

Justice H. G. Balakrishnan
Chairperson
(Former Chief Justice of India)



National Human Rights Commission

Faridkot House, Copernicus Marg,
New Delhi-110 001 India
Phone : 91-011-23382514
Fax : 91-11-23384863, 23386521
E-mail chairnhrc@nhrc.in

D.O.No.11(20)/2009-Coord

4th July, 2011

Dear Ms. *Roslyn Noonan*,

I am writing to you to convey our comments on the concerns raised by the ICC Sub-Committee on Accreditation (SCA) while recommending 'A' status re-accreditation of NHRC, India in its session held in Geneva from 23-27 May, 2011.

2. NHRC, India has considered the recommendations of SCA carefully and would like to submit its challenge to the recommendations in accordance with Art.12 of the ICC Statute.

3. The challenge of NHRC, India is detailed in the note enclosed for consideration of the ICC Bureau.

4. The SCA has noted that it will again consider, at its first session in 2013, the first three areas of concern viz. (i) composition and pluralism, (ii) appointment of Secretary General and Director General (Investigation) from the Central Government and (iii) relationship with civil society. The NHRC, India is unable to find any mandate that authorizes the SCA to "consider issues" on a member of the ICC, except as part of the accreditation or re-accreditation process, or if a special review is called for. The circumstances under which a special review may be held have been spell out in the ICC's Statute and do not apply to the NHRC, India.

With kind regards,

Yours sincerely,

(K.G.Balakrishnan)

Ms. Roslyn Noonan
Chairperson
International Coordinating Committee of National Institutions for the Promotion
and Protection of Human Rights (ICC)
PO Box 6741, Wellesley Street
Auckland 1141, New Zealand
iccchair@hrc.co.nz

NHRC, India Comments - on the Concerns of the Sub-Committee on Accreditation (SCA)

.....

The National Human Rights Commission of India (NHRC) has received from the ICC Secretariat the letter dated the 9th June, 2011 which conveys the recommendation of the ICC Sub-Committee on Accreditation (SCA) that it should be re-accredited in A status, as well as some concerns. SCA has, while recommending 'A' status, noted that three areas of concern i.e. composition and pluralism, appointment of Secretary General and Director General of Investigation from Central Government and relationship with civil society will again be taken up for review in its first session in 2013.

The documents the NHRC presented in its initial submission and in response to requests for clarifications, should have removed these concerns, but since they linger, the NHRC will make it clear where it stands.

The Concerns of SCA

1. Composition and Pluralism

The provisions in the Protection of Human Rights Act (Amendment) 2006 dealing with the composition of the Commission are unduly narrow and restrict the diversity and plurality of the board.

The requirement for the appointment for the Chair to be a former Chief Justice of the Supreme Court severely restricts the potential pool of candidates. Similarly, the requirement that the majority of members are recruited from the senior judiciary further restricts diversity and plurality.

While the SCA understands that the justification for these restrictions is based on the NHRCs quasi-judicial function, it notes that this is but one of 10 functions enumerated in section 12 of its enabling legislation. The SCA is of the view that determining the composition of the NHRCs senior membership in this way limits the capacity of the NHRCI to fulfil effectively all its mandated activities.

The SCA notes the presence of "deemed members" from the National Commissions addressing caste, women's rights, minorities, and scheduled tribes on the full statutory commission. While this is a welcome initiative, there are concerns that they are not adequately

involved in discussions on the focus, priorities and core business of the NHRC non-judicial functions.

The SCA notes that similar concerns were voiced by the Special Rapporteur on the situation of human rights defenders, who, at the conclusion of her official visit to India on January 21, 2011, made a statement regarding the restrictive nature of the appointments process to the board.

The SCA refers to Paris Principle B.1: "The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:

- (a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;*
- (b) Trends in philosophical or religious thought;*
- (c) Universities and qualified experts;*
- (d) Parliament;*
- (e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity)"; and to*

General Observation 2.2 "Selection and appointment of the governing body", and in particular that *"the Sub-Committee notes the critical importance of the selection and appointment process of the governing body in ensuring the pluralism and independence of the National Institution. In particular, the Sub-Committee emphasizes the following factors...maximizing the number of potential candidates from a wide range of societal groups"*.

NHRC, INDIA COMMENTS:

It is pointed out that NHRC, India is not a board (the term used by the SCA) but a Commission. This may be at the root of the misconceptions in the SCA about the NHRC's role and work. No Boards in India (and very few A status NHRIs abroad) have the range

of duties and powers that the NHRC does, which is why the qualifications for its members were so tightly framed.

The main aim of the Paris Principles is for establishment of effective and powerful NHRIs having powers and force to implement their recommendations with competence to promote and protect human rights.

The NHRC, India is one of the powerful NHRIs in the world and its 99% recommendations are complied with by the Government.

The SCA is concerned that three out of the five members of the NHRC must, under the Act, be a retired Chief Justice of India, a retired judge of the Supreme Court and a retired Chief Justice of a High Court. In India, the Supreme Court and the High Courts have a well-recorded history of judicial activism on human rights issues, acting on public interest litigation brought before them by civil society. Through a very enlightened interpretation of Article 21 of the Constitution, which deals with the right to life and personal liberty, they have vastly expanded the scope of human rights jurisprudence. A wide range of rights, implicit in the Indian Constitution, have been made specific entitlements through a series of judgments. On some, such as the right to food, the Supreme Court has set up its own Commissioners, drawn from civil society, who monitor and report to it on government performance.

It is this history of judicial activism on, and deep familiarity with, human rights that makes judges particularly good choices for the NHRC, and that is why, uniquely among the many Commissions set up by Parliament, it was decided that judges should form the majority of the membership of the NHRC.

While noting that its quasi-judicial role is one of ten functions given to it by the Act, the SCA is "of the view that determining the composition of the NHRC's senior membership in this way limits the capacity of the NHRC to fulfil effectively all its mandated activities". The NHRC is astonished by this statement. The 50-page report that it sent to the SCA had 5 pages on its quasi-judicial work; 30 pages detailed its work on its other functions. If the NHRC is not doing enough, the SCA should have spelt out the shortcomings, and the yardsticks set by other A status NHRIs that the NHRC has failed to meet. It has not done so. The NHRC finds this unsubstantiated charge offensive.

Besides, there are four deemed members with varied experience and background making NHRC truly a pluralistic institution. **The deemed members are the Chairpersons of National Commissions for Minorities, Women, and Scheduled Castes & Scheduled Tribes.** NHRC, India has also opted chairperson of National Commission for Protection of Child Rights (NCPCR) as a special invitee in the Statutory Full Commission. The Chairperson of NCPCR is from the civil society and known human rights activists.

.NHRC, India is working very closely in cooperation and coordination with not only with the Deemed Members but others as well like National Commission for Protection of Child Rights, National Commission for Safai Karamcharis and State Human Rights Commissions. They participate in all major functions of the NHRC like seminars, workshops, national consultations, annual functions, legislation review councils etc. to name a few.

The SCA has referred to Paris Principle B.1, which called for the composition of an NHRI to "be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civil society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of..." This Principle placed the highest stress on an NHRI's having the power to cooperate effectively with civil society; their presence on the NHRI is an alternative. The NHRC has set out in detail the series of measures and processes through which it engages with civil society. It will continue to do so. Its composition is not a bar to this process.

The process undertaken by the Selection Committee does not exclude any particular group from consideration. Anybody can send nomination to the Government. Very often the Chairpersons of the National Commissions, who are deemed members, have been from civil society. Further, the two positions of human rights experts are also open to civil society.

2. The appointment of the Secretary General and the Director of Investigations from Central Government.

At the time of the NHRCI's re-accreditation in 2006, the SCA recommended that *"consideration be given to strengthening the consultation process regarding the selection and appointment of the Secretary General and staff under section 11(1) of the enabling law of the Commission in order to strengthen the independence of the staff appointed."* 3

The SCA is not satisfied that the NHRCI has sufficiently addressed the recommendation it made in 2006. The SCA recommends that the NHRCI advocate to amend the PHRA 2006 to remove the requirement that the Secretary General and Director of Investigations be seconded from the Government, and to provide for an open merit based selection process. The SCA also remains concerned about the practice of having police officers and former police officers involved in the investigation of human rights violations, particularly in circumstances where the alleged perpetrators are the police. This practice has adverse implications for the actual and perceived independence of the NHRCI.

The SCA refers to General Observation 2.4 Staffing by secondment: *"In order to guarantee the independence of the NHRI, the Sub-Committee notes, as a matter of good practice, (that) senior level posts should not be filled with secondees..."*

NHRC, INDIA COMMENTS

While this would be ideal in any institution that must be independent of governments, much depends on the safeguards that ensure that those who are seconded are loyal.

The Secretary General and Director General (Investigation) are appointed by the Government in accordance with the provisions of the PHR Act, but only after obtaining the approval of the Commission. The procedure is as follows:

- A panel of names of officers for these two posts is sent by the Department of Personnel and Training in the Government of India.

- The Commission chooses an officer from this panel, based on the service record; it can ask for another panel if none of the candidates proposed meets its standards or requirements.
- The officer selected and approved by the Commission is appointed by the Government.
- Once these officers are appointed, they are under the full control and direction of the Commission and there is no interference from the Government in their functioning.

The position of Indian civil servants who are chosen by the NHRC to serve it on deputation is analogous. The Indian Administrative Service and the Indian Police Service, from which the Secretary General and Director General are chosen, are Services in which officers are allotted to State cadres. When they are transferred to posts in the Central Government, it is entirely possible that they would be reporting to Ministers in New Delhi from a political party opposed to the one that formed the Government in the State: they are trained in a tradition and a discipline that demand loyalty to the post, not to a political master .

The terms under which officers are deputed to the NHRC put them in the same category as Indian civil servants seconded as advisers to foreign governments or to the Secretariats of multilateral institutions. It is given that officers on deputation pass temporarily out of the control and influence of the Government of India. All the orders issued by the Central and State Governments to officers chosen by the NHRC stipulate that their posting there will be treated as a foreign deputation.

The concern expressed by the SCA and the recommendation it has made are therefore both redundant. Nor indeed is such a recommendation likely to find favour with Parliament. India has a large number of Commissions that protect human rights, both at the Centre and in the States. Some of the senior staff of these Commissions is seconded by governments, and since there have never been complaints about their independence, to recommend an exception for the NHRC would be to give the impression that the officers who have served this Commission have been found wanting, which is not the case.

The Secretariats of the UN and other multilateral institutions, which are expected to be independent of member States, nevertheless have significant numbers of staff at the highest positions on secondment from governments. While they are international civil servants, they are expected to be loyal only to the body to which they have been deputed.

The NHRC has explained in detail the process through which it ensures that the officers seconded to it meet its standards and requirements. If the SCA is aware of problems that have occurred in the functioning of the NHRC because some officers are seconded, it should spell these out.

The SCA "also remains concerned about the practice of having police officers and former police officers involved in the investigation of human rights violations, particularly in circumstances where the alleged perpetrators are the police". According to it, this "practice has adverse implications for the actual and perceived independence" of the NHRC.

The police officers chosen by the NHRC have served it with exemplary zeal. Not even the most intemperate critics have claimed otherwise. Because they know how the system works, they are able to unearth the truth in cases where others could not. Their work has been outstanding, including on cases involving the police: on at least one, the Supreme Court has used their report as a framework against which it has asked Governments to report to it on corrective action. It is on their findings that the NHRC, every day, issues recommendations to governments for redress for wrongs committed by public servants. It is a travesty to say that their presence creates adverse implications for the NHRC. The NHRC will continue to use police officers as investigators, because this is essential if it is to ensure that it can provide relief to the victims of human rights violations in India. That remains the NHRC's principal concern.

It is not possible to implement and coordinate effectively the orders of the Commission if the officer has no wide knowledge of the Government functioning and no standing among the various levels of the Government. This system of appointment of the Secretary General & Director General (Investigation) that is followed in India is

best suited to promote and protect the human rights of the people which is the aim of establishment of NHRC, India.

The NHRC, India is fully satisfied with this functioning of the provision of the Act and is of the opinion that this, in no way, affects the independent and autonomous functioning of the Commission and hence does not feel the necessity of any amendment in this regard.

3. The Relationship with Civil Society

The NHRCI highlights the existence of Core/Expert Groups as the means by which it complies with the Paris Principles requirement for pluralism and engagement with civil society and human rights defenders. The SCA notes however that information provided by civil society organisations, including those actually represented on the Core/Expert Groups, indicates that these mechanisms are not functioning effectively as a means of engagement and cooperation between the NHRCI and civil society defenders.

The SCA refers to:

- Paris Principle C(g) provides that "*Within the framework of its operation, the national institution shall...(i) in view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas*" and to,
- General Observation 1.5 'Cooperation with other human rights institutions': "*NHRIs should closely cooperate and share information with...NGOs, working in the field of human rights and should demonstrate that this occurs in their application to the ICC Sub-Committee.*"

NHRC, INDIA COMMENTS

The NHRC is also disturbed by the import of the third set of the SCA's concerns, on its relationship with civil society. The NHRC has detailed the various ways in which it engages with civil society, but the SCA claims that information provided to it, including by "those actually represented on the Core/Expert Groups, indicates that these mechanisms are not functioning effectively. ..."

The information provided by the NGOs that the mechanisms of Core Groups of NGOs/Experts are not functioning effectively as a means of engagement and cooperation between the NHRCI and civil society defenders is totally misleading and false.

NHRC, India have the best practices for engaging with the Civil Society. It has institutionalised cooperation and collaboration with civil society. A Core Group of NGOs has been constituted which provides the Commission with crucial inputs regarding the hopes, aspirations and expectations of the civil society. Civil society is also part of other Core Groups and participators of all major events of the Commission.

The NHRC does not know which representatives of Indian civil society the SCA has consulted. There are dozens on its Core Groups; barring one or two, who rarely accept invitations from the NHRC to meetings, but complain to others, none of the others has expressed dissatisfaction with the work of these Groups, which the NHRC finds of crucial importance. As examples, in recent months, the NHRC

- issued a recommendation to the Central Government to ban the pesticide endosulfan, after consulting the experts on its Core Group on Health; and
- has asked the members of its Core Group on Mental Health and the Core Group of Lawyers to advise it on the text of the draft Bill on Mental Health.

Moreover, as the NHRC has explained in detail in its statement of compliance, the Core Groups are only a segment of its interaction with civil society. To recapitulate, it engages with them through a variety of means, including the following:

- funding NGOs that offer training courses on human rights;
- commissioning research studies from them;
- involving them in the workshops and seminars it holds on sectoral issues in New Delhi and other cities;
- setting aside a session for them when it holds meetings in State capitals, as it has recently in Karnataka and Orissa;
- consulting them and drawing on their expertise throughout its monitoring visits to backward districts;
- acting on complaints received from them.

The NHRC's relationship with civil society is therefore vibrant and robust. The NHRC will continue to nurture and strengthen this relationship, which is mutually beneficial-

The Commission firmly believes that NGOs and other civil society actors are indispensable allies in the Commission's efforts to realize a just society, predicated on a respect for the rights of every individual to a secure and dignified existence.

NHRC India is of the view that it has a very strong functional mechanism of continuous interaction, sharing, cooperation and collaboration with civil society. However, NHRC, India will appreciate if SCA can provide us with better practices being followed by any other NHRI in this regard.

4. Complaint handling function

The SCA notes that civil society groups allege that the NHRCI's complaint handling functions suffer from extended delays and that the NHRCI does not adequately address human rights violations that have occurred. Their concerns were reiterated by the Special Rapporteur on the situation of human rights defenders who, at the conclusion of her official visit to India in January 2011, stated:

"(A)ll the defenders that I met during the mission voiced their disappointment and mistrust in the current functioning of (the NHRC). They have submitted complaints related to human rights violations to the Commission, but reportedly their cases were either hardly taken up, or the investigation, often after a significant period of delay, concluded that no violations occurred. Their main concern lies in the fact that the investigations into their cases [were] conducted by the police, which in many cases are the perpetrators of the alleged violations."

By contrast, the NHRCI has indicated that in recent years it has introduced changes to its complaint handling process to address the increasing number of complaints and delays in complaint handling.

On the information available, the SCA is unable to determine the veracity of the allegations raised above, however it is clear that there is at least a perception that there are significant delays, as well as ongoing concerns about the use of former police to investigate complaints, including those against service police. The SCA encourages the NHRCI to address these concerns.

NHRC, INDIA COMMENTS

The SCA has also "noted" two issues which it will consider in 2016, when the NHRC comes up for re-accreditation. The first of these is on its complaint handling function, which, as the SCA notes, is continually reviewed and improved. In 2016, the NHRC will report on a system that will be even more thorough and responsive than it is now, but it would be glad to demonstrate to the SCA how it presently works. The SCA could also take soundings from several ICC members, in whose offices, at their request, the NHRC has installed the computer software it has developed, and whose staff it has trained to process complaints.

The NHRC, India is concerned about the human rights defenders and also organized a meeting of the Commission and Civil Society with the UN Special Rapporteur on Human Rights Defenders during her visit to India. The majority of the NGOs present there appreciated the work done by NHRC, India towards protection and promotion of rights of the human rights defenders. Hence, the statement of the SR is not factually correct.

The UN Special Rapporteur on Human Rights Defenders has made general remarks about violation of human rights of the human rights defenders but has not mentioned specific details of any such case involving the human rights defenders. It appears that the Special Rapporteur has been accessed by the few NGOs who have followed her in her every visit limiting her access to a wide spectrum of civil society genuinely working at the grass root level.

The Commission as per practice acknowledges the receipt of every complaint. Non acknowledgement of the same is an exception which could be the result of factors like postal hiccups/human error etc.

The time taken for disposal of a case depends upon the facts and circumstances of a case/response from the concerned authorities.

The complaints received from Human Rights Defenders have been promptly acted upon by the Commission. The Commission has been conducting inquires on the complaints/intimations alleging human rights violations given to the Commission by the Human Rights Defenders from all over the country. The Commission has its own investigation Division headed by the Director General (Investigation) for investigating the cases.

The Complaint Management System developed by NHRC, India is one of the best in the world and with the click of mouse the complainant can check the status of his complaint. The system has also been installed in the NHRIs of Rwanda, Jordan, Nepal and in the State Human Rights Commissions in India.

The Complaint handling system of the Commission is running satisfactorily. Moreover, the Commission keep reviewing its procedures and systems to improve disposal of the complaints. The picture depicted by some of the civil societies and UN Special Rapporteur on HRD does not reflect the correct position and is far from truth.

5. Annual Report

The SCA notes that the most recent Annual Report available to it is for 2007-2008. An Annual Report cannot be made public until it is

tabled in Parliament by the government, and this is not done until the government has prepared a response for follow up to the recommendations made by the NHRC in its Annual Report. The SCA acknowledges that it has been advised by the NHRC that Annual Reports for 2008-2009 and 2009-2010 have been submitted to the government, but as the government has not developed its responses to the recommendations in those reports, it has not yet tabled the reports in Parliament.

The SCA notes that Annual Reports serve to highlight key developments in the human rights situation in a country and provide a public account, and therefore public scrutiny, of the effectiveness of an NHRI.

The SCA refers to General Observation 6.1 NHRI Annual Report: *The Sub-Committee finds it difficult to review the status of an NHRI in the absence of a current annual report, that is, a report dated not earlier than one year before the time it is scheduled to undergo review by the Sub-Committee. The Sub-Committee stresses the importance for an NHRI to prepare and publicize an annual report on its national situation with regard to human rights in general, and on more specific matters. This report should include an account of the activities undertaken by the NHRI to further its mandate during that year and should state its opinions, recommendations and proposals to address any human rights issues of concern.*

The SCA therefore encourages the NHRCI to seek such solutions as it considers would appropriately allow it to report on a more timely basis. The SCA refers to General Observation 1.6 Recommendations by NHRIs: *"NHRI recommendations contained in annual, special or thematic human rights reports should normally be discussed within a reasonable amount of time, not to exceed six months, by the relevant government ministries as well as the competent parliamentary committees. These discussions should be held especially in order to determine the necessary follow up action, as appropriate in any given situation. NHRIs as part of their mandate to promote and protect human rights should ensure follow up action to recommendations contained in their reports*

NHRC, INDIA COMMENTS

The annual report of NHRC, India for the year 2007-08 has already been made available to the public. The reports of 2008-09 and 2009-10 have been sent to the Government and that of 2010-11 is under preparation and the same will be submitted to the Government within the due date for laying on the table of the Parliament.

The Government is required to place the Annual Report before the Parliament along with action taken memorandum. Therefore the recommendations contained in the reports are shared and distributed with the concerned Ministries/Departments/Agencies by the Government on receipt of the report from the Commission. The volume of the recommendations made by NHRC, India and the multiplicity of agencies involved in the action taken report obviously need a reasonable time to prepare memorandum of action taken by the Government.

The Act stipulates that the Report should be placed before Parliament together with the Government's response on it, and this takes time. A document that must first be submitted to Parliament cannot be made public until this is done. That creates a conundrum. However, since these Reports are made public, they can be used, as the SCA believes they should, by anyone interested, to gauge the NHRC's performance.

The NHRC, India sends its recommendations to the State Government and Central Government during the year and the same are accepted by them. The annual report is only the consolidated report of all the actions and initiatives taken by the Commission prepared in accordance with the provisions of the PHRA. It does not mean that actions recommended by the Commission are complied by the Government only after the annual report is tabled in the Parliament.

After listing the first three areas of concern, the SCA has noted that it "will again consider these issues at its first session in 2013". The NHRC is unable to find any mandate that authorizes the SCA to "consider issues" on a member of the ICC, except as part of the accreditation or reaccreditation process, or if a special review is called for. The circumstances under which a special review may be

held have been spelt out in the ICC's Statute and do not apply to the NHRC.

As a founding-member of the ICC, the NHRC has found its engagement with its counterparts of interest. From this engagement, the NHRC is aware that very few NHRIs have either the powers or the resources to carry out the range of work that it does. This work is done on behalf of the Indian citizens who come to it for help, and it must be judged by what it does for them. This means that, even if the ICC accepts it as an A status NHRI, the NHRC would fail if it let down those who need its help. However, the steep increase in the number of complaints it receives each year shows that the NHRC is accepted by the citizens of the country as an institution that fulfills its mandate. That is the yardstick by which the NHRC judges itself.

Any institution must be rated on its performance, measured against objective parameters. The SCA's comments show that it is primarily concerned with form, not outcomes or substance. If the SCA felt that the NHRC needs to do more or better, the NHRC would have expected an objective assessment to outline the benchmarks and explain why it did not meet them. **The NHRC has set out in detail what it does. If A status NHRIs must do more, the SCA should cite the work that these do, which the NHRC does not. Otherwise, its assessments become, unfortunately, the subjective views of its members.**

The NHRC wishes to make it clear that it will not subject itself to a "consideration" by the SCA in 2013.

If the ICC choose to reaccredit it in A status, it will continue to be a member of the ICC. If what is being offered is a conditional re-accreditation, for which it can find no authority in the ICC's Statute, the NHRC would consider it both deeply offensive and a travesty, and would have to very seriously consider if any useful purpose is served by maintaining its association with the ICC.
