

# **NATIONAL HUMAN RIGHTS COMMISSION OF INDIA**

## **TIME TO STAND UP AND SPEAK OUT**

**FEBRUARY 2004**

### **ASIA PACIFIC HUMAN RIGHTS NETWORK**

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## Introduction

In 1993, the UN General Assembly adopted the Paris Principles, a set of principles prescribing minimum standards for the operation of national human rights institutions. In the same year, the Indian Parliament adopted its own legislation establishing a National Human Rights Commission (NHRC), a body that has struggled over the past decade to attain the degree of independence and breadth of responsibility endorsed by the General Assembly. Its work has been hampered externally by its restrictive empowering legislation, the Protection of Human Rights Act 1993, herein referred to as the Human Rights Act, and internally by the actions and inaction of its own membership.

The operational efficacy of the NHRC has been evaluated several times in the past – by McKinsey & Company, Inc in 1997,<sup>1</sup> the Staff Inspection Unit in 1999 and by the South Asia Human Rights Documentation Centre in 2001.<sup>2</sup> This analysis looks to align its critique of the NHRC with the requirements of the Paris Principles, focusing on issues of administrative and investigative autonomy, and the scope and discharge of its mandate.

### 1. The Origins of the National Human Rights Commission

The NHRC was established by the Central Government at a time of increasingly strident international criticism regarding the activities of India's police and Border Security Force personnel.<sup>3</sup> In broad terms, the NHRC was vested with a mandate that was two-fold – to investigate and remedy individual instances of human rights violations, and to facilitate public awareness of human rights.<sup>4</sup>

The timing of the NHRC's creation raised concerns that it was merely established to restore the international reputation of the Indian Government, rather than representing any meaningful political undertaking to safeguard human rights.<sup>5</sup> Although the genuinely constructive action the NHRC has taken on particular occasions, such as its early intervention in the Gujarat riots,<sup>6</sup> is proof of its capacity to act as more than a 'post office,'<sup>7</sup> it has also become clear that the NHRC suffers from numerous structural defects. It is these inherent weaknesses that have ultimately prevented the NHRC from becoming an effective force for the 'better protection of Human Rights'<sup>8</sup> in India.

At a minimum, the NHRC must function in conformity with the standards articulated in the Paris Principles if it is to have any credibility as a national human rights institution.

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<sup>1</sup> McKinsey & Company Inc, *Preparing for a Fresh Start*, (McKinsey & Company Inc, 1997).

<sup>2</sup> South Asia Human Rights Documentations Centre, *Judgment Reserved: the Case of the National Human Rights Commission of India* (South Asia Human Rights Documentation Centre 2001).

<sup>3</sup> Vijayashri Sripati, 'India's National Human Rights Commission: A Shackled Commission?', *Boston University International Law Journal*, vol 18 no 1, Spring 2000, p5.

<sup>4</sup> The Protection of Human Rights Act 1993.

<sup>5</sup> Virendra Dayal, 'Evolution of the National Human Rights Commission, 1993-2002: A Decennial View', *Journal of the National Human Rights Commission, India*, vol 1, 2002, p40.

<sup>6</sup> National Human Rights Commission, *Annual Report 2001-2002*, p.20

<sup>7</sup> Virendra Dayal, 'Evolution of the National Human Rights Commission, 1993-2002: A Decennial View', *Journal of the National Human Rights Commission, India*, vol 1, 2002, p40.

<sup>8</sup> The Protection of Human Rights Act 1993, preamble.

The Principles set out clear guidelines relating to the composition of the Commission, its financial and operational independence, its competence and responsibilities, and its transparency and accountability.<sup>9</sup>

## 2. Composition of the Commission

A procedure for the appointment of staff to the NHRC that is free from governmental manipulation is fundamental to establishing the NHRC's operational independence. Under the current provisions of the PHRA, the President, acting on the advice of an ostensibly bipartisan Appointments Committee, is responsible for the appointment of the five members of the Commission.<sup>10</sup>

The fact that the Appointments Committee tends to be overwhelmingly biased towards the Government in practice (opposition leaders are only guaranteed two of the six spots on the Committee)<sup>11</sup> is concerning enough in itself. This is exacerbated by the lack of transparency of the actual selection process, which is routinely held behind closed doors.<sup>12</sup> More worrying, however, is the blatant disregard for the requirements of the Human Rights Act recently shown by State Governments when two former members of the NHRC were appointed to posts of State Governor in Kerala and Tamil Nadu.<sup>13</sup> This directly contravenes s6(3) of the Act— a provision that acts as a guarantee of the Commission's independence by rendering former Commission members ineligible for employment under any State or Central Government.

The Paris Principles also emphasise the need for the membership of the Commission to reflect the pluralism of a country's 'social forces.'<sup>14</sup> Beyond the ex-officio member status accorded to the Chairpersons of the National Commissions on Minorities, Women and Scheduled Castes and Tribes, this obligation is not acknowledged in the procedure for appointment of Commission staff set out in the Human Rights Act. Nor has it been a factor in the appointment of Commission staff in practice.

This can be contrasted with the originating legislation for Northern Ireland's Human Rights Commission, which requires that Commissioners 'shall as far as practicable...be representative of the community in Northern Ireland.'<sup>15</sup> Furthermore, this is clearly reflected in the current composition of the Northern Ireland Human Rights

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<sup>9</sup> Paris Principles 1993.

<sup>10</sup> The Protection of Human Rights Act 1993, section 4(1).

<sup>11</sup> South Asia Human Rights Documentation Centre, *Judgment Reserved: the Case of the National Human Rights Commission of India* (South Asia Human Rights Documentation Centre 2001), p22.

<sup>12</sup> G P Joshi, 'National Human Rights Commission – Need for Review', available at <[http://www.humanrightsinitiative.org/programs/aj/police/papers/gpj/national\\_human\\_rights\\_commission.pdf](http://www.humanrightsinitiative.org/programs/aj/police/papers/gpj/national_human_rights_commission.pdf)> (last visited 25 January 2003).

<sup>13</sup> Justice Fathima Beevi was appointed to the post of Governor of Tamil Nadu and Justice S.S. Kang was appointed post of Governor of Kerala in 1997 (South Asia Human Rights Documentation Centre, *Judgment Reserved: the Case of the National Human Rights Commission of India* (South Asia Human Rights Documentation Centre 2001 p23)

<sup>14</sup> Paris Principles 1993, B.1.

<sup>15</sup> Northern Ireland Act 1998, section 68(3).

Commission.<sup>16</sup> The New Zealand Human Rights Commission, on the other hand, is an example of a Commission that is comprised of members from diverse backgrounds even though there is no statutory obligation to appoint staff on that basis.<sup>17</sup>

### 3. Procedural Independence

The credibility of the NHRC as a whole, and its investigative division in particular, hinges on the perceived impartiality and expertise of its personnel. The Human Rights Act vests responsibility in the Central Government for providing the Commission with ‘police and investigative staff... necessary for the efficient performance of the functions of the Commission.’<sup>18</sup> Consistent with this provision, the Commission’s investigative staff is overwhelmingly comprised of officers from the Intelligence Bureau and existing police personnel.<sup>19</sup> The disproportionate presence of Intelligence Bureau officers is also apparent in the broader composition of the Commission’s staff.

Without its own autonomous cadre of investigation officers, the NHRC’s capacity to initiate genuinely independent inquiry into incidents involving public authorities is seriously compromised.<sup>20</sup> This can be contrasted with the situation in other national human rights institutions. For example, in the Northern Ireland Human Rights Commission all of the Investigations Workers work exclusively in their capacity as staff of the Commission.<sup>21</sup> Alternatively, the NHRC could aim to institute autonomous investigate teams on a smaller scale, in the style of the Phillipines Human Rights Commission who have provided for ‘Quick Reaction Teams’ comprised of a lawyer, an investigator and a medical doctor.<sup>22</sup> These teams are on twenty-four hour stand-by, ready to attend to urgent situations.<sup>23</sup> What needs to be stressed is that unless it establishes a permanent, independent investigative wing, the NHRC will continue to be subject to the influence of State agencies.

Although the Commission itself is empowered by statute to appoint ‘such other administrative, technical and scientific staff as it may consider necessary,’<sup>24</sup> the Government still retains its influence as it determines the salaries of the Commission

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<sup>16</sup> See ‘Commission Members,’ Northern Ireland Human Rights Commission, available at <<http://www.nihrc.org>> (last visited 3 February 2004).

<sup>17</sup> Human Rights Act 1993 (New Zealand) section 8.

<sup>18</sup> Protection of Human Rights Act, section 11(1)

<sup>19</sup> Vijayashri Sripati, ‘India’s National Human Rights Commission: A Shackled Commission?’, *Boston University International Law Journal*, vol 18 no 1, Spring 2000, p32.

<sup>20</sup> Vijayashri Sripati, ‘India’s National Human Rights Commission: A Shackled Commission?’, *Boston University International Law Journal*, vol 18 no 1, Spring 2000, p33.

<sup>21</sup> See ‘Commission Staff,’ Northern Ireland Human Rights Commission website, available at <<http://www.nihrc.org>> (last visited 3 February 2004)

<sup>22</sup> Vijayashri Sripati, ‘India’s National Human Rights Commission: A Shackled Commission?’, *Boston University International Law Journal*, vol 18 no 1, Spring 2000, p32.

<sup>23</sup> Vijayashri Sripati, ‘India’s National Human Rights Commission: A Shackled Commission?’, *Boston University International Law Journal*, vol 18 no 1, Spring 2000, p32

<sup>24</sup> Protection of Human Rights Act 1993, section 11(2)

staff.<sup>25</sup> The unattractive terms the Government has attached to the NHRC's posts are arguably why only 218 of the 297 positions available have been filled,<sup>26</sup> and the post of Director of Research has been vacant since the Commission's inception.<sup>27</sup> Furthermore, the Government is yet to appoint replacements after the retirement of two Commission members.<sup>28</sup>

#### 4. Financial Independence

Section 32(1) of the Human Rights Act stipulates that the Central Government shall fund the Commission through the payment of such sums of money as it 'may think fit' for the fulfillment of the purposes of the Act.<sup>29</sup> The control over the Commission's finances this provision confers upon the Government is a clear infringement upon the Commission's independence, and falls far short of the requirements for financial autonomy outlined in the Paris Principles.<sup>30</sup>

In its report on the NHRC published in 2001, the South Asia Human Rights Documentation Centre emphasised the need for funding decisions to be entrusted to a nonpartisan parliamentary body or for the Commission to be given an adequate and independent budget.<sup>31</sup> The NHRC called for similar reforms in its 1993-4 recommendations.<sup>32</sup> The need for a financing scheme that does not make funding conditional on the Government's approval remains a matter of priority today.

#### 5. Competence and Responsibilities

##### 5.1. Individual Complaints Process

###### i) Backlog of Complaints

A serious issue of ongoing concern for the Commission is the backlog of complaints that has been developing since the late 1990s.<sup>33</sup> In the last Annual Report published by the

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<sup>25</sup> South Asia Human Rights Documentation Centre, *Judgment Reserved: the Case of the National Human Rights Commission of India* (South Asia Human Rights Documentation Centre 2001), p25.

<sup>26</sup> South Asia Human Rights Documentation Centre, 'India's NHRC: No effort for Compliance of Directions', *National Human Rights Institutions in the Asia Pacific Region* (South Asia Human Rights Documentation Centre 2002), p24.

<sup>27</sup> G P Joshi, 'National Human Rights Commission – Need for Review', available at <[http://www.humanrightsinitiative.org/programs/aj/police/papers/gpj/national\\_human\\_rights\\_commission.pdf](http://www.humanrightsinitiative.org/programs/aj/police/papers/gpj/national_human_rights_commission.pdf)> (last visited 25 January 2003 B).

<sup>28</sup> National Human Rights Commission of India website, available at <<http://www.nhrc.nic.in>> (last visited 2 February 2004).

<sup>29</sup> Protection of Human Rights Act 1993, section 32(1).

<sup>30</sup> Paris Principles 1993, A.

<sup>31</sup> South Asia Human Rights Documentation Centre, *Judgment Reserved: the Case of the National Human Rights Commission of India* (South Asia Human Rights Documentation Centre 2001), p23.

<sup>32</sup> Ibid.

<sup>33</sup> South Asia Human Rights Documentation Centre, 'India's NHRC: No effort for Compliance of Directions', *National Human Rights Institutions in the Asia Pacific Region* (South Asia Human Rights Documentation Centre 2002), p15.

Commission, the 2001-2002 Report, the Commission stated that it had a total of 83,965 cases to consider, of which 14,612 cases were carry over cases from the previous year.<sup>34</sup> Comparing this to the 3,340 carry-over cases the Commission had to consider in the year 2000-2001 - an unacceptable number in itself - reveals the massive increase in the number of carry over cases in the past few years.<sup>35</sup>

The authors of the McKinsey Report considered the backlog of cases to be the biggest threat to the Commission's long-term survival.<sup>36</sup> The Report concluded that it would not only slow down the individual grievance redress function of the Commission, but also interfere with the fulfillment of its other roles under s12 of the Human Rights Act as resources were diverted to deal with the increasing caseload.<sup>37</sup> In spite of this, no real steps have been taken by the Commission to implement the extensive and detailed recommendations set forth in the McKinsey Report to alleviate the situation.

ii) The Effect of Section 19 of the Human Rights Act

The Paris Principles insist on national human rights institutions being given 'as broad a mandate as possible.' Accordingly, before the NHRC can establish itself as a truly authoritative body of inquiry, its investigative powers must be broadened to include the armed forces. As it currently stands, section 19 of the Human Rights Act precludes the Commission from undertaking its own investigation into the armed forces.<sup>38</sup> Instead, the Commission is directed to request a report from the Central Government on the relevant issue and then make recommendations to the Government on the basis of that report.<sup>39</sup>

Given that the founding of the NRHC was ostensibly intended to assuage international concerns about the atrocities being perpetrated by the armed forces, the current provisions of the Human Rights Act deprive the Commission of a crucial aspect of its role as a national human rights institution. The NHRC has brought this to the Government's attention on numerous occasions, repeatedly raising it in the Commission's Annual Reports.<sup>40</sup> Furthermore, the Human Rights Committee has noted the desirability of removing these restrictions on the NHRC's powers in its comments on India's periodic report to the Committee on its implementation of the International Covenant for Civil and Political Rights.<sup>41</sup>

The Government has proved to be completely averse to any revision of the Commission's powers in relation to the armed forces. Not only did it clearly state its support for the procedure set down in section 19 of the Act in the Memorandum of Action taken of April

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<sup>34</sup> National Human Rights Commission, *Annual Report 2001-2002*, p138.

<sup>35</sup> *Ibid*, p109.

<sup>36</sup> South Asia Human Rights Documentation Centre, *Judgment Reserved: the Case of the National Human Rights Commission of India* (South Asia Human Rights Documentation Centre 2001), p27.

<sup>37</sup> *Ibid*.

<sup>38</sup> Protection of Human Rights Act 1993, section 19.

<sup>39</sup> *Ibid*.

<sup>40</sup> See, for example, National Human Rights Commission, *Annual Report 2001-2002*, p213.

<sup>41</sup> Vijayashri Sripati, 'India's National Human Rights Commission: A Shackled Commission?', *Boston University International Law Journal*, vol 18 no 1, Spring 2000, p33.

2002,<sup>42</sup> it has also steadily ignored the Commission's recommendations to narrow the definition of 'armed forces' in the Act to exclude paramilitaries, and ignored its recommendation that armed forces should report deaths and rape in custody to the NHRC within twenty-four hours.<sup>43</sup>

The NHRC deserves to be commended for the stance it has taken in its latest Annual Report in which it clearly states that its construction of section 19(2) obligates the Government to give a 'statement of all of the facts and all of the occurrences relating to the alleged violation of human rights contained in a complaint,' and not merely its conclusions, in the report it forwards to the Commission. If the Government abides by this procedure, the Commission is much better placed to make an informed recommendation to the Government in the absence of its own inquiry into the matter.

However, there is no reason to believe that the Government will respect this recommendation any more than it has respected the Commission's recommendations in the past. Voicing its concerns annually about the constraints the Human Rights Act places on the Commission is manifestly insufficient to persuade the Government to change its position. Unless the Commission continuously and publicly lobbies for reform, it is unlikely to impact on political will on this issue.

### iii) No Power to Prosecute

The absence of a mechanism for the enforcement of the NHRC's recommendations is another major lacuna in the Human Rights Act. Under section 18 of the Act, where its inquiry discloses a violation of human rights, the Commission is limited to advising the government to prosecute the concerned persons or grant relief to the victim.<sup>44</sup> The onus is therefore on the NHRC to publicise the Government's failures to implement its recommendations and to devise new ways of pressuring public authorities into compliance.

To this end, the NHRC has not done enough. In its 1998-1999 Annual Report, the Commission states that in 176 cases of torture, it 'directed payment of interim compensation of an amount totaling Rs 13, 384, 500.'<sup>45</sup> However, it did not indicate whether a single one of the police or security personnel implicated in the 176 complaints had been prosecuted for the perpetration of torture.<sup>46</sup>

The NHRC has also failed to utilize other methods to persuade the Government to appropriately discipline officials found to be guilty of human rights violations. In its 2001 Report on the NHRC, the South Asia Human Rights Documentation Centre suggested that the Commission publish and widely disseminate the names of individuals it finds to

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<sup>42</sup> National Human Rights Commission, *Annual Report 2001-2002*, p213.

<sup>43</sup> "Government Rejects NHRC Plea on Army," *The Hindu*, 9 July 1998.

<sup>44</sup> Protection of Human Rights Act 1993, section 18

<sup>45</sup> South Asia Human Rights Documentation Centre, 'India's NHRC: No effort for Compliance of Directions', *National Human Rights Institutions in the Asia Pacific Region* (South Asia Human Rights Documentation Centre 2002), p 24

<sup>46</sup> *Ibid.*

be responsible for perpetrating human rights abuses who have not been subject to criminal or disciplinary procedures in accordance with the Commission's directions.<sup>47</sup> Again, the Commission does not appear to have considered this approach, even though its inability to enforce its recommendations has seriously undermined its credibility as a human rights institution.

iv) Reluctance to Act Independently

Apart from the limitations on the NHRC's powers written into the terms of the Human Rights Act, the Commission's work has been compromised by its own reluctance to interfere in politically sensitive matters. This is contrary to its obligation under the Paris Principles to 'freely consider any questions falling within its competence.'<sup>48</sup> The problem is borne out especially well by the Commission's role in the Best Bakery case in Gujarat and the prosecution of Abdul Rahman Geelani. In both cases, the NHRC failed to exploit its position to the fullest advantage of those in need of its assistance. In particular, the Commission refused to invoke its power to intervene in court proceedings involving an allegation of human rights violations conferred upon it by section 12(b) of the Human Rights Act.

***The Best Bakery Case***

The Best Bakery case was anticipated to be a test case for the series of trials to be held in the aftermath of the Gujarat riots. It brought to trial twenty-one people accused of murdering fourteen people at the Best Bakery in Baroda on 1 March 2002.<sup>49</sup> Each of the accused was ultimately acquitted for lack of evidence.<sup>50</sup>

The NHRC was applauded initially for its public condemnation of the violence in Gujarat, its immediate deployment of Special Representatives to the area, and the pressure it put on the Gujarat State Government to publicise how it was addressing the situation.<sup>51</sup> However, its attempts to safeguard the rights of the witnesses to the violence before and during the court hearing were patently inadequate.

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<sup>47</sup> South Asia Human Rights Documentation Centre, *Judgment Reserved: the Case of the National Human Rights Commission of India* (South Asia Human Rights Documentation Centre 2001), p117.

<sup>48</sup> Paris Principles 1993, C.1.

<sup>49</sup> South Asia Human Rights Documentation Centre, "Best Bakery: One Down, Many More To Go?", *Human Rights Features* (11 July 2003), available at <<http://www.hrdc.net/sahrdc>> (last visited 1 February 2004).

<sup>50</sup> Ibid.

<sup>51</sup> Amnesty International, 'India: Best Bakery case – Concerns for Justice', *Amnesty International Press Release* (9 July 2003), available at <<http://web.amnesty.org/library/Index/ENGASA200182003?open&of=ENG-IND>> (last visited 3 February 2004)

Human Rights Watch, 'Prevent Further Communal Violence in India,' *HRW Press Release* (13 March 2002), available at <<http://www.hrw.org/press/2002/03/india0313.htm>> (last visited 3 February 2004)

In light of the overwhelming evidence of collusion between government officials and police,<sup>52</sup> the onus was on the NHRC to ensure that witnesses were not intimidated and that all of the relevant evidence was brought to the attention of the court.<sup>53</sup> Instead, it accepted the claim of the Director General of Police, Gujarat, that it would not be possible for the State Police to offer protection to every single witness and victim, but that witnesses were free to approach the police for protection if they desired.<sup>54</sup> This is in spite of the fact that members of the police force were implicated in the attacks against Muslims, and many of the witnesses had been ignored by police when they initially tried to file First Information Reports.<sup>55</sup> Subsequently, key witnesses in the Best Bakery case indicated that they had lied in court or withdrawn their testimony as a result of harassment and death threats from the accused parties, including the ruling Bharatiya Janata Party politicians.<sup>56</sup>

This outcome was entirely foreseeable, and the NHRC should have taken several steps to guard against it. For example, it could have instituted a witness protection program for witnesses and their families monitored by the NRHC rapporteur, in coordination with other NGOs in GUjarat.<sup>57</sup> Furthermore, relying on its section 12 mandate, it should have intervened in the Best Bakery case by filing an application in the High Court appealing the first instance decision, or filing a revision petition in a Sessions or High Court asking for retrial of the case on the grounds of non-adherence to essential legal procedures.<sup>58</sup> Given how skewed in favour of the accused the legal proceedings were in this case, the NHRC should also act pre-emptively in future trials by filing affidavits in support of additional information that it believes should be brought to the court's notice.<sup>59</sup>

The NHRC's inaction in this case arguably cost the victims and their families their opportunity to obtain justice. It sets a dangerous precedent that vindicates the strategy of intimidation and harassment employed by State agents.

### ***The Prosecution of Abdul Rahman Geelani***

Abdul Rahman Geelani was arrested as a suspect in the terrorist attack on the Indian Parliament in New Delhi, on 13 December, 2001.<sup>60</sup> Along with his co-accused, he was

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<sup>52</sup>Amnesty International, 'India: Best Bakery case – Concerns for Justice', *Amnesty International Press Release* (9 July 2003), available at <http://web.amnesty.org/library/Index/ENGASA200182003?open&of=ENG-IND> (last visited 3 February 2004).

<sup>53</sup>South Asia Human Rights Documentation Centre, "Best Bakery: One Down, Many More To Go?", *Human Rights Features* (11 July 2003), available at <http://www.hrdc.net/sahrdc> (last visited 1 February 2004).

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> M M Haque, 'Geelani made a scapegoat: Amnesty International,' *The Milli Gazette*, 15 September 2002, available at [www.milligazette.com/Archives/15092002/1509200261.htm](http://www.milligazette.com/Archives/15092002/1509200261.htm) (last accessed 3 February 2004).

one of the first people to be charged and tried under India's draconian anti-terrorist legislation, the Prevention of Terrorism Act 2002 (POTA).<sup>61</sup>

Allegations that Geelani was tortured by police and then forced to sign blank papers, subsequently used as evidence of a confession, were widely reported.<sup>62</sup> Along with the tenuous evidence on the basis of which he was arrested, a phone conversation with his brother and two co-accused, this should have been enough to warrant the NHRC's intervention in the trial. Indeed, Amnesty International publicly condemned Geelani's pre-trial treatment, noting that even the minimum safeguards provided in the POTA had not been observed by police.<sup>63</sup>

Subsequently, Geelani was sentenced to death by a Special Court in December 2002.<sup>64</sup> Again, Amnesty International expressed its concern that the proceedings leading to Geelani's conviction had failed to meet international standards for a fair trial.<sup>65</sup> Following his conviction, Geelani's colleagues at Delhi University filed a complaint with the NHRC stating that Geelani had been denied basic legal rights during his appeal hearing.<sup>66</sup> In a petition signed by 241 university staff members, Geelani's colleagues urged the Commission to use its power to intervene in court proceedings to act on Geelani's behalf.<sup>67</sup> The complaint detailed the flawed legal procedure that characterised Geelani's trial, including the inaccurate translation of the phone conversation at the basis of the conviction.<sup>68</sup> In spite of this, the NHRC did not consider it an appropriate case in which to act.

The judgment of the NHRC in this instance must come under question, especially in light of the fact that Geelani was ultimately acquitted by the High Court in October 2003 on the grounds of insufficient evidence.<sup>69</sup> He was represented in his appeal by senior advocate Ram Jethmalani, who argued the case despite the Shiv Sena's vocal opposition.<sup>70</sup> It is unacceptable that in the absence of Ram Jethmalani's courage in taking up his cause, Geelani would almost certainly be languishing in jail awaiting execution, while the NHRC remained silent. The NHRC's apparent reluctance to act in high profile cases, particularly those in which the Government is looking to secure a certain outcome, defeats the purpose of it being empowered to act as an independent institution.

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<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> 'Amnesty dismayed at death sentence in Parliament Case,' *Rediff.com*, 19 December 2002, available at <<http://www.rediff.com/news/2002/dec/19parl.htm>> (last accessed 3 February 2004).

<sup>65</sup> Ibid.

<sup>66</sup> 'NHRC Urged to Intervene in Geelani Case,' *The Hindu*, 17 October 2003, available at <<http://www.hindu.com/thehindu/2003/10/18/stories/2003101803571400.htm>> (last accessed at 3 February 2004).

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> 'Police Move SC Against Geelani Acquittal,' *Indian Express*, 13 December 2003, available at <<http://www.expressindia.com/fullstory.php?newsid=26803#compstory>> (last visited 3 February 2004)

<sup>70</sup> 'Delhi HC admits Geelani's Appeal,' *Rediff.com*, January 16 2003, available at <<http://www.rediff.com/news/2003/jan/16parl.htm>> (last visited 2 February 2004).

### *The Illegal Cremations Case*

The NHRC's role in the investigation of illegal cremations in Punjab's Amritsar district also raises questions about its willingness to act when it will inevitably lead to a high profile confrontation with State authorities.

The NHRC was given an open order by the Supreme Court in December 1996 to investigate disappearances in Punjab.<sup>71</sup> In a subsequent order, the Supreme Court stated that the NHRC was 'a sui generis appointee of the Supreme Court empowered to conduct investigations unconstrained by any of the limitations of the Human Rights Act.'<sup>72</sup> At the time, this was considered to be a turning-point in the process of bringing to account the officials responsible for the disappearance of thousands of people during a decade-long crackdown on the so-called insurgents in the State.<sup>73</sup> However, the NHRC imposed its own limitations on its mandate in an order issued in early 1999.<sup>74</sup> It narrowed the scope of its enquiry to three crematoria in Amritsar district and restricted its investigations to cremations, rather than a more comprehensive inquest starting at the point of 'enforced disappearances.'<sup>75</sup>

Obviously, this was a deeply disappointing development in the investigation. However, it was unimaginable in 1999 that almost five years later, the NHRC would be so ineffectual in its role that it would be yet to hear testimony in a single case.<sup>76</sup> Although the NHRC has placed a territorial limitation on its mandate, it still has full investigative and adjudicative powers. In fact, in an amicus brief filed with the NHRC, the Harvard Law Student Advocates for Human Rights have outlined the NHRC's obligations under international law to consider all of the evidence regarding the disappearances, including testimony from interested parties such as relatives of the disappeared.<sup>77</sup>

In a further blow to its credibility in this capacity, in 2000 the NHRC gave its approval to an order from the Punjab Government offering compensation of 100, 000 rupees to eighteen families with a denial of any liability or wrongdoing.<sup>78</sup> The Government also denied, in the face of overwhelming evidence to the contrary, any charges of illegal

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<sup>71</sup> 'India: Justice Eludes Families of the 'Disappeared' in Punjab,' *HRW Press Release*, 10 June 2003, available at <[www.hrw.org/press/2003/06/india061003.htm](http://www.hrw.org/press/2003/06/india061003.htm)> (last visited 2 February 2004).

<sup>72</sup> Jaskaran Kaur, 'A Judicial Blackout: Judicial Impunity for Disappearances in Punjab, India,' *Harvard Human Rights Journal*, vol 15 Spring 2002, p293.

<sup>73</sup> 'India: Justice Eludes Families of the 'Disappeared' in Punjab,' *HRW Press Release*, 10 June 2003, available at <[www.hrw.org/press/2003/06/india061003.htm](http://www.hrw.org/press/2003/06/india061003.htm)> (last visited 2 February 2004)

<sup>74</sup> Jaskaran Kaur, 'A Judicial Blackout: Judicial Impunity for Disappearances in Punjab, India,' *Harvard Human Rights Journal*, vol 15 Spring 2002, p293. .

<sup>75</sup> *Ibid.*

<sup>76</sup> 'India: Justice Eludes Families of the 'Disappeared' in Punjab,' *HRW Press Release*, 10 June 2003, available at <[www.hrw.org/press/2003/06/india061003.htm](http://www.hrw.org/press/2003/06/india061003.htm)> (last visited 2 February 2004)

<sup>77</sup> 'Harvard Law Students Advocates for Human Rights and Human Rights Watch urge Indian National Human Rights Commission to Investigate Punjab Disappearances,' 10 December 2003, available at <http://www.punjabjustice.org/advocacy/events/harvard.htm> (last visited 2 February 2004).

<sup>78</sup> Jaskaran Kaur, 'A Judicial Blackout: Judicial Impunity for Disappearances in Punjab, India,' *Harvard Human Rights Journal*, vol 15 Spring 2002, p294.

detention in the order.<sup>79</sup> Unsurprisingly, all eighteen families rejected the offer and asked the NHRC to broaden the terms of its enquiry – a plea the NHRC refused.<sup>80</sup>

The NHRC's actions thus far clearly contravene its obligation under the Paris Principles to '[h]ear any person and obtain any information...necessary for assessing situations falling within its competence.'<sup>81</sup> Its refusal to act in the best interests of the victims in this situation begs the question of whose interests the Commission is actually acting in.

## 5.2. Policy Advice and Public Education

### i) Tabling of Annual Reports in Parliament

Each year, in the form of an Annual Report the NHRC submits an extensive list of recommendations to the Government summarizing the findings of its research and investigative work in the past year. This is consistent with its responsibility under the Paris Principles to advise the Government 'on any matters concerning the promotion and protection of human rights.'<sup>82</sup> Under section 20(2) of the Human Rights Act, the Government is expected to table each Report in Parliament together with a Memorandum of Action Taken outlining its response to each of the NHRC's recommendations.<sup>83</sup>

Unfortunately, the Government's record of complying with the section 20(2) procedure is symptomatic of its general apathy towards the NHRC's advice. At the time of writing, the Government was yet to table the 2000-2001 and the 2001-2002 Annual Reports, along with the required Memoranda of Action Taken. The Memorandum detailing the Government's response to the Commission's 1999-2000 Report was only tabled in April 2002. Not even the opposition parties have instigated debate or discussion of the NHRC's findings in the past.<sup>84</sup>

To put an end to this cycle of delay, the Commission has recommended that section 20(2) of the Human Rights Act be amended to ensure that the Annual Reports are placed before Parliament within a period of three months from the date of their receipt by the Government, and that where the Report is not laid before Parliament within that period, it is open to the NHRC to publish the Report.<sup>85</sup>

To date, this recommendation has also been ignored by the Government. All of this suggests that the Government views compliance with the Commission's recommendations as a matter of convenience – not responsibility.

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<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Paris Principles 1993, C.2.

<sup>82</sup> Ibid, A.3(a).

<sup>83</sup> Protection of Human Rights Act 1993, section 20(2).

<sup>84</sup> Vijayashri Sripati, 'India's National Human Rights Commission: A Shackled Commission?', *Boston University International Law Journal*, vol 18 no 1, Spring 2000, p45.

<sup>85</sup> Virendra Dayal, 'Evolution of the National Human Rights Commission, 1993-2002: A Decennial View', *Journal of the National Human Rights Commission, India*, vol 1, 2002, p45.

ii) Governmental Non-Compliance with Key Recommendations

***Proposed Amendments to the Protection of Human Rights Acts 1993***

As noted above, certain provisions of the NHRC's empowering legislation are worded to constrain the NHRC from acting independently and ultimately subvert the purpose of creating a national human rights institution. As a result, the NHRC has been forwarding proposals to the Central Government to amend the problematic sections of the Act since its inception.<sup>86</sup> Its suggestions have routinely been ignored by the Government. This culminated in the NHRC's initiation in 1998 of a comprehensive and independent examination of the Human Rights Act by a seven-member Advisory Committee, chaired by former Chief Justice of India, Justice AM Ahmadi (herein referred to as 'the Ahmadi Committee').<sup>87</sup>

After exhaustively reviewing the principal legislation, the Ahmadi Committee submitted a Draft Amendment Bill to the Commission, entitled the Protection of Human Rights (Amendment) Bill 1999.<sup>88</sup> The Draft Bill incorporated the essence of the proposed amendments originally put forth by the NHRC in its Annual Reports, as well as additional administrative and structural reforms.<sup>89</sup> The NHRC forwarded the Ahmadi Committee's proposals to the Central Government before the Home Ministry had issued its Action Taken Report in December 2000.

In its Annual Report for 2001-2002, the NHRC stated that the Ahmadi Committee's proposals were still pending consideration before the Central Government, 'despite the Chairperson having personally drawn attention to this matter, both public and privately, at the highest reaches of Government.'<sup>90</sup> As recently as 31 January 2004, the Commission's Chairperson Justice A S Anand openly lamented the Government's inaction on this issue, expressing his regret that the recommendations were yet to be tabled in Parliament at a meeting of the Chairpersons of the State Human Rights Commissions.<sup>91</sup>

The Government's formal position, contained in its Memorandum of Action Taken of April 2002, stated that the suggested amendments were 'very sensitive.' Accordingly, a Committee of Joint Secretaries was set up to consider the recommendations and then pass its final opinion onto the Government.<sup>92</sup> The Government's two-year delay in communicating this interim response is true to form, but is particularly galling in light of the high-profile nature of the review.<sup>93</sup>

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<sup>86</sup> South Asia Human Rights Documentations Centre, *Judgment Reserved: the Case of the National Human Rights Commission of India* (South Asia Human Rights Documentation Centre 2001), p21.

<sup>87</sup> *Ibid*, p39.

<sup>88</sup> *Ibid*.

<sup>89</sup> *Ibid*.

<sup>90</sup> National Human Rights Commission, *Annual Report 2001-2002*, p10.

<sup>91</sup> 'No Move on HR Act Amendments', *United News of India*, 31 January 2004, available at <<http://www.centralchronicle.com/20040131/3101147.html>> (last visited 9 February 2004).

<sup>92</sup> *Ibid*, p.11.

<sup>93</sup> *Ibid*.

### ***Recommendations regarding India's International Obligations***

The Human Rights Act confers upon the NHRC the responsibility of ensuring India's fulfillment of its obligations under international law.<sup>94</sup> It is mandated to 'study treaties and other international instruments on human rights and make recommendations for their effective implementation.'<sup>95</sup>

India's most controversial outstanding obligation is its failure to ratify the 1984 Convention Against Torture and other Cruel, Inhuman or Degrading Punishment (CAT) and take measures to implement it at a domestic level.<sup>96</sup> The NHRC has been urging the Central Government to accede to the CAT since its second Annual Report in 1994-1995, but to date has not had any success.<sup>97</sup> Simply observing that the Government is yet to ratify the CAT and that it is desirable that the Government do so is clearly not enough to persuade the Government to change its stance. This is a situation that requires sustained political lobbying and public campaigning, not just annual reminders.

Similarly, as a State Party to the First Optional Protocol to the International Convention on Civil and Political Rights (ICCPR), the Government has been expected to submit its fourth report to the Human Rights Committee commenting on its adherence to its obligations under the ICCPR. This report was due at the end of 2001.<sup>98</sup> Although the NHRC has emphasised the importance of India embracing its international human rights commitments, ironically, it has not facilitated the Government in its preparation of treaty reports.<sup>99</sup> Obviously, if the NHRC was to have a role in the preparation of the submissions, they would be more likely to be an objective representation of the human rights situation in India. The NHRC must act with greater initiative in its assumption of this responsibility.

### ***Recommendations regarding the Administration of the Criminal Justice System***

The administration of the criminal justice system in India has been an issue of long-standing concern to human rights advocates, including the NHRC. Unfortunately, it is also a situation that demonstrates an apparent consistency in the NHRC's approach – once again, the NHRC took pro-active steps to initially draw the Government's attention to the problem, but ultimately failed to follow through on its recommendations and effect any real change.

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<sup>94</sup> Protection of Human Rights Act 1993, section 12(f).

<sup>95</sup> Ibid.

<sup>96</sup> South Asia Human Rights Documentation Centre, 'India's NHRC: No effort for Compliance of Directions', *National Human Rights Institutions in the Asia Pacific Region* (South Asia Human Rights Documentation Centre 2002), p20.

<sup>97</sup> Ibid.

<sup>98</sup> See 'Report Status By Country' UN High Commission for Human Rights website, available at <http://www.unhchr.ch/tbs/doc.nsf/NewhvVAII SPRByCountry?OpenView&Start=1&Count=250&Expand=79.1#79.1> (last visited 3 February 2004).

<sup>99</sup> Vijayashri Sripati, 'India's National Human Rights Commission: A Shackled Commission?', *Boston University International Law Journal*, vol 18 no 1, Spring 2000, p29.

The urgent need for reformation of the criminal justice system was recognised more than two decades ago in The Report of the All India Committee on Jail Reforms released by a delegation headed by Justice A N Mulla.<sup>100</sup> In its inaugural Annual Report, the NHRC also expressed its alarm at the appalling condition of prisons across the country, including overcrowding, lack of sanitation and poor medical facilities.<sup>101</sup>

In its 1995-1996 Annual Report, the NHRC noted that it was in the process of drafting a Model Prison Bill to replace the present Indian Prison Act 1894, and that it was enlisting the assistance of other NGOs and State and Central Government officials with expertise in the area.<sup>102</sup> In its 1997-1998 Annual Report, it stated that the Draft Prison Bill had been circulated to the States to elicit their views, and that it would send the proposed Bill to the Central Government for enactment under Article 252 of the Constitution after considering their feedback.<sup>103</sup> The NHRC's determination and consistent progress on the issue seemed to bode well for the future of the Bill. However, after this point, the NHRC's enthusiasm for amending the Indian Prison Act seems to have dissolved completely. The Bill was not raised publicly by the NHRC again until a cursory note was made in its 2000-2001 Annual Report that the Commission was 'pursuing its recommendations, made to the various States and Union Territories, to draft a new Prison Bill and Jail Manual.'<sup>104</sup> Accordingly, the Indian Prison Act stands as it was originally passed, and the conditions in Indian prisons continue to deteriorate.

Equally as disappointing is the NHRC's silence in response to last year's Report of the Committee on Reforms of Criminal Justice System. The Committee, headed by former Chief Justice of Kerala and Karnataka and former member of the NHRC Justice VS Malimath, submitted its report to the Ministry of Home Affairs in April in 2003.<sup>105</sup> The Report itself has come under heavy criticism for recommending an overhaul of the criminal justice system in a way that also eviscerates several fundamental rights of defendants and prisoners as guaranteed by the Constitution.<sup>106</sup> Even though the media has reported that the Government is introducing a Bill to amend the Code of Criminal Procedure to reflect some of the Committee's recommendations,<sup>107</sup> making it a crucial time to initiate debate of the issue, the NHRC has refused to publicly articulate its views on the Committee's Report.

### iii) Promoting Human Rights Literacy and Awareness

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<sup>100</sup> Kamayani Bali-Mahabal, "Prison conditions in India", Human Rights Law Network, reproduced on Altindia.net at <http://www.altindia.net/documentation/PRISON%20CONDITIONS%20IN%20INDIA.html>.

<sup>101</sup> Ibid.

<sup>102</sup> Vijayashri Sripathi, 'India's National Human Rights Commission: A Shackled Commission?', *Boston University International Law Journal*, vol 18 no 1, Spring 2000, p48.

<sup>103</sup> Ibid, p49.

<sup>104</sup> National Human Rights Commission, *Annual Report 2001-2002*, p182.

<sup>105</sup> Amnesty International India, *The (Malimath) Committee on Reforms of Criminal Justice System: Premises, Politics and Implications for Human Rights*, (Amnesty International India 2003), p1.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid, p2.

One of the functions of the NHRC stipulated in the Human Rights Act is the facilitation of public awareness of human rights and the safeguards available for the protection of these rights.<sup>108</sup> The Paris Principles also recognise the role of national human rights institutions to ‘assist in the formulation of programs for the teaching of, and research into human rights and to take part in their execution in schools, universities and professional circles.’<sup>109</sup>

In its chapter on the Promotion of Human Rights Literacy and Awareness in its most recent Annual Report, the Commission discusses its organisation of numerous seminars and workshops, along with its human rights training programs for specific public personnel (for example, para-military and armed forces and civil servants).<sup>110</sup> Although these efforts are commendable, the NHRC needs to do more to incorporate human rights as a component of standard educational syllabi. The Commission does mention in passing in the chapter’s introductory paragraph that ‘it has pressed for the introduction of human rights education in the curricula both of schools and universities.’<sup>111</sup> However, there is no elaboration on this and no discussion of any concrete steps the Commission has taken towards achieving this goal, for example, the development of educational modules that could be used in schools and universities. The Commission should also be looking to utilise the media for the purpose of promoting human rights, beyond the establishment of a website for the Commission. Awareness campaigns aired on the radio and television and the production of documentaries that are informative on topical human rights issues would be a good starting point for a comprehensive public education plan.

Most of the emphasis in the Commission’s section on ‘Human Rights Training for Police Personnel’ is on individual training projects. Along with a reference to material prepared for training police officers, the Commission states that the feedback it has received ‘indicates that the material prepared and disseminated by it is being incorporated into both the basic and the refresher course in police training institutions.’<sup>112</sup> It is imperative that the Commission take a more proactive approach and demand information as to how this material is being incorporated into police training courses – otherwise, the ‘incorporation’ risks being nothing more than a token gesture on the part of the Police.

## **6. Transparency and Accountability**

The legitimacy of the NHRC hinges in large part on the transparency of its operations and its accountability to the public. This is especially pertinent in relation to the individual complaints process - arguably the Commission’s most important function.

In the past, the details of individual complaints were not publicly accessible, unless they were one of the few cases chosen for publication in the Annual Report. The outcomes of the vast majority of cases would be summarized in a percentage breakdown of the way

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<sup>108</sup> Protection of Human Rights Act 1993, section 12(h).

<sup>109</sup> Paris Principles 1993, A.3(f).

<sup>110</sup> National Human Rights Commission, *Annual Report 2001-2002*, Chapter 10.

<sup>111</sup> *Ibid*, p118.

<sup>112</sup> *Ibid*, p122.

the Commission dealt with complaints indicating the percentage of complaints dismissed in limini, the percentage of complaints disposed of with directions etc. However, the Commission now has a facility on its website that enables anyone to access the details of a particular case after entering a basic search term. Although this sounds like a much more transparent system, the descriptions of the cases on the website are unacceptably brief and vague.

The information contained in the case profile includes ‘Direction Issued by the Commission,’ ‘Action Taken’ (by the Commission) and ‘Status on [today’s date].’ There is generally no more than one sentence detailing each of these aspects of the case. Occasionally, the section on ‘Direction Issued’ outlines the facts the Commission relied on to reach its decision, but if no formal direction was issued e.g. if a complaint was dismissed in limini, no such information is given. In light of the high percentage of cases dismissed in limini each year – in the year 2001-2002, 42% of the cases considered by the Commission were dismissed on this basis<sup>113</sup> – this is unacceptable. Equally as important is a clear explanation of why the Commission has accepted a police report when the report has formed the basis of the Commission’s decision.

Furthermore, there is generally no detail relating to matters of compliance, such as whether the Commission issued a deadline to the relevant authority by which to start its investigation, whether the investigation was actually launched, whether anyone was prosecuted, and whether any of the recommended compensation was actually administered. The user is instead told to contact the Commission for any extra information.

To act with ‘transparency and autonomy’ – a guideline in its own legislation – the Commission must establish clear written guidelines for screening, registering, accepting and rejecting complaints, and make these guidelines clear in its reports or website.<sup>114</sup> It should also provide an accurate and complete record of the action taken on individual cases, the status of the investigation, the action recommended by the NHRC, the response of the concerned authorities to the NHRC’s recommendations, and the results subsequently obtained.<sup>115</sup>

An extra measure of openness that the NHRC could take is to publish the minutes of its meetings on its website, in the manner of the Northern Ireland Human Rights Commission.<sup>116</sup> At present, the internal workings of the NHRC are shielded from public scrutiny, leaving the reasons informing its determinations and actions a mystery. By opening itself up to public inspection, the NHRC reinforces its credibility as an institution working on behalf of India’s people.

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<sup>113</sup> Ibid, p138

<sup>114</sup> South Asia Human Rights Documentations Centre, *Judgment Reserved: the Case of the National Human Rights Commission of India* (South Asia Human Rights Documentation Centre 2001), p5.

<sup>115</sup> Ibid.

<sup>116</sup> See ‘Minutes of Commission Meetings,’ Northern Ireland Human Rights Commission website, available at <<http://www.nihrc.org>> (last visited 3 February 2004)

## 7. Conclusion

A decade after its inception, the National Human Rights Commission is struggling to establish itself as an autonomous and effective human rights institution, as envisaged by the Paris Principles.

The terms of the Protection of Human Rights Act 1993 are one of the biggest fetters on the NHRC's credibility, binding the Commission to the Government for its funding and the provision of its staff. The legislation also stops short of conferring the investigative mandate and powers of prosecution onto the Commission that would enable it to seriously inquire into human rights violations. However, the Commission itself is guilty of deferring unnecessarily to the Government in its investigations - amply illustrated by its inaction in the Best Bakery case, A R Geelani's prosecution and the illegal cremations case in Amritsar.

Furthermore, the NHRC has been meek in its criticism of the Government for failing to table the Commission's Annual Reports in Parliament, failing to comply with the NHRC's recommendations for the amendment of the Human Rights Act and failing to ratify the Convention Against Torture. In taking such a submissive approach, it has given the Government the perfect excuse to delay its responses, if it bothers to respond at all, to the NHRC's recommendations. The Commission has also failed itself to follow through on its initial agenda for reform of the criminal justice system, and is yet to genuinely instigate measures to make itself a transparent and accountable institution.

It thus becomes clear that the NHRC's failings are attributable to both the actions of its own members and to the inherent weaknesses and inadequacies of its empowering legislation. Both aspects need to be urgently reformed if the Indian Government's attempts to address its appalling human rights record are to be taken seriously.