

HUMAN RIGHTS COMMISSIONS AND OVERSIGHT OF POLICE
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Many countries in the Commonwealth have signed and ratified one or more international human rights treaties. Consequently, these countries are required to legislate to ensure compliance with international standards. However, usually it is not enough to legislate and the state needs to establish effective mechanisms and institutions to ensure that human rights standards are in effect being complied with. Referred to as National Human Rights Institutions (NHRIs) – and including within their ambit Human Rights Commissions and Ombudsmen – these mechanisms have been established in many Commonwealth countries with a mandate to promote and protect human rights. “NHRIs can be distinguished from non-governmental human rights organizations by their very establishment as a quasi-governmental agency occupying a unique place between the judicial and executive functions of the state, and where these exist, the elected representatives of the people.¹”

The 1993 World Conference on Human Rights encouraged the establishment and strengthening of NHRIs, while recognizing both the rational and requirements of Paris Principles² and that each state chooses the framework that best suits its particular needs³. Amnesty International clarifies their true role:

“NHRIs should never be seen as a replacement or alternative to an independent, impartial, properly resourced, accessible judiciary, whose rulings are enforced. NHRIs can however constitute an effective complement to the judiciary and other institutions within the state in promoting and protecting human rights standards. There can be no alternative to a determined government policy to holding the perpetrators of human rights violations accountable.”

Human Rights Commissions, as NHRIs, have been established in many Commonwealth countries to promote and protect human rights through effective investigation of broad human rights concerns and individuals' complaints about human rights violations they have suffered, and through making recommendations accordingly. The small states in the Caribbean and the Pacific region have Ombudsmen rather than Human Rights Commissions (HRCs). However, in the Pacific there is a movement towards having HRCs. As a result Fiji has had a HRC since 1999 and there is a provision in the draft constitution of the Solomon Islands for the creation of a HRC. Apart from this, there are countries like Pakistan, Bangladesh and Mozambique that have not established HRCs despite constant demand from the civil society to do so.

In assessing how effective HRCs are, it is imperative to look at their independence and the scope of their powers.

- **Expertise and Independence**

The Commonwealth Secretariat in its 'Best practice for National Human Rights Institutions' (referred to as the Commonwealth Best Practice hereinafter) notes that there are two "absolutely necessary features for an NHRI to function effectively: (i) high-quality members and staff; and (ii) independence. Individual members should possess the requisite expertise, integrity, experience and sensitivity to adequately protect and promote human rights. NHRIs must be free to perform their mandates and functions without outside restraint or improper influence."⁴

The independence of HRC depends on a lot of factors and the most prominent is whether it has a constitutional or a statutory basis. In that case, it is not subject to the will of the executive. If the HRC is based on, say, a Presidential decree like in Maldives then it cannot be independent as its mandate, powers and even existence depends on the will of the executive and can be tampered with as when it suits the latter.

Many HRCs find it difficult to retain their independence when they are dependent on the executive for their funds and resources. Human Rights Watch in its report on the HRCs in Africa states that the "budget should be voted by the legislative body, and not allocated by the executive, to emphasize its accountability to population. Once allocated, the commission's budget should be self-administered without interference, subject to usual auditing rules."⁵ One of reasons that HRCs in countries like Uganda are strong and have been able to address police brutality is because they are allocated resources by the parliament and the law mandates the parliament to ensure that adequate resources and facilities are made available to the Commission to function effectively. Then there are countries like Fiji where the Minister must ensure that funds appropriated by the Parliament are adequate for the proper functioning of the HRC. In some countries, "the withholding of adequate financing is a means through which the state can exert control over the human rights commission and ensure that the president's authority is not eroded. For example, Cameroon, the commission's funding was dramatically reduced for two years after it criticized the government abuses in a confidential report on the state of emergency in the North-West Province in 1992. In Zambia, the commission already short of funding, lost the government premises promised to it after it commented on torture of coup detainees in 1996."⁶ Notably, there exist countries like India where the law mandates that the government may pay to the HRC such funds as it thinks fit for being utilized by the latter for the purposes of the law and

still the commission remains strong and independent because of the wide public support that it enjoys.

The political environment in which the HRC exists, the public perception of its independence and the manner of appointments of the commissioners also impacts upon the efficacy of the HRCs. HRCs in Malaysia and Maldives are not effective both because of the political milieu and the manner in which the commissioners are appointed by the President/King without effective consultations.

- **Mandate and Powers**

The Commonwealth Best Practice Best Practice provides that a HRC “should have a broad mandate covering the full range of human rights issues and recognising the universality, interdependence, interrelatedness, and indivisibility of human rights.”⁷ “Human Rights should be defined not only by reference to domestic law, but also by reference to all international instruments, whether or not acceded to by the relevant State.”⁸ The Malaysian law, for example, limits the definition of human rights to the “fundamental liberties as enshrined in Part II of the Federal Constitution” (as stated in Section 2 of the Act), which do not fully conform to universally accepted definitions of human rights contained in the Universal Declaration of Human Rights and two of the UN’s main human rights instruments namely the ICCPR, the ICESCR and the Convention Against Torture (Malaysia has not ratified the two covenants). While Section 4(4) of the 1999 Act does provide that whatever rights and liberties not provided for in Part II of the constitution but referred to in the UDHR must be considered, the Section goes on to state that they can only be considered if there is no conflict with the Federal Constitution. In reality, the safeguarding of the fundamental liberties of Part II of the Constitution is wholly undermined through the enforcement of draconian statutes like the Internal Security Act and the Official Secrets Act, which the Constitution accommodates. In effect, by abiding by constitutional provisions, the Commission is forced to recognise some of Malaysia’s most draconian laws which only foster police misconduct and lack of accountability.

Almost all the HRCs have jurisdiction over the police and such they are yet another external mechanism of oversight over the police. While there are HRCs like the Mauritian National Human Rights Commission that are specifically authorised to investigate complaints against the police, there are those like in India and Malawi that are also mandated to perform this task as part of their broader role of promoting and protecting human rights of all. In countries like Australia and South Africa with strong civilian oversight mechanisms for police specifically,

the HRCs usually refer the complaints pertaining to police misconduct to these specialized oversight mechanisms.

The effectiveness of the HRCs depends largely on the range of powers given to them to exercise their function of oversight.

- ***Conciliation***

Notably, many HRCs are required to resolve the matters through conciliation. The Commonwealth Best Practices states that an NHRI “should have the power to use conciliation, mediation and other alternative dispute resolution mechanisms, when appropriate, to resolve complaints”. With respect to this point Amnesty International cautions that NHRIs “should not broker agreements for only reparations, such as compensation, to be paid, where the appropriate response would rather be reparation and prosecution of the perpetrator – for example in cases of torture”. While some countries like Uganda recognise this explicitly and enter into the process of conciliation only in appropriate cases, there are allegations against certain other HRCs like the one in Sri Lanka for conducting inquiries in such a manner that victims have no option but to agree to a settlement. In these cases, the settlements have amounted to as little as 1000 rupees (US \$ 10). This is done despite the fact that the officers involved know that there is no way to enforce payment, as the NHRC has no capacity to legally impose and enforce financial settlements⁹.

- ***Investigations***

The Commonwealth Best Practice states that all NHRIs including HRCs “should have the power to investigate alleged human rights violations on their own initiative. This power should be used actively to investigate human rights concerns of people who may have difficulty accessing the NHRI on their own.” Many HRCs in the Commonwealth are empowered to investigate cases of police abuse upon complaints and also suo motto. To be able to conduct effective investigations, the HRCs are given a wide range of powers. One of the important powers given to HRCs in many Commonwealth countries including India and Fiji is the power to summon and enforce attendance of witnesses and examining them on oath, to compel production of documents, and to procure any public record or court document. Commonwealth Best Practices states that NHRIs “should have the power to effectively address non-cooperation, obstruction, or victimisation in an investigation, e.g. a refusal to produce evidence.¹⁰” Usually, the HRCs are given powers of a civil court for these purposes and therefore any person can be committed for contempt in case of non-cooperation and obstruction. In countries like Uganda and

Tanzania, wilful obstruction and interference with the functioning of the HRC is an offence¹¹.

- ***Recommendations and compliance with them***

It is not enough to have powers of investigation unless the HRC is empowered to give recommendations that are complied with by the executive. Amnesty International states that NHRIs “should have powers to ensure effective non-judicial remedies, including interim measures to protect life and safety of an individual and adequate medical treatment where necessary; it should ensure measures of redress and rehabilitation are taken in appropriate cases.” The Indian HRC is empowered to award interim compensation to the complainant.

One of the most frequently cited problems with using the HRC mechanism is that it lacks powers to get its recommendations implemented. This is not to say that HRCs are not given powers to ensure compliance with their recommendations. Usually give recommendations but then some are empowered to some extent to see compliance with recommendations.

In countries like India, the HRC submits its report to the government, which is then required to lay the report in the Parliament. Although the powers of the Indian HRC are recommendatory, if the government decides not to abide by its recommendations, it has to give reasons for its decision in a special report called the action taken report. This report is laid before the Parliament. Similarly in Tanzania, the concerned institution has 3 months to advise the Commission in writing what it has done or proposes to do on that recommendation. In cases where the government fails to abide by the recommendations of the HRCs in India and Tanzania, they are empowered to approach the courts to get their recommendations enforced. The recent anti-Muslim riots in Gujarat in 2002 are a good example where the Indian National HRC blasted the government and the police for its role in the riots. In Gujarat, it took up certain cases *suo moto* and when the government did not accept its recommendations, the NHRC went to the Supreme Court to get its recommendations implemented.

The Ugandan HRC has a legal and tribunal department that is empowered to grant any remedies provided for in the constitution including release of a detained person, payment of compensation, and any other legal redress. Appeals against such decisions lie to the High Court. A complainant does not waive his or her right to bring a judicial action by bringing his or her case to the Uganda HRC but once decision to go to the court is made by the complainant, the UHRC loses

jurisdiction over the matter. And when a matter has been conclusively handled by the UHRC, a similar matter cannot be taken before a court of law except by way of appeal. The law provides that the decisions of the Ugandan HRC will have the same effect as the decisions of the court and shall be enforced in the same manner¹².

- ***Other powers***

Some HRCs are given specific powers over the police and other law enforcement authorities. Many countries like Sri Lanka, India, Tanzania, Uganda, and even Malaysia empower the HRCs to visit places of detention. Some of these HRCs like the Indian one can publish special reports on these visits or mention this in their annual reports. In countries like Sri Lanka with the dubious record of disappearances and torture, the law mandates the police to report to HRC within 48 hours “all arrests and detention under the Emergency Regulations (ER) and the Prevention of Terrorism Act (PTA).¹³”

In some countries like India, the HRC can intervene in a matter in the court pertaining to violation of human rights with the permission of the court.

In Mauritius, the police is required to inform the HRC about all complaints against the police and action taken in those.

**MAURITIAN HRC OVERSEES
THE INTERNAL COMPLAINTS MECHANISM OF THE POLICE**

The Mauritian law specifically empowers the HRC to enquire into complaints against the police. The Mauritian HRC is also mandated to oversee the formal internal police complaints system. The enabling legislation¹⁴ provides that where any person complains to the police against an act or omission of another the police officer, the Commissioner of police will forward the copy of the complaint to the HRC and inform it of any criminal or disciplinary proceedings taken or to be taken as a result of the complaint. The HRC is empowered to ask the Commissioner of police to provide it with such further information that it thinks fit in relation to such complaint. Where the HRC is informed that no criminal or disciplinary proceedings are to be taken, it may enquire into the matter and exercise all its powers under the in relation thereto.

Some other powers that HRCs exercise with respect to promotion of human rights include reviewing laws, holding training and passing guidelines to be followed by police in exercising their powers. In India, the HRC has also passed guidelines for the police to follow when arresting a person and the provincial governments and police have accepted in principle to follow these. In many countries like Fiji, India

and Uganda, the HRCs conduct human rights trainings for the police. In Fiji, the Human Rights Commission has conducted many training sessions with the police to spread awareness of human rights within the force. Recently, the Commission launched a handbook for the disciplined forces of Fiji (including the police) entitled “*National Security and Human Rights*”. President Ratu Josefa commented at the launch “that the Handbook paved the way for the Disciplined Forces of Fiji to uphold the rule of law through the promotion and protection of human rights”. Many HRCs also review existing or proposed laws that impart enhanced powers to the police or grant immunity to them prosecution and civil suits. Recently in 2001, the Indian HRC has reviewed the proposed anti-terror law in India and recommended that it should not be enacted into a law and although the then government has still enacted the law, the statements passed by the HRC lent power to the voice of the civil society. After the elections in 2004, the new government cited the opinion of the HRC and scrapped the Prevention of Terrorism Act, 2001.

- **Obstacles faced by HRC’s in overseeing Police:**

- ***Structural limitations:***

One the most common reasons for the failure of HRC to function effectively is the structural limitation imposed on it by the enabling legislation. In Tanzania, the President can direct the HRC that investigation shall not be carried out if there is a real and substantive risk of prejudicing national defence or security. In countries like India, the law provides that the HRC cannot enquire into matters where a state or national commission of enquiry instituted. As a result whenever a state government wishes to frustrate the attempts of the National HRC to investigate a matter, it can set up a state commission of enquiry and politically manipulate the results of that inquiry.

“Although some reasonable time limits may be used to ensure that complaints come forward speedily with their complaints, NHRIs should undertake any investigation where there is evidence in existence to consider: they should not be inhibited by arbitrary time limits on investigations, and should not be inflexible in rejecting cases for being brought to their attention outside of time limits.¹⁵” In India, the law mandates that the HRC cannot examine any case of violation of human rights after one year of the date of occurrence. This impacts on the ability of the HRC to investigate cases of human rights violations that have occurred more than a year ago. While there are countries like Sri Lanka that do not provide a limitation period, others like Uganda provide 5 years and state that in exceptional cases, it can be waived off.

- ***Lack of effective procedure of investigation:***

Commonwealth Best Practices state that each NHRI “should establish its own guidelines and rules of procedure for the investigation of complaints. Its procedures should reflect the principles of natural justice and procedural fairness.¹⁶” However many HRCs are criticized for not having established a proper procedure of investigation. The National as well as state human rights commissions in India have been criticized for relying heavily on government employees including police officers, either on deputation from different departments or on post-retirement work, to carry out much of their work, minimising their autonomy from government.

LACK OF EFFECTIVE INVESTIGATIVE PROCEDURE:
SRI LANKAN CASE STUDY

The Sri Lankan HRC has been criticized over its failure to develop an effective complaint and investigation procedure. This became apparent in November 2003 after an Area Coordinator submitted a report on a torture case where a 17-year-old boy suffered serious injury as a result of being hung from a beam and assaulted by the police. According to this report, the child had never been tortured/ This child, BG Chamila Bandara Jayaratne, was a part of a team representing the World Organization against Torture (OMCT) and Asian Legal Resource Centre at proceedings before the Human Rights Committee during its hearing of Sri Lanka's periodic report. When questioned by the Committee about this case, the Sri Lankan delegation claimed that the story was false. The delegation based its claim on a report by the HRC Area Coordinator for Kandy. The report was made without interviewing the victim, his family, or the doctors who had examined him. A complaint was subsequently lodged with the NHRC Chairperson, who reopened the case and also announced an inquiry into the conduct of the Area Coordinator¹⁷. Dr. Irvin Jayasuriya, the person conducting the enquiry, “found that Chamila Bandara had been tortured and that the Coordinator had been biased towards the Ankumbura police and appeared to lack training¹⁸”.

Asian Legal Resource Centre (ALRC), an intNGO, also observes that on occasions, the Sri Lankan HRC conducts investigations at police stations. Victims complaining of torture have been asked to come back to the same police station where they have allegedly been tortured, for further inquiries¹⁹. Another problem lies in the fact that in many cases, the HRC intimates to the perpetrators that a complaint has been made against them, and giving the particulars of the victim. This has been done without providing any protection to the victim²⁰. Commonwealth Best Practice states that the complaint mechanism of an NHRI “should be simple, accessible, inexpensive and expeditious. Where necessary for the protection of witnesses or victims, confidentiality should be guaranteed.²¹” The extremely long periods taken to investigate matters

and give recommendations in countries like India is also a matter of grave concern.

- ***Political interference and lack of resources***

Political interference through appointments and control over funding is yet another reason why HRCs cannot function effectively.

POLITICAL INTERFERENCE IN CAMEROON

The National Commission on Human Rights and Freedoms (NCHRF) in Cameroon was created by a Presidential decree in 1990. A Human Rights Watch report of 2001 observes that the “NCHRF’s credibility and autonomy are greatly hindered by the strong presidential control over its appointment and operations. The current NCHRF members were named by the president in 1991 when Cameroon was still a one party state. The original five-year term of the sitting commissioners members expired in 1996. Yet, some three years later, President Biya has neither renewed the sitting members nor appointed new members. Some Cameroonians postulate that this is due to the fact that the president-in accordance with the decree requiring that a representative from each political party represented in the National Assembly sit on the NCHRF-would now have to allow political opposition members on the NCHRF. By law, the membership of the NCHRF is long overdue for renewal, and should have a more balanced political representation. Additionally, the NCHRF possesses weak powers. It can only make recommendations to the government, and its confidential reports were (until recently) submitted only to the president’s office.²²”

- ***Non-cooperation by the government and its agencies***

In many countries within the Commonwealth, the governments do not comply with the recommendations of the HRCs. In countries like India, on many occasions, the state governments refuse to comply with its recommendations “by simply ignoring them or by furnishing a long bureaucratic discourse on how compliance with the recommendations is not in public interest (read governmental interest)²³.” In Sri Lanka, lack of cooperation from other agencies and especially the police force is a major hurdle in the effective functioning of the HRC. Recently, Asia Human Rights Commission (AHRC), an international NGO, reported several officers of the HRC being harassed by the officers at the Paiyagala Police Station at least on two occasions in June 2004. According to information received by the AHRC, when the Sri Lanka HRC officers, in carrying out their official duty, visited the Payagala police station to inquire into complaints made by persons who were allegedly tortured at the station, these officers were threatened and manhandled by police officers opposed to the inspection.

END NOTES

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- ² *Principles relating to the status of national institutions* adopted in the UN Commission on Human Rights Resolution 1992/54.
- ³ Commonwealth Secretariat (2001), *National Human Rights Institutions: Best Practice*, Legal and Constitutional Affairs Division (London).
- ⁴ *Ibid.*
- ⁵ Human Rights Watch (2001), *Protectors or Pretenders? –Government Human Rights Commissions in Africa*, <http://www.hrw.org/reports/2001/africa/> (accessed on 7th February 2005)
- ⁶ *Ibid*
- ⁷ Commonwealth Secretariat (2001), *National Human Rights Institutions: Best Practice*, Legal and Constitutional Affairs Division (London).
- ⁸ *Ibid*
- ⁹ Asian Legal Resource Center, Statement on 'National Human Rights Commission of Sri Lanka in serious need of reform' received by the UN Commission on Human Rights at its 60th session, <http://www.alrc.net/pr/mainfile.php/2004pr/63/> (accessed on 19-11-2004).
- ¹⁰ Commonwealth Secretariat (2001), *National Human Rights Institutions: Best Practice*, Legal and Constitutional Affairs Division (London).
- ¹¹ The Uganda Human Rights Commission Act, 1997 and Section 37 of The Commission for Human Rights and Good Governance Act, 2001 of Tanzania
- ¹² The Uganda Human Rights Commission Act, 1997
- ¹³ Fourth Periodic Report of Sri Lanka submitted to the Human Rights Committee under Article 40 of the ICCPR. See CCPR/C/LKA/2002/4 (18th September 2002).
- ¹⁴ Section 4(6) of The Protection of Human Rights Act 1998, Mauritius
- ¹⁵ Amnesty International (2001), *National Human Rights Institutions: Amnesty International's recommendations for effective protection and promotion of human rights*, AI Index IOR/40/007/2001, 1st October 2001.
- ¹⁶ Commonwealth Secretariat (2001), *National Human Rights Institutions: Best Practice*, Legal and Constitutional Affairs Division (London).
- ¹⁷ Article 2, *Second special report: endemic torture and the collapse of policing in Sri Lanka* at page 38, Vol. 3, No.1, February 2004, <http://www.article2.org/pdf/v03n01.pdf> (accessed on 19-11-2004)
- ¹⁸ AHRC, Update on Urgent Appeal 39-2003, *Human Rights Commission of Sri Lanka decided to transfer the Kandy coordinator*, UP-66-2004
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- ²⁰ *Ibid*
- ²¹ Commonwealth Secretariat (2001), *National Human Rights Institutions: Best Practice*, Legal and Constitutional Affairs Division (London).
- ²² Human Rights Watch (2001), *Protectors or Pretenders? –Government Human Rights Commissions in Africa*, <http://www.hrw.org/reports/2001/africa/> (accessed on 7th February 2005)
- ²³ Tiwana, Mandeep, (2004) "Needed: More effective human rights commissions in India" at page 3, Commonwealth Human Rights Initiative Newsletter, Vol. 11 Number 2, New Delhi, Summer 2004.