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EFFECTIVE FUNCTIONING OF HUMAN RIGHTS MECHANISMS

Written statement* submitted by the South Asia Human Rights Documentation Centre (SAHRDC), a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[8 February 2005]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

THE NATIONAL HUMAN RIGHTS COMMISSION OF INDIA

SAHRDC has previously questioned the process of appointments to the National Human Rights Commission of India (NHRC), including at this forum. The appointment of Mr. P.C. Sharma – a former director of India's Central Bureau of Investigation, a federal police body – as a Member of the NHRC in 2004, illustrated the extent to which the Government of India is willing to go to undermine the credibility of the NHRC.

A legal challenge mounted against the appointment by a civil rights group resulted in a split decision by a two-judge bench of the Supreme Court of India in January 2005. While one judge, Justice Y.K. Sabharwal, ruled against the appointment, his brother judge, Justice D.M. Dharmadhikari, held that the appointment had conformed to all legal procedures and requirements, and was therefore valid. A larger bench will now hear the case.

There is, nevertheless, even at this interim stage, a lesson for the Indian government. For, even if the legal procedures were followed in making this appointment, it does not absolve the government of its responsibility of ensuring that the appointments are above board.

Question of Credibility

At the core of the issue is the credibility of the NHRC. As Justice Sabharwal emphasised in his order, the NHRC is a high-powered statutory body functioning as an instrument to protect and promote human rights, and “the credibility of such an institution depends upon [a] high degree of public confidence”.

“An individual Police officer may be very good but his participation in decision making as a member of the Commission is likely to give rise to a reasonable apprehension in the minds of the citizens that he may sub-consciously influence the functioning of the Commission. Such reasonable perception[s] of the affected parties are relevant considerations to ensure the continued public confidence in the credibility and impartiality of institution like NHRC,” the judge observed.

Public confidence is clearly nowhere at the top of the government's agenda – neither the Central Government's, nor the States'. If it was, the NHRC's annual reports would not have been stowed away in the Ministry of Home Affairs, waiting to be presented to Parliament. The annual report for 2002-2003 has only recently been tabled in Parliament – in December 2004. If public confidence were indeed on the agenda, the NHRC's directions would be complied with as a matter of priority. State Human Rights Commissions would have been established in every state. The dismal performance of the existing state human rights commissions would be reason enough to bring them under the purview of the NHRC.

Eligibility

Section 3 of the Protection of Human Rights Act stipulates that the four members of the NHRC shall include two persons having knowledge of, or practical experience in, matters relating to human rights. In the case of the appointment in question, the appointee does not have either a judicial or a human rights background.

It is not his policing skills that are in question. As Justice Sabharwal's order states, "A Police officer may be very good investigator. He may have vast experience in respect of the nature of commission of crime and consequentially its prevention. But, for the present purposes what is relevant to be borne in mind is that [a] number of cases reported to NHRC relate to acts of omission and commission by the members of such forces."

The order also questioned the ostensible utility of having a former police officer serve as a Member of the NHRC on the stated grounds that the NHRC could put his expertise in investigation to good use. "[T]he knowledge or practical experience in relation to commission of crime, investigation and solving a crime which may show violation of human rights is one thing and the knowledge or experience relating to protection of life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the international covenants and enforceable by courts in India is altogether different," Justice Sabharwal observed. "The requirement of section 3(2)(d) – relating to the constitution of the Commission", he held, "is of [the] latter and not [the] former."

Amendments to the Protection of Human Rights Act

SAHRDC has long advocated the raising of the bar. According to Section 4 of India's Protection of Human Rights Act 1993 - the enabling legislation for the setting up of the National Human Rights Commission - the President of India appoints the Chairperson and other members of the Commission based on the recommendations of a Committee comprising the Prime Minister, the Speaker of the Lok Sabha (lower house of Parliament), the Home Minister, the leader of the opposition in the Lok Sabha and Rajya Sabha (upper house of Parliament) and the Deputy Chair of the Rajya Sabha.

The Appointments Committee is not free from political influence and in practice recommendations evince a pro-government stance. The opposition is given two spots in the Committee and the representatives of the Government form a two-thirds majority in the Committee. Independence in the appointment committee, as is insisted upon by the Paris Principles – the minimum criteria for the establishment and functioning of national human rights institutions – is therefore not assured. Thus, while an appointment may have been carried out with due regard to the consultation process, it is worth examining if the process itself is adequate, in letter and in spirit.

Further, although, the legal fraternity has been represented in the NHRC, persons having knowledge and experience in the field of human rights have no representation in the NHRC. It seems unlikely that a Commission meant to protect and promote human rights can achieve its objective without giving any representation to those who work directly for the cause of human rights and are aware of the various issues that need to be addressed in this area.

The enabling legislation setting up the Commission is restrictive in scope so far as membership is concerned and fails to guarantee a pluralistic membership to the Commission as is required by the Paris Principles, thus violating the standards in practice.

What next?

Hopefully not a former chief of the Intelligence Bureau. As SAHRDC has previously pointed out, a significant percentage of NHRC staff is drawn from the Intelligence Bureau, India's

internal intelligence wing. In a functioning democracy, this should be considered sacrilege. Those who belong to the intelligence community, on becoming part of the NHRC, must resign from their parent cadre and agree to be absorbed as regular NHRC staff. The NHRC, most of all, cannot allow for dual loyalties in its serving personnel.

It is incumbent on the government to ensure that future appointments are made with the utmost discretion. There is a vast pool of human rights expertise in this country that the government can tap into. It is inconceivable that from the entire range of available human rights lawyers, activists, and academics, the government could only find a person who has had no human rights experience worth the name. Any more dubious appointments will serve to greatly lower the prestige of the NHRC, both domestically and internationally.

Get Going

The NHRC will also need to engage in some activism of its own, for its own sake. This, the Commission has been reluctant to do. With India's free and vibrant press the NHRC could have developed a dynamic relationship and used newspaper columns and television interviews as a platform. In its engagement with peer networks and other human rights bodies at the international level, it could be more forthcoming about its problems, and use them as a sounding board.

With non-governmental organisations, which continue to regard the NHRC with hope and promise, the NHRC could have established a transparent and constructive method of interaction, one that goes beyond token meetings and perfunctory, dead-end discussions. Meetings of the NHRC's Core Committee of NGOs are desultory exercises in defensiveness on the part of NHRC officials, and repeated attempts by some NGO Core Committee members to elicit concrete action from the NHRC on substantive issues have failed. The NHRC's failure to act on – or even comprehensively discuss – the appointments issue prompted the resignation of Mr Ravi Nair, Executive Director of the South Asia Human Rights Documentation Centre (SAHRDC), from the NGO Core Committee in December 2004.

The Indian NHRC was among the first to be established in the Asian region. It was hoped that it would serve as an inspiration, a blueprint for other upcoming NHRIs throughout the region. It now appears that it is more likely to show other NHRIs the way to the bottom.

The corrosion from within must halt immediately.
