CHAPTER 4

MECHANISMS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

In this chapter, we concern ourselves directly with the topic of what measures and mechanisms are at our disposal in the promotion and protection of human rights. At the national, regional and international levels, a complex body of structures, bodies, laws and customs serve to form the basis for the realisation of universal human rights. At the institutional apex of this structure we find the United Nations, which, after more than fifty years of pursuing its goal to '...reaffirm faith in fundamental human rights...[176]' is still actively engaged in codifying and assisting member states in establishing mechanisms at the local and regional level to safeguard, monitor and enhance human rights. More specifically, these efforts are directed towards the *promotion* and *protection* of human rights. In the following sections, we will examine the meaning of promotion and protection, focus on the institution of national human commissions or other national mechanisms and highlight the Paris Principles as representing the international standard for the establishment of such institutions. Finally, we will describe the past and future human rights institutions in Thailand, including pre-1997 constitutional institutions, the 1997 constitutional provisions and the National Human Rights Act of 1999.

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[176] Canadian Human Rights Foundation and Forum Asia. Manual of Readings – Engaging National Human Rights Commissions: The Role of Civil Society. Nakorn Nayok: Forum Asia, 1999, p 1-3

4.1 National Mechanisms

Throughout the existence of human rights, there has been sustained debate about the ultimate source of rights. Although most activists would place the source of human rights in the fundamental, inherent dignity of the human being, while others would allude to divine origin, still others would argue that an individual only may enjoy such human rights as the state will grant him or her. Despite the increasing encroachment of international human rights law and norms upon the formerly sacred sovereignty of the nation-state, the national level remains the primary stage upon which human rights are ultimately realised – or not, as the case may be. As such, the importance and significance of national mechanisms becomes readily apparent. Though there has been some substantial progress towards the establishment of regional human rights mechanisms, Asia remains the only major continent of the world without one. Moreover, some ASEAN governments have argued that it would be premature to enact a regional mechanism ahead of national mechanisms in all the respective member nations. Given the appalling human rights situation in countries such as Burma and Laos, proponents of a regional mechanism should not expect any substantial commitment in the near future.

Within the Asian Pacific region, there have been several nations that have enacted legislation to establish national human rights mechanisms, most commonly a national human rights commission. Among these are Indonesia, Thailand, Nepal, Philippines, Malaysia, India, Pakistan and Sri Lanka. Of these, only four are in the Southeast Asia region. The impetus for the establishment of the commissions in the countries listed above varies according to the historical, social and political situation unique to that country. At a recent conference on national human rights commissions, some of the

reasons for the establishment were highlighted by delegates.[177] In Indonesia, the moves to establish a commission was said to have begun with international pressure following an incident called the Santa Cruz massacre on East Timor, (a former Portuguese colony under Indonesian occupation.) The commission was set up under a presidential decree. In Nepal, the commission owes its birth to major political change in the country ranging from revolution, to the change from absolute monarchy to a system of constitutional monarchy. In the Philippines, with a very strong NGO community, the commission became an election issue and was promoted using 'people power.' In Malaysia, the commission was said to have been established to placate NGOs and also to conform to international norms. In India, the National Human Rights Commission - was designed, as the then ruling party admitted, to "counter western propaganda".[178] As for Thailand, the delegate spoke of civil society-generated pressure as the main reason for its enactment.

In several of the examples above, international pressure and/or norms was given as one of the reasons for the establishment of a commission. This type of pressure often comes to bear on a nation which has recently undergone a traumatic or particularly repressive incident in which many people were killed or in which there was a grave and major violation of human rights, such as in the case of Indonesia. Another major influencing factor involves the domestic application of international law. When a state accedes to an international human rights instrument such as a Covenant or

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[177] Conference organised by the Canadian Human Rights Foundation and Forum Asia, entitled Engaging National Human Rights Commissions: The Role of Civil Society. Nakorn Nayok, Thailand 1999

[178] South Asia Human Rights Documentation Centre. *National Human Rights Institutions in the Asia Pacific Region* (Report of the Alternate NGO Consultation on the Second Asia-Pacific Regional Workshop on NHRIs). March 1998

Protocol, it is expected that that state will take steps to incorporate provisions of that instrument into its domestic law, and/or to bring all existing domestic legislation into conformity with the spirit and obligations of the instrument.[179] The legal enforcement of said laws through some form of institutional infrastructure is critical to ensuring the true enjoyment of human rights. In other words, its not enough to have the law exist in principle, but it must also be manifest in practical terms. This essential factor serves as the principal argument for the establishment of national institutions for the promotion and protection of human rights.

According to Karel Vasak, writing in 1982, human rights institutions usually serve either a promotion or protection function, but seldom both at the same time.[180] He sees the *promotion* of human rights as forward looking, seeking to educate and disseminate human rights knowledge with the aim of identifying inadequacies and preventing the violation of human rights in the future. This he associates with the Anglo-Saxon legal and social tradition. In contrast, he argues the *protection* of human rights focuses on the present, and the observance of human rights under existing laws and structures.[181] To use a medical metaphor, the promotion of human rights could be considered as preventative medicine – the giving of a vaccine, while the protection of human rights would be viewed as emergency medicine – using the tools at hand to cure an existing ailment.

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[179] Centre for Human Rights. "National Human Rights Institutions: Background and Overview." in *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights.* Geneva: United Nations, 1995, p. 3

[180] Vasak, Karel (ed.) *The International Dimensions of Human Rights*. Westport. Connecticut: UNESCO. 1982 , p. 215

[181] Ibid. p. 216

To date, there has not yet been an internationally recognised definition of a national human rights institution, however most agree that is can deal with virtually any national-level institution, recognised by or enacted in law, by decree or constitutionally enshrined, which is engaged in the promotion and protection of human rights. They thus serve as administrative organisations which usually fall into one of two general categories: human rights commissions or ombudsman. In general, a human rights commission is an institution engaged in activities directly concerned with the promotion and protection of human rights, which may include an advisory function, educational mandate, and impartial investigatory function. The commission may receive individual complaints, hold tribunals, report on the government's human rights record, or any number of a range of other activities. Comparatively, the ombudsman usually has a more limited mandate, encompassing an impartial investigatory function usually related to transparency and fairness in the public administration sphere.[182]

Vasak describes five key functions which he feels are essential elements of a human rights institution in promoting and protecting human rights.

1. **Information**: the institution must gather, compile and make effective use of information regarding human rights, their observance, and violations
2. **Investigation**: The institution must have a variety of tools at its disposal in order to gather information, such as fact-finding. A central question becomes, who initiates the process?
3. **Conciliation**: an effective institution will have the power to mediate and offer friendly settlement options during a dispute

[182] Ibid., p. 7

4. **Decision**: the institution will have the legal authority and power to offer resolution to a dispute. The authority here may range from making recommendations to quasi-judicial powers to render a verdict and impose remedial measures.
5. **Sanctions**: the institution should be able to impose sanctions. Currently, no national human rights mechanisms have this authority. They, can, however mobilise public opinion towards such an end.[183]

These five functions, while evidencing some inadequacies, find a more comprehensive articulation in the growing body of international law and norms on the establishment of national human rights mechanisms. These norms have been codified into concrete guidelines by which states can set up national structures to promote and protect human rights. Under the direct guidance of the Economic and Social Council, the Commission on Human Rights and through the participation of member states of the United Nations, these norms have taken shape and have been accepted by the General Assembly as representing the current international standard for national mechanisms.[184] Known as the *Principles Relating to the Status of National Institutions* or the *Paris Principles*, these guidelines form the backbone of the UN's drive to encourage national governments to found national mechanisms in their respective nations.

4.1.1 Paris Principles

The Paris Principles are the product of decades of consolidation, consensus-building, diplomacy and international advocacy by the United Nations, concerned nation states

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[183] Ibid. p. 218

[184] Resolution 48/134 of the General Assembly of the United Nations, 20 December, 1993 See Centre for Human Rights., op. cit., p. 5

and non-governmental organisations. Indeed, the issue of national human rights mechanisms was first discussed by the Economic and Social Council (ECOSOC) of the UN in 1946, two full years before the proclamation of the Universal Declaration of Human Rights.[185] In two subsequent resolutions, the Council continued to pursue its policy of inviting member states to consider the role of national mechanisms.[186]

The first major exercise in standard-setting occurred at the Seminar on National and Local Institutions for the Promotion and protection of Human Rights, held in Geneva in September, 1978. The standards resulting from this seminar were accepted and endorsed by the General Assembly as recognised guidelines. These guidelines were later re-evaluated and updated at the Workshop on National Institutions for the Promotion and Protection of Human Rights, held in Paris, 1991. It was at this meeting that the Paris Principles were articulated and consolidated.[187]

The most comprehensive and important international gathering on the issue of human rights took place in 1993 with the World Conference on Human Rights, held in Vienna. This conference brought together governments, activists and NGOs from all over the globe to discuss, debate and affirm international human rights norms. At the conference the delegates reaffirmed the indivisibility and interdependence of all human rights and included the following crucial statements on national institutions in the Vienna Declaration and Programme of Action:

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[185] Ibid., p. 4

[186] Ibid. p. 4. (ECOSOC resolution 2/9, 21 June, 1946 and ECOSOC resolution 772B (XXX) of 25 July, 1960)

[187] Ibid. p. 5

'...the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights...(part I, para. 36)'[188]

The gathering also called upon governments to establish and/or strengthen national institutions modelled on the Paris Principles, and recognised the right of each state to choose for itself the best form of institution for its particular situation.[189] Prior to the Vienna conference, a preparatory regional meeting was held in Bangkok, with Asian governments making a statement reaffirming the sovereignty of the nation-state and the principle of non-interference in national affairs (see page 37, 64)

The Paris Principles refer to six general categories, or 'effectiveness factors' as prerequisites for a functioning, effective institution. Within each broad category there are also included relevant subcategories. They are briefly summarised here[190]:

Independence is defined as the ability of the institution to function independently, without interference from government and political parties. It is concerned with the independence of the institution through legal and operational autonomy, independence through financial autonomy, independence through appointment and dismissal procedures, and independence through composition (pluralism).

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[188] Ibid., p. 5
[189] Ibid., p. 5
[190] For complete details, please see Appendix

Defined jurisdiction and adequate powers refers to the clearly delineated scope of the institutions powers and mandate. It includes subject-matter jurisdiction, avoiding conflicts of jurisdiction, and adequate powers.

Accessibility refers to the openness of the organisation to the population it is mandated to serve. This category includes a level of awareness of the institution, physical accessibility and accessibility through representative composition.

Cooperation deals with the location of the institution within the network of local, regional and international human rights networks and systems. This incorporates cooperation with non-governmental organisations, cooperation between national institutions, and cooperation with intergovernmental organisations, including the UN.

Operational efficiency refers directly to the day-to-day operations of the institution, its procedures, its rules, regulations and working methods. This category encompasses adequate resources (both human and material), working methods, personnel matters, and review and evaluation.

Accountability necessitates a system of checks and balances to ensure the institutional effectiveness of the entity. This may take the form of reporting to relevant government bodies (usually the government and/or Parliament), as well as to the public.

We will return later to the Paris Principles when assessing the efficacy of advocacy coalitions in the achievement of their policy goals. (see chapter 5) In order to frame the parameters for the discussion in chapter 5, let us now turn to a concise

examination of the national human rights mechanisms which exist in Thailand. We begin with those institutions in operation prior to the 1997 constitution, then proceed to examine the provisions in the constitution which establish the basis for a national human rights commission, followed by an outline of the National Human Right Commission Act, 1999.

4.2 Pre-Constitutional (1997) Mechanisms in Thailand

Although prior to 1997, Thailand was lacking in a national human rights commission, there were numerous other entities which were charged, either directly or indirectly, with the promotion and protection of human rights in varying degrees. These entities range in institutional character from legislative committees to ministries to state agencies. Though not perhaps promoting and protecting human rights in an entirely comprehensive manner, these entities were involved in coordination and some promotional activities. For example the National Youth Bureau[191], and the National Commission on Women's Affairs.[192]

In terms of direct protection of human rights, most are associated with the Ministries of Justice and Interior, and represent the more traditional structural institutions such as the police, public prosecutors and various offices to which citizens may submit grievances or complaints. However, it must be also noted that many of these organisations, such as the police, are directly involved with the majority of human rights violations against average citizens. In addition to these, there are various

[191] www.nyb.go.th

[192] สตรีกับกฎหมายและสิทธิมนุษยชน ดูข้อมูลเพิ่มเติมได้ที่ www.pmo.thaigov go.th/thaigov/home/htmlady/law.htm

Parliamentary House and Senate committees which deal with disadvantaged groups such as women, children, the disabled, etc. Finally, the judiciary also forms a central institution legally mandated to uphold the law and protect the rights of citizens. However, the inaccessibility and cultural and social biases make the courts the least attractive option for many. Other remedial avenues of support for citizens include the Petition Council of the Council of State, established in 1979[193], the Office for the Protection of Citizens Rights and Legal Assistance of the Office of the Attorney General, established in 1982[194], the House Justice and Human Rights Committee, established in 1990[195], and the Senate Committee on Human Rights, established in 1998[196].

In essence, however, the majority of these bodies (with the exception of the Senate and House committees) are not mandated to deal with general human rights issues. Many civil servants, who staff these committees and offices also express confusion as to their role, the meaning of human rights, and the jurisdictional ambiguity of their

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[193] ธีระพล อรุณะกสิกร. *พระราชบัญญัติคณะกรรมการกฤษฎีกา พ.ศ. 2522 แก้ไขเพิ่มเติม พ.ศ. 2534.* วิญญูชน กรุงเทพฯ 2539, p. 21. This section has since been repealed under the *Council of State Act* (No. 4), 1999 for the following reasons: 'Upon the establishment of the Administrative Courts in accordance with the law on the establishment of the administrative courts and administrative court procedure, there are transitory provisions under section 12 and section 13 of the *Council of State Act* (No. 4), B.E. 2542 that all affairs and personnel in connection with the work of the Petition Council and the Law and Petition Analysis Division of the Office of the Council of State insofar as determined by the Prime Minister shall be transferred to the Office of the Administrative Courts and that the provisions relating to petitions under the law on the Council of State shall remain in force until the Central Administrative Court has been in operation, the details of which appear in the full text of the *Council of State Act* (No. 4), B.E. 2542...' (Council of State, Internet website)

[194] ลัดดาวัลย์ ตันติวิทยาพิทักษ์ และ ฯลฯ. รายงานการวิจัยเรื่องการจัดตั้งคณะกรรมการสิทธิมนุษยชนแห่งชาติ. สำนักงานคณะกรรมการการวิจัยแห่งชาติ กรุงเทพฯ 2543, p. 77

[195] Personal interview with Sarawut Pratoomraj of CCHROT.

[196] Thongbai Thongpao. "Senate to Protect Human Rights." *Bangkok Post*, February 28, 1999, p. 5

organisation.[197] Moreover, these bodies are often part-time, highly inaccessible, relatively unknown in the general population, and may even be involved in direct human rights violations. The full realisation of a distinct, independent national human rights mechanism was not to be initiated until 1997, when for the first time, the Thai constitution explicitly set forth provisions for the establishment of a national human rights commission.

4.3 Human Rights in the 1997 Thai Constitution

Under Chapter 6 – The National Assembly, Part 8 of the Thai constitution of 1997, a national human rights commission is to be set up for the first time in Thai history. The two critical articles, Article 199 and Article 200 provide the basis in constitutional law for the enactment of organic legislation to establish the commission. The two Articles are brief and of considerable import. They read as follows:

> **Section 199**
> The National Human Rights Commission consists of a President and ten other members appointed, by the King with the advice of the Senate, from the persons having apparent knowledge and experiences in the protection of rights and liberties of the people, having regard also to the participation of representatives from private organisations in the field of human rights.
>
> The President of the Senate shall countersign the Royal Command appointing the President and members of the National Human Rights Commission.

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[197] ลัดดาวัลย์ ต้นติวิทยาพิทักษ์., อ้างแล้ว. p. 76

The qualifications, prohibitions, selection, election, removal and determination of the remuneration of members of the National Human Rights Commission shall be as provided by law.

The members of the National Human Rights Commission shall hold office for a term of six years as from the date of their appointment by the King and shall serve for only one term.

Section 200

The National Human Rights Commission has the powers and duties as follows:

1) to examine and report the commission or omission of acts which violate human rights or which do not comply with obligations under international treaties to which Thailand is a party, and propose appropriate remedial measures to the person or agency committing or omitting such acts for taking action. In the case where it appears that no action has been taken as proposed, the Commission shall report to the National Assembly for further proceeding;

2) to propose to the National Assembly and the Council of Ministers policies and recommendations with regard to the revision of laws, rules or regulations for the purpose of promoting and protecting human rights;

3) to promote education, researches and the dissemination of knowledge on human rights;

4) to promote co-operation and co-ordination among Government agencies, private organisations, and other organisations in the field of human rights;

5) to prepare an annual report for the appraisal of situations in the sphere of human rights in the country and submit it to the National Assembly;

6) other powers and duties as provided by law.

In the performance of duties, the National Human Rights Commission shall also have regard to the interests of the country and the public.

The National Human Rights Commission has the power to demand relevant documents or evidence from any person or summon any person to give statements of fact including other powers for the purpose of performing its duties as provided by law.[198]

In addition to these two key articles, another fundamental article which concerns the enactment of organic laws required by the constitution is found in the section on Transitory Provisions. Section 334(1) of the constitution mandates that,

> 'the laws under section 68, section 199, section 200, section 248, section 270, section 275 and section 284 paragraphs two and paragraph three shall be enacted within two years as from the date of the promulgation of this Constitution'[199]

Interestingly, the National Human Rights Commission was not mentioned under section 329 which lists the various organic laws required to be enacted within two years. Although the NHRC and Ombudsman are found in the same Chapter, they seem to be given differing levels of importance by the constitution drafters. The Ombudsman can be found in section 329, as well as in section 330 which explicitly states certain provisions that must appear in the organic law on the Ombudsman,

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[198] Office of the Council of State. *Constitution of the Kingdom of Thailand B.E. 2540(1997)*, pp 73-75

[199] Ibid., p. 140

relating to its duties, powers, composition, cooperation and qualifications.[200] Such clarity was not accorded the National Human Rights Commission.

Another critical section whose importance will be mentioned later, is section 75 under Chapter 5 – Directive Principles of Fundamental State Policies. In reads as follows:

> **Section 75**
> The State shall ensure the compliance with the law, protect the rights and liberties of a person, provide efficient administration of justice and serve justice to the people expediently and equally and organise an efficient system of public administration and other State affairs to meet people's demand.
>
> The State shall allocate adequate budgets for the *independent* administration of the Election Commission, the Ombudsmen, the *National Human Rights Commission*, the Constitutional Court, the Courts of Justice, the Administrative Courts, the National Counter Corruption Commission and the State Audit Commission.[201]

In addition to those sections of the constitution that deal directly with the National Human Rights Commission, there were also several groundbreaking provisions in the 1997 constitution dealing with human rights in general. Although references to the rights and duties of Thai citizens had been included in Thai constitutions since 1932, for the first time, the 1997 constitution incorporated the broadest definition to date of human rights. This definition included three key features. First, human dignity was recognised as the central tenet and basis for human rights. This incredible

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[200] Ibid., p. 137
[201] Ibid., p. 22. Emphasis added.

accomplishment represents a sea-tide change in the thinking of Thai constitution drafters.[202] It means that human rights are grounded in human dignity and trace their legitimacy from that dignity. Human rights are no longer simply legal statements of what the state will permit its citizens to 'have.' Second, the constitution recognises the fundamental principle of equality. Due to the advocacy efforts of many women's groups, this also includes an explicit mention of the equality of the sexes. Finally, the enjoyment of human rights must take place in a climate of tolerance and respect, with the constitution outlawing discrimination based on irrelevant characteristics such as religion, nationality, language or gender.[203] As a crowning achievement, all such rights also became judicable as the constitution became the supreme law of the land under sections 6, 28 and 29.[204]

4.4 National Human Rights Commission Act (1999)

Under section 334(1) of the Constitution, the government was required to draft and enact a law to establish the National Human Rights Commission. This was achieved with the *National Human Rights Commission Act*, 1999 being published in the Royal Gazette on November 25, 1999.[205] The road leading to this final enactment in law was, however, an extremely bumpy one, and proved to be arguably the most controversial organic law under the new Constitution. Upon examination of meeting records of the Constitutional Drafting Assembly, the issue of the National Human

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[202] Some drafters, however, proposed cutting the word 'human dignity' from the draft because it has 'no meaning.' See 'สรุปผลการประชุมยกร่างรัฐธรรมนูญ ของ คณะกรรมาธิการยกร่างรัฐธรรมนูญ สภาร่างรัฐธรรมนูญ วันที่ 22 เมษายน 2540', p. 3 in มูลนิธิอาเซีย และสถาบันพระปกเกล้า. *ฐานข้อมูลรายงานการประชุมสภาร่างรัฐธรรมนูญ (สสร.) รัฐธรรมนูญแห่งราชอาณาจักร ไทย พ.ศ. ๒๕๔๐* [CD-ROM]. กรุงเทพฯ: มูลนิธิอาเซียสถาบันพระปกเกล้า

[203] ไพโรจน์ โพธิไสย. "คณะกรรมการสิทธิมนุษยชนแห่งชาติ." ใน รัฐ*สภาสาร*. สำนักงานเลขาธิการสภาผู้แทน ราษฎร กรุงเทพฯ 2543, p. 30

[204] Office of the Council of State., op. cit., pp. 3, 9

[205] ไพโรน์ โพธิไสย. อ้างแล้ว., p. 45

Rights Commission took up more time than almost any other issue. Furthermore, during the drafting and debating process, no fewer than five drafts were submitted to the House during first reading for consideration.[206] As we will see in the following chapter, the divisions between proponents and opponents came into sharp and painful relief compared to the more muted and accommodating atmosphere that pervaded the debates in the Constitutional Drafting Assembly.

The *National Human Rights Commission Act* in the end failed to represent all the characteristics as demanded by human rights activists. It represents a compromise document, which is not necessarily a negative situation. Even the United Nations, in its preamble to the Paris Principles, recognises the necessity for national human rights mechanisms to be 'appropriate' to the local social, cultural, political and economic situation in the country of its establishment.[207] This apparent 'nod' to the Asian governments following their 'Bangkok Declaration' does permit some flexibility in allowing governments to adapt their commissions to suit indigenous patterns of social organisation and beliefs. This adaptation is of course, subject to negotiation during the drafting process (providing the government is open to public input) and can therefore even provide a more effective, legitimate and generally respectable institution on the ground.

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[206] Some authors have placed the number as high as 17 different versions, including civil society drafts, and drafts which were revised during the scrutiny processes of various institutions such as the Council of State, Parliament, etc. However, as many of these (such as the civil society versions) were not officially considered by the Parliament, they are of lesser importance, and records regarding process and debate on them are more scarce. However, some did serve an important belief system defining function within and among various advocacy coalitions.

[207] Centre for Human Rights., op. cit., p. 11

Very briefly, the *National Human Rights Commission Act* contains the following provisions. The Act shall be controlled by the President of the National Human Rights Commission who has the authority and power to issue regulations in the performance of the duties of the commission. The commission is comprised of a President and 10 other commissioners, appointed by the King at the recommendation of the Senate, giving regard to the opinions and participation of private civil society organisations. Importantly, commissioners cannot be a government official or hold any other employment. The commission will promote compliance with human rights instruments, both domestic and foreign, will examine and report on violations of human rights, will recommend policies related to human rights to the National Assembly, will promote human rights education, promote inter-agency cooperation, and prepare annual reports on the human rights situation in the country. Commissioners will work full time and receive a salary. The commission is attached to the National Assembly. For the complete Act in its entirety, please see Appendix.

The constitutional provisions and subsequent enactment of the *National Human Rights Commission Act* was a long and arduous process. In the next chapter we apply the Advocacy Coalition Framework to the political reform and human rights policy subsystems. Here we move away from the historical or philosophical underpinnings to belief systems and focus on their explicit articulation in public documents in order to differentiate aggregate groups (advocacy coalitions) and to measure the changes in belief systems over time.