC

Civil society groups in Malaysia, particularly those working on HIV/AIDS, SOGIESC, and human rights issues, fear that the propagation of repulsive attitudes towards SOGIESC diversity will lead to increased hate crimes in Malaysia.[264] Concerned organizations have forwarded such concerns regarding LGBTI issues to SUHAKAM, putting SUHAKAM in a critical position to bridge the gap between the government and civil society.[265]

SUHAKAM is established through the Human Rights Commission of Malaysia (SUHAKAM) Act 1999. The Act provides a broad mandate to advise the Government in human rights matters and establishes a commission comprising a maximum of 20 members.[266] Under the Paris Principles—the guidelines for the establishment and effective operations of NHRIs in line with international standards[267] — a NHRI should be able to operate with independence from political direction or interference.[268] However, SUHAKAM fails to meet the international standards set by the Paris Principles due to its lack of independence. For example, SUHAKAM's commissioners are appointed by the *Yang di-Pertuan Agong* (King of Malaysia) on the recommendation of the

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[261] SUHAKAM (20 August 2015) *Press Release: SUHAKAM Opines that Fundamental Rights and Universal Freedoms are an Integral Part of Islam,* Malaysia.

[262] UN Human Rights Council (2009 - 2013) *Human Rights Bodies: UPR – Malaysia, http://www.lan.ohchr.org/EN/HRBodies/UPR/Pages/MYSession17.aspx,* Switzerland.

[263] UN Human Rights Council (2013) *Report of the Working Group on the UPR – Malaysia, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/188/48/PDF/G1318848.pdf?OpenElement,* Switzerland.

[264] Justice For Sisters (2017) *Brief Media Analysis, https://justiceforsisters.wordpress.com/2017/03/01/brief-media-analysis-sameeras-case-justiceformeera/;* 76 Crimes (2017) *Malaysian group teaches how to report on trans people, https://76crimes.com/2017/04/28/malaysian-group-teaches-how-to-report-on-trans-people/*

[265] SUHAKAM (2013) *Report of the Complaints and Inquiries Working Group: LGBT,* Malaysia.

[266] Laws of Malaysia (1999) *Act 597: Human Rights Commission of Malaysia Act, Section 5(1)*

[267] OHCHR (1993) *Principles relating to the Status of National Institutions (The Paris Principles), Adopted by General Assembly Resolution 48/134 of 20 December 1993,* Switzerland.

[268] United Nations Commission on Human Rights resolution 1992/54 and General Assembly resolution 48/134.

Prime Minister and funded under the discretion of the Ministry of Finance on an annual basis.[269] Under the Paris Principles, the funding of NHRIs should "not be subject to financial control which might affect its independence." Control of SUHAKAM's budget by the Ministry of Finance is problematic as demonstrated in November 2015 when the Ministry reduced SUHAKAM's budget by almost 50 per cent for the year 2016. During that same year, the Asian NGO Network on National Human Rights Institutions recommended an increase in SUHAKAM's budget to ensure the effectiveness of the Commission.[270]

SUHAKAM's lack of independence as well as political and societal pressures potentially limit its ability to fully promote LGBTI rights and protect LGBTI persons. SUHAKAM did not prioritise LGBTI issues in its early work due to an apparent adherence to "cultural" and "religious" relativism. For example, in 2009, after attending the Asia Pacific Forum Workshop on how NHRIs can engage the Yogyakarta Principles in their mandates, SUHAKAM stated:

> Within the Malaysian context, SUHAKAM emphasised that the position of Islam as the official religion of the Federation, together with the whole society's religious, moral and cultural sensitivity, must be given due respect in determining the extent of LGBT rights as well as the non-LGBT. Liberal steps taken by some States may not work for others, as cultural and religious diversity significantly mould the society's standard of tolerance and acceptance towards certain practices and actions. Article 29(2) of the UDHR also recognises cultural diversity of a society in the application of human rights principles. The State-legislated Syariah laws, applicable to Muslims, lay down certain prohibitions based on Islamic moral values, preserving teachings of Islam. Once again such restrictions are not violation of human rights and whether in the context of Syariah laws or the public law, no rights are absolute. The prohibitions are with purposes and do not infringe any basic rights of the LGBT as human beings.[271]

More recently, SUHAKAM adopted a cautious approach to engaging in LGBTI-related work, which may be viewed as a strategic method to support the work of LGBTI activist organizations and slowly chip away at cultural and other factors resulting in violations of LGBTI rights. This lack of prioritization is evident in SUHAKAM's annual reports. While SUHAKAM's annual reports highlight many critical violations of human rights in the country that require immediate action by the state, LBGTI violations are mentioned in only four of 17 total reports by SUHAKAM.[272]

By 2016, SUHAKAM made progress and suggested that LGBTI rights should not be trumped by

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[269] Laws of Malaysia (1999) *Act 597: Human Rights Commission of Malaysia Act, Section 5(2), 19 (1)*

[270] ANNI, FORUM-ASIA (2016) *Report on the Performance and Establishment of National Human Rights Institutions in Asia, p14.*

[271] SUHAKAM's Interventions at the Workshop on the Role of the NHRs in the Implementation of The Jogjakarta Principles (2009) www.asiapacificforum.net/issues/sexual_orientation/downloads/apf-regional-workshop-may-2009/Malaysia.doc

[272] SUHAKAM Publications*: (2010) Annual Report, pp16 & 67; (2011) Annual Report, p76; (2015) Annual Report, pp 44-45, 107 & 144; (2016) Annual Report, p27;* Malaysia.

cultural and religious intolerance. Then Chairperson of SUHAKAM, Tan Sri Hasmy Agam described LGBTI rights as a challenging issue that the Malaysian society will need to deal with seriously and carefully. He said:

> This is a highly sensitive issue in Malaysia, which must be handled with great care and prudence so as not to affect the progression of human rights agenda in the country. A national discussion has to be had to understand and promote a degree of tolerance towards the (LGBTI) community. The Commission will continue to handle this challenge through greater dialogue and engagement with the parties concerned in the hope that over time, there would be greater understanding or tolerance resulting in fewer, if not zero incidence of harassment and intimidation and better respect for personal liberties and privacy. I must admit this is one of the most difficult issues to be handled by the Commission, with no easy solution in sight. [273]

SUHAKAM Officer Nurul Hasanah confirmed to Fortify Rights that the current Commissioners' are now more concerned or at least emphatic towards SOGIESC issues:

> SUHAKAM started looking into LGBT issues back in 2010-2011, when the then Commissioner Datuk Khaw Lake Tee brought up the discussion with the other commissioners after attending forums on SOGIESC rights. In 2014, when Human Rights Watch published their "I am Scared to be A Woman" report, SUHAKAM was asked to hold a public inquiry into the violations of transgender persons. However, the Commission decided that the lack of complaints from the transgender community did not serve as a strong ground for the inquiry. This is understandably so, as the transgender community would not dare to come forward to SUHAKAM – seeing the Commission as another government body. The institutionalisation of religious laws is causing the situation to regress, making it difficult for SUHAKAM to confidently work on SOGIESC issues. [274]

Recognizing the challenging environment in Malaysia with regard to SOGIESC issues, SUHAKAM has undertaken several commendable initiatives in recent years to address specific SOGIESC-related concerns and rights violations. For example, in 2014, SUHAKAM adopted the right to health in prison as one of its two thematic priority areas,[275] and through its work on ensuring that the conditions of confinement in Malaysia are constitutional and consistent with rights to health, safety and human dignity, SUHAKAM established a monitoring program that included examining the treatment of transgender people in detention. This work led to calls to ensure that inmates with diverse gender identity are placed in the same cell, separate from other inmates.[276] SUHAKAM highlighted the outcome of its monitoring in its 2015 Annual Report, finding that there is no standard policy or basic ethical standards when it comes to treating

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[273] The Malaysian Insider (3 January 2016) www.themalaysianinsider.com/malaysia/article/were-turning-back-human-rights- clock-if-nsc-bill-becomes-law-says-hasmy

[274] Fortify Rights interview with Ms. Nurul Hasanah, SUHAKAM Officer, 25 May 2017, Malaysia.

[275] SUHAKAM (2014) *Areas of Work: Right to Health in Prison,* Malaysia.

[276] *Ibid, p13.*

transgender prisoners.[277]

SUHAKAM has carried forward its work to ensure the treatment and conditions of detention for transgender prisoners are in line with international standards. For example, on 30 May 2017, SUHAKAM demanded the Prisons Department to set up a "standard operation procedure" (SOP) on the treatment of transgender prisoners to ensure their safety, and that they are treated fairly and lawfully.[278] This recommendation stemmed from SUHAKAM's finding in its 2017 publication *The Right to Health in Prison: Results of A Nationwide Survey and Report* that transgender people are at substantially high risk of assault or self-harm in the Malaysian prison environment.[279] SUHAKAM found:

> [T]here is no standardised policy concerning the placement of transgender persons in prisons. As it stands, decisions over whether to send a prisoner (prisoners) to male or female prisons depend on their legally recognised gender, which is determined through their birth certificate or identity card.[280]

As a result, SUHAKAM recommended that prison authorities produce a policy framework outlining how transgender prisoners could be assured of their safety within the prison environment and consider training selected staff to address their special needs in prisons.[281]

SUHAKAM also monitored court proceedings involving SOGIESC issues. Although the Commission will not formally intervene in court proceedings, it will monitor cases of concern,[282] which indicates cases that raise important human rights concerns.[283] For example, in 2015 SUHAKAM monitored a case concerning the validity of Section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 that criminalises any male person who "wears women's clothing" or "poses as a woman."[284]

On 27 January 2015, during the leave proceedings in the case of *Mohd Juzaili bin Mohd Khamis v Kerajaan Negeri Sembilan*, where a trans woman was charged under the same discriminative state legislation, SUHAKAM attended the leave proceedings as an observer, in accordance with its

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[277] SUHAKAM (2015) *Annual Report, Chapter 1: Report of the Policy, Law and Complaints Group, Right to Health in Prison, pp21-22,* Malaysia.

[278] Free Malaysia Today (30 May 2017) *SUHAKAM calls for SOP on transgender prisoners, http://www.freemalaysiatoday.com/category/nation/2017/05/30/suhakam-calls-for-sop-on-transgender-prisoners/,* Malaysia.

[279] SUHAKAM (2017) *The Right to Health in Prison: Results of A Nationwide Survey and Report,* Malaysia

[280] SUHAKAM (2017) *The Right to Health in Prison: Results of A Nationwide Survey and Report, p.78,* Malaysia

[281] SUHAKAM (2017) *The Right to Health in Prison: Results of A Nationwide Survey and Report, p.82,* Malaysia

[282] *Ibid, p8.*

[283] Paris Principles (1991) *Princple 6.3: Monitoring functions.*

[284] Syariah Justice Department (1992) *Syariah Criminal (Negeri Sembilan) Enactment 1992, Section 66,* Malaysia.

commitment that "all human beings, regardless of their sexual orientation, should be able to enjoy the full range of human rights without exception."[285] The Federal Court granted leave to appeal and SUHAKAM continued to monitor the case and attended the hearing on the merits in August 2015 as an observer.[286]

However, the Federal Court in October 2015 unanimously overturned the decision by the Court of Appeal on a technical ground—that the legal challenge to the constitutionality of any law should be made directly to the Federal Court as the matter would involve an interpretation of the Federal Constitution.[287] As a result, the law still stands.

Considering the sensitivities surrounding LGBTI issues in Malaysia, SUHAKAM has strategically adopted a step-by-step approach to meet with various stakeholders, including religious leaders and civil society groups, to gain an understanding of the different perspectives on SOGIESC. For example, in August 2010, SUHAKAM organised a meeting with various Islamic groups in order to gain better understanding of the Islamic perspective on SOGIESC issues, such as same-sex intercourse, cross dressing, imitation of the opposite gender, and gender re-assignment.[288] The participants also discussed the application of the principles of non-discrimination under the Federal Constitution with regards to LGBTI people.

In November 2010, SUHAKAM also met with LGBTI individuals and civil society groups with the objective of engaging directly with members of the LGBTI community to comprehend the challenges and violations that they face.[289] SUHAKAM also discussed violations against sexual minorities during a roundtable discussion on "Gender Equality: Unaddressed Women's Rights Issues" organized with the Selangor Community Awareness Organisation (EMPOWER).[290] In January 2015, SUHAKAM further engaged civil society groups to discuss issues related to Section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 (concerning prohibition of males posing as females) and other related issues affecting the criminalisation and marginalisation of LGBTI people.[291]

SUHAKAM has demonstrated a continued commitment to engage on SOGIESC issues despite social, political, and religious challenges in Malaysia. For example, in 2016, the Commission agreed to undertake a baseline study to obtain information on discrimination faced by transgender persons in the country. The Commission interviewed 100 respondents, including transwomen and transmen, and held structured interview sessions whereby respondents gave detailed information

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[285] SUHAKAM (2012) *Annual Report, p.110,* Malaysia.

[286] APF (2015) *SUHAKAM in Briefing document for the workshop on the role of National Human Rights Institutions in promoting and protecting the rights of LGBTI in Asia and the Pacific, pp. 15-16.*

[287] Human Rights Watch (2015) *Malaysia: Court Ruling Sets Back Transgender Rights*

[288] SUHAKAM (2010) *Annual Report,* Malaysia.

[289] *Ibid, p15.*

[290] SUHAKAM (2011) *Annual Report,* Malaysia.

[291] SUHAKAM (2015) *Annual Report,* Malaysia.

on matters of their personal backgrounds as well as related to their rights to employment, health care, education, housing, and dignity.[292] The research is expected to be complete within the next year.[293] SUHAKAM Officer Lau Sor Pian, who oversees the project, told Fortify Rights:

> The research is targeted to be completed by next year. Due to resources and budget restraints, we are only able to focus the study in Kuala Lumpur and Selangor. Clearly, there is a gap to be addressed as this pioneer study will not reflect the situation of transgender people across the country. Nonetheless, it is important for the Commission to make the report public to raise awareness on the dire need to address transgender rights.[294]

RECOMMENDATIONS

SUHAKAM has an indispensable role to play in promoting SOGIESC rights in Malaysia and regionally. As an authority mandated to promote and protect all human rights and identify specific groups at risk of human rights violations, SUHAKAM should continue to include LGBTI persons as a priority group to monitor. It should do everything in its power to avoid corrosive pressure from political and conservative religious factions who are committed to dismissing SOGIESC rights.

SUHAKAM should leverage regional engagement by working with SOGIESC dedicated groups like the ASEAN SOGIE Caucus (ACS),[295] which has fostered partnerships between ASEAN LGBTI civil society and NHRIs since its establishment in 2011. This would enable SUHAKAM to engage in research, advocacy, and educational experiences and develop positive working relationships with other NHRIs on SOGIESC issues in Southeast Asia.

On a domestic level, SUHAKAM should engage in strategic dialogue with law enforcement officers, government agencies and service providers, members of the judiciary, and religious leaders to develop and implement policies and programmes for the protection and welfare of LGBTI people.

As the power of media can make either a positive or detrimental impact, SUHAKAM should engage and educate local media outlets on SOGIESC issues to ensure proper use of terminology and non-derogatory terms and work with them in raising awareness of sexual minorities' rights.

SUHAKAM should also establish a special committee or inquiry to investigate abuse of power and violence against LGBTI persons by the public, law enforcement officers, and other government agencies.

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[292] SUHAKAM (2016) *Annual Report, Chapter 1: Research on Transgender, p 27,* Malaysia.

[293] Fortify Rights interview with Ms. Lau Sor Pian, SUHAKAM Officer, 25 May 2017, Malaysia.

[294] Fortify Rights interview with Ms. Lau Sor Pian, SUHAKAM Officer, 25 May 2017, Malaysia.

[295] Statement of Representatives of (2011) *ASEAN Civil Society Conference/ASEAN People's Forum to the Informal Meeting Between ASEAN Leaders and Civil Society,* Indonesia.

In line with its current research into discriminatory practices against the transgender community in Malaysia, SUHAKAM should broaden its research to evaluate Malaysia's existing laws and practices in relation to protections for LGBTI persons. Based on this analysis, SUHAKAM should work with the government to amend and bring problematic laws in line with international standards. SUHAKAM should also encourage and work with the Government of Malaysia to become a signatory of the Yogyakarta Principles 2006.

Mental Health and Human Rights in Indonesia: The Role of Komnas HAM

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Abstract

In recent years, Indonesia has sought to protect the rights of individuals with psychosocial disabilities through new and revised legislation, greater investment in community health organizations, and campaigns aimed to prevent discrimination against persons with severe mental illness. While the ratification of the Convention on the Rights of Persons with Disabilities (CRPD) in 2011, the passage of the Mental Health Act in 2014 and the enactment of Law No. 8 on Persons with Disabilities in 2016 have bolstered legal protections for individuals with both physical and psychosocial disabilities, the Indonesian National Human Rights Commission (Komnas HAM) has investigated human rights violations, recommended amendments to discriminatory laws and policies and produced research on the intersections of mental health and human rights. Nevertheless, protecting the rights of persons with psychosocial disabilities remains a challenge for Komnas HAM due to weak enforcement powers and widespread misconceptions about disabilities and disability rights. In this paper, I begin with an examination of the specific contributions Komnas HAM has made toward improving the rights of persons with psychosocial disabilities. Next, I identify three issues that have hampered the institution's mental health advocacy efforts—namely, its inability to enforce legislation; its ambiguous definitions of disability, mental health and human rights; and its uneven, inconsistent approach to mental health advocacy. In the third section of this paper, I offer a critique of Indonesia's Bebas Pasung campaign, which represents a disaggregated approach to mental health and human rights. I suggest that an over-emphasis on reporting and identifying cases of *pasung*—the practice of restraining persons with acute mental illness—has discouraged comprehensive discussions of mental health in Indonesian communities. I end with specific recommendations Komnas HAM can take to better serve individuals and families affected by psychosocial disabilities.

Komnas HAM and Mental Health

The Indonesian National Human Rights Commission (Komnas HAM) was established in 1993[296] with 'the function of monitoring, mediation, public awareness, and research on human rights, including implementation of international human rights norms in Indonesia' (Komnas HAM, 2016: 2). Although the institution's early years focused on criticizing police and military activities (Eldridge, 2002: 145), it has also supported the rights of marginalized groups through research, public discussions, training sessions and partnerships with civil society organizations and other government bodies. For Herbert (2008: 462), these activities are 'part of the process of educating the public, government and civil society on human rights issues'.

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[296] Jeff Herbert (2008: 461) notes that Komnas HAM 'was actually established prior to the legislation by Presidential Decree No 50 of June 1993, as a governmental auxiliary body' and has been referred to as 'Komnas HAM I' prior to Law No. 39/1999 and 'Komnas HAM II' post-1999.

Komnas HAM took on a more active role in supporting the rights of persons with disabilities with the development of the United Nation's Convention on the Rights of Persons with Disabilities (CRPD), which represents the 'first comprehensive and legally binding international framework for promoting the rights of people with mental and psychosocial disabilities' (Drew et al, 2011: 1665). Komnas HAM supported Indonesia's decision to sign the convention in 2007 and pushed for ratification, which was achieved in 2011. For Suharto et al (2016: 694-95), Indonesia's ratification of the CRPD 'reaffirmed the spirit on advocacy of the rights of people with disabilities' and has helped bring about 'a gradual shift in the societal tendency towards recognising and utilising the unique abilities of people with impairments' (2016: 695). In 2009, Komnas HAM met with disability activist groups to discuss appropriate, non-stigmatizing terminology for referring to persons with disabilities within official documents.[297] These meetings resulted in a Memorandum of Understanding (2010) that promoted *penyandang disibilitas* as the most preferable term (Edwards, 2014: 4).

In the early 2000s, disability rights activists called for the amendment of Law No. 4/1997 on Persons with Disabilities[298], which contained provisions they believed conflicted with the CRPD.[299] Komnas HAM contributed revisions, which eventually informed Law No. 8/2016 on Persons with Disabilities (*Ibid*., 5). However, this law has also been criticized for its failure to 'fully comply' (Human Rights Watch, 2017) with the UN CRPD. Other laws and policies directly violate the human rights of individuals with psychosocial disabilities, such as a regional election law, which bars persons with permanent mental illness from participating in elections (Irmansyah, 2017), and interdiction provisions, which deny persons with mental illness the right to make their own legal decisions (Colbran, 2010: 48). Disability rights activists have also criticized the 2014 Mental Health Act, which 'allows a family member or guardian to admit a child or an adult with a psychosocial disability without their consent to a mental health or a social care institution and without any judicial review' (Reese, 2016).

To combat these and other forms of discrimination against persons with psychosocial disabilities, Komnas HAM has urged the Indonesian government to ratify the Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP CRPD), which will 'strengthen the implementation and monitoring of the CRPD' (Nainggolan et al, 2016: 8-9). The OP CRPD will allow individuals to directly petition the international OP-CRPD Committee, which is composed of ninety-two member states, to investigate violations of their rights. In this way, the OP CRPD grants persons with disabilities 'alternative channels' for seeking justice (*Ibid*., 6).

Komnas HAM's Limitations

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[297] Nursyamsi et al (2015: 44-45) note that debate over proper terminology 'is still ongoing'.

[298] Edwards (2014: 4) takes issue with the translation of Law No. 4/1997 on 'Persons with Disabilities', claiming that 'a more accurate translation of the legislation – the title of which refers to *penyandang cacat* – is "Law No 4 of 1997 on the Handicapped"'.

[299] For example, Law No. 4/1997 is seen to promote a 'charity based' model of disability instead of the more commonly accepted 'social model.' See Edwards (2014) and Colbran (2010) for specific criticisms of Law No. 4/1997.

Beyond issuing legal recommendations, Komnas HAM processes complaints, publishes new research and partners with civil society organizations to protect the human rights of persons with psychosocial disabilities. Nevertheless, the institution remains hampered by its inability to enforce anti-discrimination laws and by widespread confusion about disability rights, mental health issues and human rights violations. Such confusion has the potential to undermine Komnas HAM's advocacy efforts. The following section outlines these limitations in greater detail.

Lack of Enforcement

Since its inception, Komnas HAM has been critiqued for its inability to enforce the law. The institution's responses to complaints are not legally binding, leading some to perceive Komnas HAM as 'toothless' (Edwards, 2014: 9). For Eldridge (2002: 147), 'perceptions of powerlessness weaken public credibility and confidence in approaching [the institution]. These largely stem from false expectations that Komnas HAM can enforce its own recommendations'. Others have suggested that the call for a separate National Disabilities Commission (Komisi Nasional Disabilitas), which would to oversee the implementation of Law No. 8/2016 on Persons with Disabilities as well as the CRPD, suggests 'scepticism' towards Komnas HAM's contributions to disability rights advocacy (Pusat Studi Hukum dan Kebijakan Indonesia, 2014; Edwards, 2014: 9). The creation of a National Disabilities Commission is included in Law No. 8/2016 on Persons with Disabilities and is designed to 'ensure "the implementation of respect, protection and fulfilment of rights of Persons with disabilities"' (Pusat Studi Hukum dan Kebijakan Indonesia, 2016). However, the presidential regulation required to establish the commission has not yet been issued, causing disability rights activists to publicly demand swiffer action (Fransisca, 2017).

In the absence of robust legal powers, Komnas HAM has often relied on media publicity to draw attention to human rights violations and 'exert pressure on individuals or groups to cooperate with its inquiries' (Herbert 2008: 463). In May of 2016, Komnas HAM Commissioner Siane Indriani used this tactic to shine a spotlight on cases of *pasung*—the practice of restraining persons with severe mental illness, either by confining them within rooms, cages or huts or restricting their limbs with chains or wooden stocks (Stratford et al, 2014: 72). *Pasung*, which is typically a last resort for families whose relatives pose a danger to themselves or others, is considered a violation of human rights within the Indonesian Constitution (1945), Law No 39/1999 ("Human Rights" Law), and Law No 36/ 2009 ("Health" Law), which states, 'Patients with mental disorders who are abandoned, left to wander about, or who threaten the safety of themselves and/or others, and/or disturb public order and/or public safety are obligated to receive treatment and care at health-care facilities' (Pramesti, 2014). Indriani visited several families in East Java who had restrained their relatives and spoke to reporters at *Tempo* and *Harian Jogja* to advocate for the use of medical treatment, greater access to mental health facilities and reduced stigma towards individuals and families affected by mental illness (Harian Jogja, 2016; Nugroho, 2016).

Despite these efforts to promote the rights of persons with psychosocial disabilities through media platforms, Komnas HAM acknowledges that 'people with disabilities in Indonesia still experience various forms of human rights violations and their cases cannot be resolved effectively by existing national mechanisms in Indonesia. The state does not take action to provide effective solutions' (Nainggolan et al, 2016: viii). The U.S. State Department (2016) has found that the Indonesian government has ignored and 'often avoided' adopting recommendations submitted by Komnas HAM and other agencies, such as Komnas Perempuan. For Komnas HAM

to be effective, Hsien-Li argues, the Indonesian government must not 'obstruct' the institution (2011: 89-90): 'Real powers and adequate resources must be given [to Komnas HAM] such that the proper functioning of its mandate—educating the public about human rights and encouragement on the ratification of UN human rights treaties, as well as reporting and rectifying Indonesian rights practices in line with the Constitution, *Pancasila*, and UN treaties Indonesia has acceded to—can be carried out'.

Lack of Clarity

Komnas HAM's advocacy efforts are also weakened by what Edwards refers to as 'widespread ignorance about people with disabilities in Indonesian society' (2014: 11). Misconceptions about what constitutes a 'disability' or a 'human rights violation' undermine the institution's efforts to promote human rights literacy and may interfere with current complaint reporting procedures and data collection. Unfortunately, inconsistencies within Komnas HAM's own publications may contribute to this confusion.

Article 1 of the United Nation's Convention on the Rights of Persons with Disabilities defines 'persons with disabilities' as 'those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others' (Drew et al, 2011: 1665). In this formation, psychosocial impairment is included within, and considered a specific type of, disability. This same construction emerges within Komnas HAM's 'Position Paper' (Nainggolan et al, 2016: 1-2), which further elaborates on the differences among physical, mental, intellectual and sensory forms of impairment'. Similarly, in their recent Submission to the United Nations/ 3rd Universal Periodic Review (Komnas HAM, 2016: 4-5), a discussion of *pasung* and other forms of discrimination faced by 'persons with mental disabilities' appears under the sub-heading, 'Persons with Disabilities', suggesting that psychosocial impairment is included within the broader category of 'disability'.

In other publications, however, 'disability' refers specifically to physical impairments and does not include experiences of mental illness. A 2015 edition of *Suar*, a Komnas HAM newsletter 'distributed to civil society, educational institutions, religious groups, the military, police, and government agencies' (Herbert, 2008: 462), was dedicated exclusively to issues concerning 'persons with disabilities' (*penyandang disabilitas*) but contained no articles on mental health issues. This construction, which separates psychosocial impairment from physical disability, is consistent with popular understandings of the term, '*penyandang disabilitas*', which, according to Suharto et al (2016: 693), 'focuses on physical deficits rather than acknowledging the varied abilities'.

The lack of clarity surrounding the definition and classification of various disabilities directly impacts the quality and availability of assistance for persons with either or both mental and physical impairments. In some cases, individuals with vision impairments have been required to submit verification of their ability to make independent decisions—a process typically reserved for individuals with psychosocial impairments rather than visual/sensory disabilities (Colbran 2010: 49; Edwards 2014: 11). For Edwards (2014: 11-12), such confusion is not 'limited to the uneducated'; in fact, 'The apparent ignorance about people with disabilities evinced by members

of the legal profession may be another reason why the formal rights which do clearly exist for people with disabilities in Indonesian law are largely unenforced, in that the very people who are supposed to advocate on behalf of people with disabilities may not really understand the issues'.

Ambiguous constructions of 'disability' and 'persons with disabilities' have also compromised data collection efforts by producing unreliable demographic estimates. In 2012, the National Socioeconomic Survey (Susenas) estimated approximately 2,126,000 individuals living with a disability in Indonesia, or 2.45 per cent of the total population (Nainggolan et al, 2016: 2). The World Health Organization puts this figure closer to ten per cent, a discrepancy Edwards attributes to 'differing understandings about the basic issue of what constitutes a disability' (2014: 11). The Indonesian Centre for Law and Policy Studies views such discrepancies as an obstacle to mental health advocacy, since 'A thoroughly valid inventory is essential for the basis of policy making' (Pusat Studi Hukum dan Kebijakan Indonesia, 2014).

Such confusion impacts Komnas HAM's data collection efforts as well. The institution's monthly reports[300] offer information about the groups and individuals who have submitted complaints, using classifications such as 'Corporation', 'LGBT individual', 'Person with Disabilities' (*Penyandang Disabilitas*) and 'Disabilities Organization' (*Kelompok Penyandang Disabilitas*). Because these classification schemas do not address whether persons with psychosocial disabilities are included in the category, 'penyandang disabilitas', it is impossible to draw any definitive conclusions about such individuals' complaint reporting practices. Nonetheless, current data suggests that Komnas HAM's reporting mechanisms remain underutilized by this group. In 2015, Komnas HAM received a total of 8,249 complaints, only two of which were submitted by individuals with disabilities and four from disabilities organizations. In 2016, individuals with disabilities submitted four complaints and disabilities organizations submitted only one out of a total of 7,188 complaints. These dramatically low numbers support one of three possibilities: reporting mechanisms are not accessible to persons with disabilities; confusion about what constitutes a human rights violation against persons with disabilities persists; persons with disabilities are disinclined to report violations of their rights to Komnas HAM. For Drew et al (2011: 1672), 'Part of the reason why violations continue unabated is that they are unreported. Legal mechanisms therefore need to be in place to enable and encourage people with mental and psychosocial disabilities, their family members, friends, and advocates to report any human rights violations freely and securely'.

The scope and variety of discrimination faced by persons with disabilities may contribute to lingering confusion about what constitutes a human rights violation against such individuals. In a 2016 Position Paper (Nainggolan et al, 2016: 3), Komnas HAM lists 'discrimination, stigmatization, harassment, expulsion, ridicule, assault, rape, violence, and murder' as examples of human rights violations against persons with mental illness and notes that such violations can occur with respect to employment, education, public services, transportation, participation in elections and physical abuse. Persons with disabilities continue to be regarded as 'unhealthy people' (*Ibid.*, 4-5), 'unproductive citizens' (Reese 2016), or 'spiritually deficient' individuals (U.S. Department of State, 2016) and may be further dehumanized through stigmatizing language. Although the term '*penyandang cacat*,' which translates literally as 'persons with

[300] These reports can be accessed at: https://www.komnasham.go.id/index.php/data-pengaduan/.

defects' (Suharto et al, 2016: 699) has been replaced by '*penyandang disabilitas*' in official documents, terms like '*orang gila* (mad person), *gelo* (crazy), *edan* (crazy), and *otack miring* (unstable brain) are still common and exacerbate stigma' (Reese, 2016). The U.S. Department of State (2016) found that stigma has a direct impact on the utilization of resources, as 'persons with disabilities commonly fail to pursue the accommodations to which they are entitled'. In this way, ongoing stigma towards persons with physical and/or psychosocial disabilities disrupts advocacy efforts.

In recent years, Komnas HAM has taken steps to improve complaint reporting and increase public literacy of human rights within specific communities throughout Indonesia. Their April 2017 report (Komnas HAM, 2017: 7) includes plans to hold 'proactive complaint consultation and procurement in the region' of East Java by opening a new complaint post, holding a focus group discussion and developing a radio talk show. Their May 2016 report (Komnas HAM, 2016: 14-15) describes similar activities implemented in the Gunung Sitoli region of Nias. However, such efforts tend to have a general focus and do not directly address misconceptions towards mental illness or disability rights.

Lack of Coordination

As a national institution with limited powers of enforcement, Komnas HAM may be most influential through its regional offices, which can respond to the unique needs of Indonesia's provinces. Herbert notes, 'Regional centres are generally established around existing local human rights networks and draw heavily on the input and knowledge of the local sector. All centres work hard to build dynamic links with local government, civil society and educational institutions' (2008: 465). At present, Komnas HAM has offices in Aceh, West Sumatra, West Kalimantan, Central Sulawesi, Maluku and Papua.

Nevertheless, an uneven distribution of power within these regional offices may negatively impact advocacy for the rights of persons with psychosocial disabilities. Herbert explains, 'Regional representatives are to some extent personality-driven…The personal networks, previous vocations, and level of skills in advocacy, mediation and campaigning of individual commissioners tend to influence the overall strategies adopted by each regional centre in responding to regional human rights issues, alongside the strength and effectiveness of their relationships with regional government' (*Ibid*., 466). This pattern suggests that discrimination against persons with psychosocial disabilities will not be addressed unless the representatives themselves prioritize mental health. The specific interests and training of individual Commissioners also impact the procedure for reviewing and responding to complaints. According to Colbran (2010: 27), 'Most complaints are directed personally to one of the Commissioners who is himself blind. He responds directly, rather than submitting the complaints through Komnas HAM's formal complaint mechanism procedure'.

Protecting the human rights of persons with psychosocial disabilities demands coordinated action among mental health professionals, social workers, human rights advocates and community members. Both national and regional officials must commit to protecting the rights of persons with psychosocial disabilities not merely through legislation, but through stigma reduction, accurate data collection and research methods and a commitment to making mental health

resources more affordable and accessible. Similarly, Komnas HAM must adopt a comprehensive approach to mental health advocacy rather than assign unequal responsibility to regional representatives. In this way, Komnas HAM representatives can help build a wider network of support for individuals who have experienced human rights violations as a result of mental illness.

Beyond *Pasung*: Developing a Comprehensive Approach to Mental Health Advocacy

With lingering stigma towards persons with disabilities, 'widespread ignorance' (Edwards 2014: 11) about disability-related issues, unreliable data and inconsistent attention devoted to disability rights with Komnas HAM's regional offices, it is unsurprising that approaches to mental health advocacy continue to be disjointed and disaggregated. Lata Mani (2013: 121) describes disaggregation as 'the separation of an interconnected whole into its component parts. It follows that when this whole is disaggregated, the relations of multiplicity and relationality of which it is composed are also taken apart and remade'. Indonesia's recent efforts to protect the human rights of individuals who have been chained, shackled or confined due to mental illness presents a clear example of such a 'disaggregated' approach.

Although *pasung* has been banned in Indonesia since 1977, the past decade has seen a more concentrated effort to view the practice as a human rights violation and to reduce the total number of cases throughout Indonesia. In 2010, Aceh was the first province to launch a 'Bebas Pasung' ('Free Pasung') program, which aimed to release and provide medical treatment to the two hundred individuals reported to be in physical restraint (Irmansyah, Prasetyo and Minas, 2009). The Ministry of Health developed a similar program in 2011 called, 'Menuju Indonesia Bebas Pasung' ('Towards a Shackle-Free Indonesia'), which has been implemented on a regional level (Stratford et al, 2014: 72). A recent report (Reese, 2016) found that 'about 20 out of Indonesia's 34 provinces—including Central Java, West Nusa Tenggara, East Java, Jambi, Yogyakarta, and Aceh have a functional *pasung*-free initiative'. Initially, the national campaign bore the name 'Stop Pasung,' as efforts focused on eliminating the practice 'from the whole of Indonesia' (Puteh, Marthoenis and Minas, 2011: 4). The name was later changed to 'Free Pasung'.

In theory, the Bebas Pasung program aims to do more than merely 'free' individuals from restraint. Through coordination with government officials, social services, community mental health workers and community leaders, the campaign strives to reduce the stigma associated with mental illness, raise awareness about effective forms of treatment, and improve Indonesians' access to mental health care. However, the emphasis on 'stopping' or 'eliminating' *pasung* has discouraged a long-term, comprehensive approach that devotes equal attention to follow-up care. In a recent New York Times article (Emont 2016), Dr. Nova Riyanti Yusuf, a psychiatrist, former chairwoman and well-known advocate for persons with mental illness, reflected on the limitations of such an approach:

During her time in Parliament, Ms. Nova worked to convince lawmakers of the dire situation of the mental health system. She led lawmakers on a trip to Lombok, an underdeveloped island east of Bali, where the mentally ill were chained to sheds by family members who did not know what else to do with them. 'The male parliamentarians were so eager to remove the person from his chains,' she remembered. But then 'the family began crying. After he was released the family

didn't know what came next.' The point, she explained to her colleagues, was that there was no clear next step, as Indonesia did not have an established system for mental health care.

Regional initiatives, such as Makpasol[301] and e-pasung, have also prioritized identifying and documenting cases of *pasung* and have devoted less attention to creating additional opportunities for follow-up care. According to Dr. Azhari Cahyadi Nurdin and Dr. Agung Wiretno Putro who designed Makpasol, the website offers 'a database for pasung cases' that serves West Nusa Tenggara Province[302]. Community members, social workers and government officials can report cases of *pasung* through the site's online submission form. Once these reports are verified by Mutiara Sukma Mental Hospital, a team of community mental health workers is sent to release individuals from *pasung* and deliver appropriate medical services. The site also contains a counter that estimates the number of *pasung* cases in each region. Although Makpasol includes an FAQ page that addresses misconceptions about mental illness, surveys designed to encourage early detection, links to articles and other resources on mental health and a consultation page allowing visitors to submit queries anonymously to a psychiatrist, it is clear that, at least at this stage, the site functions primarily to address current cases of *pasung*.

The e-pasung program represents a similar initiative. First launched in Surabaya in May of 2016, 'e-pasung' refers to the use of smartphone applications as data collection technology that, in conjunction with educational campaigns and affordable treatment, may expedite symptom assessment and strengthen community mental health networks. In East Java, e-pasung has been praised for offering mental health workers a fast and reliable means of reporting new cases of *pasung*, organizing existing cases into an accessible database and continually monitoring individuals who have been shackled to prevent 'relapse'—that is, the family's resumption of *pasung* after a relative has received medical treatment (Fajerial, 2016). According to Dr. Sukesi, the Head of Social Services in East Java, e-pasung has helped reduce the number of pasung cases from 729 in early 2016 to 712 cases in July 2016 (Budiawan, 2016). However, the success of e-pasung has been measured by the number of individuals that community mental health workers have identified, released from confinement, and brought to local hospitals for medical treatment. There are no complementary efforts to determine whether the use of e-pasung has increased public awareness of mental health and human rights, strengthened relationships between community members and mental health workers or improved resource allocation in targeted areas.

For this reason, Makpasol and e-pasung offer a disaggregated approach to mental health advocacy, placing undue emphasis on eliminating existing cases of *pasung* without sufficiently addressing the multiple, intersecting factors that cause families to rely on *pasung* in the first place. For Chapman (2009: 108), this represents a challenge for human rights advocates more broadly, as 'the narrow and sometimes excessively legalistic understanding of the right to health held by many in the human rights community does not accord sufficient importance to the role of the social determinants of health'. The social determinants underlying families' reliance on *pasung* include persistent stigma toward persons with psychosocial disabilities and 'inaccessible, unaffordable, ineffective psychiatric treatment services' (Puteh, Marthoenis and Minas, 2011: 5).

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[301] Makpasol is an abbreviation of 'Masyarakat Aktif Klik Pasung Online', or 'Active Society/Community Clicks Pasung Online'. For more information, see: http://www.makpasol.ntbprov.go.id/.

[302] Email correspondence with author, 3 April 2017.

Without an effective stigma-reduction program, for example, individuals who have been released from *pasung* and received medical treatment may face difficulties with community re-integration. Reese (2016) explains, 'Even those who are rescued return to *pasung* once they return to the community due to a lack of follow-up and access to community-based support and mental health care services, and continued stigma in the community'. Mamnuaha et al (2016: 24) also stress the importance of 'community integration' within the recovery process: 'Patients striving to free themselves from the confines of the illness and developing a personal identity is meaningful, where they are able to carry out their role in the community'.

A comprehensive approach to mental health must also increase the availability and accessibility of mental health resources. Of Indonesia's thirty-four provinces, eight are without a mental hospital and three have no psychiatrists (Reese 2016). Even when mental health facilities are available, negative perceptions of psychiatrists and hospitalization can cause an under-utilization of such resources. For Suripto and Alfiah (2017), 'The large number of people with severe mental disorders who did not receive medical treatment is due to factors such as lack of funds and families' and community members' lack of knowledge about the symptoms of mental disorders'. Families may also avoid hospitalization due to a preference for spiritual and traditional healers (Reese, 2016).

Further, although Makpasol and e-pasung may improve coordination among community health workers, human rights activists and government officials in the long-term, these initiatives rely on technologies that are not necessarily accessible to low-income families, individuals in geographically remote areas or persons with psychosocial disabilities themselves. Instead, these initiatives are geared towards community members with smartphones and internet access who are aware that *pasung* constitutes a human rights violation. These factors merely increase the likelihood that the Makpasol and e-pasung initiatives will function primarily to identify and respond to cases of *pasung* rather than provide a comprehensive mental health resource for the greater community.

The Bebas Pasung campaign also represents a disaggregated approach to mental health advocacy by shining a spotlight on the most extreme human rights violation against persons with severe mental illness without connecting *pasung* to broader discussions of discrimination against persons with psychosocial disabilities. In recent years, *pasung* has dominated both international and national discussion of mental health and human rights in Indonesia. For example, in both the 2016 and 2017 Human Rights Watch Country Reports on Indonesia, the section devoted to 'Disability Rights' focuses entirely on *pasung* as an ongoing human rights violation. Within Indonesian news, stories of individuals who have been released from restraint or confinement are a regular feature. Such reports emphasize the violence of *pasung*, with photographs focused on grimy shackles and chains. In video footage, government officials, psychologists or social workers are shown heroically sawing through chain links or locks to free the *pasung* 'victims'. These stories, and the Bebas Pasung campaign as a whole, suggest that mental health advocacy depends primarily on the protection of individual's 'negative' rights—that is, the right *not* to be restrained —and devotes considerably less attention to the protection of individuals' and communities' 'positive' rights, such as the right to affordable, accessible mental health care. Moreover, the campaign divorces *pasung* from other experiences of psychosocial disability, suggesting that only

individuals who have been restrained deserve media attention and social resources. In this way, the Bebas Pasung campaign offers a disaggregated approach to mental health and may exacerbate widespread confusion surrounding mental health, disability and human rights in Indonesia.

Recommendations

Komnas HAM has guided Indonesia towards laws, policies and campaigns designed to improve the lives of persons affected by mental illness. The government's ratification of the Convention on the Rights of Persons with Disabilities (2011), the passage of the Mental Health Act (2014) and the enactment of Law No. 8 on Persons with Disabilities (2016) represent critical first steps towards strengthening legal protections and addressing existing discrimination against persons with mental illness. However, these actions must be more than just 'window dressing' and must represent 'a serious commitment to implement respect for human rights in practice' (Hafner-Burton and Tsutsui, 2005: 1378). Although Komnas HAM lacks the power to enforce mental health legislation, the institution can continue to protect the human rights of individuals and families affected by psychosocial disabilities through research, education, and advocacy.

Specifically, Komnas HAM should offer clarification with regards to terminology used to refer to persons with psychosocial disabilities within its publications and reports. Such clarification is needed to improve research on complaint reporting practices and increase the accessibility of complaint reporting mechanisms. Second, Komnas HAM can bolster its outreach and education efforts by integrating comprehensive discussions of mental health into workshops and training sessions that focus more generally on human rights. Including persons with psychosocial disabilities as both consultants and instructors in such workshops can help reduce stigma within the community and address misconceptions surrounding disabilities, discrimination and human rights.

Finally, Komnas HAM should strive to provide consistent mental health advocacy throughout Indonesia so that regional offices do not adopt a 'personality-driven' agenda dictated by the concerns of individual representatives. Through partnerships with community mental health organizations and disability rights activists, Komnas HAM's regional offices can offer mental health resources that address the specific needs and values of the community. In all these efforts, Komnas HAM must adopt an inclusive approach to protecting the 'positive' rights of persons with psychosocial disabilities (including the right to health, the right to participate in government elections, and the right to independent decision-making) while also responding to, and striving to prevent, human rights violations. Such an approach will prove beneficial both to individuals with psychosocial disabilities and to Indonesian society as a whole.

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War on Drug and Human Rights Violation in Philippines

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Abstract

The Philippines is one country of Southeast Asia facing significant challenges to protect human rights of its citizens. Violence is seen to be a tool from government in both national and local level used as a crime solution. More than 6,000 Filipinos died during President Rodrigo Duterte's war on drug policy. The brutal killing targets drug dealers and drug users in the urban slums of Philippines. Notoriously, this shows government support of extrajudicial executions against its own citizens and in fact this is not a new initiative driven and supported by the President of the Philippines. Duterte is previously known for his support for The Davao Death Squad (DDS), an alleged group responsible for violence used against individuals suspected of petty crimes in Davao. According to this violent circumstance, the level of democracy and human rights standard become critical situations for the country. Even though the Philippines Human Rights Commission (HRC) was established early in 1987, the manipulation of the institution is low capacity. The only matter that HRC is doing is to criticize human rights abusive policy from the government while investigating certain suspicious cases, still, the evidence from witnesses are barely useful since no one wants to speak to this regard. This paper is to show the informative background of Duterte that impacts on the current policy. Moreover, it argues war on drug policy had terrible consequences, fueling the spread of violence, human rights abuses.

Introduction

On May 9, Rodrigo Duterte won the 2016 Philippine presidential election. Duterte was a prosecutor for Davao City, an urbanised city of Mindanao island, before becoming a vice mayor and mayor of the city accordingly. As a mayor of Davao City, Duterte was criticised by Human Rights groups for the extrajudicial killings of hundreds of drug users, criminals, and street children which involved with the Davao Death Squad, which was cooperated with the police in order to execute suspect individuals while being generally paid for an assassination. The 16th and current President of Philippines who won the presidential election with only 38.5 per cent of the votes[303], promising to declare war against illegal drugs by initiating the Philippine Drug War and also to withdraw the Philippines from the UN. The first initiative campaign from the president of Philippines when he took power against the illegal drug trade has led to the execution of almost

[303]Parameswaran, The Truth About Duterte's 'Popularity' in the Philippines.

3,000 suspected dealers[304] by police and unknown assailants within the first three months. The execution was an instant shoot to kill, while the suspected individuals could not stand a chance for any trial. Furthermore, as his promise to end crime by far within six months of being president, there was a report of around 7,000 suspected drug dealers and users have been executed[305] without a chance for any trial. He also threatened to kill any lawyers or human-rights activists who oppose his brutal campaign against crime and illegal drug trade. Phelim Kine, a deputy director of Human Rights Watch said that the most of those extrajudicial killing targets were neither the high-level individuals nor the powerful drug dealers who really have the power for supplying drugs on the streets. And he also suggested that an international drug control agencies need to make clear to Philippines' current president that the act of killings any suspected drug users and dealers is not a way to control the crime, and it is a failure of the government to protect people's human rights[306]. Since the target individuals were mostly the common peasants or street children, the big heads of this illegal drug trade are still out there supplying drugs on the streets in the country.

In terms of international relations, Philippine under the lead of Duterte has gone too far and his policy within international level as well as the international relation has been shifted. Once his campaign against the illegal drug trade has had many extrajudicial killings. Former president of the United States, Barack Obama, expressed his concern about this act of extrajudicial killing, Duterte then reacted by calling him a son of a whore while demanding for U.S. special forces to leave the southern island of Mindanao, the place where they have been joint military training. Duterte once said that: "For as long as we stay with America, we will never have peace." Likewise, with the promise to withdraw the country from the United Nations and having Marcos Ferdinand, a former president of the country who had bad reputation of being a dictator, as an idol and even offers Marcos a hero's burial in Manila which obviously threatens both foreign and local investor's perspective toward the Philippine president as well as the trust for country's economic. Moreover, the language that Duterte uses and his brutal war on drugs could be designed to draw attention from the world. In fact, Duterte has given the Philippines more role in an international sphere for cutting aid from the United States beginning to negotiate with other superpowers such as China. The crudeness of the new president of the Philippines has been drawing attention from all around the world, some might say that Duterte and Donald Trump are so similar. Likewise, those who are against Duterte's campaign fear that the drug trade problem will be subdued temporarily but the basis of the democratic institutions will worsen. On the citizen perspective in this campaign, it feels like they are living on the edge of fear when a group of people, mainly police and the assailants, could have killed them and not go to jail. This kind of approach from Duterte toward the international sphere in addition with HRW critics, the international relations combining with the war on drugs will lead to the use of violence inside the country.

The Philippine drug war was the circumstance of the long last addiction of methamphetamine, a violent and powerful drug. In Southeast Asia, we can see that the case of President Duterte of Philippines and Thailand under former Prime Minister Thaksin has something in common, the tough policy against illegal drugs and criminals. The anti-drug policy

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[304]Economist 421, A liar or a killer; Rodrigo Duterte.

[305]Economist 420, Sceptred bile; the Philippines under Rodrigo Duterte.

[306]ibid.

of Thaksin during the year 2003 had resulted toward extrajudicial killings from the drug-related case. Prime Minister Thaksin also threatened all criminals by giving a speech to the public that those who illegally sell the drugs must be ended up in jail or the tomb. The two leaders of the country have given the same speech which demonstrates violence against drug dealers and to declare the war on drugs. The result of the anti-drug policy from Thaksin's regime had led to an increase in murder case, during the length of the campaign[307]. The extrajudicial killing which is portrayed as war on drugs of the Philippine was not the first time that this kind of event had occurred in the Southeast Asia region. In 2003, Thailand under Prime Minister Thaksin Shinawatra also launched a war on drugs campaign. The campaign was aimed at illegal drug trafficking as well as the use of drugs. Similar to Duterte's campaign, extrajudicial killing had occurred with an estimate amount of 2,800 deaths over three months[308]. However, half of the dead bodies were found with no evidence or connection to drugs. Therefore, the suggestion from the HRW to former Prime Minister Thaksin's government at that time was to restrain the act of killings in the name of war on drugs, to investigate and bring the killings and human rights abuses to justice. The most important is that Thai government must adopt integrated and comprehensive drug strategies that comply with human rights and fundamental freedoms.

The purpose of this paper is to show the use of violence from the government during the length of Duterte's war on drugs. The extrajudicial killings that have been funded by the government, now resulted in the lower level of democracy and human rights in the country. This paper will discuss non-violence tactics as a suggestion for the war on drugs, which are two policies from the western world, decriminalisation from Portuguese case and legislation from the United States case using analysis from Elizabet Smiley. Through the decriminalisation, Portugal's policy was designed to help the drug addicts and not to punish them. Decriminalisation allows drug addicts to receive treatment without criminal proceeding.

Historical Background of Duterte

The current president of the Philippines, Rodrigo Duterte. He was born on 28 March 1945, in Maasin (a capital of Southern Leyte). Duterte, as one of the most famous recognition among the public inspired by His father Vicente G. Duterte, who played his part in Philippines politics as a local mayor and governor while his beloved mother, Soledad Duterte, was a teacher and community activist. During his early years, there is a report that he was forced out from elementary school twice by his temper and misbehaviour. Duterte, influenced by the founder of Communist Party of the Philippines José María Sison, went to study law at San Beda College. Later on he finished his degree in 1975 while there is a report claims that he shot one of his classmate[309]. Following his degree of law, he climbed his career path firstly as a special counsel at the City Prosecution Office of Davao City in 1977. Duterte then became assistant city prosecutor in 1979 and later became a vice mayor of Davao City in 1986[310]. Meanwhile in the same year

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[307] HRW, Thailand's 'war on drugs', International Harm Reduction Association and Human Rights Watch Briefing Paper.

[308] ibid.

[309] Ott, T., Rodrigo Duterte

[310] ibid.

President Ferdinand Marcos, who Duterte has idolised, was forced out from his position from People Power Revolution, thus, created massive degree of violence and crime in the country as well as in Davao City. Duterte as a mayor in 1988 aimed to solve the criminal rate by launching a curfew and drinking legislation as well as permitting the actions of vigilantes referred to as the famous DDS. These acts of vigilante resulted in many deaths of suspected drug dealers and criminal members over the seven terms of Duterte as a mayor. There is also evidence supporting his permission to act as his statement "They are saying that I'm part of a death squad? True, that's true." There was former policeman whom accused Duterte of paying the police to kill criminals, Arthur Lascanas, said that the gang of Davao Death Squad were paid between 400 - 2000 US dollar per assassination depending on the target individuals[311]. One of his targets was a radio commentator who criticised Duterte, Jun Pala. He was murdered in 2003 by gunmen who then got paid from the mayor Rody Duterte, said by Lascanas. Moreover, the recent report from the Guardian, Human Rights Watch (HRW) claimed that President Rodrigo Duterte bears ultimate responsibility for the deaths of more than 7,000[312]. In addition, the report also said that "the police have repeatedly carried out extrajudicial killings of drug suspects, then falsely claimed self-defence and planted guns, spent bullets or drugs on the dead bodies." The report shows the evidence that the masked gunmen are directly cooperating with the police which make the deaths of the people legal, to claim for self-defence and to put the drugs on the dead bodies. These relentless actions are surely against human rights and the dead bodies would not stand a chance for the trial or even the normal investigation whether the suspect is innocent or guilty.

However, his brutal way of dealing with criminals proved successful as he was credited with helping to make Davao City cleaner by enforcing a smoking ban. He was somehow be recognised as the Punisher for his methods under his periods on Davao City, nevertheless, his tough method has proven success as he placed Davao City as the cleanest city of Philippines and was ranked the fourth which has its safety index of 82.06 and its crime index of 17.94[313]. In May 2016, Duterte was officially in charge of the Philippines as the 16th president. He promises to establish a new federal parliamentary government and revive the country's economy. However, his promising campaign became nothing compared to a series of furiously statements such as the time when he proposed to deal with criminals brutally saying that, "If I make it to the presidential palace, I will do just what I did as mayor. You drug pushers, hold-up men and do-nothings, you better go out. Because I'd kill you. I'll dump all of you into Manila Bay, and fatten all the fish there." Duterte seems no longer holding back, especially with his headline-making statements against the U.S. president Barack Obama over extrajudicial killings saying that, "I am no American puppet. I am the president of a sovereign country and I am not answerable to anyone except the Filipino people. Son of a bitch, I will swear at you." Meanwhile he even compared himself to Hitler for his aim to execute drug addicts in the country stating that, "Hitler massacred 3 million Jews. Now, there are 3 million drug addicts. I'd be happy to slaughter them." Those headline comments would be found anywhere on the media.

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311 Aljazeera, Rodrigo Duterte accused of paying police to kill.

312 The Guardian, Philippines police plant evidence to justify killings in drug war, says report.

313Ruiji Peter, Davao now 4th safest city.

For his family, Duterte was married to former flight attendant Elizabeth Zimmerman having 3 kids when he ended his relationship with her in 2000. Duterte is now married to his wife Honeylet Avanceña whom he has a daughter with. Duterte also said that apart from his two wives he also has two girlfriends. The one of the two works in the cosmetics department of a mall in Davao City while the other is a cashier.[314] Despite being Christian, he aims to further government population control programs which, obviously in contrast with the belief of christianity, say that three children should be the maximum number for a family. According to Hazel Torres[315]Duterte once mentioned that, "I'm a Christian, but I'm a realist so we have to do something with our overpopulation," and "The religious sector, I'm sorry, your fundamental beliefs do not solve the problems of the country." In his same speech, he even mentioned that he believes in one god Allah. It is wrong on many levels, still, his joking and serpentine kind of talking has attracted many attentions toward him and that is somehow a political success. Meanwhile, there is also a rumour from his first wife saying that his womaniser behaviour was the problem that destroyed their marriage. The now tough-talking president of Philippines has been attracting the global eyes to him as he shifted down the long standing alliance such as the United States and turned toward the new rising giant, China. Duterte, whom grandfather was an immigrant from China's Xiamen province[316], has contributed a huge effort to win China's favour. While he shut down a joint military exercise and criticised the leadership of the U.S. There will be more to see from the new ties that Duterte is now doing with China, especially in the economic sector. However, by dumping the U.S., he has to have something equal in his mind since the South China Sea is still a problem between the Philippines and China. Cutting help from the U.S. will make the country pass some potential opportunities.

War on Drugs, Human Rights Violation and The Role of NHRC

Many currently illegal drugs have been used for many centuries for both medical and spiritual purposes. Those include marijuana, opium, cocaine and narcotics drugs. Methamphetamine, a narcotic drug, which locally known as "shabu" is one of dangerous narcotic drugs and a threat to the Philippines society. The Meth's status as the popular drug choice in Southeast Asia is a result of the poverty meeting the region's work ethic[317]. The drug users were a young generation with poverty issues and especially those who are working for many hours. In fact, the usage of this drug was distributed among bus and taxi drivers. The answer for the problem of having no food to consume but with a strong feeling of working until they collapse. Drug addiction has been a critical issue for the Philippines government since the history[318]. Opium was the popular narcotic drug among the Chinese and also those who migrants to the Philippines. The earliest mention of opium was traced back to the year 1609 in which the traffickers were the Dutch and the origin was from the east coast of India. The Chinese immigrants had taken the opium culture toward the

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[314] Pia Ranada, Rodrigo Duterte: Yes, I'm a womanizer.

[315] Torres, Duterte vows to promote birth control in the Philippines, says he's a Christian but believes 'in one god Allah'.

[316] Woody, The Philippines' president is headed to China with high hopes, but he may be in for a rough landing.

[317] Joanna Fuertes-Knight, The Philippines can't fight its meth battle until it wins the war on corruption.

[318] Zarco, A Short History of Narcotic Drug Addiction in the Philippines.

Philippines. Moreover, not only opium but Coca plants had entered the Philippines as well during 1941 - 1945, the exact date could not be concluded. While Marijuana was noticed in 1959. The Philippines, at that time, was lacking local terms regarding addictive drugs and its absence in tradition and custom. To understand the origin of drug addiction is the essential way to develop effective solutions to the amount of drug usage in the long-run. Despite the fact that these drugs are dangerous but how it became illegal, it has understand the people who associated with these drugs. The drug war was started in the United States. According to the past contexts, it proves that this statement is literally true. The first anti-opium laws were directed at Chinese immigrants, the first anti-cocaine laws were directed at black men, and the first anti-marijuana laws were directed at Mexican migrants. The war on drugs policy is a typical law enforcement from the government to suppress and contaminate the illicit substances inside the country but it could lead to further benefit for deputies. In the case of the Philippines, there are more than 7,500 drug-related deaths that the country has endured over the past six months, according to the current Philippines National Police statistics. Most of the suspects were targeted to extrajudicial killings by vigilante and police. To evaluate more on Duterte's policy of drug war, this paper will focus on the Santo Niño, through an article from the CNN[319]. Santo Niño is a poor neighbourhood in Pasay City also known as Metro Manila. If we ignore the unsolved murders and extrajudicial killings that happen inside the Philippines, it could be said that Santo Niño residents are safer since the drug users and suppliers as well as criminals have been removed. However, for the families of many victims the presence of safety comes with a cost for them. Shabu is a popular drug among the Philippines people especially for those living under the poverty line due to its effectiveness to rid off hunger and to push their extended hours of work mainly for the hard labor. Such as taxi drivers and construction crews. The Philippines government launched its policy on anti-drug driver, known as "tokhang"[320]. It allows police to photographed, interviewed, fingerprinted and required drivers to vow not to put their hands on drugs. While those who are opposed to this policy will not receive government support, meanwhile, those who are registered will receive recuperation on drugs. A de-facto of arbitrary arrest.

After Duterte took power from the election, he then escalated his shoot to kill policy of drug-related suspects while culture of impunity to law enforcement and vigilante for their efforts. The police will be protected from prosecution especially under Duterte's watch. The war on drugs and human rights violations are correlated. As mentioned above, the procedure of war on drugs campaign in the Philippines and elsewhere is subjected to treat people who are drug-related with injustice, especially human rights abusive policy. It is the responsibility of the States to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems[321]. There was a public statement on extrajudicial killings by Duterte as a reference to the correlation of war on drugs and human rights violation, suggesting that killing suspected drug traffickers and users was necessary to meet his goal. There were many forms of

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[319] CNN, City of the dead.

[320] Ibid

[321] OHCHR, What are Human Rights.

human rights violation such as the case Kidapawan City[322] and the unofficial jail hidden behind bookshelf in Manila's Tondo district[323].

The Philippines was the first to established the National Human Rights Commission in 1987 and the first among Southeast Asian region as a part of 1987 Constitution by President Cory Aquino[324]The Commission consists of a Chairman and four members that are appointed by the president for seven years term. NHRC covers both protective roles as well as promotional of human rights including forensic legal services through aid, counselling, conciliation and mediation. It also provides financial assistance to victims of violations. However, its capacity has been known for being toothless. In fact, the majority of human rights violation cases remained in the investigation stage since there was a lack of witnesses and insufficient evidence. The Commission relies on government budget under the Department of Budget and Management, the fact is that parts of the budget have not been released or even reduced. The commission is too close to the government with inability to mandate independent monitoring. With the recent re-introduction to the death penalty that was supported by government. "The re-imposition of capital punishment is an important component in building a trustworthy government that protects its citizens and youth from crime, especially the kind perpetuated by illegal drug traffickers and violators," said presidential spokesperson Ernesto Abella[325]. Moreover the majority of the Philippines people still support death penalty, even though, the Philippines has signed and ratified the Second Optional Protocol to the Covenant on Civil and Political Rights which prohibits the re-imposition of death penalty. By re-introduce the death penalty, it means that Duterte's government is grateful to break international law since the law does not permit withdrawal from the Second Optional Protocol and it will commit an international wrongful act[326].

Additionally, war on drugs is seen to be a war on people in lower class instead of the drugs. As mentioned above, most of the victims are people living in poverty, who do not even have money to bribe the police who secretly use the abusive war on drug campaign for their own personal gains. The vast majority of family members of drug-related killings often linked the drug trade with poverty and a lack of job opportunities. According to a report from Amnesty, in one case in Cebu City. When Gener Rondina was surrounded by police officers and he was about to surrender, the police ordered him to lie down as they told another person in the room to leave. Gunshots fired out, the body was carried like a pig according to the witnesses. While relatives were allowed back in the crime scene, all valuables including; laptop, watch, and money were gone, according to family members, there were no reports about those missing properties from the police. As for the majority of the victims are in lower class. The elites or who are in the upper level that are responsible for drug pushers in the Philippines are still roaming on the streets. While crime rates are hugely decreasing under Duterte's war on drug campaign, the ones who are supplying drugs for the country are not affected by this campaign. Thus, it reflects a lack of equality, legal enforcement, and corruption in the Philippines politics from the top to the bottom.

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[322] Kenneth Roth, Philippines Events of 2016.

[323] Phelim Kine, Philippine 'Drug War' Spawns Unlawful Secret Jail.

[324] Gomez, The "protection" capacity of National human rights institutions in Southeast Asia.

[325] Dacanay, Philippines to pursue re-imposition of death penalty.

[326] Ward, IN DEFENSE OF THE RIGHT TO LIFE: INTERNATIONAL LAW AND DEATH PENALTY IN THE PHILIPPINES.

The Legislative of Drugs: Legalisation and Decriminalisation

The Drug addiction issue is a serious issue for both national and international level. While containing drugs issued by legal violence and force is not the sole answer against this issue, therefore, other factors that could amount to the drug addicts population need to be discussed. This paper constructs an essential conceptual clarification between war on drugs, human rights, democracy and good governance, and modern world policies to settle drug issues which are decriminalisation and legalisation. In the Philippines case, there was a strong absence of human rights abuse under the war on drugs. Human rights have various definitions which are based on states and moral standards of the society, I would like to define human rights in this case as a prime concern to offer protection from tyrannical and authoritarian calculation. The rights for humans to be protected by the law of the state. Which many people who found guilty of drug connection might get killed instantly without any investigation. Human rights is an essential standard right for any human to be respected. Tyrannical and authoritarian acts seem to be the cause of human rights violation in various cases such as Thailand and the Philippines. As a consequence, it is crucial that democracy and good governance have to be defined. Democracy, basically, refers to a method of group decision making which characterised by a kind of equality among the participants at an essential stage of the collective decision making[327]. Meanwhile, the participants in this term may be various, for instance, the participants could be citizens of the state or government itself. For the Philippines' case, an extrajudicial killing from the government was not concerned for citizens' opinion which, obviously, in contrast to the killing. While the concept of governance may be various, however, the definition of good governance is so simple. Good governance, among other things, is transparent, accountable and participatory. The benefits of good governance are the effective and equality administration. On the other hand, promotes the rule of law and ensures political, social and economic in the society to be consensus-based. The policy from the Philippines under Duterte could make drug management for the country become more complex with violence. This paper will discuss between two methods for dealing with illicit substances in the country which are; legalisation and decriminalisation, as well as to develop a suggestion for the National Human Rights Commission to be able to introduce the real solution for the human rights violation in the Philippines.

The first legislative enforcement was established in Colorado, the United States, particularly focuses on marijuana which somehow deals less serious health issues for the society, while control over the supply of drugs to receive tax benefits. The legalisation does not have the focus on individual users while it does only help individuals to not be prosecuted for using or processing marijuana. Meanwhile, it does give police more complexity due to the fact that legal marijuana growth makes black market producers and sellers harder to be detected by the government. The largest benefit is the tax revenue since legal marijuana sales would inject the money more on marijuana regulatory system, education and public safety which surely benefits everyone in the society. It is needed to be informed that this kind of policy will have to be strictly only with non-harm addictive drugs, in this case, marijuana. By going far more than this will cause threat toward the society more than good. For the Philippines using this kind of strategy would put the whole society at risk. Legalisation process is very simple by placing the illicit substance to be a legal commodity. By placing them on one of the demerit goods; such as alcohol

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[327] Christiano, Democracy.

beverages and cigarettes, the government will receive economic benefits through selling which then can contribute to national growth. However, the Philippines should have a strict and firm regulation in order to prevent the youths from becoming an addict which also does any good for the society. The possibility for this law to be introduced to the Philippines is quite low. Additionally, the legalisation process is suggested for the developed countries where moral and human rights are primarily accepted among deputies and citizens.

The establishment of decriminalisation was a successful achievement for the government of Portugal in terms of reducing overdose fatality rates for the addicts while providing a fundamental firm approach to tackle illicit substances and criminals. By allocating ordinary drug addicts, the police could have an investigation and are able to identify potential criminals and have more clearer direction to amount the illicit substances from society. The decriminalisation of Portugal provides more efficiency for the police in terms of drug seizure which is a way to subdue the real threat. For the Philippines this kind of policy is suggested more than the previous one. Firstly, the policy can suit any kind of illegal drugs and the prominent shabu among the Philippines people. There are more than million of shabu addicts across the country and by imposing decriminalisation, the Philippines government would be able to focus on the drug maker rather than individual users. Thereby when the addicts were caught, they will not have to face a death penalty or to fear of the extrajudicial killings. Instead, they will proceed to receive the medical treatment which should improve their life condition as well as get rid of this bad behaviour of drug consumption. Meanwhile, the government should distribute the budget more on other areas such as economic and education which are considered as the cause of the drug abuse among its citizens. The decriminalisation should provide a resolution for the Philippines apart from using extrajudicial killings and vigilantism to rid off the shabu addiction.

With the re-introduction to the death penalty and extrajudicial killings that is happening everywhere in the country, the need for CHR is essential. Since most of the time when suspicious cases of extrajudicial killings happened, there was no progressive action from the human rights commission. Due to the claim that there was a lack of witnesses and evidence, the investigation became struck. In fact, there are witnesses upon the extrajudicial killings but there are none willing to speak about it. CHR should focus on how to extract more details and evidence from the witnesses and provide the guardian for those who are willing to speak against the human rights violation. If the witnesses are feeling safe and comfortable, CHR will be able to investigate and eventually develop a resolution for this massacre. Moreover, CHR should work harder in order to promote a human rights violation issue among the Philippines citizens in order to gather more witnesses and evidence since Duterte's policy is using an element of fear. CHR has to get people out of silence. Nevertheless, the extrajudicial killings is a serious issue which CHR alone could not be able to develop a solution. The issue has deeply gone beyond politics, it is now the problem of society, corruption among law enforcement, poverty, and civil society. Global Alliance of National Human Rights Institutions has to investigate more on this serious issue of human rights violation from war on drugs.

In my opinion, I could not deny that Duterte's policy is not successful. In fact, his war on drugs campaign has managed to put domestic security to a better condition. Citizens who were afraid of criminals are now feeling more protected, as the reduction to crime rates. Meanwhile, Duterte's policy still has a negative impact since many of the innocent people were killed and the statistics from Philippines National Police proves that not all the murdering cases are drug-related. Many citizens who opposed Duterte' policy are questioning about the non drug-related case and suspicious case which remains in an investigation process. While wasting time and effort to

execute the low level of criminal, instead Duterte should focus more on the real trouble, the drug makers not the users. With the re-imposed of the death penalty, the Philippines Human Rights Commission is proved to be toothless and lack of power. It is suggested that Duterte's government should be more democratic and expose any criticism from CHR in order to promote human rights protection for the Philippines people.

Conclusion

The Philippines was the first country to establish the National Human Rights Commission. Under the presidency of Rodrigo Duterte, the culture of impunity, bad governance and lack of democracy from the government. Duterte's war on drugs encourages people, especially official deputies, to kill drug suspects without being prosecuted which then developed toward a culture of impunity. Bad governance which created corruption among officials, especially police from the act of extrajudicial killings and arbitrary arrests. Also the lack of democracy that alternative viewpoint of politics cannot be discussed. All of these three are making the function of NHRC interrupted, even become toothless, in addition to the characteristics of the president. The Philippines is now criticised for the violence and human rights abuse that is occurring throughout the nation.

As Duterte has declared war against drugs which he promised to promote law and order as one of his policies, more than 7,000 deaths are reported and even thousands more will be coming with the war on drug campaign. Duterte is previously known for his responsibility for Davao Death Squad, a group of vigilante that claim to be a cause of drug-related murder case. He is now becoming popular among his citizens since his war on drugs campaign has contributed to the increasing of security despite the fact that the murdering and extrajudicial killings is also higher. His tough-talking style and his achievement for placing Davao City, a city that he was a governor, as the cleanest city of the Philippines, has convinced many citizens to trust him with his violence tactic to tackle crimes.

The Philippines is now facing challenges to protect the human rights violation for its citizens. Despite that there is a need for NHRC reform including being less service provider and more independent monitoring agency. The function of NHRC needs to be acknowledged by not only ordinary people but government officials. From my perspective, when NHRC can function properly, the democracy level will be raised accordingly. Legalisation and Decriminalisation is seen to be a suitable legislative approach. To some extent, Duterte has to drop out his vigilantism method and stop supporting the extrajudicial killings which many human rights institutions claim that he has been a part of. The abusive war on drugs policy from the Philippines under Duterte has been criticised by certain groups of human rights organisations to be a war on poor people. The police killings are driven by pressures from the top who are the country's elites. So, the reform in politics is suggested for the Philippines in order to cleanse the corruption and authoritarianism from the political sector which then will make a policy that suits the needs of the Philippines people.

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