

**Suggested talking points for the presentation on “NHRIs’ Relations with the Judiciary”
in the SEANF Seminar on 27 September 2016, Nay Pyi Daw, Myanmar**

Introduction

- A national human rights institution, or NHRI for short, has an important role to play in the promotion and protection of human rights at domestic level. However, it is not the only institution having such a role. There are many other state entities which are entrusted by the law to promote and protect human rights. Apart from various ministries and departments under the executive branch, the Court of law is another major institution with direct responsibility of protecting human rights. In discharging its duty of adjudicating on cases brought before it, the Court is putting into actual implementation the provisions of the law, giving protection to persons whose rights are violated, providing them with compensation and other remedies for the damage that has been incurred, and punishing those who have committed wrongdoings as prescribed by the law.
- The NHRI and the Court are both independent institutions. Both have their function of protecting human rights enshrined in legislation. It is, therefore, important to understand different roles each institution has to play with regard to human rights protection. It would also be useful to know in what way the NHRI can work together with the Court, or how its work can complement that of the Court.

Different roles between NHRI and the Court

Complaints handling and investigation

- For the NHRI with the power to receive complaints on alleged human rights violations from individuals, that NHRI carries out a function similar to that of the Court in judging whether a violation has occurred as claimed. After receiving a complaint, it must investigate into the case by collecting related facts and evidence from both the complainant and the alleged person or agency before determining whether a human rights violation has occurred. If it is found that a violation took place, the NHRI will come up with measures it deems necessary to address the problem and submit them to the person or agency concerned for action. But in this process of complaint handling, the difference between the NHRI and the Court is that the remedial measures put forward by the NHRI are recommendations in nature and do not carry the force of law as is the case with a court ruling.
- Then someone may ask a question: What is the use of filing a complaint with the NHRI when submitting his or her case to the Court seems to be the more effective way of

solving the problem as the court ruling can be enforced? On this question, a former Human Rights Commissioner of Australia, Brian Burdekin, has explored the advantages of the complaint mechanism of the NHRI as compared to that of the Court in his book titled “National Human Rights Institutions in the Asia and the Pacific Region” which may be summarized as follows:

- Firstly, submitting a complaint to the NHRI is free of charge. It is also relatively easy as there is no complicated process to follow. This makes it more accessible to the people in general.
 - Secondly, it is a method of resolving problems between conflicting parties that is less adversarial in nature than judicial proceedings.
 - Thirdly, the investigation process of the NHRI is usually not as formal and rigid as that of the Court. Therefore, it does not take the NHRI as much time to conclude its consideration of a complaint.
 - And lastly, many NHRIs have the power to mediate or conciliate between the conflicting parties. This can help conflicting parties to settle the problem more quickly.
- The enabling laws of some NHRIs clearly state the scope within which it may consider individual complaints so that it does not overlap with that of the Court. This is the case of the National Human Rights Commission of Thailand (NHRCT). In the NHRCT Act of 1999, Section 22 states that the NHRCT shall not investigate a complaint which is pending before the Court or on which the Court has issued the final ruling.
 - As mentioned earlier, remedial measures which are the result of the investigation of a complaint by the NHRI do not carry the force of law as with a court ruling. In general, the NHRI has the power only to recommend such measures. It usually submits those measures to the government or state authorities concerned for consideration. It is up to the government or the authorities to decide whether or not they want to implement the NRHI recommendations. The law usually does not provide for sanction should the government or the authorities concerned do not follow NHRI’s proposed remedial measures.
 - However, the fact that NRHI recommendations do not carry the force of law does not necessarily mean that they are not useful in any way to the complainant. In the case of NHRCT, the complainant may decide to file his or her case to the Court and submit the NHRCT investigation report as a piece of evidence in his or her file.

Conciliating a complaint

- During the investigation of a complaint, the NHRI may suggest that conciliation be carried out in some cases which do not involve serious human rights violations if it deems appropriate. This, of course, can only be done with consent of the parties concerned. Conciliation is a means to help the conflicting parties to find a solution to the problem quickly. Most NHRIs that are members of the SEANF have the power to conciliate a complaint at some stage of investigation. SEANF member institutions having such power include the commissions of human rights of Indonesia, Myanmar, the Philippines and Thailand. It is true that the Court can also conciliate a case filed with it, but conciliation process of an NHRI is usually less formal than that used by the Court, and thus can be concluded in a relatively shorter period of time.
- Generally, the agreement reached as a result of conciliation by the NHRI usually does not have the same enforceability as a court ruling. In the case of NHRCT, our current enabling law stipulates that if one of the parties does not observe the agreement, the NHRCT can resume the investigation of the complaint. Should a violation has been found, it shall propose remedial measures to the person or government agency responsible for such violation. However, there are some NHRIs, for example the Commission of Human Rights of South Korea, whose enabling law states that the agreement reached from conciliation shall have the force of a court ruling. But a conciliated agreement with such enforceability is quite rare. In general, if the complaint cannot be resolved by conciliation, the complainant can bring the matter to the Court. In the case of the Human Rights Commission of Sri Lanka, the law provides for the Commission to refer matters where attempts at conciliation have been unsuccessful to the Court.

Conclusion

- In conclusion, the NHRI is not created to carry out the Court's functions. The Court continues to be a major and an important institution in protecting human rights. As part of the state justice system, the Court has the duty to enforce the law. But the NHRI is not a law enforcement authority. The objective for giving the NHRI the function of receiving individual complaints is to provide the people with an additional channel for recourse. Through this channel, they can bring their grievances to the attention of the government and have some of the urgent problems addressed in a timely manner while

others may be resolved by conciliation. In both cases, the people can have their problems resolved in a much shorter period of time than bringing the matter to the Court. This can also help reduce the number of cases that are to be brought before the Court.

- I would like to cite an example to show that the NHRI does not have the same function as the Court in protecting human rights. The NHRCT have received a number of complaints relating to physical abuse and ill-treatment of individuals during the arrest or while under the custody of police or security officers. After the investigation, if it is found that a violation had occurred, the NHRCT would send its investigation report together with remedial measures to the government departments concerned for action. In most of these cases, the NHRCT proposed that they establish a committee to investigate into the matter and, should the allegation prove true, they must take appropriate action to punish the responsible officers and ensure that those whose rights had been violated receive a compensation or other remedy. In this case, although the investigation by the NHRCT has been completed, the concerned government departments have to take further action. They have to prosecute the officers who were found to have violated human rights by filing a case with the Court so that they receive criminal sanctions as prescribed by the law. Ultimately, it is the duty of the Court to uphold the law and ensure effective protection of human rights.

NHRI's work in relation to the Court

Intervention in judicial proceedings

- For some NHRIs, their enabling laws explicitly provide for their roles in judicial proceedings. The details on the scope and ways in which this can be done differ from country to country. An NHRI may assist the Court as *amicus curiae*, or acting as a “friend of Court,” or request to intervene in the proceedings by presenting its opinions on a case relating to the promotion and protection of human rights. This can be done only with the authorization of the Court. The only SEANF member with the function to provide input into a case before the Court is the Human Rights Commission of Indonesia. But there are other NHRIs in the wider Asia-Pacific region with such function. They are, for example, the human rights commissions of Australia, New Zealand, India, Sri Lanka and the Republic of Korea. In some cases, the Court may request an NHRI on a particular human rights issue. The opinions presented by the NHRI can assist the Court in interpreting and applying relevant laws in accordance with human rights principles and international obligations binding on a particular country.

Submission of cases to the Court

- Some NHRI have the power to submit cases of human rights violations to the Court. This can be a matter relating to a complaint or an issue the NHRI deems necessary on its own initiative. However, very few NHRI are given such power. The NHRCT used to be able to submit matters relating to human rights to the Court. This is stipulated in the previous Constitution of 2007 as follows:
 - The NHRCT may submit to the Constitutional Court a case in relation to a complaint where the Commission is of the view that the provisions of any law are detrimental to human rights and beg the question of the constitutionality;
 - The NHRCT may also submit to the Administrative Courts a case in relation to a complaint where the Commission is of the view that any rule, order or administrative act is detrimental to human rights and begs the question of the constitutionality and legality; and
 - Lastly, the NHRCT may bring a case to the Courts of Justice for the injured person upon request of such person if it deems appropriate for the resolution of human rights violation problem as a whole.
- As the 2007 Constitution was abrogated in May 2014, the power of the NHRCT relating to the submission of cases to the Court has been automatically revoked. However, since the time when the 2007 Constitution came into force until its abrogation in 2014, the NHRCT did exercise this power by submitting four cases to the Constitutional Court and the other four cases to the Administrative Court. Among the four cases it submitted to the Constitutional Court, three of them were dismissed by the Court and the other one is still under its consideration. As regards the four cases submitted to the Administrative Court, two of them are under the consideration of the Central Administrative Court and the other two are pending in the Supreme Administrative Court. The latter two are cases where the NHRCT has made an appeal against the verdicts of the Central Administrative Court.
- With regard to the power to bring a matter to the Court of Justice on behalf of the injured for the benefit of resolving a human rights violation as a whole, the NHRCT had received quite a number of complaints requesting it to initiate court proceedings on their behalf. However, there was not any case that the NHRCT considered appropriate for taking it to the Court. There are quite a few reasons why the NHRCT decided not to do

so. These include a lack of sufficient evidence to substantiate the claims and the failure to meet the requirement of being beneficial to the resolution of human rights violations as a whole as prescribed in the Constitution.

Resort to court power for non-compliance with NHRI's requests for information and evidence in the investigation process

- There are other ways in which the work of NHRIs is related to the Court. Some NHRIs have to resort to the power of the Court in the process of complaint investigation. The laws of many NHRIs provides for sanctions to any person who refuses to give information or provide evidence as requested by the NHRIs. In some cases, there are also sanctions for any person obstructing the performance of duties of NHRI and/or their staff, making false statements or falsifying evidence. This is to ensure that the NHRI has all the information and evidence relating to the matter under its consideration needed for delivering a judgment that is fair to all sides.
- The enabling laws of several NHRIs in the Asia-Pacific region have provisions on sanctions for non-compliance with NHRIs' requests. For some NHRIs, sanctions are in fines only. This is the case of the Human Rights Commissions of Australia, New Zealand and the Republic of Korea. For others, sanctions can be both in fines and imprisonment. This is the case of the Human Rights Commissions of India, Fiji and Thailand. For yet other NHRIs, sanctions are not provided for in the law but they may request the Court to impose sanctions on persons who refuse to give information as requested. This is the case of the Human Rights Commissions of Indonesia, Sri Lanka and Mongolia.

Assistance to ensure equal access to justice

- Another area where the work of NHRIs is related to the Court is the promotion of equal access to justice, especially among the vulnerable groups. The NHRI can provide assistance to persons whose rights have been violated by giving information and advices on legal proceedings or on how to request for compensation and remedy. It should also ensure that the right of a person to fair trial is respected. For example, in a trial involving a member of a minority group or a migrant worker, an interpreter should be provided if that person does not understand the language used in the Court. Or if it is a person with some kind of disability, for example someone who has hearing impairment, that person should be assisted by a sign language interpreter.

Enhancement of human rights knowledge among judicial authorities

- Another important role the NRHI can play in relation to the judiciary is to provide judicial authorities with knowledge on human rights principles and standards. International human rights law is dynamic and new instruments and standards have been constantly developed. By becoming party to an international human rights treaty, the State has voluntarily agreed to adopt the principles and standards stipulated in the instrument for application at home. As the judiciary is a major institution which has to ensure that the rights guaranteed in the treaty that State ratifies will be protected, it is all the more important for judicial authorities, especially the judges, to have the knowledge and understanding of international human rights law that is applicable to their country.
- In Thailand, there have increasingly been more courses on human rights law being taught in universities. Human rights are also incorporated in the curricula of the Institute of Legal Education of the Thai Bar Association. The Office of the Court of Justice has arranged for lectures on human rights in some of its training courses for judges and invited me to be the speaker quite a few times now since I took up the position of NHRCT Chairperson in November last year. This is an encouraging development since it shows that the judiciary fully aware of the importance of human rights in the performance of their duty. On the part of NHRCT, we will continue to support the Office of the Court of Justice in its efforts to enhance the knowledge and understanding of human rights of the judges and other judicial personnel.

Mandate and functions of the NHRCT in relation to the Court under the new constitution

- Thailand is in the process of having a new constitution, which was passed by the referendum held in early August this year. With the coming of the new constitution, a new enabling law of the NHRCT will be drafted. This is a good opportunity for the NHRCT to improve some of the provisions in its existing law and make them more suitable for effective performance of the Commission. The NHRCT has submitted a proposal on the draft organic law for the NHRCT to the Constitution Drafting Committee, which is responsible for the drafting of all organic laws as stipulated in the constitution. In the draft law that we proposed, there are two new important issues in the functioning of the NHRCT that are related to the Court which are not provided for in the existing legislation.

- The first one is a proposal to give back to the NHRCT the mandate to submit a matter to the Constitutional Court and the Administrative Court as provided for in the 2007 Constitution. (After the abrogation of the 2007 Constitution, the NHRCT continues to exist and carry out its functions based on its enabling law of 1999, which does not provide for this mandate.)
- We did not ask the Constitution Drafting Committee to return to us the mandate to bring a matter to the Court of Justice on behalf of the injured upon his or her request if the NHRCT deems it appropriate for the resolution of human rights violation problem as a whole. On this point, the Commissioners spent quite some time discussing and debating about the *pros* and *cons* of having this mandate. One of the problem many people see as a weakness of the NHRCT, and this is probably the case for some other NHRIs as well, is that our recommendations to the government are often not implemented because they have no legal force. Having the mandate to bring a matter to the Court provides a means for the NHRCT to ensure that concerned government agencies will take necessary actions to address human rights violations as we would like them to do.
- On the other hand, having this mandate can be problematic. If the NHRCT brings a matter to the Court, it becomes a party to a dispute. This can affect its impartiality, be it real or perceived, which is an important requirement for an NHRI and can impact on the credibility of its work. After weighing all the *pros* and *cons*, we decided not to request for such mandate.
- However, we did propose that the NHRCT be able to submit its opinions to the Court of Justice and the Military Court in criminal cases where it is of the view that the laws or by-laws applicable to the cases are inconsistent with the Constitution or relevant laws.
- The second issue that we proposed to the Constitution Drafting Committee is to grant NHRCT members functional immunity to ensure their independence. The immunity will give them protection from legal liability for acts undertaken in good faith in their official capacity. This is to comply with the recommendation of the Sub-Committee on Accreditation (SCA). (The SCA is a subsidiary body of the global network of NHRIs having the specific task of considering whether an NHRI is established and discharges its mandate in accordance with the international standards as appeared in the document titled “The Principles relating to the status of national institutions for the promotion and protection of human rights” or the so-called “Paris Principles” for short.)

- The whole process of drafting the organic law for the NHRCT will take 240 days from the date the new constitution becomes into force. It is expected that the new constitution will come into effect in November this year. The NHRCT will follow closely the drafting process to see if its proposals will be incorporated in its new organic law.

Conclusion

- To conclude, the duty to promote and protect human rights in international law is the primary responsibility of the State. State here means all entities of the legislative, executive and the judiciary. The Universal Declaration of Human Rights, which was adopted by the United Nations in 1948, states in its preamble that “*(Whereas) it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,...*” The Court is, therefore, an important institution in ensuring that human rights are effectively protected.
- However, the NHRI can complement the work of the Court in protecting human rights in many ways. This can be done through the discharging of its mandate to receive and investigate individual complaints on alleged human rights violations, to recommend remedial measures to the person or government agency concerned and to mediate or conciliate a complaint. This helps to reduce the number of cases that might be brought to the Court. In addition, the NHRI can assist the Court in the deliberation of cases relating to human rights by submitting its opinions on legal or factual matters. It also helps to ensure that the most vulnerable groups of the population have equal access to justice and to enhance the knowledge and understanding of human rights of judges and other judicial authorities. Therefore, the NHRI and the judiciary should cooperate and coordinate with each other as appropriate, taking into account the need for both NHRI and the judiciary to maintain their independence and the specific national context in which they work, for the benefit of protecting the rights of the people in a more effective manner.
- I would like to end my presentation here and I am happy to answer any questions from the floor.
