

National Human Rights Commission of India

A Human Rights Evaluation

A dissertation submitted by Reenu Paul to the London School of Economics & Political Science, in part completion of the requirement for the **MSc in Human Rights**, September, 2003

“ I, Reenu Paul hereby state that this report is my own work and that all sources are made explicit in the text”

Acknowledgments

Foremost, I am grateful to my tutor Professor Conor Gearty for his guidance, encouragement, advice and comments. I will also like to thank Dr.Francesca Klug who guided me in framing the idea of this study. I am also indebted to a number of other people for many helpful comments at various stages of the work. Justice S.B Sinha, Mr.Virendra Dayal and Dr H.C Pokhriyal who graciously allowed to be interviewed. I am especially grateful to Y.S.R Murthy for his useful comments and contributions. Ritwick Dutta, Avdhesh Kaushal and Collin Gonsalvis provided comments and inputs, which reflected Non Governmental Organisation's views. In the end though, I am especially indebted to my husband, Vijendra Paul-my 'mentor', for his constant support and inspiration, both of which helped me in my work.

List of Abbreviation

NHRC	National Human Rights Commissions
NHRI	National Human Rights Institutions
NGO	Non Governmental Organisations
UN	United Nations
JCHR	Joint Committee on Human Rights
SAHRDC	South Asia Human Rights Documentation Center
SHRC	State Human Rights Commission
FCRA	Foreign Contribution (Regulation) Act
ESC	Economic, Social and Cultural

Chapter I

Introduction

There are different ways of protecting human rights. A pluralist and accountable parliament, an executive who is ultimately subject to the authority of elected representatives and an independent, impartial judiciary are necessary, but not sufficient, institutional prerequisites¹. Besides these basic ‘institutions’ there may be other mechanisms whose establishment and strengthening will enhance the existing mechanisms. As a general point in this dissertation, I will be looking at the national human Rights Commission as an alternative way of protecting human rights.

Lately National Human Rights Commissions (NHRCs) have become prominent actors in the national, regional and international human rights arena. The UN bodies and other funders in international donor community have directly encouraged and supported both technically² and financially the growth of these institutions. The international community lends its support because it considers the process of establishing NHRCs to be an indication that a government is willing to abide by international human rights norms.

Thesis-

I will explore two questions-

First is up to what extent National Human Rights Commission (NHRC) can help in holding government accountable by making government conscious of the fact that it is the primary duty bearer. National human Rights Commissions can establish a culture of accountability as they are charged with monitoring the state’s performance constantly. Without effective monitoring, states cannot be held

¹ Brian Burdekin and Anne Gallagher, ‘The United Nations and National Human Rights Institutions’, Human Rights-2/1998, A Quarterly Review of the Office of the UN High Commissioner for Human Rights, p.21

² For example a project, entitled ‘Action Research Study on the Institutional Development of Human Rights in Bangladesh’ (IDHRB) was undertaken by the UNDP to assess the need of establishing the NHRC.

accountable for non-implementation of, or be made liable for violations of the human rights. Surely this monitoring work can be done to a certain extent through judiciary but NHRCs have potential to accomplish this task more effectively. I will also argue, however, that while doing so it should keep balance. It has to be proactive without being confrontational, so that public interest does not suffer because of unnecessary and unproductive competitiveness between it and other governmental bodies. It has to take initiative rather than having a prescriptive view.

Second I will consider why NHRC India³ has been relatively effective in protecting human rights, given the widely accepted and acknowledged appreciation of its role in promoting awareness of human rights, despite the relative weakness of its formal powers. What does this phenomenon tell us about human rights protection in general including protection of economic, social and cultural rights? In this regard I will be looking at the National Human Rights Commission of India as a case study of how human rights protection can become effective beyond the limits of the courts. NHRC India was the first National Human Rights Institution to be established in the South Asian Region .It has completed almost ten years. It has not been totally uncontroversial but it has taken tough and independent stands on several occasions. Despite its weak foundation, as discussed in chapter four and five of this study, the NHRC India is effective and demonstrates that human rights protection does not have to rely entirely on courts and gradually how National Human Rights Commission has become locus of human rights awareness at national level.

Very few studies have looked at the NHRC India from evaluative angle. This study aims to do evaluative study of the impact of the NHRC on the above-mentioned parameters. This will help in assessing its impact vis-à-vis its mandate.

³ Hereinafter, the terms National Human Rights Commission, the NHRC and the Commission shall be used interchangeably

Chapter 2

Literature Review and Methodology

A lot of written material is available about national human rights institutions (NHRIs); the institutions themselves generate most of it. While that material is informative, generally it is descriptive. It does not really reveal how effective the institution is on the ground. There is a need of systematic studies of their formation and impact.

After the enunciation of Paris principles, much of the research on NHRIs – including material produced by the institutions themselves, as well as literature propagated by international human rights Non Governmental Organisations – have been revolving around these principles. To be certain, the Paris guidelines are an essential minimum as well as a useful roadmap. However one can refer to them only as minimum threshold as the debate around them has been largely normative and legal in character- not sufficiently analytical, and comparative.⁴ Paris Principles are also called ‘normative framework of national institution’⁵ But an evaluation of the effectiveness of these institutions can and will have to be based not only on their theoretical conformity with the Paris Principles but also on their work in practice.⁶

Significant comparative studies have been done on NHRCs. For example studies by the International Council on Human Rights policy⁷ and the Danish Centre of Human Rights.⁸ A group of legal experts at the United Nations has recently published a study.⁹The UN itself,¹⁰ as well as the Commonwealth Secretariat¹¹ and Amnesty

⁴ Lindsnaes Birgit, Lindholt Lone & Yigen Kristine (eds.), *National Human Rights Institutions-Articles and Working Papers*, The Danish Centre for Human Rights, 2001, p.50

⁵ See the research brief of Valentin Aichele, a PhD student at the university Mannheim available at web portal www.nhri.net

⁶ Lindsnaes Birgit, Lindholt Lone & Yigen Kristine (eds.), *supra* note 1.

⁷ ‘Performance & legitimacy: National Human Rights Institutions’, International Council on Human Rights Policy, 2000 based on field research in three countries –Ghana, Indonesia and Mexico- and an examination of secondary sources in several additional countries.

⁸ Lindsnaes Birgit, Lindholt Lone & Yigen Kristine (eds.), *Supra* note 1. Its aim is to put inputs to the discussions on the establishment and development of the functions of NHRIs.

⁹ K.Hossain, L.Besselink, H.S Gebre Selassie and E.Volker, ‘Human Rights Commissions and Ombudsman Office, 2000

¹⁰ IV Professional Training Series, launched by the UN Centre for Human Rights, 1994,

¹¹ National Human Rights Institutions: Best Practice’, 2001

International¹² have published guidelines on how these institutions can be made independent and what they should do to be effective.

Particularly useful was the Brice Dickson's article¹³. As he is the Chief Commissioner of the Northern Ireland Human Rights Commission he gives valuable inputs about the function and effectiveness of NHRCs at the international level in general and the added value of human rights commissions at the local level in particular. Abul Hasant Monjurul Kabir's paper focuses on the promotion and protection of human rights by NHRIs and on the factors that affect the effectiveness of these institutions.¹⁴

Sonia Cardenas has done useful analysis of NHRCs of India, Philippines and Indonesia. The manner in which Sonia Cardenas examines the role of eleven factors that might affect the creation or impact of NHRIs is useful for understanding of the dynamics of NHRIs. In her findings, she has highlighted the dominant role of democracy in creation of NHRIs. That is striking, since much of the literature on NHRIs focuses on the democratizing effects of NHRIs. Her study shows instead that states that create NHRIs are, on balance, already more democratic. She also observes that states creating NHRIs share the following characteristics: they tend to be more democratic, have ratified a great number of treaties, report more frequently to treaty bodies and show greater respect for social and economic rights specially those of women.¹⁵

Another feature of her work is that she has classified the functions of NHRC as regulative and constitutive. Where she has defined regulative functions as those that focus on eliciting conformance with international norms and rules. Constitutive functions are those, which are intended to transform the identity of state or societal actors¹⁶.

¹² National Human Rights Institutions: Amnesty International's recommendations for effective protection and promotion of human rights, 2001

¹³ Dickson Brice, 'The Contribution of Human Rights Commissions to the Protection of Human Rights', *Public Law*, Summer (2003), Sweet and Maxwell and Contributors

¹⁴ Abul Hasnat Monjurul Kabir, 'Establishing National Human Rights Commissions in South Asia: A Critical Analysis of the Processes and the Prospects', *Asia –Pacific journal of Human Rights and the Law*, 2001, Volume 2, Number 1, 1-53

¹⁵ See Cardenas Sonia, 'Adaptive States: The Proliferation of National Human Rights Institutions', Carr Centre for Human Rights Policy Working Paper T-01-04, p.17-20

¹⁶ Id.p.22

C.Rajkumar's paper is also a useful study. The highlight of the paper is the – discussion on arguments against establishment of NHRCs on the basis of external and internal critiques. But the writer has observed that all the arguments against establishment of NHRCs that are internal to the institutions, for example lack of functional and financial autonomy, improper selection of members, lack of enforcement powers and accessibility, are also in some form a principle standard that the NHRC needs to observe for effective functioning.¹⁷

In this work rather than presenting a catalogue of deficiencies, focus will be on the methods adopted by the NHRC India to hold the government accountable and how far it has been successful in this task. While doing that consideration will be taken of its genesis and the way its genesis has cast constant shadow over its performance. For this purpose after a brief discussion on the institutional analysis of different models of NHRIs and tracing the evolution of the concept of NHRIs, in the third chapter, Indian government's policy behind the formation of the NHRC has been investigated in the fourth chapter. The remainder of the study consists the case study of the NHRC India, focusing on the composition and mandate of it in the first part and on the organisational and programme strategies adopted by the NHRC for the promotion and protection of human rights in the Second part of the Chapter five. I have used library based secondary research methods and ten interviews with the member of NHRC, NGOs, the Supreme Court judge, advocates and academicians. In conclusion, I try to make a case for the NHRC, as it has been relatively effective despite its relative weak formal powers.

¹⁷ C.Raj Kumar, '*Role and Contribution of National Human Rights Commissions in Promoting National and International Human Rights Norms in the National Context*', LL.M paper written by the author for LL.M, Harvard Law School, September 2000

Chapter III

- 1. Discussion on National Human Rights Institutions (An institutional analysis of different models of national institutions)**
- 2. Brief History-trace the evolution of the concept of National Human Rights Institutions**
- 3. Definition**

Universal human rights standards and norms have been included in the domestic laws of most countries. To realise these rights, there is need for the formation of implementation machinery. NHRIs have been set up in many countries in recent years to fulfil this function.¹⁸ Supporters of the trend towards establishing NHRIs argue that the national character of such institutions enables them to de-mystify universal principles and translate them into practical measures at the level where it most matters.¹⁹

On the other hand, many of the debates surrounding the creation of NHRIs often question the wisdom of creating another institution in an already cluttered institutional landscape. The United Kingdom, for example, had earlier rejected a proposal in the late 1990s to create a broad-based NHRC largely out of concern for older and related institutions like the Equal opportunities Commission and the Commission for the Racial Equality.²⁰ Though lately UK government has been considering of establishing a NHRC. The Joint Committee on Human Rights (JCHR) has submitted its report

¹⁸See generally Cardenas Sonia, Adaptive States: The Proliferation of National Human Rights Institutions', Carr Centre for Human Rights Policy Working Paper T-01-04, p.17 where she lists and examines the eleven factors that might effect the creation or impact of NHRIs.

¹⁹ Statement of the representative of the NHRC, India to the fifty-second session of the United Nation Commission on Human Rights, 10 April, 1996 as quoted in Gallagher, 'Making Human Rights Treaty Obligations a reality: working With New Actors and Partners', in The Future of Human Rights Treaty Monitoring (eds.) Alston Philip & Crawford James, 2000,p.203

²⁰ See Cardenas Sonia,*Supra* note 1,p.15

‘The Case for a Human Rights Commission’ on 19 March 2003²¹ where it has recommended that a NHRC be established in order to spread the culture of human rights. The concept is that of an institution, directly under the parliament, enjoying institutional and financial freedom and acting as a torchbearer of the spread of culture of human rights and not as a faultfinding mechanism. The JCHR specifically recommends that the proposed commission should not be seen as another inspectorate, advisory body, regulatory body or enforcement agency. It also should not be seen as a body with adversarial or litigious approach to its mission. Its principle purpose should be “to foster a culture of respect for human rights through raising awareness of the need to promote human rights in public authorities in the delivery of services and through making individuals conscious of their rights and guiding them in asserting their rights.” The proposed commission is not expected to handle individual complaints. As against such institutional clarity Cambodia is still struggling with the debate regarding creating another national institution to cater to Human Rights violations. In a country that already has human rights committee in the national assembly and senate, as well as an executive national human rights committee - institutions that are all more or less politicised and ineffective - local observers cannot help but question why they should create a national commission *per se*.²²

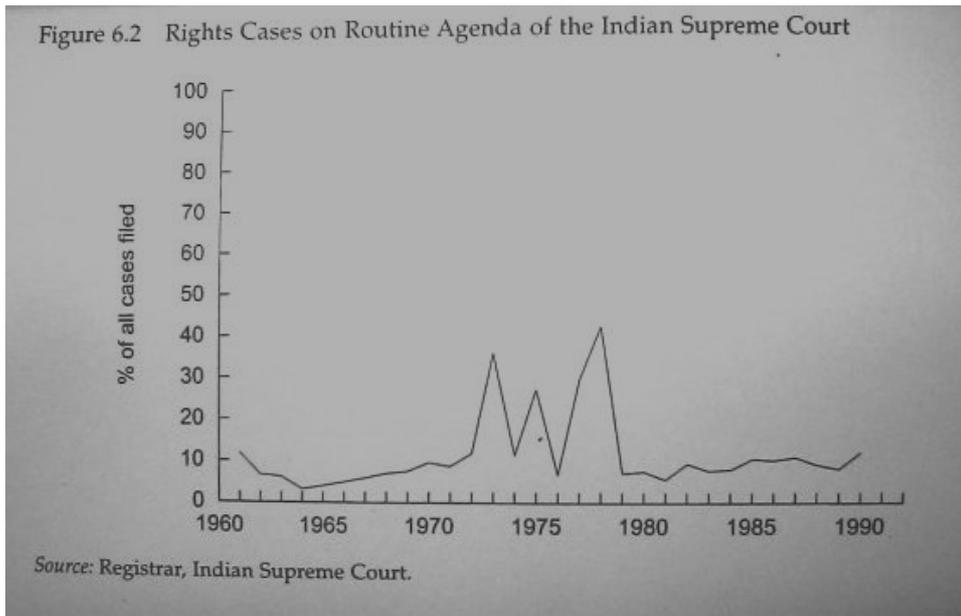
The view that courts are sufficient for protection of human rights may not be true in many social settings. Many factors seem to affect the functioning and impact of courts in dealing with rights based litigation. Epp²³ has analysed the performance of the Indian Supreme court with respect to the rights based litigation. Due to the limitation of the amount of legal aid available and the way it is administered it is discovered that only 10% cases in the Supreme Court belong to this category. Whereas in the United State of America the percentage of rights based litigation is about 60%. (Refer to figures 1 & 2)

²¹ See ‘Joint Committee on Human Rights –Sixth Report’ available at <http://www.parliament.the-stationery-office.co.uk/pa/jt200203/jtselect/jtright/67/6702.htm>

²² See Cardenas Sonia, *supra* note 1, p.15

²³ Epp Charles R, ‘The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative perspective’, The university of Chicago Press, Chicago and London, 1998

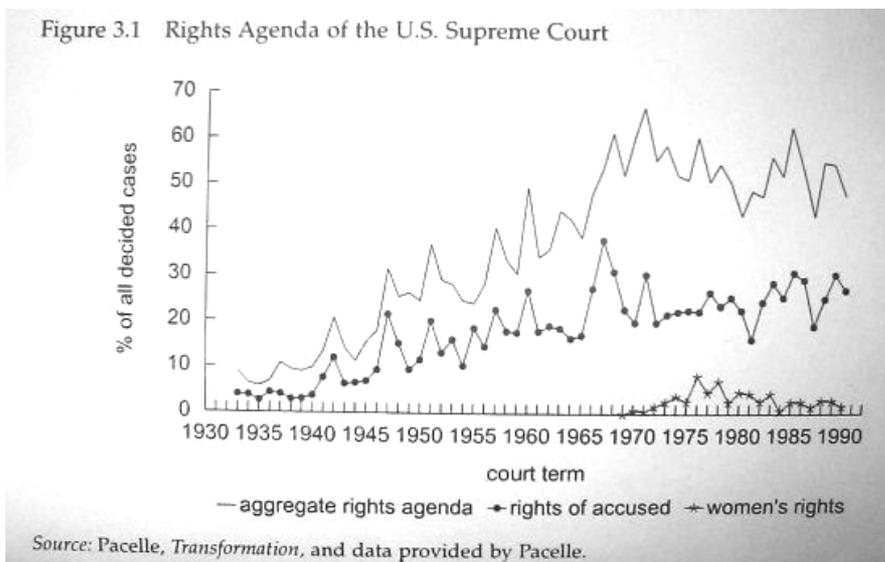
Figure 1



Source-Epp²⁴

Blip of 1975 –1977 is because of emergency imposed by Mrs. Indira Gandhi during which thousands of national leaders and activists were arrested. They had filed large number of rights based litigation during this period.

Figure -2



Source- Epp²⁵

²⁴ Id. Figure 6.2, p.92

²⁵ Id. Figure 3.1, p.28

Epp ascribes this to “ the weakness of the support structure for legal mobilisation.”²⁶ This factor is relevant for explaining the rationale for an independent human rights commission. In a country specific setting like that of India courts may not be in the position to deliver relief for infringement of rights due to institutional weaknesses and what Epp calls “weakness of the support structure for the legal mobilisation” i.e. legal aid, very little support for advocacy groups, absence of development of sustained, deep judicial policy making on individual rights and the fragmentation of the Indian interest group system.

Effective NHRIs with a broad mandate encompassing all human rights have the potential to complement at the national level the vital monitoring and accountability role performed by the United Nations (UN) treaty bodies at the international level.²⁷ These NHRIs can be developed according to local cultures and conditions, and offer informed advice from within the state. The importance of information and recommendations coming from within cannot be underestimated, as ‘foreign interference’,²⁸ is still used by many states as an excuse to dismiss human rights concerns.

In this chapter I will start with a brief history where I will trace the evolution of the concept of NHRIs. I will also look at the various definitions of NHRIs. Then I will develop an overview of existing forms of NHRIs.

If the 1960s were the golden era of United Nations (UN) standard setting, the 1990s have arguably been its period of pragmatic implementation. There has been an increasingly concerted focus on identifying ways in which international obligations can be anchored firmly in domestic contexts.²⁹ National commissions derive their formal authority from a range of organisational sources. These commissions are created more often than not by statutory law or a national constitution, although some

²⁶ Id.p.89

²⁷ Earle Patrick, Human Rights Council of Europe, National Human Rights Institutions and the Human Rights Approach to Development, 2.

²⁸ Burdekin Brian and Evans Christine, ‘A Global Trend’, Canadian Human Rights Foundation Newsletter: 2000-VolumeXV

²⁹ Hucker John, ‘Bringing Rights Home: The Role of National Human Rights Institutions’, in ‘*Human Rights Protection: The Role of National Human Rights Institutions*’, Butler.F (ed.), Kluwer Law International and British Institute for Human Rights, 2002,p.31

originate in presidential decrees.³⁰ National commissions can be the product of peace deals. For example Northern Ireland commission was created under the Good Friday Agreement of 1998.

As standard setting in the field of human rights gained momentum during the 1960s and 1970s, discussions on national institutions became increasingly focused on the ways in which such bodies could assist in the effective implementation of these international standards. Throughout the 1980's, the UN continued to take an active interest in this area.³¹ It was during this time that a considerable number of National institutions were established –often with the assistance of the Advisory Services Programme of the Centre for Human Rights. For example contributions have been made to strengthen the human rights structures in the Caucasus (Armenia, Azerbaijan and Georgia) by this centre.

The Commission on Human Rights held a workshop in Paris in October 1991. The workshop was to review patterns of cooperation between national institutions and international organisations and to explore ways of increasing the effectiveness of national institutions. Its conclusions were endorsed by the Commission on Human Rights³² in the form of the 'Paris Principles'³³, which articulate the status and responsibilities of NHRIs and lay down the normative framework for NHRIs. Subsequently they were endorsed by the General Assembly also³⁴. These norms have been further elaborated and now constitute a broad and constructive platform, where each society can make the necessary adoptions without compromising on the main principles.³⁵

Trans governmental activism by NHRIs soared following the creation in the early 1990s of a special post devoted to NHRIs under the UN office of the High

³⁰ Cardenas Sonia, *supra* note 1, p.21

³¹ See Cardenas Sonia, 'Global Norms: The United Nations and National Human Rights Institutions', paper presented at the Academic Council of the United Nations System/American Society of International Law workshop, University of Warwick, Summer 2000; also see Lindsnaes Birgit, Lindholt Lone & Yigen Kristine (eds.), 'National Human Rights Institutions-Articles and Working Papers', The Danish Centre for Human Rights, 2001, p. 9 footnote 20

³² Resolution 1992/54

³³ For full text see Annexure 1 of IV –Professional Training Series launched by the UN Centre for Human Rights, 1994, pp.200-203

³⁴ Resolution 48/134 of 20 December 1993.

³⁵ See Lindsnaes Birgit, Lindholt Lone & Yigen, *Supra* note 14, preface

Commissioner for Human Rights.³⁶ The rise of these new human rights actors raises the domestic profile of human rights issues.³⁷ Throughout the 1990s, NHRIs met in six international workshops³⁸ and a flurry of regional meetings.³⁹ Regional cooperation in the field has been encouraged. For example NHRIs in the Asia Pacific region have established the Asia–Pacific Forum of National Human Rights Institutions in 1996; this forum provides institutions with an opportunity to learn through exchange of ideas and experiences.

Some of the peace accords and civil reconstruction missions have also included provisions for the creation or strengthening of NHRIs as an instrument to protect human rights.⁴⁰ NHRIs have been considered important for sustained democratic development and viewed as an important part of civil reconstruction and transitional justice. One can take example of Afghanistan, where the independent NHRC was established in June 2002. It was established through the signing of a decree between the Afghan Interim Administration and the United Nations. The decree vested the commission with broad scope and competence.

Several international organisations, particularly the Commonwealth Secretariat⁴¹ and the International Ombudsman Institute, have been active in promoting the establishment and development of NHRIs. The Danish Centre has also done substantial work in this area. On 27 November 2001, a web portal www.nhri.net was launched and is being maintained and funded by the Office of the High Commissioner for Human Rights⁴² and the Danish Centre for Human Rights.

³⁶ Originally labelled the ‘Coordinator for National Institutions’ the UN head of NHRIs is now known as the ‘Special Adviser on National Institutions, Regional Arrangements and Preventive Strategies’. The broader title reflects growing attention to issue of regionalism and prevention in the Human rights field, as well as the adoption of more comprehensive mandates. As quoted in Cardenas Sonia, p.7

³⁷ Cardenas Sonia, Supra note 1. p.14

³⁸ Paris (1991) followed by Tunis (1993), Manila (1995), Merida, Mexico (1997) Rabat (2000) and Copenhagen and Lund (2002)

³⁹ Last meeting of NHRIs from the Commonwealth and Asia Pacific Region was held in New Delhi, India from 26 – 29 May 2003 to discuss a proposal to develop a comprehensive and integral United Nations Convention to promote and protect the rights of persons with disabilities.

⁴⁰ Reif C.Linda, ‘Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection’, Harvard Human Rights Journal, vol.13 spring 2000

⁴¹ See Commonwealth Secretariat publication, ‘National Human Rights Institutions: Best Practice’, 2001, available at <http://www.thecommonwealth.org/pdf/humanrights/BestPractice.pdf>

⁴² See report of the Secretary –General to the Commission on Human Rights on The Technical Cooperation Programme (E/CN.4/1997/86) and the report of the High Commissioner for Human Rights (E/CN.4/1997/98)

Before focusing on case study of India in the chapters four and five it will be useful to discuss briefly the definition and classification of NHRCs. As it will help in differentiating the NHRCs from other NHRIs. It is necessary because of the reason that though each of NHRIs traditionally has its own particular characteristics, the boundaries between them are increasingly blurred, especially in the more recently established institutions, which are hybrid forms.⁴³

Various Definitions of National Human Right Institutions- There is broad consensus among scholars on their main objectives: promotion and protection of human rights and to implement human rights norms domestically. In general, however the term has been used by various scholars in the different ways. Some have very optimistically called NHRIs “fundamental building blocks of human rights protection”⁴⁴, and “with their complementary mechanisms the new actors on the human rights landscape.”⁴⁵ While other have identified them as “state -sponsored, state-funded entity”⁴⁶, and “government agencies”⁴⁷. Some other scholars have not associated them with government and have recognised them “...as independent entities”⁴⁸ but have acknowledged that they have been created by the government.⁴⁹

From a comparative perspective, the institution of Ombudsman⁵⁰ is generally associated with an emphasis on the impartial investigatory functions of

⁴³ Tigerstorm Von Barbara, ‘Implementing Economic, Social and Cultural Rights: The Role of National Human Rights Institutions’ in ‘Giving Meaning to Economic, Social and Cultural Rights’, Merali Isfahan and Oosterveld (eds.), PENN University of Pennsylvania Press, Philadelphia, 2001

⁴⁴ Commonwealth Secretariat Human Rights Unit, National Human Rights Institutions in the Commonwealth Directory Survey and Analysis, 2nd ed. (London: Commonwealth Secretariat, February 1992) Preface

⁴⁵ Sripati Vijayshri, ‘India’s National Human Rights Commission: Strengths and Weaknesses’, in Lindsnaes Birgit, Lindholt Lone & Yigen Kristine (edit.), ‘National Human Rights Institutions-Articles and Working Papers’, The Danish Centre for Human Rights, 2001, p.151

⁴⁶ Gomez Mario, ‘National Human Rights Commissions and economic, Social and Cultural Rights’ in ‘Circle of Rights: Economic, Social and Cultural Rights Activism: A Training Resource’, International Human Rights Internship Program and Asian Forum for Human Rights and Development, 2000

⁴⁷ See Cardenas Sonia, *supra* note 1 p.2

⁴⁸ Alston Philips and Crawford James (edit.), ‘The Future of UN Human Rights Treaty Monitoring’, Cambridge Publication, 2000, p.202

⁴⁹ See IV Professional Training Series, launched by the UN Centre for Human Rights, 1994, Para36-39

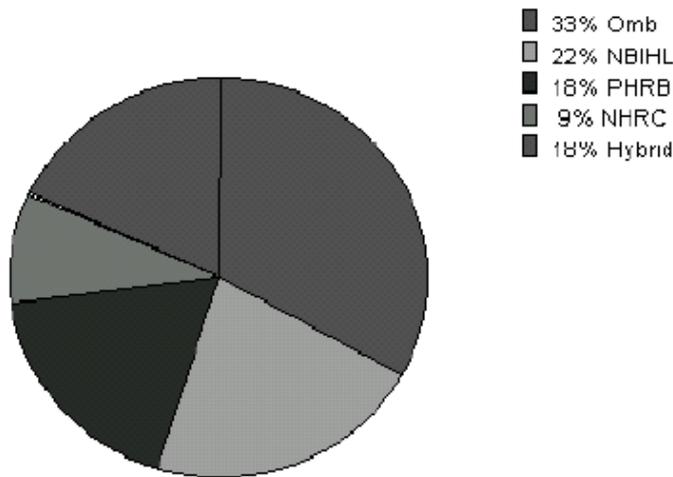
⁵⁰ In India it is called ‘Lokpal’. The Lokpal Bill, 1996, drawn up ostensibly to root out corruption at high places, had been introduced in the Lok Sabha and still awaits the approval of both the Houses.

‘maladministration’ by public officials i.e. to oversee fairness and legality in public administration. There are about 75 ombudsmen in the world.⁵¹

Hybrid Institutions are a mixture of national ombudsmen and human rights commissions, sometimes the product of national ombudsmen that have had human rights responsibilities grafted into their mandates.⁵²

Sonia Cardenas has shown the breakdown of the various NHRIs in the following manner-

Figure 3 – Types of National Human Rights Institutions



Source-Cardenas Sonia⁵³

Omb. = Ombudsmen

NBIHL = National Bodies for International Humanitarian Law

PHRB = Parliamentary Human Rights Bodies

NHRC = National Human Rights Commissions

Hybrid = Hybrid Institutions (Ombudsmen + NHRCs)

The Above review shows that there is no uniformity in the definitions as well as in the classification of the institutions. However, since the field is still emerging this lack of unanimity is not surprising, especially when it has not hindered the functioning of these institutions.

⁵¹See Reif C.Linda, 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection', Harvard Human Rights Journal, p. 20

⁵² Cardenas Sonia, *Supra* note 1 P.13-14

⁵³ Id.p.11

Chapter IV

1. **Brief and descriptive background-Genesis/Origin**
2. **Government's policy behind establishment of the commission**

Background record suggests that the Indian government was not serious about establishing this Commission. It set up this commission to improve the country's reputation and as an answer to the critics. It is very important to find out whether government was seeking merely to appease an international audience or whether the NHRC has had an independent impact. For this purpose I will try to see that how far Indian state before establishing NHRC had the political and social discourse on the establishment of NHRC within the nation. This is important, as it is only through this process that one can evolve and determine the particular shape, characteristics, functions and priorities that such commission should have.

Here one may refer to various observers who note that human rights commissions have been created in Asia mostly to appease international audiences. "One potential problem is that for many governments, human rights commissions have the potential to become merely cosmetic exercises aimed at boosting the government's human rights image in the eyes of the global community."⁵⁴ The Asian Legal Resource Centre also noted before the UN Human Rights Commission in mid-1999 that governments in the region have used national commissions largely to enhance their national images⁵⁵ and primarily to rebuff international pressure, criticism and scrutiny over violations of human rights by the governmental forces and agencies. Whether for good or ill, setting up a NHRC is clearly in fashion for the Governments of the region.⁵⁶

⁵⁴ See Cecilia E. Jimenez, 'The Proliferation of National Rights Institutions: For Other Ends?' in *Human Rights Institutions: Lessons and Prospects* (Manila, Philippines Human Rights Information Centre, 1994), at p.23 as quoted in Abul Hasnat Monjurul Kabir, 'Establishing National Human Rights Commissions in South Asia: A Critical Analysis of the Processes and the Prospects', *Asia-Pacific Journal of Human Rights and the Law*, 2001, Volume 2, Number 1, p.45

⁵⁵ Liyanage Sanjeewa, Asian Legal Resource Centre, Statement before the UN Commission on Human Rights. United Nations Press Release, 21 April 1999, HR/CN/99/51 as quoted in Cardenas Sonia, 'Adaptive States: The Proliferation of National Human Rights Institutions', Carr Centre for Human Rights Policy Working Paper T-01-04 p.28 also see generally Gomez Mario, 'Circle of Rights: Economic, Social and Cultural Rights Activism: A Training Resource', Module 23, International Human Rights Internship Program and Asian forum for Human Rights and Development, 2000

⁵⁶ South Asia Human Rights Documentation Centre (SAHRDC), 'National Human Rights Institutions in the Asia Pacific Region: Report of the Alternate NGO Consultation on the Second Asia-Pacific

Until the early 1990s, the Indian Government displayed scant regard for local human rights and civil liberties organisations. Their reports, appeals and petitions on human rights abuses, particularly in view of anti insurgency operations in Kashmir, Punjab and northeast states, met with deafening silence. The scathing reports of Amnesty International and Asia Watch had sharpened the international visibility of these human rights abuses.⁵⁷ The Indian government, however, could not continue to ignore the criticism of the international human rights community, which reported to the world the increasing incidence of human rights violations in the country and accused the government of condoning the abuses by providing impunity to security forces and virtually condoning human rights excesses. Important precedents already existed for doing so. India's parliament had created two related commissions in 1990 (a National Commission for Scheduled Castes and Scheduled Tribes and a National Commission for Women), as well as a National Commission for Minorities in 1992.⁵⁸ The State of Madhya Pradesh itself had created a State Human Rights Commission in 1992.⁵⁹

In 1991 and 1992, as international groups levelled criticisms on the basis of earlier fact-finding missions and international economic donors referred explicitly to deteriorating human rights conditions,⁶⁰ the Indian Government began to debate the creation of a national commission, as did major political parties in their bid for Parliamentary elections. In 1991, during the period of campaigning for the general

Regional Workshop on National Human Rights Institutions' (NEW Delhi: SAHRDC, March 1998), p. 2.

⁵⁷ See May 1991 report, '*Kashmir Under Siege*', Asia Watch, Human Rights Watch Report of 1991 available at http://www.hrw.org/reports/1992/WR92/ASW-07.htm#P540_207732.

Also see Sripati Vijayshri, 'India's National Human Rights Commission: Strengths and Weaknesses', in Lindsnaes Birgit, Lindholt Lone & Yigen Kristine (edit.), '*National Human Rights Institutions- Articles and Working Papers*', The Danish Centre for Human Rights, 2001, p.153

⁵⁸ Charles H. Norchi, "The National Human Rights Commission of India as a Value- Creating Institution", in John Montgomery, ed., '*Human Rights: Positive Policies in Asia and the Pacific Rim* (Hollis, NH: Hollis Publishing, 1998), p.113.

⁵⁹ V. Vijayakumar, "The Working of the National Human Rights Commission: A Perspective," in C.J Nirmal, ed., '*Human Rights in India: Historical, Social and Political Perspectives* (Oxford :Oxford University Press, 2000), Chapter 12, p.215

⁶⁰ In USA Congress, human rights violations in Punjab and Kashmir were the focus of a debate in 1991, sparked by the introduction of a House measure calling for a cut off of all U.S. development aid if the Indian government did not allow human rights groups access to India. The bill, sponsored by Representative Dan Burton, was aimed at gaining access for Amnesty International, which has been barred from conducting fact-finding missions in India. An amended version of the bill was adopted by the House on June 19, without the aid cutoff. Human Rights Watch, Human Rights Development 1991 Report quoted from the State Department's annual *Country Reports on Human Rights Practices*.

election to Parliament, the creation of a NHRC was included in the manifestos of both major political parties of India, Congress (I) Party and the *Bhartiya Janata Party* (BJP)⁶¹.

After winning the election, the Congress (I) party, under the leadership of the then Prime Minister Mr.PV Narasimha Rao, waited almost a year to begin discussions on setting up a commission. Speaking on 16 March 1992, the then Indian Home Minister Mr.S.B Chavan told the *Rajya Sabha* ⁶²that the purpose of the proposed Human Rights Commission was to “counter the false and politically motivated propaganda by foreign and Indian civil rights agencies.”⁶³ But here it is important to be reminded that this statement of Mr.Chavan is not true as for Indian government domestic critique did not matter .It is only when international groups started criticising the government, it took this initiative. Mr.Chavan further added that whether the body would be totally government sponsored or placed in the voluntary sector had yet to be decided.⁶⁴On 24th April 1992,Mr.V.N Gadgil, the official spokesperson of Congress (I) stated that his party would call for a national consensus on the role and powers of proposed Indian NHRC.The commission’s findings, according to Gadgil would act as “correctives to the biased and one sided reports of the NGOs “and would also be “an effective answer to politically motivated international criticism.”

On 30 August 1992,a Chief Ministers conference chaired by the prime minister was held in New Delhi to develop an approach for setting up the commission and to formally approve its formation. Reportedly, the meeting examined the possibility of placing constitutional civil liberties within the ambit of the Commission. The Conference formally approved the formation of NHRC.

⁶¹ A Hindu nationalist party who has philosophy of Hindutva (Cultural Nationalism) see – <http://bjp.org/>

⁶² Upper house of the federal parliament, although considered the upper house, its authority in the legislative process is subordinate to that of the Lok Sabha.

⁶³ John Cockell, State Institutions and Human Rights in India, (First Draft), (New Delhi: Centre for Peace Studies, June 1995), 7 as quoted in South Asia Human Rights Documentation Centre (SAHRDC), ‘National Human Rights Institutions in the Asia Pacific Region: Report of the Alternate NGO Consultation on the Second Asia-Pacific Regional Workshop on National Human Rights Institutions’ (NEW Delhi: SAHRDC, March1998), p. 2 and also in Ministry of Home Affairs, Government of India, ‘Background Note on Setting up of a National Commission on Human Rights – Issues and Tentative Framework’, cited in Norchi, ‘The National Human Rights Commission of India,’ p. 116

⁶⁴ The Independent (Bombay), 18 October 1992

On 14th May 1993, the final day of the Budget Session of the Lok Sabha⁶⁵, the government of India introduced “The Human Rights Commission Bill, 1993” (Bill No.65 of 1993). Curiously, the Home Minister, Mr.Chavan, did not abide by the established routine that the bill first be referred to the Parliamentary Standing Committee for scrutiny. Instead, after introducing it in the Parliament, the Minister Chavan referred the bill to the Parliamentary Standing Committee of the Home ministry, where it soon faded. The President, under Article 123 of the Constitution promulgated the Protection of Human Rights Ordinance on 28th September 1993. Two months later; a fresh bill was submitted to Parliament. The Government of India was clearly in a hurry to establish the NHRC through an ordinance without going through the normal Parliamentary procedures.⁶⁶ On 8th January 1994, after a relatively indifferent Parliamentary discussion, the “Protection of Human Rights Act, 1993” received assent from the President. The Act came into force with retrospective effect from 28th September 1993.⁶⁷

Despite government’s claim to the contrary both social activists and government opponents in India viewed the National Commission as internationally inspired. Prominent human Rights advocate and SAHRDC's Executive Director, Ravi Nair portrayed the government’s motive in creating the commission as an effort “to circumvent international scrutiny by stating that they have adequate national institutions to investigate these charges.”⁶⁸

The government did not initiate broad –spectrum substantive public discussion, nor did it include major human rights non –governmental organisations in the limited number government–sponsored consultations and discussions on the commission.⁶⁹ For example, the Government’s “Background Note on Setting Up a National Commission On Human Rights –Issues and Tentative framework,” was not released to the public nor it was placed before Parliament. The lack of transparency and the

⁶⁵ The lower house of the Indian Parliament

⁶⁶ South Asia Human Rights Documentation Centre (SAHRDC), ‘*Judgement Reserved: The Case of the National Human Rights Commission of India*’, September 2001, p.1-3. SAHRDC can be accessed at <http://www.hrdc.net/sahrhc/>

⁶⁷ See V.Vijayakumar, *supra* note 6, pp.215-220

⁶⁸ Ravi Nair, *The New York Times*. Cited in Norchi, ‘The National Human Rights Commission of India,’ p. 114

⁶⁹ Abul Hasnat Monjurul Kabir, *Supra* note 1, pp.1-53

attempt to shroud the proposal in a veil of secrecy did not augur well for consensus building, nor did it bode well for the resulting legislation, an inherently weak document.⁷⁰ This fact has prompted one scholar to comment that the government's deliberate refusal to vest the NHRC with adequate authority and resources has rendered it a toothless and inept institution, designed only to please US and western diplomats (who are supposed to be guardians of human rights) at UN assemblies.⁷¹ Government has tried its best to see that NHRC did not encroach on the state's absolute and arbitrary powers to curtail the rights of the citizens and remained at best a cosmetic exercise to meet the legal requirements of the then US –led 'new World order'.

It is true that India has long sought institutional solutions to its human rights problems, but in the absence of international pressure, norms and cooperation, it is unlikely that India would have created a national human rights commission per se.⁷²

⁷⁰ See, SAHRDC Report, 1998, *supra* note 3, p.9

⁷¹ Banerjee Sumanta, 'Human Rights in India in the Global Context', *Economic and Political Weekly*, February 1, 2003

⁷² See Norchi, *supra* note 5, at p.113-114

Chapter V

Critical Analysis

As reflected in the previous chapter that the government was not serious about establishing this commission, it is hardly surprising that there are many deficiencies in the establishing Act itself. It takes a very narrow view of human rights⁷³. It has been provided with a very weak foundation to start with. This helps one in recognising and acknowledging some of the parameters within which the commission has to operate. This is also indicative of the fact that sometimes task of the commission is onerous particularly in those conditions where the political will is lacking, the state is not serious about fulfilling its obligations. Here I want to clarify that I am not defending the shortcomings and weaknesses of the NHRC but I am trying to be fair and realistic in my assessment.

Menno T. Kammingo in his book 'Inter State Accountability for Violations of Human Rights'⁷⁴ distinguishes the term 'accountability' and 'responsibility'. Accountability is claimed to involve a duty to provide an explanation or account for an act apparently contrary to an international obligation. Responsibility involves a duty to provide appropriate reparation for an internationally wrongful act. Responsibility can be a means of discharging accountability, but accountability is a wider concept because a state may be able to explain an act of apparent violation of international law in a way that does not involve its responsibility can be understood as a limited sub-category of accountability.⁷⁵ This definition of accountability and NHRC's mandate to ensure the protection of rights enshrined in the two covenants and the Indian Constitution can help to some extent in understanding and evaluating the performance of NHRC. Particularly in the area of holding the government accountable by making the government conscious of the fact that it is the primary duty bearer⁷⁶ and it has an international and constitutional obligation to discharge this duty.

⁷³ Under sub clause (d) of section 2 of the Protection of Human Rights Act, 1993

⁷⁴ Philadelphia: University of Pennsylvania Press, 1992

⁷⁵ H.Steiner & P.Alston, 'International Human Rights in Context', 2nd ed. Oxford: Clarendon Press, 2000,p.218

⁷⁶ This is, in fact, the reaffirmation of the principle of international law as "under international human rights law states are the creators of the norms, the designers and member of the institutions, the participants in the processes, as well as the primary duty bearers." Alston and Steiner p.989

In this chapter I will assess the complex impact of NHRC India, mainly in one area – holding the government accountable and how it has been relatively effective in protecting human rights despite weakness of its formal structure. For that I will try to explore and examine organisational and programme strategies adopted by the NHRC for the promotion and protection of human rights. For example, I will study its complaint receiving mechanism in detail as I feel that it is one of the effective strategy through which NHRC has been able to hold government and its bodies accountable by receiving and entertaining complaints, by investigating state practices and then by providing redressal in various forms. I will also study various other methods, which have been adopted by NHRC to hold the government accountable like-taking *suo motu* cognisance of gross human rights violations, third party intervention in ongoing cases in various courts (representation) and by commenting on controversial proposed bills by the Parliament etc. Simultaneously, looking at these functions, I will also try to evaluate evidence of NHRC functioning as an institution protecting human rights, including economic, social and cultural rights, through non- judicial means.

Before exploring and examining organisational and programme strategies of NHRC it is useful to have an overview of the NHRC's mandate and composition. An effective NHRC must enjoy a clearly defined area of jurisdiction to perform effectively. The NHRC itself and the community it serves should be in no doubt as to the functions it is assigned to perform. The legal powers conferred on it must be relative to its tasks. A carefully defined mandate would also enable it to avoid possible conflicts of jurisdiction with other independent agencies or with the courts.

I Composition and Mandate-

(i) Mandate

The NHRC India has limited mandatory powers. As mentioned above⁷⁷ that the Act takes a very narrow view of human rights and provides that 'human rights' means the right relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution of India or embodied in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and cultural Rights and enforceable by the courts in India. So, main drawback of this statutory definition

⁷⁷ See *supra* note 1

seems to be that it curtails the mandate of the commission by limiting it to the rights enshrined in the two covenants and the constitution. As India subscribes to the dualist pattern with regard to the relationship between international treaty law and domestic law, theoretically speaking the commission cannot discharge its responsibility for protecting rights in the covenants unless the Parliament enacts domestic legislation incorporating these rights. While the Supreme Court has reiterated this dualist approach to enforcement of international treaty law in India⁷⁸ but lately it has dealt with this issue differently.⁷⁹ Beside this the India has signed several other International treaties but through this limited definition NHRC's mandate is restricted to the two covenants only. But this factor does not diminish the magnitude of its task or its potential to protect India's citizens and to develop a culture respectful of human rights and fundamental freedoms.⁸⁰

Besides having a narrow definition of human rights, Indian armed forces are excluded from the jurisdiction of the NHRC.⁸¹ The NHRC cannot inquire into complaints against them. It has to seek a report from the central government and send its recommendations on such report to the government.⁸² Though in the context of counter-insurgency campaigns, it was essential to bring the armed forces in the jurisdiction of the NHRC. The Ministry of Defence has been asked by the commission to formulate necessary guidelines for the observance of human rights of the civilian population by the Armed Forces while performing their duties in non-combat areas. The NHRC had noted that unless the government empowers the NHRC to inquire

⁷⁸ Jolly George vs. Bank of Cochin, AIR 1980 SC 470 (where the Supreme Court held that rights contained in an international treaty that India has signed do not become a part of the corpus juris of India until parliament makes implementing legislation incorporating those rights as quoted in Sripathi Vijayshri, 'India's National Human Rights Commission: Strengths and Weaknesses', in Lindsnaes Birgit, Lindholt Lone & Yigen Kristine (edit.), *National Human Rights Institutions-Articles and Working Papers*, The Danish Centre for Human Rights, 2001, p.157

⁷⁹ See *Vishaka v State of Rajasthan*, AIR 1997 SC 323; (1997) 6 SCC 241, where while laying down guidelines for dealing with the problem of sexual harassment of women at the work place, the supreme court emphasised that international conventions and norms were to be read into the enforceable fundamental rights in the absence of domestic law occupying the field when there is no inconsistency between them.

⁸⁰ Sripathi Vijayshri, *Supra* note 6 p.152

⁸¹ While considering India's third periodic report, the Human Rights Committee, in its concluding observations 'regrets that the NHRC is prevented by section 19 of the act from investigating directly complaints of human rights violations against the armed forces, but must request a report from the central government.' The committee recommended 'that these restrictions be removed, and that the NHRC be authorised to investigate all allegations of violence by agents of the state.' UN Doc. CCPR/C/60/IND/3, (1997) at para.22

⁸² The Protection of Human Rights Act, 1993, 19(1-4)

more effectively into human rights violations by the armed forces, it may “erode the credibility of the government of India in its commitment to respect human rights.”⁸³

But the government has not taken any action in this matter.

(ii) Composition

The Human Rights Act, 1993 sets out the legal framework of the NHRC. The composition of NHRC is high-powered as three out of its five members are judges. The Chairpersons of the National Commission for Minorities, the National Commission for the Scheduled Castes and Scheduled Tribes (SCST) and the National Commission for Women are all deemed (ex-officio) members of the commission.⁸⁴ But as there is no coordination between the NHRC and these other national commissions opportunities to look into group complaints of minorities, SCSTs and women seems to have been lost.

This composition gives NHRC certain degree of legitimacy, solemnity and credibility as the Act disallows any person other than a former Chief Justice of the Supreme Court to be appointed to be the Chairperson of the commission but at the same time it attracts criticism of being ‘retired persons’ den’.⁸⁵ The risk of legal formalism is inherent in the way the commission is constituted. Remaining two members are to be men and women ‘who have knowledge and practical experience in matters relating to human rights.’⁸⁶ Surprisingly, neither a human rights activist nor a woman has been selected under this category. Along with this, in the almost ten years of its existence, the commission has only for the second time come to have a woman judge as a commissioner.⁸⁷ In this context, one scholar has pertinently observed “NHRIs must manifest their commitment to equity and non-discrimination by ensuring gender balance at all levels of their own staff, especially at the level of commissioner.”⁸⁸

The NHRC’s composition also does not reflect the country’s ‘sociological and political pluralism’- a requirement emphasised by both the UN handbook and the

⁸³ NHRC, *Human Rights Newsletter* (New Delhi January 2001)

⁸⁴ The protection of Human Rights Act, 1993, 3 (3)

⁸⁵ Dutta Ritwick, Advocate and Human Rights Activist, Personal Interview (New Delhi, April 2003)

⁸⁶ The protection of Human Rights Act, 3 (2) (a)-(d)

⁸⁷ See Sripati Vijayshri, *supra* note 6, at p.154

⁸⁸ Aurora Sneh, ‘Balancing the Scales: Gender Composition of Commonwealth National Human Rights Institutions’, Commonwealth Human Rights Initiative, 2001

Paris principles.⁸⁹ Now a day the commission is handicapped as its strength is reduced to three only, with two members and a chairperson .Two posts of members are lying vacant since January 1997. It is affecting its efficiency adversely as with a view to expediting the disposal of the complaints, the regulations were amended empowering a single member to deal with the complaints instead of a bench of two members. The Advisory Committee set up by the NHRC to assess need of structural changes and amendments in the Human rights Act suggested change in the composition of the NHRC with two judicial and three non-judicial members of whom one should be a woman.⁹⁰

Federal system

Indian NHRC is ‘. . .federal system with a complex web of sub-national commissions’.⁹¹ As observed by Ian Brownlie,“There can be little doubt that federalism as a system provides a special capacity and a flexibility in facing cultural diversity.” But in the case of the NHRC this ‘complex web’ of national and several state human rights commissions (SHRCs)⁹² creates a host of confusion regarding jurisdiction for the common man. This is because the Act does not delineate jurisdiction, between national and state commissions clearly and no hierarchical relationship has been mandated. Any matter, which is already being inquired into by the Commission, or any other Commission, the State Commission shall not inquire into the said matter. In the same way the Commission shall not inquire into any matter which is pending before a State Commission or any other Commission ⁹³ .It also results in competitiveness between national and state commissions because of jurisdiction overlap. Besides, experience has shown that section 36 of the Act has lent itself to efforts to thwart the purposes of the Act. On occasion, this has been done by bringing a matter before a SHRC or some other commission in similar, or slightly

⁸⁹ See Sripati Vijayshri, *supra* note 6, at p.155

⁹⁰ Ahmadi Committee Report, ‘Protection of Human Rights (Amendment) Bill, 1999’

⁹¹ Cardenas Sonia, *Adaptive States: The Proliferation of National Human Rights Institutions*, Carr Centre for Human Rights Policy Working Paper T-01-04, p.14

⁹² Under section 21, the state governments are expected to constitute their respective state human rights commissions to perform the similar functions within their territories, however only thirteen of the thirty-five states have SHRCs and most of them had also formed these institutions under NGO’s pressure or by the court’s order .For example State of Uttar Pradesh formed Sate Human Right commission by the March 2000 order of the Allahabad High Court. That was an outcome of a Public Interest Litigation in which NHRC also became a party.

⁹³ The protection of Human Rights Act, 1993, 21(5) and 36 (1)

modified manner, in order to seek to block the jurisdiction of the NHRC.⁹⁴ This situation arose, for example, when the NHRC took up a complaint alleging that serious human rights violations had been committed in respect of the manner in which the state of Tamil Nadu police had arrested the former Tamil Nadu Chief Minister Mr. M. Karunanidhi, Union Ministers Mr. M. Maran and Mr. T.R. Balu and some others. In respect to a notice from the commission, the state government of Tamil Nadu contended, inter-alia, that since a Commission of Inquiry had been set up by the Government to look into the matter, the jurisdiction of the NHRC to inquire into the matter was barred by section 36 (1).⁹⁵

Unfortunately there is no cooperation and coordination between the Commission and state commissions. 'Neither of the commissions utilise the other's potential or expertise, thus losing the opportunity for a mutually beneficial relationship.'⁹⁶ There can be adhoc coordination between the NHRC and the SHRCs. There is potential for cooperation in the areas of training in the investigative expertise of higher order and norms setting. To avoid the conflicts and increase the efficiency, complaints of that specific state should be mandated to be dealt at the state level and the state commission's orders and directions should be open to challenge before the commission by way of revision. In this way state commission shall be subject to the judicial control of the commission.⁹⁷

SHRCs cannot be established on the pro-rata basis because of inherent difficulties. For example financial constraints, because of non-availability of retired chief justice or justices of the high court whose presence is essential for the composition under the act.⁹⁸ In respect of the states in the Northeastern region, there is a single high court in Guwahati. A formula may need to be specially devised for these states in respect of SHRCs.

⁹⁴ Dayal Virendra, 'Evolution of the National Human Rights Commission, 1993-2002: A Decennial View', in Journal of the National Human Rights Commission, India, 2002, p.45

⁹⁵ NHRC, *Human Rights Newsletter* (New Delhi, November 2001)

⁹⁶ South Asia Human Rights Documentation Centre (SAHRDC), '*Judgement Reserved: The Case of the National Human Rights Commission of India*', September 2001, p.122. SAHRDC can be accessed at <http://www.hrdc.net/sahrhc/>

⁹⁷ See Annexure VI of the NHRC's first Annual Report 1993-1994

⁹⁸ The protection of Human Rights Act, 1993, 21(2)

Beside the State human rights commissions there is a provision for the designation of a court of session in each district of India as a human rights court. This is aimed at providing speedy trial of offences arising out of violations of human rights. A special public prosecutor is supposed to be assigned to each human rights court.⁹⁹ Such courts were notified in Andhra Pradesh, Assam, Sikkim, Tamil Nadu and Uttar Pradesh, but ambiguity remained as to the precise nature of the offences that should be tried in such courts and other details regarding the conduct of their procedure.¹⁰⁰ Hence at district level human rights dispensation is largely non functional.

II – Organisational and programme strategies –

By holding the government accountable for existing or past violations of human rights the NHRCs can play a vital role in fulfilment of national and international human rights norms. The NHRC India has adopted various methods to carry out this task. It accepts complaints regarding human rights violations. After receiving the complaints it asks for the explanation from the government and if it is not satisfied with the reply, it starts independent investigation on its own. In the course of investigation, the commission among other things can summon and force witnesses to appear before it and then examine them under oath. It can call for relevant documents. In its proceedings, the NHRC is endowed with all the powers of a civil court.¹⁰¹ Sometimes the NHRC initiates a general public inquiry also. Following investigation, the NHRC can award compensation or can issue the directions. The NHRC has been surprisingly successful, even according to its staunchest critics, in persuading the state to pay compensation to human rights victims.¹⁰² The NHRC may recommend the granting of ‘immediate interim relief’ to a victim of human rights abuse or his or her family.¹⁰³ The NHRC has created its website on which it post its Human Rights Newsletters and one can see the progress and status of one’s complaint online.¹⁰⁴ According to the NHRC, “ the provision of an investigating mechanism of its own in the commission gives it the advantage of not being required to rely on the state

⁹⁹ The protection of Human Rights Act, 1993,30&31

¹⁰⁰ NHRC’s Annual Report, 1996-1997,p.57

¹⁰¹ Id 13-17

¹⁰² See Cardenas Sonia, *Supra* note 19,p.50

¹⁰³ The Protection of Human Rights Act, 1993, 18(3)

¹⁰⁴ See NHRC’s website at <http://nhrc.nic.in/>

machinery for inquiring into complaints of violation of human rights when the allegation of violation is against the state machinery itself.”¹⁰⁵

(A) Suo moto powers

The commission can receive complaints or investigate on its own about ‘violation of human rights or abetment thereof or negligence in the prevention of human rights violations by public servants’.¹⁰⁶ “These powers have helped the NHRC to work in preventive and penetrative way.”¹⁰⁷ These suo moto powers of commission to initiate suo moto inquiries are an important aspect of its protective functions that can be fully utilised.¹⁰⁸ This is particularly relevant in those situations, which involve individuals or groups belonging to the marginalised sections of the society who do not have the financial or social resources to lodge individual complaints.¹⁰⁹ It is the same vulnerable groups, which are the ones most likely to be unaware of their rights and of the mechanisms, which protect these rights. “A national institution with the capacity to initiate its own investigations can make a significant contribution to ensuring that vulnerable groups are given a public voice and human rights violations, wherever they occur, become a matter of general knowledge and concern.”¹¹⁰

The commission is to be credited with making full use of these suo moto powers. It has taken cognisance of many journalistic items, news reports and reports by foreign news agencies. It focused on some key human rights issues such as custodial deaths, fake encounters, police atrocities including torture, crude methods of laproscopy, disappearances in Kashmir valley and violence against women, etc. Still some observers feel that most of the time the NHRC takes suo moto cognisance in high profile cases and that is if there is lots of NGOs pressure. Sometimes it takes

¹⁰⁵ NHRC, *Human Rights Newsletter* (New Delhi, September 2000)

¹⁰⁶ The Protection of Human Rights Act, 1993, 12(a)

¹⁰⁷ Dayal Virendra, Member, NHRC, Personal Interview (New Delhi, April 2003)

¹⁰⁸ See Sripati Vijayshri, *supra* note 6, at p.158

¹⁰⁹ Raj Kumar.C, ‘Role and Contribution of National Human Rights Commissions in Promoting National and International Human Rights Norms in the National Context’, LL.M. Paper, Harvard Law School, September 2000

¹¹⁰ Anne Gallagher, ‘Making Human Rights Treaty Obligations A Reality: Working with New Actors and Partners’, in Philip Alston and James Crawford (eds.), ‘The Future of UN Treaty Monitoring (Cambridge, Cambridge University Press, 2000) p.215

cognisance and then tends to pass it over after initial report. As one observer rightly commented that “it has to meet the ends of justice”.¹¹¹

As pointed out by John Hucker¹¹² NHRCs has conciliation powers and this fact in the context of the NHRC is reflected by the Gujarat case. To illustrate this point, it is relevant to focus on Gujarat case where NHRC took suo moto cognisance of the riots in the state, started proceedings and is still doing a serious follow up .The NHRC called for a report from the state government and it was followed by a visit of a high level team of the commission to the state, headed by its chairperson. It had some ‘balming effect’ on the minority population of the state. While commenting on the state government’s report the commission observed, “It is the responsibility of the state to ensure that such rights are not violated either through overt acts, or through abetment or negligence. It is a clear and emerging principle of human rights jurisprudence that the state is responsible not only for the acts of its own agents, but also for the acts of non- state players acting within its jurisdiction. The state is, in addition, responsible for any inaction that may cause or facilitate the violation of human rights.”¹¹³

In its further proceedings on this matter the Commission had set out its Preliminary Comments and detailed recommendations on relief camps, rehabilitation of the families affected by the violence and on police reform. It sent a copy of those Proceedings to the Government of Gujarat and to the Government of India for their response. After getting the response from the state government the NHRC made the detailed comments and recommendations. In the ‘ Proper Implementation of Existing Statutory Provisions, Circulars and Guidelines’. In its concluding observations, the Commission stated “there was a comprehensive failure on the part of the State Government to control the persistent violation of the rights to life, liberty, equality and dignity of the people of the State. That is why it remains of fundamental importance that the measures that require to be taken to bring the violators of human rights to book are indeed taken and the integrity of the administration must be restored

¹¹¹ Dutta Ritwick, *supra* note 13

¹¹² Hucker John, ‘Bringing Rights Home: The Role of National Human Rights Institutions’, in ‘*Human Rights Protection: The Role of National Human Rights Institutions*’, Butler.F (ed.), Kluwer Law International and British Institute for Human Rights, 2002

¹¹³ NHRC, Human Rights Newsletter (New Delhi, April 2002)

and sustained if those who have suffered are to be fully restored in their rights and dignity.” After this the NHRC constantly monitored the situation and in view of the reported imminent plans of the Gujarat Government to hold a series of Gaurav Yatras and Jagannath Rath Yatras in Gujarat, the Commission considered it necessary to caution Gujarat government against that, because of the reported widespread apprehension that this could re-ignite communal violence in the State.¹¹⁴

(B) Complaint Redressal Mechanism

Receiving and investigating complaints about rights violations remains the commission’s most important function. Members of public do not readily understand what constitutes a human rights issue particularly in a country like India where literacy rate is 57.2% and 287.0 million people are illiterate.¹¹⁵ Complaints redressal mechanism has brought the commission closer to the Indian masses and has provided visibility to the commission to a certain extent. Types of complaints handled by the NHRC are following - a majority of the complaints that the commission received in the ‘public sphere’ were abuse by state officials, ministries, public service organs, the judicial maladministration (13%) and abuse by the police, prison guards, security forces, military, torture and ill – treatment (41 %). These make up the highest number of complaints and “a reflection on the state of the penal system in the country.”¹¹⁶ In ‘public/private sphere’ major complaints were relating to discrimination based on gender, race, disability, age, nationality, marital status and sex (5 %). In ‘private’ sphere 5% complaints are related to family law: inheritance and 37% are related to other various violations.¹¹⁷

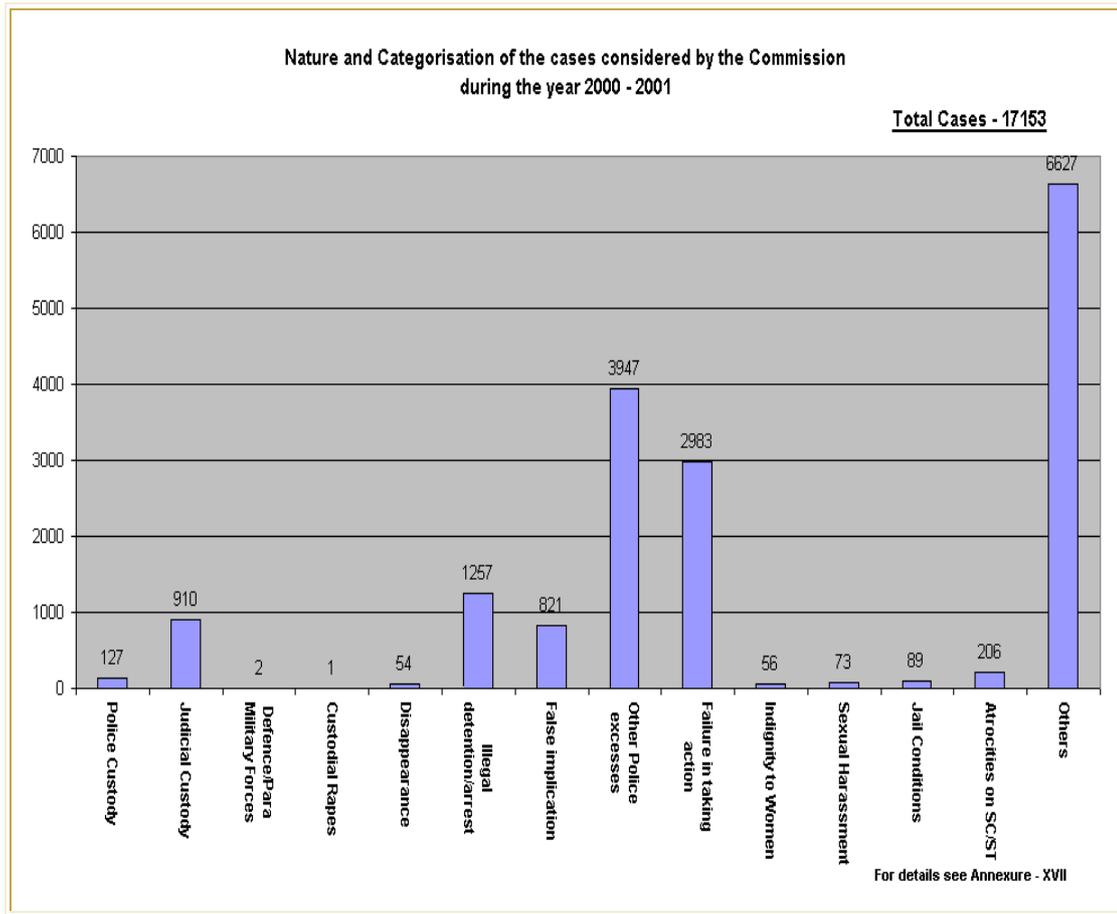
¹¹⁴ Id. (July 2002) and See NHRC’s publication ‘Proceedings of the NHRC on the Situation in Gujarat: 1March-1July, 2002’

¹¹⁵ For source see 2000 figures estimated by UNESCO Institute for Statistics, July 2002

¹¹⁶ Banerjee Sumanta, ‘Human Rights in India in the Global Context’, *Economic and Political Weekly*, February 1, 2003

¹¹⁷ Source of the figures, Lindsnaes Birgit, Lindholt Lone & Yigen Kristine (edit.), ‘National Human Rights Institutions-Articles and Working Papers’, The Danish Centre for Human Rights, 2001, page 225-227 Tables 1A, 1B & 1C

Figure 4



Data Source-NHRC Annual Report 2000-2001

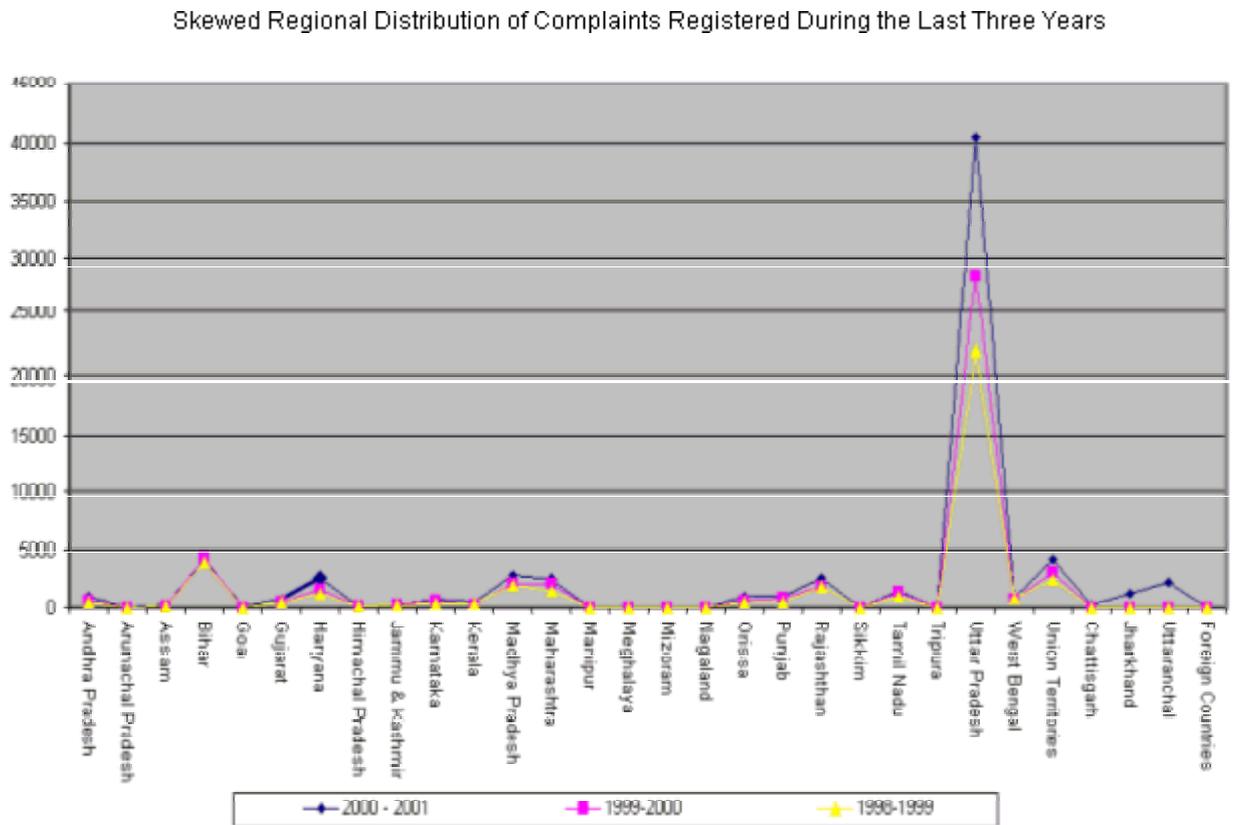
NHRC’s categorisation of large number of cases as ‘ others’ smacks of non-specificity in dealing with complaints. There is no categorisation on the basis of income level to know the representation of the people living below the poverty line.

While the commission’s case load in its first year was a mere 500 complaints, it has received more than 60,000 complaints during the year 2000-2001. Justice S.B Sinha has contributed this increase in number to the commission’s effectiveness, “As NHRC receives huge complaints, it can be taken as an indicator of its effectiveness.”¹¹⁸ However, the commission has an acute pendency problem for which some satisfactory solution yet to be found.

There is problem of skewed regional distribution of the complaints. (Refer to figures 5 and 6)

¹¹⁸ Justice Supreme Court of India, Personal Interview (Dehradun, April 2003)

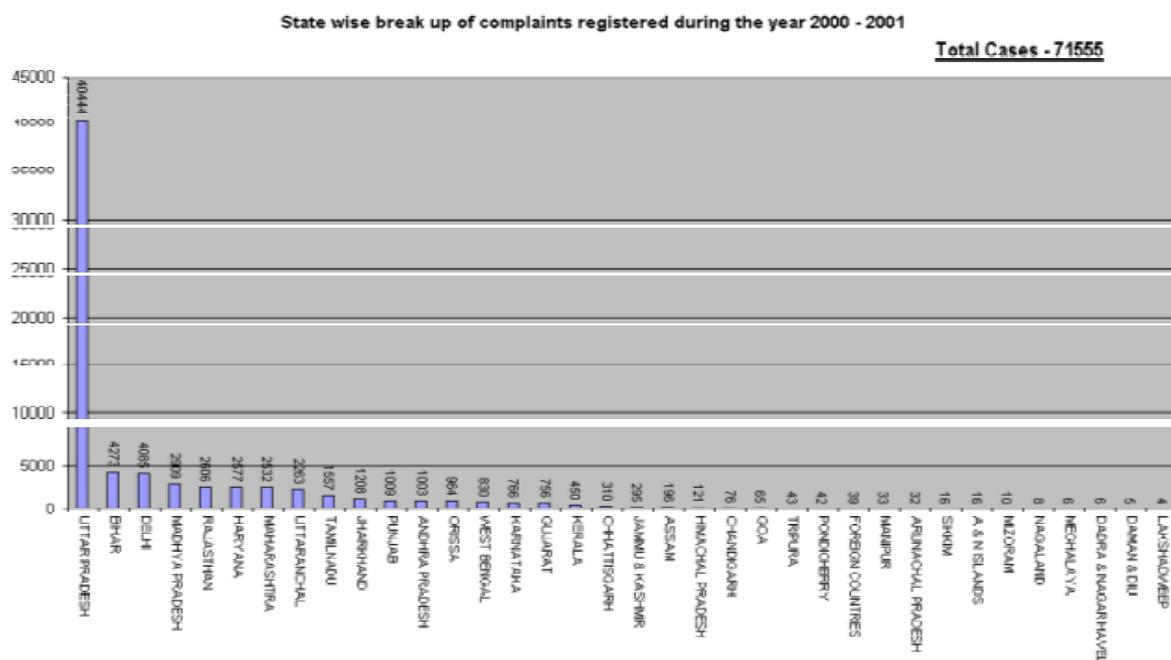
Figure 5



Data Source-NHRC Annual Report 2000-2001

A cursory glance at the figures of complaints received reveals that it has a persistent skewed regional bias. States of Uttar Pradesh (U.P), Bihar and Delhi contribute 71% of the complaints, the Southern states Kerala, Karnataka, Andhra Pradesh (A.P) and TamilNadu contribute 5.2% of the complaints, even when the states have better literacy and higher investment flows. The situation in North East is even more dismal because the total number of complaints received from this region is less than 1%, where most of the states are faced with counter insurgency operations.

Figure 6



Data Source-NHRC Annual Report 2000-2001

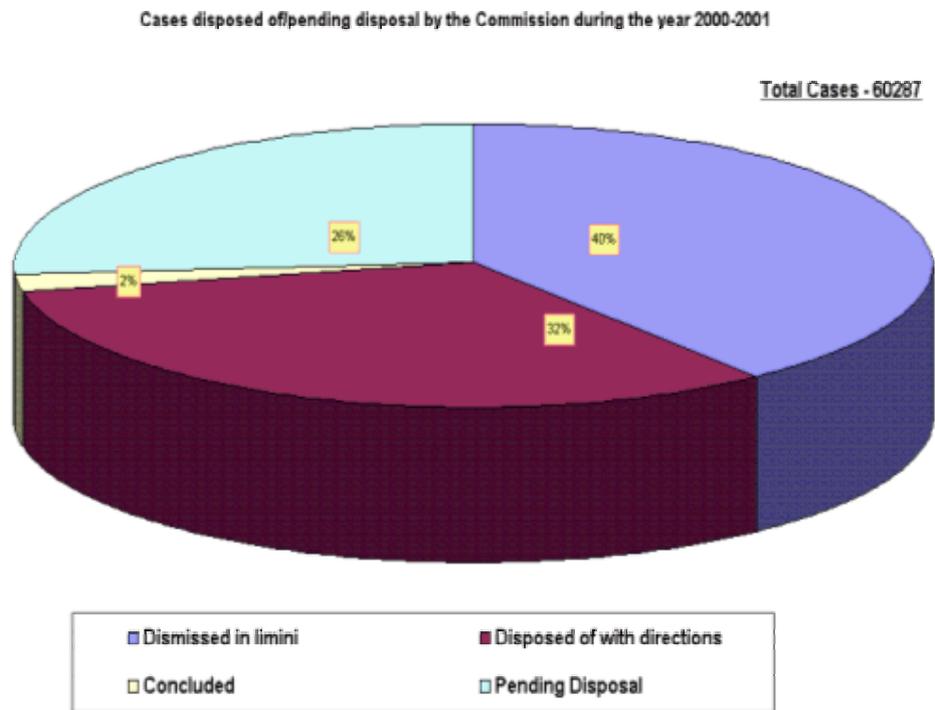
The skewed regional distribution pattern has persisted since the beginning of the commission. The NHRC does not give any reasons for the above pattern. However it is reasonable to assume that physical proximity to the commission, the headquarter is in the New Delhi, linguistic familiarity and aggravated administrative culture could be some of the reasons behind this phenomenon.

The commission has not responded with the opening of the regional offices in South India and North East as its mandate allows it to do so. It could be due to institutional elitism prevalent in India or due to legal formalism of its members. Urgent steps are required to investigate the regional biases and remedy the situation so that the complaints redressal has an all India character.

In the mid – 1990s, a report was submitted by the Kerala High Court .It submitted a draft of the NHRC's (Procedure) Amendment Regulations to deal with the complaints received and the suo moto action taken by the commission but few, if any, of the extensive recommendations made in this report have been implemented. Another excellent report on the NHRC, produced by McKinsey & Co entitled 'Preparing for a Fresh Start' in 1997 met the same fate. This report highlighted what it believed to be the NHRC's main problem: the backlog of pending cases. The report pointed out that not only will the commission's grievance redress function be affected as the time taken for redress multiplies, but so will other functions assigned by Section 12 of the

Act because the members will not have enough time to pursue them vigorously.¹¹⁹ It is not proper on the part of the institution to dismiss the complaints on frivolous grounds or acting as if having no empathy with the common man. Sometimes plea of dismissal is ‘relief not specified in complaints’. Along with that reason of dismissal is not communicated to the complainant. To tackle with the heavy backlog of the complaints the commission has dismissed 64% cases *in limini*¹²⁰ in the period October 1993-31 March 2002.

Figure 7



Data Source-NHRC Annual Report 2000-2001

As it is clear from this chart that in year 2000-2001 alone 40% of cases were dismissed in limini. Thus the main defect in complaints redressal mechanism appears to be the approach of dismissing the cases in limini and not indicating the reasons for doing so to the complainants. The NHRC seems to have become the victim of its legal formalism. As Gearty¹²¹ has pointed out “It is a risky venture in any society, even a democratic one, to put the judges in the front line of human rights protection. The

¹¹⁹ For the brief summary of this report see South Asia Human Rights Documentation Centre (SAHRDC), *Supra* note 25, p.27-30

¹²⁰ (On the threshold) an objection in limini is a preliminary objection

¹²¹ Gearty Conor, ‘Human Rights in an Age of Globalisation : The Challenge of Growing Up’, A talk delivered to mark Human Rights Day, 10 December 2002, LSE London

second risk is an even greater one, however. An over-commitment to the legalism of human rights drains the subject of life, emptying it of much of its ethical activism and moral energy and replacing these vital forces with the careful accuracy and the passion-less pedantry of the law.”

Ideally any NHRC should have an efficient complaint mechanism, which is free of costs, free of jargons, devoid of bureaucratic impediments and with simplified procedures as that is the best method of ensuring accessibility to the most vulnerable sections of the society.

(C) Rights of downtrodden/subjugated/exploited and oppressed

It is particularly critical to find out whether poor people and groups who are socially vulnerable to abuse are being protected by the institution. The crucial measure of the effectiveness of the institution, it would seem, resides in its capacity to respond to the needs of those sections of society who are at risk of human rights violations.¹²² For this purpose it is important to see the working of the NHRC in this area and see how far it has responded to the needs of the excluded vulnerable millions.

The NHRC has made special efforts to deal with such issues. Whether they are Alleged atrocities on adivasis in Kerala by public servants¹²³ or exploitation of tribals by land lords and mafia,¹²⁴ rehabilitation of people displaced by mega projects, or issues relating to disabled, dalits, mental health patients¹²⁵ or rehabilitation of widows of vrindavan.¹²⁶ It also dealt with appalling practices like bonded labour and manual scavenging¹²⁷ and has tried to deal with entrenched attitudes, which have wounded and fractured the Indian society. In view of large number of complaints, being received by the commission, relating to women and girl child the commission has set up a women’s human rights Cell within the commissions Law division.

¹²² Lindsnaes Birgit, Lindholt Lone & Yigen Kristine (edit.), *National Human Rights Institutions- Articles and Working Papers*, The Danish Centre for Human Rights, 2001, p.50

¹²³ NHRC, *Human Rights Newsletter* (New Delhi, April 2003)

¹²⁴ NHRC Annual Report 1999-2000, p.53

¹²⁵ NHRC, ‘Quality Assurance in Mental Health’, (New Delhi, 1999)

¹²⁶ For the action taken report on the commission’s recommendations on this issue see NHRC, *Human Rights Newsletter*. (May 2002)

¹²⁷ See NHRC Annual Report 1999-2000 61-62 for NHRC’s recommendations on this issue

The NHRC has a fast track complaints procedure for the most vulnerable sections of society, including children, women and people with disabilities. This procedure also applies to certain categories of complaints, including bonded labour, child prostitution and allegations involving safety of the detained people.¹²⁸ This is a redeeming feature of the functioning of the commission.

(D) Civil Society

There can be a mutual relationship between NHRC and civil society. NHRC can give societal groups effective channels to make their claims, the political power of these groups may grow and NHRI can help transform the domestic human rights context.¹²⁹ In the same way NHRC requires independent inputs from civil society in order to be effective and accessible. One scholar has called them “receptors and transmitters in the cycle of human rights activity (as) they endeavour to implement international norms in practice while simultaneously filtering information from civil society back to the state ...”¹³⁰ It is remarkable that the Commission is to encourage the efforts of Non-Governmental Organizations (NGOs) and institutions engaged in the field of Human Rights.¹³¹ Accordingly, with a view to utilizing the knowledge, experience and expertise of credible NGOs working in the field of human rights, the Commission has constituted a Core Group to serve as a monitoring mechanism in 2001. Following the same the NHRC organised two regional consultations with NGOs of the Eastern and Southern Regions of India. But some critics are not satisfied with its relationship with NGOs.¹³² As they feel that the NHRC provides little information about the protection of the rights of the NGOs and human rights defenders. The NHRC has remained silent on another important issue concerning the restrictions imposed on the activities of the NGOs by the government of India through an anachronistic, emergency-era statute, the Foreign Contribution (Regulation) Act of 1976.¹³³ The

¹²⁸ Raj Kumar C., *Supra* note 37, p.13

¹²⁹ Cardenas Sonia, *Supra* note 19 p.6

¹³⁰ Hucker John, *Supra* note 40, p.34

¹³¹ The protection of Human Rights Act, 1993, 12(i)

¹³² South Asia Human Rights Documentation Centre (SAHRDC), National Human Rights Institutions in the Asia Pacific Region, Report of the Alternate NGO Consultation on the Second Asia –Pacific Regional Workshop on National Human Rights Institutions (New Delhi, India: SAHRDC, March 1998)

¹³³ The FCRA requires all Indian organisations and individuals that seek to receive foreign contributions to receive clearance from the Ministry of Home Affairs, in the form of either registration or prior permission. The Home Ministry uses the FCRA as a blatantly political tool against the disfavoured NGOs.

silence of the NHRC on the FCRA issue is especially disturbing, as it should have condemned this long ago.¹³⁴ Despite all these shortcomings in this area one can say that both on the societal and state fronts, the NHRC has shaped expectations about the legitimate scope of state authority.

(E) Economic, social and cultural rights

As one purpose of this work is to find the evidence of NHRC functioning as an institution protecting human rights, including economic, social and cultural (ESC) rights, through other than judicial means i.e.-protection, promotion and investigation. So in this section it will be useful to look at the work of the NHRC in the area of ESC rights.

Traditionally NHRCs, like most international human rights bodies, have focused on civil and political rights, but increasingly –and spurred by a 1998 U.N document¹³⁵ outlining the role of NHRCs in this area –attention is being paid to the role of NHRC vis-à-vis (ESC) rights¹³⁶ But since its inception the NHRC is empowered to inquire into complaints of violations of ESC rights through the Act.¹³⁷ The NHRC has adopted a proactive approach in the area of ESC rights. It rejected the argument that poverty was the principle cause of, and therefore justification for child prostitution and child labour. In 2000 while its annual report for the year 1998-1999 was being tabled in the Parliament the NHRC raised the fundamental questions of equity and justice in the country and called for policies for ensuring economic and social rights.¹³⁸ The commission has taken the issue of starvation deaths in the state of Orissa very seriously. With the help of its Special Rapporteur, the Commission has been monitoring the situation on a continuing basis. In this matter the Commission has taken the view that the Right to Food is inherent to a life with dignity, and Article 21 of the Constitution of India which guarantees a fundamental right to life and personal

¹³⁴ SAHRDC report of 2001, *supra* note 24, p.69-70

¹³⁵ The role of national human rights institutions in the protection of economic, social and cultural rights:03/12/98.E/C.12/1998/25,CESCR General Comment 10

¹³⁶ Cardenas Sonia, *Supra* note 19 p.22 also see Earle Patrick, 'National Human Rights Institutions and the Human Rights Approach to Development', The Human Rights Council of Australia, available at <http://www.hrca.org.au>

¹³⁷ *Supra* note 1

¹³⁸ NHRC, *Human Rights Newsletter* (New Delhi, March 2001)

liberty should be read with Articles 39(a)¹³⁹ and 47¹⁴⁰ to understand the nature of the obligations of the State in order to ensure the effective realization of this right.

The other important issues that NHRC has been concerned with are issues relating to HIV/AIDS and human rights. These include: consent and testing, confidentiality, discrimination in health care, discrimination in employment, women in vulnerable environments, children and young people, people living with or affected by HIV/AIDS and marginalized populations. After taking suo motu cognizance of the calamity arising from the devastating earthquake, which hit large areas in the State of Gujarat in 2001, the NHRC constantly monitored the relief and rehabilitation measures undertaken by the government in the earthquake hit areas of Gujarat. The commission drew the attention of the government to the fact that the government machinery involved in rehabilitation should be able to take all the steps necessary for the equitable distribution of both relief as well as rehabilitation measures and that in the process, the poor, destitute women and children and old persons, who would be in greater need of relief and rehabilitation assistance, should not be deprived and or made to suffer.

(F) Representation

Though the purpose of this work is to look at NHRC as an alternative way of protecting human rights but this fact can't be ignored that an important task of NHRC is to complement other branches of government mainly the judiciary. But while doing so it should take care to keep its independence intact. In representing the interests of human rights victims NHRC helps them in seeking legal redress. The NHRC has the authority to make an intervention in court proceedings relating to violation of human rights with the approval of the court.¹⁴¹ In this context it will be relevant to discuss the facts of a recent leading case-the Best Bakery case and the role-played by the NHRC in this case. The Best Bakery case is among the most serious instances of violence during the Gujarat carnage of 2002. Apprehending that the state police would not be able to conduct a fair, unbiased and thorough investigation, the National Human

¹³⁹ Article 39(a) of the Constitution, enunciated as one of the Directive Principles, fundamental in the governance of the country, requires the State to direct its policies towards securing that all its citizens have the right to an adequate means of livelihood

¹⁴⁰ Article 47 spells out the duty of the State to raise the level of nutrition and standard of living of its people as a primary responsibility.

¹⁴¹The Protection of Human Rights Act 1993,12(b)

Rights Commission (NHRC) in its report of April 2002, had recommended that the case be handed over to the CBI. The incident involved the gruesome killing of 14 people when the Best Bakery was attacked by a large mob. There have been allegations that police failed to take adequate action to save the victims during the attack that lasted for many hours. The Best Bakery case was the first to be tried by a "fast track" court specially set up to try cases of violence during the Gujarat carnage of 2002. However, the manner in which the investigation was carried out and the case was heard had done little to inspire confidence among the victims of violence or the public at large that justice would be done. To ensure justice in such a sensitive case, it was absolutely imperative that the court should have directed the police to provide the maximum possible protection and security to all witnesses. The NHRC had also sought report from Gujarat Government on protection of victims and witness deposing in Courts or before Justice Nanavati Commission of Inquiry arising out of the Godhra and post-Godhra violence¹⁴² in the state of Gujarat.¹⁴³ But the state government, the court and the public prosecutor took no steps in this regard. As a result the majority of prosecution witnesses turned hostile. The public prosecutor also did not bother to place on record or follow up the report of the NHRC, which (based on depositions before it during its hearings in Vadodara) contained information relevant to the case. Given this background the judgement¹⁴⁴ acquitting all the accused came as no surprise. "Deeply concerned about the damage to the credibility of the criminal justice delivery system and negation of human rights of victims"¹⁴⁵, the Commission took a commendable step and on consideration of the report of its team which was sent to Vadodara, has filed a Special Leave Petition under Article 136¹⁴⁶ of the Constitution of India in the Supreme Court of India with a prayer to set aside the impugned judgement of the Trial Court in the Best Bakery case and sought directions for further investigation by an independent agency and retrial of the case in a competent court located outside the State of Gujarat.

¹⁴² See Human Rights Watch report, 'We have No Orders to Save You: State Participation and Complicity in Communal Violence in Gujarat', Vol.14, No.3(c), April 2002

¹⁴³ NHRC, *Human Rights Newsletter* (New Delhi, June 2003)

¹⁴⁴ For a good critique of the judgement see <http://www.pucl.org/Topics/Religion-communalism/2003/best-bakery.htm>

¹⁴⁵ NHRC Press Release, (New Delhi, July 2003)

¹⁴⁶ Under Article 136 the Supreme Court is authorised to grant in its discretion special leave to appeal from any judgment in any case passed or made by any court or tribunal in the territory of India.

The NHRC also does the follow up of public-spirited judgments of the Supreme Court of India. Indeed, in important instances, the Supreme Court has itself remitted to the commission matters that were before it. Notable among them are the cases relating to the allegation of starvation death in Orissa, the monitoring of programmes to end bonded and child labour, the ‘mass cremation of unidentified people of Punjab¹⁴⁷ and the proper management of institutions for mentally challenged and protective home for women. A symbiotic relationship exists between the NHRC and the Supreme Court and the Supreme Court emphasised that the commission can bring sustain scrutiny on these matters. The NHRC contributes to ‘national human rights jurisprudence’.¹⁴⁸

(G) Human Rights Legislation

Another important function of the NHRC is to conduct a systematic review of the government’s human rights policy in order to detect shortcomings in human rights observance and to suggest ways of improvement.¹⁴⁹ The NHRC has been doing this task by commenting on the draft legislation, drawing the attention of the government to the lacuna in the existing law and forming a human rights policy for the nation according to the local needs. The NHRC urges the government to accede to the international conventions as it has a statutory responsibility to study treaties and other international instruments on human rights and make recommendations for their effective implementation.¹⁵⁰ For example the NHRC has been urging the government to accede to the 1984 UN convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The government signed this convention in 1997 but still has not ratified it despite continuous urging of the NHRC. The NHRC does not help the government in preparing the country reports which have to be submitted to the treaty monitoring bodies and in view of some scholars that is the right thing to do, “ since this would compromise the independence of the office, which requires it to

¹⁴⁷ See Kaur Jaskaran, ‘A Judicial Blackout: Judicial Impunity for Disappearances in Punjab, India, 15 Harvard Human Rights Journal 269 (Summer 2002)

¹⁴⁸ Cardenas Sonia, *Supra* note 19 p.23 also see generally on human rights jurisprudence in India Jeewan Reddy B.P and Rajeev Dhavan, ‘The Jurisprudence of Human Rights’, pp.175-226 in Beatty David M. (ed.) ‘Human Rights and Judicial Review: A Comparative Perspective’, International Studies in Human Rights, Martinus Nijhoff Publishers, 1994

¹⁴⁹ Raj Kumar C., *Supra* note 37, p.9

¹⁵⁰ The Protection of Human Rights Act 1993, 12(f). Also see Anne Gallagher, ‘Making Human Rights Treaty Obligations A Reality: Working with New Actors and Partners’, in Philip Alston and James Crawford (eds.), ‘The Future of UN Treaty Monitoring (Cambridge, Cambridge University Press, 2000)

maintain some distance from the government and not to speak on its behalf.”¹⁵¹ But the NHRC considers the country reports submitted by the government and the comments of the concerned treaty bodies and gives its observation in the annual report.¹⁵²

While government was trying to introduce draconian law like Prevention of Terrorism Ordinance 2001 the NHRC raised its voice against it and questioned the need for it. In view of the NHRC “Strategy to counter terrorism must be in accordance with Constitution and laws and must reconcile human dignity with integrity of the nation.”¹⁵³ In the view of one observer, “it is quite creditable for a government funded commission to take such a step.”¹⁵⁴ The NHRC gave its comments on several draft legislations for example the Freedom of Information Bill 2000, the Protection from Domestic Violence Bill 2002; draft of Model Prison Manual and on the draft Manual of Identification, Relief and Rehabilitation of Bonded Labour.¹⁵⁵ The NHRC has also started emphasising on the implementation of the existing law. For example the Commission, on 19 May 2003, issued notice to the Chief Secretaries/Administrators of all the States and Union Territories to furnish information to the Commission on implementation of the Juvenile Justice (Care and Protection of Children) Act, 2000.

It is clear that the commission has adopted multipronged approach and has tried to be comprehensive in its functioning. It seems to have succeeded in making its presence felt in various aspects of human rights enforcement.

¹⁵¹ Tigerstorm Von Barbara, ‘Implementing Economic, Social and Cultural Rights: The Role of National Human Rights Institutions’, in ‘Giving Meaning to Economic, Social and Cultural Rights’, Isfahan Merali and Valerie Oosterveld (eds.), PENN University of Pennsylvania Press, Philadelphia, 2001, p.151

¹⁵² See NHRC Annual Report 1999-2000, p.9.

¹⁵³ NHRC, *Human Rights Newsletter* (New Delhi, December 2001)

¹⁵⁴ Personal Interview, Staff, NHRC (April 2003, New Delhi)

¹⁵⁵ NHRC, *Human Rights Newsletter* (New Delhi, May 2003)

Conclusion

A study of the previous chapters reveals that this NHRC case study illustrates the difficulties faced by a national commission and its potential contribution for advancement of human rights. To a limited extent the NHRC has succeeded in sensitising the central and state governments regarding observance of international human rights norms. It seems to be evolving.

Societal backdrop of South Asia is not conducive to practice of human rights. This region is marked by endemic poverty, illiteracy, societal fragmentation and insensitive authority structure. As Madhavi Basnet has observed that “ South Asian governments have ratified some international human rights instruments, but such policy is not reflected in the national constitution or law of any government. One cannot help but question whether South Asian governments really care about their citizen’s interest in having human rights enforced by domestic law.”¹⁵⁶In this context the headway made by the NHRC, though limited is significant.

Evaluative frameworks for judging effectiveness of the national institutions like NHRC are yet to be developed. Chapman highlights some of the difficulties.¹⁵⁷ Many Scholars assign the NHRC a supplemental role in conjunction with legislators and judiciary in addressing human rights concerns.¹⁵⁸ Cardenas¹⁵⁹ has observed that NHRC are being created largely to satisfy international audiences; they are the result of state adaptation. She also observes that “NHRCs have the following paradoxical effect: most of them remain too weak to protect society from human rights violations at the same time they create an unprecedented demand for such protection.” This may be partly justified by the evidence because a number of areas remain where performance of the commission is not adequate. Sumanta Banerjee has gone to other

¹⁵⁶ Basnet Madhavi, ‘South Asia’s Regional Initiative on Human Rights’, The Human Rights Brief, Washington College of Law, American University, Volume 4, Number.2 Winter 1997

¹⁵⁷ Chapman Audrey R., ‘Indicators and Standards for Monitoring Economic, Social and Cultural Rights’, American Association for the Advancement of Science, available at <http://shr.aaas.org/pubs/title.php>

¹⁵⁸ Reif C.Linda, ‘Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection’, Harvard Human Rights Journal, vol.13 spring 2000 also see Human Rights Watch report ‘Protectors or Pretenders? Government Human Rights

Commissions in Africa available at [http:// www.hrw, org/reports/2001/africa/overview/conclusion.html](http://www.hrw.org/reports/2001/africa/overview/conclusion.html)

¹⁵⁹ Cardenas Sonia, Adaptive States: The Proliferation of National Human Rights Institutions’, Carr Centre for Human Rights Policy Working Paper T-01-04, p.1

extreme and observed that the NHRC is total failure.¹⁶⁰ Jaskiran Kaur has also highlighted non-performance of the commission in dealing with allegations relating to the “mass cremation” of persons declared unidentified in certain districts of the Punjab.¹⁶¹

Coming to the Indian NHRC case study it becomes clear that the commission has been hampered in realising its full potential by external as well as internal factors. External factors are those, which are controlled by or influenced by the state and its agencies. Some of the **external factors** are enumerated below:

- the NHRC emphasised the need to set up SHRCs and to establish clear functional relationship between the two but the central government has categorically dismissed the commission’s proposals.
- In the area of child labour, education and other aspects of child welfare the commission has made policy recommendations but the central government has not responded to them.
- dealing with human rights violations committed by armed force personnel but the privileged status of armed forces continues and the government has dismissed all such proposals as unnecessary, even case of death and rape while in the custody of armed forces.
- For the last five years the government has not appointed two members.

While **internal factors** are the ones, which the NHRC has, some control but because of various factors has not been able to cash on. For example:

while the government was at fault for not complying with the recommendations of the NHRC, the commission was also responsible for not supporting its strong words with action. The NHRC has followed through on only a few of the recommendations issued in its annual reports.¹⁶²

¹⁶⁰ Banerjee Sumanta, ‘Human Rights in India in the Global Context’, *Economic and Political Weekly*, February 1, 2003

¹⁶¹ See Kaur Jaskaran, ‘A Judicial Blackout: Judicial Impunity for Disappearances in Punjab, India, 15 Harvard Human Rights Journal 269 (Summer 2002)

¹⁶² South Asia Human Rights Documentation Centre (SAHRDC), ‘*Judgement Reserved: The Case of the National Human Rights Commission of India*’, September 2001, p.iii. SAHRDC can be accessed at <http://www.hrdc.net/sahrhc/>

- Similarly the commission could have taken number of steps itself to remedy the situation but because of legal formalism and administrative inertia these steps have not been taken.
- Given the NHRC's caseload, it is astonishing that a large number of posts (there are 218 staffers as against the sanctioned strength of 297) are still vacant, which the commission itself is empowered to fill.
- The commission in its various reports has not started the practice of measuring its performance in terms of satisfaction of victims. A victim's perspective of judging its effectiveness is singularly missing.
- The commission has not opened regional offices for adequate regional representation of complaints.
- Large number of cases is dismissed by the commission in limini.
- pendency of large number of cases and failure of the commission to evolve time-bound transparent disposal mechanisms of complaints.
- In the context of counter insurgency operations in the North Eastern states the issue of state accountability becomes indispensable. The NHRCs reports neglect to highlight this important issue of accountability.

From study of the secondary sources and ten personal interviews conducted by the author it is apparent that despite limitations the NHRC India has made significant progress in holding the government accountable specially its activism in Gujarat cases, suo moto cognisance, prison reforms, child labour and prostitution, mental health etc. Its success in complaints redressal mechanism is affected by legal formalism and disposal of cases 'in limini' procedure, lack of transparency and its failure to have regional offices in south India and northeast. The performance of the commission has a few purple patches in an otherwise dismal landscape of apathy to human rights norms at societal level.

Surprisingly, the NHRC itself seems to be actually aware of what it calls its 'challenges'. After the establishment it is the period of consolidation for the commission where the commission has observed in its annual report 1998-1999 that how it has to deal with challenges of credibility, scale and expectation, variety, good governance and entrenched attitudes. However, no blueprint for effective action is outlined in its documents.

As illustrated by Epp¹⁶³ the existence of supreme court in a setting like India may not be a panacea for attending to rights based litigation, in the absence of strong support of legal mobilisation at societal level. Institutions like the NHRC are the only means, which theoretically at least, hold promise of affordable access to justice for the poor and the vulnerable which constitute at least one third of India's population. Hence in such social settings institutions like the NHRC fill an important void in a poor person's search for justice.

Despite limitations, highlighting the structural inadequacy of Indian society by focusing on economic, social and cultural rights the NHRC has made great strides in making the Indian state aware of attending to economic, social and cultural rights. The real significance of the commission is advocacy, to build constant pressure and act as reminder of the state obligations towards the rights. Due to the commission's insistence these economic, social and cultural rights have acquired constant public discourse in evaluating the effectiveness of the Indian state.

As observed earlier in this study that the courts are not sufficient in themselves in attending rights because of weak support structure for legal mobilisation. The view that courts and existing national institutions are sufficient to attend to the human rights agenda is based on the assumption that that support for legal mobilisation is uniform throughout. However as analysed by the Epp, this is not true in some social settings as India in particular and South Asia in general. In addition, the social composition is such that the poor and the vulnerable groups form significant components in these societies. These very social segments are hardly in the position to utilise the courts as an institution to full their fundamental rights, much less their economic, social and cultural rights. In such social settings institutions like the NHRC are very much needed to keep exclusive focus on need for fulfilment of these rights and internalisation of international human rights norms.

¹⁶³ Epp Charles R, 'The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative perspective', The university of Chicago Press, Chicago and London, 1998

The case study of Indian NHRC has international significance because India with its one billion population is too important to be ignored. At regional level of South Asia it has its own importance as a trendsetter in human rights field. The case study illustrates difficulties in establishing an independent body entrusted with internalising international human rights norms in a hostile domestic context and great potential for such an institution to advance human rights agenda. The need for the international community, to sustain such an institution and keep advocating greater institutional autonomy in concept as well as in practice, hardly need to be emphasised. This will help in consolidation of the work done by the NHRC and gradually establish a culture of human rights norms in India.

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