

# MISSION REPORT

ON THE PERFORMANCE OF NATIONAL  
HUMAN RIGHTS COMMISSION OF INDIA

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21-25 August 2018



# Asian NGO Network on National Human Rights Institutions (ANNI)

Mission Report on the Performance of National Human Rights Commission of India (NHRCI)

21-25 August 2018



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# About Us

## **Asian NGO Network on National Human Rights Institutions (ANNI)**

The Asian NGOs Network on National Human Rights Institutions (ANNI) was established in December 2006. It is a network of Asian non-governmental organisations and human rights defenders working on issues related to National Human Rights Institutions (NHRIs). ANNI has members that are national organisations from all over Asia.

ANNI currently has 33 member organisations from 21 countries or territories. The work of ANNI members focuses on strengthening the work and functioning of Asian NHRIs to better promote and protect human rights as well as to advocate for the improved compliance of Asian NHRIs with international standards, including the Paris Principles and General Observations of the Sub-Committee on Accreditation (SCA) of the Global Alliance of NHRIs (GANHRI).

The work of the ANNI is coordinated by FORUM-ASIA in the latter's capacity as the Secretariat.

## **Asian Forum for Human Rights and Development (FORUM-ASIA)**

The Asian Forum for Human Rights and Development (FORUM-ASIA) works to promote and protect human rights, including the right to development, through collaboration and cooperation among human rights organisations and defenders in Asia and beyond.

FORUM-ASIA is a network of 81 members in 21 countries, as of September 2018, across Asia. It was founded in 1991 in Manila, the Philippines. Its Regional Secretariat was established in Bangkok, Thailand in 1992. Since then, offices have been opened in Geneva, Jakarta, and Kathmandu.

FORUM-ASIA is committed to building a peaceful, just, equitable and ecologically sustainable community of peoples and societies in Asia, where all human rights of all individuals, groups and peoples – in particular, the poor, marginalised and discriminated – are fully respected and realised in accordance with internationally accepted human rights norms and standards. It does so by:

- ▶▶ Bringing together activists and stakeholders to tackle human rights issues;
- ▶▶ Protecting human rights defenders in Asia that find themselves in emergency situations;
- ▶▶ Advocating for human rights at the national, regional and international level;
- ▶▶ Building the capacity of its members and partners.

## **EXPERT TEAM**

**Prof. Kwak Nohyun** is the former Commissioner and Secretary General of the National Human Rights Commission of South Korea. He was a member of the Asia Pacific Forum Council of Jurists and International Coordination Committee of NHRIs (ICC, later known as GANHRI) SCA from the Asia Pacific; headed the UN fact-finding mission on Nepal NHRI; served as a member of the Presidential Commission on Policy Planning and was the Chief Superintendent for the Seoul Metropolitan Office of Education. As part of the academia, he was a Professor at Korea National Open University, and was visiting Professor at the University of British Columbia and University Washington Law School. He has published a range of academic journals, commentaries and expert opinion on democracy, human rights and rule of law, public education, etc. He was the former co-chair at the Korea House for Human Rights and Democracy and currently is one of the advisors for ANNI.

**Ms. Rosemarie D. R. Trajano** is a prominent HRD from the Philippines. A nurse by profession, Rose has more than 30 years of experience in the Philippines in defense and protection of human rights. Rose currently serves as the Secretary General of the Philippine Alliance of Human Rights Advocate (PAHRA), a member of ANNI, in which she manages and coordinates campaigns of the alliance at the national, regional and international level. She serves as a Convener for In Defense of Human Rights and Dignity Movement (iDEFEND), a human rights movement that provides a platform to empower people to resist state repression and address its root causes with the vision of establishing rights-based governance and sustainable development. In 2017, Rose received the Franco-German Prize for Human Rights and Rule of Law Award.

**Dr. Khoo Ying Hooi** is a Senior Lecturer at the Department of International and Strategic Studies, University of Malaya. She completed her PhD in Politics and Government, examining social movements and democratisation with a focus on Malaysia's electoral reform movement. Her research interests include social movements, national human rights institutions, human rights and democratisation with a regional focus on Southeast Asia, especially Malaysia and Timor-Leste and provides expert opinion on these areas. She has published a range of academic journals, commentaries. Prior to her academic career, she worked at the Human Rights Commission of Malaysia (SUHAKAM) as the Head of International Issues and Cooperation. She was involved in the amendments to the SUHAKAM Amendment Bill 2009.

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In July 2018, the Asian NGO Network on National Human Rights Institutions (ANNI) initiated the process for greater engagement on the National Human Rights Commission of India (NHRCI). The independence and effectiveness of the NHRCI is important in two aspects. First, it is the National Human Rights Institution (NHRI) of the second most populous country in the world. The human rights conditions of 1.3 billion people depend, in part, on the well-functioning of the NHRCI. Second, established in 1993 as one of the earliest NHRIs, the NHRCI has been a model NHRI and hence its impacts and influence go beyond India's national boundaries. Significant changes in the law and practice of the NHRCI are therefore likely to influence other similar NHRIs particularly in the South Asia region. Third, the NHRCI in India is among 170 other national and state thematic human rights institutions in India – the only one of its kind in the entire globe. In short, it is prudent to review and strengthen the independence and effectiveness of the NHRCI, as it could be of benefit not only to other national and state human rights institutions in India but also to other countries with NHRIs, as well as to serve as an inspiration to those without ones.

Created on 12 October 1993, the NHRCI celebrated its silver jubilee anniversary on 12 October 2018 with the attendance of Prime Minister Narendra Modi. In its year of birth, it was an inventive and unique newcomer to the small community of NHRIs of the time. Unlike Australian, Canadian, and New Zealand counterparts that were created mainly to implement UN human rights covenants and other human rights treaties domestically, the NHRCI was created mainly to defend and enhance the international image of India under the increasing international pressures

concerning the tragic human rights conditions, including the Kashmir region. The NHRCI was one of the earliest NHRIs in the developing countries in which democracy was further evolving and rule of law was fragile compared to advanced and wealthy countries. Unlike the NHRIs of the Philippines (1987) or South Africa (1995) that were created mainly to respond to the post-revolutionary popular demands, the NHRCI came into being at the initiative of the Indian Government as a response to both the increasing acknowledgement of the need for NHRIs that would assist in the promotion and protection of human rights, as well as strong international pressure created by the adoption of the Paris Principles by the United Nations Commission on Human Rights in 1992 and followed by the United Nations General Assembly in the following year.

As part of the government's initiatives to improve international image in response to the government's human rights records, NHRIs created under such "disadvantageous" conditions, normally would neither be independent nor effective. Unless fundamental political changes take place, the foundational intention and the matching design of a NHRI would last unchanged, underlying and penetrating its institutional life and shape on the ground. Unfortunately, the expert team is of the opinion that the NHRCI has been no exception despite a few striking sets of clauses in the Protection of Human Rights Act 1993 (PHRA). At a casual look, the NHRCI appears to be endowed with a great level of independence from the government for two reasons. As provided in Section 3(2) of the PHRA, first, its Chair shall be a former Chief Justice of the Supreme Court of India (SC). Out of four other members, two members are

required to have been judges of the High Court and Supreme Court – one of whom must be a former judge of the Supreme Court of India and the other must be a former Chief Justice of a High Court (HC). These three judicial members should hopefully guarantee the NHRCI an unprecedented level of independence. Section 3(3) of the PHRA stipulates that the chairpersons from the National Commissions for Minorities, Scheduled Castes, Scheduled Tribes and Women are deemed to be members of the NHRCI<sup>1</sup>. Second, to guarantee the NHRCI’s “politically-pluralist” representation and composition, the PHRA bestows the appointment power upon a selection committee consisting of six highest rank political figures, including the Prime Minister and guarantees two seats to the opposition party/parties – Leader of the Opposition in the House of the People and the Leader of the Opposition in the Council of States. Despite these two outstanding independence enhancing arrangements, as described by an interviewee, the NHRCI has been known to be a “sleeping giant” at most, implying that they are hardly operative on the ground and are easily overridden by other aspects of its law and practices.

With this background understanding and concerns in mind, ANNI organised a fact-finding mission comprising three experts<sup>2</sup> in Asia on NHRCs to explore reasons and plausible solutions. The expert team undertook a five-day mission to India between 21–25 August 2018. During the mission, the team held 19 meetings, including seven online calls, interviewees ranging from senior lawyers and jurists, academicians, and human rights activists, to former staff of the NHRCI. The team also had a meeting with the NHRCI.

The team observed immense dissatisfaction among the interviewees with regard to the functioning of the NHRCI to the extent of terming it a “monumental failure.” Their criticisms derive from their concerns of the apex Indian human rights institution crumbling down. Enacted in 1993, the PHRA was amended once in 2006, in which it provides the NHRCI with significant powers. Nevertheless, the findings of the mission strongly indicate that the NHRCI has failed to exercise its powers timely and effectively.

In November 2017, the NHRCI obtained “A” status, i.e., Paris Principles (PP) fully compliant status, from the Sub-Committee on Accreditation (SCA) of the Global Alliance of National Human Rights Institutions (GANHRI). During the accreditation review in November 2016, for the first time the accreditation of NHRCI’s was deferred and it was asked to demonstrate reforms within a year, i.e., before November 2017. Civil society organisations (CSOs) and human rights defenders (HRDs) in India claimed that during the one year of deferment, there was limited change in the law<sup>3</sup> despite the proposed amendments to the NHRCI’s enabling law and practice of the NHRCI. According to them, the situation of the NHRCI is the same in substance in November 2016 and November 2017, so they question the SCA on the grounds for the NHRCI being granted an “A” status.

The SCA report in November 2017 confirms the claims made by CSOs and HRDs. The SCA report specifically welcomes the “proposed amendments to its enabling laws”. On 4 April 2018, the Cabinet approved the amendment bill, 2018.<sup>4</sup> However, even till the finalisation of this

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<sup>1</sup> Full list of the composition can be found in this link, <<http://nhrc.nic.in/about-us/composition-of-commission>>, accessed on 11 January 2019.

<sup>2</sup> Professor Kwak Nohyun, formerly associated with the South Korean NHRI; Dr. Khoo Ying Hooi, associated with the University of Malaya in Malaysia; and Ms. Rosemarie Trajano, associated with the Philippine Alliance of Human Rights Advocates (PAHRA). Ms. Sutawan Chanprasert from the ANNI Secretariat assisted the team.

<sup>3</sup> A copy of The Protection of Human Rights (Amendment) Bill, 2018 is available at <[http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/147\\_2018\\_LS\\_Eng.pdf](http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/147_2018_LS_Eng.pdf)>, accessed on 11 January 2019.

<sup>4</sup> A copy of the press release is available at <<http://pib.nic.in/newsite/PrintRelease.aspx?relid=178395>>, accessed on 11 January 2019.

report, this amendment bill was never passed in Parliament. The expert team would like to make a concerning note at the outset that the NHRCI was granted an “A” status just on the basis of proposed amendments at that time. The expert team notes among several cases, cases of NHRIs from countries such as South Korea, Germany, Hungary, Cameroon, Egypt and Malawi, where accreditation was deferred up to seven cycles because “proposed amendments” did not come into effect.

Judging from the primary and secondary materials at the expert team’s disposal, the NHRCI does not meet the parameters of the PP. The Chairperson and its Members are selected by a committee of six influential political figures<sup>5</sup>. On most occasions, this committee is potentially dominated by 4:2 ratio in favour of the ruling dispensation. Selection by the ruling party, Bharatiya Janata Party (BJP) that dominated the committee raises serious questions on the independence of the NHRCI’s senior leadership. The expert team is of the opinion that the NHRCI cannot justify its independence solely on the ground of a majority of its senior leadership being from the judiciary. This process of appointment encourages questioning of the appointments, which itself is detrimental to the NHRCI. To get things worse, the senior officials of the NHRCI are senior bureaucrats, army personnel and police officials on secondment, including now from the Indian intelligence, confirming to echo CSOs’ concerns of the risk of the NHRCI of being “yet another government institution.” As pointed out in the GANHRI General Observations of the SCA, adopted on 21 February 2018, Section I.9, “Political representatives on NHRIs”, mentioned that “The SCA recognizes that it is important to maintain effective working relationships, and where relevant, to consult with government. However, this should not be achieved through the participation of government representatives

in the decision-making body of the NHRI.” This report attempts to bring forward a series of concerns pertaining to the NHRCI.

Further, in recent years, there have been increasing reports of attacks, killings, and fabricated charges against HRDs and overall shrinking of democratic spaces in India. While it is not the objective of the report to dwell into this domain, concerns expressed from several interviewees are difficult to ignore. Given the objective of the mission and report, the team restricts its mandate to the NHRCI. It is shocking to observe that little political will has been shown by the NHRCI when it comes to issues related to the challenges faced by HRDs and democracy in India. The expert team observed that in cases related to HRDs barred from travelling for international meetings and advocacy; activists, academics and non-governmental organisation (NGO) workers being deported and barred from entering India; arbitrary non-renewal, suspension and cancellation of licenses under Foreign Contribution Regulation Act (FCRA); killings of journalists; mass killings by police and security forces across the country; cases of sexual violence and rapes by security forces; false and fabricated charges against students, journalists, lawyers, artists and activists; deportation of refugees, stateless people; cases of lynching and mob violence; continuous detention of a wheelchair bound person with 90% disability in a central jail with no special facilities for detaining such persons and on several other such important issues, it is very often that the NHRCI either maintained a “spectacular silence” or initiated a “token approach”. The expert team is confident that a stronger visible posturing and actions upholding the Indian Constitution, the Universal Declaration on Human Rights (UDHR), UN Conventions and policies, guidelines and standards emanating

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<sup>5</sup> The six figures are the Prime Minister, Speaker of the House of the People, Home Minister, Leader of the Opposition in the House of the People, Leader of the Opposition in the Council of States and Deputy Chairman of the Council of the States.

from the UN Special Procedures and resolutions of the UN General Assembly and Human Rights Council would have earned the NHRCI not only the respect of the Indian civil society and HRDs but also ensured in strengthening the Indian democracy and placed itself as a model for the other over 170 National and State Human Rights Institutions in India to follow.

## **METHODOLOGY**

The mission was undertaken between 21–25 August 2018 in New Delhi, India. The methodology comprised of an analysis of secondary documents and information collected from primary sources. Primary sources of information were from interviews held with 19 senior lawyers and jurists, academicians, human rights activists, and former staffs of the NHRCI. These interviews were held in person and through online calls. Please see Annex I for a list of people interviewed during the mission.

A meeting was also held with the NHRCI. The meeting was chaired by Justice (Retd.) D. Murugesan, a Member of the NHRCI, and other participants included Ms. Jyotika Kalra, also a Member of the NHRCI, and other senior officials of the NHRCI. The Chairperson did not appear though his presence was agreed upon in prior arrangements.

The secondary documents referred to were the ANNI annual reports where the Indian ANNI member, the All India Network of NGOs and individuals working with National and State Human Rights Institutions (AiNNI) contributed a chapter on the NHRCI, reports submitted to the GANHRI's SCA by AiNNI, the South Asian Human Rights Documentation Centre (SAHRDC), and other CSOs in 2011, 2016 and 2017 for the NHRCI's review, SCA reports on the NHRCI in 2011, 2016, and 2017, the PP, GANHRI-SCA's General Observations on the Paris Principles, PHRA, PHRA's rules, and the available NHRCI's annual reports.

## CHAPTER 2 FINDINGS AND OBSERVATIONS

### *“Wake up National Human Rights Commission from being a sleeping giant”*

This quotation from one of the interviewees during the mission summarises the findings. As the expert team observed, this was the key message from all the interviewees. Most of them expressed the need for the NHRCI to step up and there are serious concerns over the effectiveness of the NHRCI in addressing and responding to the human rights situation in the most challenging times. It seems even clear to us, foreign observers that in recent years, its credibility and reputation among Indian HRDs has hit the bottom. Their cynicism of the NHRCI as it stands now is so strong, their frustration with the real-world NHRCI is so deep, yet their hope for a reformed NHRCI of and for the people is so high that the expert team cannot but agree it is one of the most pressing and urgent public interests on the ground to dismantle the multiple layers of distortions and hypocrisies surrounding the current practices of the NHRCI, to reform both the PHRA and the day-to-day practices of the NHRCI in complete compliance with the PP and the Indian Constitution.

The NHRCI was established on 12 October 1993, just nine months after the PP was adopted by the UN General Assembly and four months after the UN World Conference on Human Rights in Vienna was held. Except for Australia and New Zealand in the Pacific, the NHRCI is the second oldest NHRI in Asia, the first being the Commission on Human Rights of the Philippines. In that sense, the founding legislation of the NHRCI was inventive and unique in that its principles of composition including membership qualifications and

appointment process were quite different from the NHRIs of the Philippines and Australia, the then two salient precedents in the world. It soon became a model for South Asian countries when they created a NHRI. Not only one of the oldest, the NHRCI is also one of the biggest NHRIs in the world.

Though one of the oldest NHRIs in the world, the NHRCI's independence has always been problematic since its inception mainly because its birth and design were indebted to the government rather than popular pressures and struggles. The expert team has learned that the NHRCI was created rather abruptly in 1993 at the diplomatic initiative of the then Indian Government to appease ever-growing international pressures and improve its worsening international image in the aftermath of massive human rights violations, including the human rights violations by the Indian military in the Kashmir region which was made notorious and undeniable by fact-finding efforts and media coverage largely organised by Amnesty International. This reminds us of the time proven fact that NHRIs that were not established by the efforts of human rights movements and were not born by post-revolutionary or highly reformist governments could be challenging in keeping their independence regardless of the language of their organic law. On close investigation, the expert team discovered that its founding law itself turns out to have a number of loopholes and leeways designed into it both explicitly and implicitly. The team is of the opinion that the Indian PHRA is no exception, as the findings and observations that follow will amply testify.

Even though a statutory rather than constitutional body, the NHRCI may well be proud that a majority of its commissioners are recruited from a pool of the highest rank former judges from the high judiciary and its appointment committee comprises six most influential political figures in India, with no parallel examples in the world. Under the PHRA, the NHRCI is a five full time member NHRI including its Chairperson. Three out of the five members should be from the judiciary. Its Chairperson should be one of the former Chief Justices of the SC. The second judicial member should be a serving or former judge of the Supreme Court of India and the third, a serving or former Chief Justice of a High Court. HC. The remaining two members could be of non-judicial background. Unlike their judicial colleagues, they are required under the law to have knowledge of or practical experience in, matters relating to human rights. The term of all members is five years so that their tenure on occasions may be longer than the duration of the serving government. The NHRCI is bestowed with the powers of a civil court when it comes to both suo-moto actions and complaint investigations. All these legal arrangements are apparently in favour of the NHRCI's independence.

It should also be noted that on the face of the PHRA, the government does not have the liberty to independently appoint any member. According to Section 4 of the PHRA on, "Appointment or Chairperson and other Members", the six-member appointment committee guarantees at least two seats to the opposition party leaders, one from the House of People and the other from the Council of States. Out of six members on the appointment committee, only three are to belong to the government – the Prime Minister, Speaker of the House, and Minister of Home Affairs. The remaining members, Deputy Chair of the Council of States, may or may not belong to the ruling party because that post can be taken by the opposition party if it is in a majority in the House of Council of States. In short, the political

composition of the appointment committee would be in the ratio of 4:2 in most cases, or 3:3 in rare cases. In the current scenario, prevailing since May 2014, in the absence of a Leader of the Opposition in the House of People, this ratio has changed to 4:1 or 3:2, in favour of the government. Under this kind of arrangements, opposition leaders are guaranteed meaningful voices and political compromises are unavoidable among the six most prominent political figures on the committee. The expected result would be that politically one-sided candidates are screened out in the deliberation process or a degree of political pluralism is guaranteed in the composition of the NHRCI. However, this expectation has hardly been met.

According to a couple of interviewees, there are two solid reasons for this. First, the NHRCI appointment is so small a stake for the opposition party leaders that they do not care much about. Second, the ruling and opposition parties of India have so many understandings and interests in common when it comes to human rights policies and issues. Ideally, the three top-level judicial members are expected to act as the human embodiments of the NHRCI's will to be independent from the government and its courage to speak the truth to the government against all odds. This expectation has hardly been met. Again, based on interactions with the interviewees, one plausible explanation may be that the Indian society is of a highly hierarchical nature and in any organisation, the top posts are filled with successful conformists who never say no to their superior or top leader. This is one instance of the law of the independent commission yielding to the culture of the hierarchical bureaucracy.

Over the past three decades, India has established many rights and anti-discrimination bodies under the Constitution and statutes, now numbering over 170 if both the union and state agencies are counted. The expert team observed from their interactions with the interviewees

that most of these institutions are reduced to “career stations” for favoured individuals, especially those from the ruling party of the state concerned with state level institutions. The interviewees expect that the NHRCI, being the sole NHRI representing the Indian human rights situations in the UN system under the PP, should play the leading and exemplary role as well as the monitoring and promoting roles for all these rights protecting institutions. Based on the reactions from several interviewees, the team confirmed that these roles have never been conducted despite the Deemed Membership arrangement under PHRA. The following section will detail key observations on the NHRCI. Most of the sections begin with quotes, which are captured from the interviewees during the course of interactions.

### ***“NHRC is only a showcase of the Government”***

## **APPOINTMENTS IN THE NHRCI AND ITS PROCESS**

During the expert team’s interactions with the interviewees, all of them unanimously expressed concerns over the appointment criteria and process for the NHRCI membership and they believed it opens the floodgates towards compromising the independence of the institution. The team believes the root of the problem lies in the PHRA itself. For example, some interviewees expressed concerns over the immediate appointment of retired members of the senior judiciary on the NHRCI. The expert team observed their concerns with regard to possibilities of compromises in the independence of the judiciary with the possibility of a “post-retirement job”. For instance, after the retirement of Justice (retd.) Konakuppakatil Gopinathan Balakrishnan as the NHRCI Chairperson on 11 May 2015, the next NHRCI Chairperson appointed was Justice (retd.) Handyala Lakshminarayanawamy Dattu on 29 February 2016, after a gap of nearly nine months. Justice Dattu retired as the Chief Justice of India on 2 December 2015. The interviewees

commented that after Justice Balakrishnan’s tenure, the seat was kept vacant deliberately for Justice Dattu despite the immediate availability of other eligible candidates as per the PHRA. Some of the interviewees also recommended for a cooling off period of two years after judicial retirement is attained before being appointed as the NHRCI Chairperson.

A closer look at the appointment committee reveals that this committee is often dominated by the government of the day. In the current context, the Prime Minister, Minister of Home Affairs, and the Speaker of the House of People are from the same political party and the Deputy Chairperson of the Council of States is from the larger ruling coalition. This itself has tilted the majority in the ratio of 4:2 towards the government. Further, as informed by the interviewees, the Leader of the Opposition in the House of People is not appointed from May 2014 onwards, and the ratio of the appointment committee over the past four years has been 4:1. Hence, the voice of the opposition leaders has safely been ignored.

This seriously compromises the independence of the NHRCI. Over the past four years, the appointments made under the 4:1 ratio has included Justice (retd.) H.L. Dattu, the NHRCI Chairperson and former Chief Justice of India, Justice (retd.) Pinaki Chandra Ghose, the NHRCI Member and a former Judge of the SC, Ms. Jyotika Kalra, the NHRCI Member and an advocate on record in the Supreme Court of India. As on 29 April 2019, there is one vacancy in the NHRCI arising after Justice (retd.) Darmar Murugesan completed his tenure on 20 September 2018. There was another vacancy that was most recently filled following the retirement of Member Sharad Chandra Sinha on 7 April 2018. The third vacancy was from 19 March 2019 and it was only most recently filled since Justice (retd.) Pinaki Chandra Ghose was appointed as the Chairperson of another commission.

The expert team is of the opinion that an appointment committee biased in favour of the government will lead to suspicion of the independence of the NHRCI. This also provides the scope for the government to appoint favourable persons on the NHRCI. Questions and concerns were raised on the news of appointment of Mr. Avinash Rai Khanna as a NHRCI Member. Mr. Khanna was then the Vice-President of the BJP, the political party in power from where the Prime Minister, Minister of Home Affairs, and Speaker of the House of People hail. Mr. Khanna resigned from the BJP to qualify for the rights panel membership but his appointment did not take place as it has evoked heavy criticism. He rejoined the BJP after a petition was filed in the Supreme Court to challenge his appointment under Section 24(3) of the PHRA and Articles 14 and 21 of the Constitution as he had been a member of Punjab State Human Rights Commission. However, this specific appointment scandal raises several questions which calls for relooking at the PHRA to be in full compliance with the PP.

For any NHRI, complete functional and operational independence from the government is the key principle behind its establishment and existence. Interviewees also expressed concerns over the appointment of Ms. Jyotika Kalra. Ms. Kalra was appointed on 25 March 2017. It is brought to the expert team's notice that she is closely associated with the lawyers' wing of the Rashtriya Swayamsevak Sangh (RSS) and has been a contributor to RSS's journal. RSS is the largest Right-wing umbrella body closely associated with the BJP. The government had also appointed Ms. Kalra as a part-time non-official director of the public sector company Power Grid on 16 February 2017. Her association with Human

Rights Defense International (HRDI), alleged to be a government-sponsored NGO (GONGO), also raises concerns. The interviewees believed that her appointment to the NHRCI was to satisfy the SCA recommendations in 2011 and 2016, where it advocated for pluralism and diversity in the NHRCI. Ms. Kalra is the only woman member of the NHRCI since 2004 after the retirement of Ms. Justice (ret'd.) Sujata Manohar and the third woman member in the NHRCI's 25 years. Her appointment is now technically also flagged off as the first representative from 'civil society' on the NHRCI.

It was further brought to the expert team's attention that Ms. Kalra had "resigned" from the NHRCI in January 2018 and then re-joined in March 2018 just before the accreditation report was adopted and it is pertinent to read her letter of resignation, which interestingly supports most of what the expert team has heard from the interviewees. As gathered from media sources,<sup>6</sup> she in her resignation letter mentioned that "Despite the fact that the PHRA gives power to the members to take suo-moto cognisance of any human rights violation on their own, by an office order, members of the Commission have been divested of their powers, and members cannot take cognisance of any human rights violations on their own. In furtherance of the same, new Regulations have been proposed, whereby the power of a member, to take suo-moto cognisance would no more be there." She also raised questions on NHRCI's inefficiency in spreading awareness about human rights, poor complaints handling with a tendency to close cases quickly and significant cuts in budgetary allocation for research.

The SCA reports of 2011,<sup>7</sup> 2016,<sup>8</sup> and 2017<sup>9</sup> have significantly emphasised on the need for a

<sup>6</sup> Details can be found at, <<https://scroll.in/article/871612/national-human-rights-commission-member-returns-to-work-two-months-after-quitting-raising-questions>>, accessed on 10 December 2018.

<sup>7</sup> Details can be found at, <<https://nhri.ohchr.org/EN/AboutUs/GANHRIAaccreditation/Documents/SCA%20REPORT%20MAY%202011%20-%20FINAL%20%28with%20annexes%29.pdf>>, accessed on 10 December 2018.

<sup>8</sup> Details can be found at, <<https://nhri.ohchr.org/EN/AboutUs/GANHRIAaccreditation/Documents/SCA%20Final%20Report%20-%20Nov%202016%20-%20English.pdf>>, accessed on 10 December 2018.

<sup>9</sup> Details can be found at, <<https://nhri.ohchr.org/EN/AboutUs/GANHRIAaccreditation/Documents/SCA%20Report%20November%202017%20-%20ENG.pdf>>, accessed on 10 December 2018.

transparent, broad and consultative appointment process including advertising of the vacancies, and considering a wide pool of candidates from different societal groups. From the interactions with the interviewees, the expert team observed that this is not in practice for the NHRCI appointments. This seriously limits the expertise that can be brought on to the NHRCI and the diversity that a vast and diverse country like India needs to have in its NHRCI. It is imperative that representations from religious minorities; Dalits, tribals; people with disability; women; lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) and other communities are reflected in the composition of the NHRCI. Unfortunately, under the provisions of the PHRA, the number of members is confined to mere five and three from the judicial branch so that there hardly remains any space for diversity and pluralism. The expert team is of the opinion that urgent revision and amendments to the PHRA are called for to ensure pluralism and diversity in the NHRCI to include a larger number of members on the NHRCI.

The appointment process in itself is not transparent despite the selection committee. The expert team had access to two right-to-information petition responses on the appointments of Mr. Khanna and Ms. Kalra. In both responses, under the minutes of the meeting disclosed to the applicant, the expert team has ascertained there is only one sentence confirming the appointments. This leads to the speculations that there were no discussions on the other possible candidates. There is no information whatsoever on other probable candidates considered by the appointment committee. There is also no information from where the committee came to receive these references of proposed candidates. As informed by the after of interviewees, the actual process seems to be that government proposes and minority opposition consents without due deliberation except in some

exceptional cases in the years prior to 2014. In case the opposition leaders object, objections are overruled and the preferred candidate is appointed. This highlights a serious flaw in the process, which needs immediate rectification. The expert team observed that there is no open and public call for applications or possibilities of recommendations from the civil society, a process that has been constantly emphasised by the SCA for all NHRCs. The interviewees confirmed that in 25 years of the NHRCI, not a single HRD has ever been appointed on the NHRCI, and they objected to Ms. Kalra's appointment, given her close association with the government. Even in the latest two appointments, to the NHRCI in the fourth week of April 2019, it is clearly seen that the same has been made in total secrecy without anyone in the country aware that these vacancies were to be filled up while the elections to the 17th Lok Sabha were already in progress throughout the country. This is almost to signify that the appointments that were held up for several months now are completed before the next government takes responsibility in less than two months.

According to Section 3(2) of the PHRA, "Two Members to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights." However, these two posts have always, or with an exception such as Ms. Karla, been unofficially reserved for a senior bureaucrat or even a police official. In March 2013, on the appointment of Mr. S.C. Sinha as a NHRCI Member, Ms. Sushma Swaraj, the present Minister of External Affairs and former Leader of the Opposition in the House of People, said, "It is disappointing that one place on the NHRC panel has been reserved for Indian Administrative Service (IAS) and one for Indian Police Service (IPS)."<sup>10</sup> At the same time, Mr. Arun Jaitley, Minister of Finance and former Leader of the Opposition in the Council of States, wrote,

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<sup>10</sup> Details can be found at, <<https://www.ndtv.com/cheat-sheet/bjp-opposes-sc-sinhas-appointment-to-national-human-rights-commission-sources-517649>>, accessed on 12 December 2018.

“Heads of investigative agencies must function without fear or favour... It is this temptation of a future favour which is seriously compromising the functioning of heads of investigative agencies.”<sup>11</sup> This practice continues till today despite the then opposition being in power for five years now.

These concerns raised above pertaining to the appointment committee, appointment process, lack of measures to ensure pluralism and diversity, lack of civil society representation, lack of transparency, political appointments, independence of judiciary, representation from investigation agencies and bureaucracy, are detrimental to the functioning and perception of the NHRCI. Immediate reforms in the founding law are therefore urgently required to ensure that the NHRCI is truly PP compliant. The expert team also calls upon the SCA and GANHRI to take note of these concerns as we raise serious concerns on the parameters of SCA accreditation for the NHRCI.

**“NHRCI’s top officials are Indian Government’s top officials”**

## **STAFF APPOINTMENT IN THE NHRCI**

### *Director General of Investigation*

The post of Director General of Investigation (DGI) is crucial to the daily work of the NHRCI. This post has always been occupied by “serving” police officers and this has been a long-standing concern of the SCA and civil society in India. As told by the interviewees, in most of the cases of human rights violations that the NHRCI investigates, the alleged perpetrators are police personnel. Having a senior police officer of the rank of the Director General of Police (DGP) as overall in charge of the investigation leads to several genuine questions on the independence and credibility of the NHRCI. The DGI during this mission was Mr. Gurbachan Singh, a senior police officer who in the past held the post of

the Special Director of the Intelligence Bureau. The current DGI is Mr. Prabhat Singh who in the past held the post of the Special Director of the Central Reserve Police Force. It is evident that the practice of appointing police officers continues in the NHRCI despite repeated concerns from the SCA and Indian civil society. The interviewees also expressed concerns over the large vacancies in this top position for long periods of time and they believed this severely hampered the progress of on-going cases. As told by the interviewees, in the past six to seven years, seldom a DGI served more than one year. The average period of service is considerably less than a year. In short, a high-level police officer of DGP rank has been appointed as DGI just a few months ahead of retirement after a long period of vacancy.

The practice of having police on board is not limited to the DGI only. As told by the interviewees, staff in the investigation division are solely drawn from the police service. The expert team observes the rationality behind the apprehensions of the interviewees. Human rights violation investigations are not criminal investigations and they need not therefore have only police officials on board. This also severely compromises the perceptions held by the victims/survivors of human rights violations. The investigation panel should comprise doctors, experts in forensic science, psychologists, academics including experts in sociology, criminology, experienced human rights activists who have engaged in human rights investigations and documentation all their lives and may also have a representation of experienced police officials who have experience in human rights investigation as opposed to criminal investigation.

### *Secretary-General*

The Secretary-General (SG) of the NHRCI is the Chief Executive Officer (CEO) and holds

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<sup>11</sup> Details can be found at, <<https://www.ndtv.com/cheat-sheet/bjp-opposes-sc-sinhas-appointment-to-national-human-rights-commission-sources-517649>>, accessed on 12 December 2018.

an important portfolio in the overall working operations of the NHRCI. Mostly, an officer of the IAS is being deputed by the government to this position. Since 2006, the SCA has repeatedly emphasised its concerns over the appointment of a civil servant as the SG, as it impacts the independence of the NHRCI. The SCA also recommended that the position of SG should also be filled through an “open and merit-based” selection process. As explicitly mentioned in the SCA General Observations in Section 2.4 on Recruitment and Retention of NHRI Staff,<sup>12</sup> “Staff should be recruited according to an open, transparent and merit-based selection process that ensures pluralism... Such a process promotes the independence and effectiveness of, and public confidence in, the NHRI.”

Same as the post of DGI, the post of SG had also remained vacant for significant periods over the past five years. As told by interviewees, most SGs have been appointed just few months ahead of their retirement. Extremely short presence of a senior most high ranking bureaucrat, seconded from the government, as the CEO of the NHRCI, followed by long vacancy, lowers organisational dynamics and administrative efficiency and thereby weakens the effectiveness of the NHRCI. The administrative head of the NHRCI should be able to bring the expertise in both management and human rights. These qualities in the SG of NHRCI will only ensure the NHRCI is more accessible and open to people and their issues. In addition there is no publicly available material to indicate that the persons selected have been selected after verifying their special qualifications to head the NHRCI.

### *Secondment*

As informed by the interviewees, majority of the staff of the NHRCI are seconded from various

ministries and departments of the Government of India. This remains a serious concern. The major problem with the NHRCI’s recruitment policy based on secondment is that officials on secondment remain belonged and loyal to the ministries and departments of their origin. The secondment system leads to a serious conflict of interest situation whenever the officials on secondment deal with human rights cases involving their ministry or department of origin. Moreover, the secondment issue has been raised repeatedly by the SCA on NHRI. Officials on secondment lack serious motivation to develop expertise in the NHRCI’s work. They are eager and ready to return to the original post, if chance and possibility arise. Under the secondment personnel system, not only passions and responsibilities of public service but organisational knowhow as well is quite underdeveloped and organisational culture becomes lax. Several interviewees expressed concerns over the NHRCI and its staff being “bound by protocol”. If majority of the staff, including top posts like SG and DGI are from the government how then can the NHRCI act independently in its operations? This is in direct contradiction to the PP. A close perusal of its advertisement for 8 positions at the lower level even titled Advt No 2/2019 for the 8 positions advertised, three in the administration division, four in the research division and one in the law division claim that the applicants are to be on deputation or transfer on deputation. In relation to this, the expert team opined that it is crucial for the NHRCI to ensure that all its staff, immaterial of positions they hold, are recruited independently in an open process by the NHRCI.

***“The NHRCI hardly intervenes on major human rights concerns, reduced to a ‘post-office’”***

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<sup>12</sup> GANHRI General Observations of the SCA, adopted by the GANHRI Bureau at its meeting held in Geneva on 21 February 2018, p. 39.

## COMPLAINTS HANDLING

In comparison with other NHRIs around the world, the PHRA has ensured that the NHRCI has significant powers when it comes to complaints handling<sup>13</sup>. NHRCI has powers of a civil court and it can recommend among others, legal prosecution, compensation, witness and victim protection. The NHRCI can intervene before proceedings in courts, including the superior courts in India. The NHRCI can also intervene in cases, which are sub-judicial, and over the past 25 years, the same was demonstrated in a few selected instances. As told by the interviewees, the NHRCI in the past had also exercised its powers to summon officials and when the same was not obeyed it had issued bailable warrants. Warrants were issued in some instances to the administrative heads of certain states. For the purpose of investigation into complaints, the NHRCI can also utilise the services of any officer or agency. While there are restrictions on complaints against armed forces,<sup>14</sup> it can still call for reports and if creative, can also undertake fact-finding missions to get victims/ survivors version on board and intervene in the court and also make recommendations to the government.

During the expert team's interactions, it is observed that the interviewees were extremely disappointed with the NHRCI not intervening in serious cases of human rights violations and seldom exercising the powers mentioned above. An interviewee mentioned about the human rights violations against indigenous people in a state in which several deaths had occurred and sexual harassment has been documented and the case has not been finalised by the court. The NHRCI failed to protect those people who went to report to them about the incident as well as have not taken up the case seriously. The NHRCI

stated that they could not confirm the incident because some people could not remember the dates of the incident and some people did not remember the actual number of police/armed forces that actually assaulted them. The expert team observed that most of the complaints dealt by the NHRCI violate the principles of natural justice. The NHRCI limits itself to merely acting as a "post office", it receives complaints from the victims/ survivors or by HRDs/ lawyers on their behalf and share the same with the 'appropriate authority,' calling for a report within six weeks and sometimes eight weeks. In all such cases, the accused and accused's department end up sending a report back, almost always later than the indicated response period, alleging there was no human rights violation. The PHRA provisions are not restrictive and it ensures services of any officer or agency to investigate. However, in practice in most cases, it is the alleged perpetrator who ends up investigating the allegations against him/her. Cases after cases narrated to the team speak volumes of this "malpractice". It is also evident that with the large volume of complaints being handled by the NHRCI and the comparatively lesser number of staff in its law division, the NHRCI is now even resorting to recruitment of temporary consultants instead of experienced permanent staff in its law division.<sup>15</sup>

Every aspect of complaint handling at the NHRCI needs a complete review and changes in procedures. The NHRCI had often claimed that high volume of cases is dealt by it and at times stated the same as a reason for the delay and backlog. Going through the NHRCI's latest available annual report of 2015–2016,<sup>16</sup> 1,18,254 complaints were disposed of during the year. Out of these 1,18,254 cases, 65,220 cases were "dismissed in limine" (55.2%),

<sup>13</sup> Protection of Human Rights Act (PHRA), Articles 12, 13(1), and 13(2).

<sup>14</sup> Protection of Human Rights Act (PHRA), Article 19.

<sup>15</sup> [http://nhrc.nic.in/sites/default/files/Consultatnt\\_proceeding\\_scrutiny\\_Proforma.pdf](http://nhrc.nic.in/sites/default/files/Consultatnt_proceeding_scrutiny_Proforma.pdf), accessed on 4 May 2019

<sup>16</sup> [http://nhrc.nic.in/sites/default/files/NHRC\\_AR\\_EN\\_2015-2016\\_0.pdf](http://nhrc.nic.in/sites/default/files/NHRC_AR_EN_2015-2016_0.pdf), accessed on 12 December 2018.

15,975 disposed with directions (13.5%) and 24,622 transferred to the State Human Rights Commissions (SHRCs) (20.8%). This means, a total of 89.5% cases were not dealt by the NHRCI and were just disposed under above-mentioned heads and only 10.5% of the total cases received were handled by the NHRCI. What is more revealing and shocking is that in only 332 cases compensation was ordered (0.03%) and in only 33 cases compliance reports were served. Disciplinary action was recommended in 30 cases and implemented in 29 cases. While the NHRC claimed that its recommendations are largely respected and accepted by the governments, the annual report tells a totally different story. One of the respondents also mentioned this as a result of no follow up by the NHRC.

***“The NHRCI should have ears and eyes in the grassroots”***

The above arguments do not reflect the fact that over the recent years, the NHRCI has demonstrated a visible reluctance in intervening in serious cases of human rights violations. The expert team’s interactions with the interviewees alarmed them of the NHRCI’s inaction and inadequate actions. Interviewees mentioned about cases of lynching and mob violence across India where individuals and communities are being targeted, but thus far, the NHRCI has not intervened or provided relief. Even when the matter was taken up before the SC in public interest litigation, the NHRCI did not choose to intervene in the same. For instance, when a HRD from Kashmir was barred to attend UN Human Rights Council’s session, the NHRCI registered the case but later closed it based on a report from the intelligence bureau of the Government of India where the bureau alleged that the

individual is not a HRD. The expert team regrets the NHRCI did not investigate further on the issue. This case has been made famous as it was cited by the United Nations Secretary General’s most recent report on reprisals.<sup>17</sup>

As informed by the interviewees, the NHRCI has a practice of appointing its Special Rapporteurs (SRs) but this remains an ineffective system. These SRs have no legal powers or seldom influenced the NHRCI’s action as can be interpreted in the interactions with the respondents. Almost all of these SRs are former bureaucrats, police officers, senior officials of the security forces or former officers of the NHRCI itself. This is a concern, as it does not bring on board the expertise, which the HRDs possess with their years of experience and knowledge. In 2017, the NHRCI appointed two “Special Monitors” from civil society, Ms. Maja Daruwala and Mr. Harsh Mander.<sup>18</sup> Ms. Daruwala was appointed for matters relating to prisons, while Mr. Mander was in charge of matters relating to religious minorities. The latter resigned in June 2018 when the NHRCI failed to acknowledge the work of the monitor and act on his recommendations.<sup>19</sup> It was pointed out to the expert team that this appointment was made just before the SCA accreditation process. It is imperative to note that these monitors and rapporteurs have no powers to act independently. Absence of a definite mandate for rapporteurs and monitors make us believe that these exercises are merely to satisfy the international requirements.

As a watchdog for human rights, the NHRCI has not been able to provide sufficient protection to the victims/ survivors and HRDs. The expert team observes that there is a firm belief among the CSOs and HRDs that the NHRCI should not only be concerned with cases of human rights

<sup>17</sup> Details can be found at, <[http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/36/31](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/36/31)>, accessed on 13 December 2018.

<sup>18</sup> Details can be found at, <<http://nhrc.nic.in/press-release/nhrc-appoints-special-monitors>>, accessed on 14 December 2018.

<sup>19</sup> Details can be found at, <<https://www.hindustantimes.com/india-news/harsh-mander-resigns-as-nhrc-monitor/story-4fEZ14kgCJfnp03WfbBK.html>>, accessed on 14 December 2018.

violations but also to take strong positions to address the systemic root cause of violations now besetting the country. Even in the cases of Foreign Contribution Regulation Act (FCRA) suspension, cancellation and non-renewal, seriously hampering the work of HRDs and CSOs, NHRCI after initial actions immediately prior to its 2016 review, preferred to remain a silent observer.

### ***“Poor sensibilities”***

## **ENGAGEMENT AND RELATIONSHIP WITH CIVIL SOCIETY**

The November 2017 report of the SCA mentions that it had received “extensive” information from CSOs in India about non-effective relationship between the NHRCI and the civil society. The report also mentions that the core group mechanism of NGOs is not effectively functioning nor bridging the gap between the NHRCI and the civil society. The expert team’s interactions with the interviewees revealed that in the initial years of the NHRCI, there was a lot more synergy between the NHRCI and the CSOs. Over the recent years, the interviewees allege that the NHRCI has been selective in engagement with CSOs and critical voices seldom find space in the NHRCI consultations. Even the NGO core group mechanism has crumbled down in the recent years.

The expert team is of the opinion that the NHRCI and CSOs as well as the HRDs are inherent allies in the defence and promotion of human rights. Both groups need to serve as watchdogs of the government’s compliance with international human rights standards and the Indian Constitution. The very dynamic and broad civil society in India has to be acknowledged by the NHRCI and it should see this as an asset and an opportunity and engage them as force multiplier for human rights concerns especially in far-flung areas. Some of the interviewees who met the expert team, expressed that they have completely disengaged with the NHRCI due to

the lack of action by the NHRCI on their lodged concerns and overall situation of human rights in India. They criticised the insensitivity of the NHRCI to their plight such as unreasonable postponement of meetings or hearings with the expenses incurred and time wasted when the CSOs have come from distant districts. The NHRCI is located in the capital city, New Delhi and with no ground presence especially in distant areas and conflict zones, making it increasingly difficult for the individuals and organisations to have a strong relationship and engagement with the NHRCI.

While there is the existence of the SHRCs, throughout the mission, the expert team was made aware that these SHRCs suffer from various challenges such as the lack of manpower, resources and some are not even in function anymore. The SRs for instance could have bridged this gap, but they largely remain only on paper with little implementation and enforcement. Further, the fact of them being originated from the bureaucracy, police and security forces, they remain inaccessible to the common people including the HRDs. The NHRCI’s record of protecting HRDs and intervening in their cases is extremely dismal. The expert team observed that all interviewees strongly echoed this concern. When freedom of expression, assembly and association is being restricted in India, the NHRCI’s silence is highly questionable. A greater proactive approach and posturing by the NHRCI would have certainly helped it being respected by the HRDs and CSOs.

### ***“Always delayed and running late”***

## **ANNUAL REPORTS**

At the time of writing, the most recent annual report of the NHRCI that is publicly available is for 2015–2016. The delay in issuing the annual report is highly troubling for many reasons such as accountability and transparency of the NHRCI’s work. The expert team observed that the NHRCI’s annual reports are always made public after a minimum of two years. This is in violation

of people's right to information. The reason for the delay in releasing the annual reports is said to be the delay on part of the Government from tabling it in the Parliament. In view of the expert team, annual reports are not primarily for

the use of the Government or Parliament. It is fundamentally in the domain of people's right to know. The annual reports should be made public at the same time when it is submitted to the Government and the Parliament.

*“Too little, too late and ineffective”*

The SCA report on NHRCI’s accreditation review in November 2017 mentions about proposed amendments to the PHRA.<sup>20</sup> The report states, “The SCA notes that the NHRCI has proposed amendments to its enabling law, and encourages the NHRCI to strengthen its legislative framework by continuing to advocate for passage of these amendments.” At the onset, the expert team would like to mention that the proposed amendments to the PHRA were not the outcome of any consultative process and no civil society organisations or HRDs were ever consulted. This goes against the very basic spirit of the PP. During the interactions with the interviewees, they claimed that they were kept in dark about the amendments until the same was tabled in the Parliament. The expert team took extra efforts to talk about the proposed amendments which were then tabled before the Parliament. The amendment draft as provided to the SCA in no ways ensure the NHRCI to be in compliance with the PP. This section broadly analyses the proposed amendments

and also suggest areas, which need a relook and consideration for amendments.<sup>21</sup>

The expert team is of the opinion that the proposed amendments fail to work towards complete realisation of the PP in the NHRCI. Regarding the point on enlarging the scope of eligibility and selection of chairperson of the NHRCI, the opinions of the interviewees were divided and more discussions are in need. The team is of the opinion that the NHRCI should discontinue the practice of only a former judge of the SC to be the chairperson of the NHRCI. Quasi-judicial function is only one aspect of the NHRCI and for all other functions under Section 12 of the PHRA,<sup>22</sup> it is not always that the judges bring on board the most appropriate capacities and expertise. The expert team also has concerns when it comes to the average age of the chairpersons and members at the NHRCI. A NHRI with its leadership averaging above 60 years in age is not the most encouraging. This is also goes against the spirit of diversity

<sup>20</sup> GANHRI Sub-Committee on Accreditation Report – November 2017, p. 18, available at <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Pages/SCA-Reports.aspx>, accessed on 15 December 2018.

<sup>21</sup> The proposed amendments to the PHRA pertaining to the NHRCI are:

- (i) amendment of clause (a) of sub-section (2) of section 3 of the Act so as to provide that a person who has been a Judge of the Supreme Court is also made eligible to be appointed as Chairperson of the Commission in addition to the person who has been the Chief Justice of India;
- (ii) amendment of clause (d) of sub-section (2) of section 3 of the Act to increase the Members of the Commission from two to three of which, one shall be a woman;
- (iii) amendment of sub-section (3) of section 3 of the Act so as to include Chairperson of the National Commission for Backward Classes, Chairperson of the National Commission for Protection of Child Rights and the Chief Commissioner for Persons with Disabilities as deemed Members of the Commission;
- (iv) amendment of sub-sections (1) and (2) of section 6 of the Act so as to reduce the term of the Chairperson and Members of the Commission from five to three years; and shall be eligible for re-appointment;

<sup>22</sup> 12. Functions of the Commission

The Commission shall perform all or any of the following functions, namely:

- (a) Inquire, suo-moto or on a petition presented to it by a victim or any person on his/her behalf [or on a direction or order of any court], into complaint of (i) violation of human rights or abetment thereof; or (ii) negligence in the prevention of such violation, by a public servant;
- (b) Intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court;

and pluralism as envisaged in the PP. Further, restricting the chairpersonship to only judges has restricted the possibility of HRDs and CSOs that have significant expertise and practical knowledge in the field of human rights to be the top leader of the NHRCI. It is important that among others, the human rights lawyers, activists, professionals, academics are also considered to head the NHRCI. Their capacities on human rights will only add value to the work of NHRCI.

The amendments in the PHRA for complete adherence to the PP should bring into its fold the following:

- (i) If the NHRCI Chairperson has to be a retired judge, then the expert team suggests that it should be the retired Chief Justice of India. This will allow the NHRCI the highest authority and narrow senior judges' harmful competition for the post. In case of the eligibility of chairpersonship remaining the same, the two other retired judicial members are neither necessary because the quasi-judicial function suitable for former judges is merely one of many functions, nor desirable because the very nature of the NHRCI is also in need for activist-type members from the CSOs rather than retired judicial or scholastic members.
- (ii) It is important to note that quasi-judicial function is only one out of ten functions to be undertaken by the NHRCI as listed in Section 12 of PHRA. Hence, the NHRCI in its appointments should achieve a diversity based on expertise and also other social

factors. The NHRCI and the Government of India may argue that there are thematic human rights institutions in India, however the power vested in the NHRCI is unique and as the apex human rights institution in India, it is bound to be inclusive.

- (iii) On this note, the expert team would like to share observations about deemed members of the NHRCI as mentioned in Section 3 of PHRA. The amendments propose the inclusion of more thematic human rights commissions as deemed members of the NHRCI. The expert team welcomes this initiative. However as observed from the interactions with the interviewees, the functioning of the full commission, a combination of the NHRCI and thematic human rights institutions is actually dormant. There are hardly any meetings held and if held majority are absent, as interpreted from the right to information responses shared with the expert team. Further, the expert team has two very specific concerns. First, all thematic human rights institutions other than the NHRCI have direct political appointments of party members belonging to the ruling dispensation. The team fears this will further erode the independence of the NHRCI. Second, deemed members are not supposed to be part of the quasi-judicial functions of the NHRCI as stipulated in Section 12(a) and hence diversity in the composition is required. The NHRCI's commissioners should be well versed in issues among others, concerning gender,

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<sup>(c)</sup> Visit, notwithstanding anything contained in any other law for the time being in force, any jail or other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection, for the study of the living conditions of the inmates thereof and make recommendations thereon to the Government;

<sup>(d)</sup> Review the safeguards provided by or under the Constitution or any for the time being in force for the protection of human rights and recommend measure for their effective implementation;

<sup>(e)</sup> Review the factors, including acts of terrorism that inhibit the enjoyment of human rights and recommend appropriate remedial measures;

<sup>(f)</sup> Study treaties and other international instruments on human rights and make recommendations for their effective implementation;

<sup>(g)</sup> Undertake and promote research in the field of human rights;

<sup>(h)</sup> Spread human rights literacy among various sections of society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminar and other available means;

<sup>(i)</sup> Encourage the efforts of non-governmental organisations and institutions working in the field of human rights;

<sup>(j)</sup> Such other functions as it may consider necessary for the protection of human rights.

caste, religion, disability, poverty, land, business and human rights, HRDs should not direct a victims/survivors or their representative to other NHRIs. The NHRCI should respect the fact that victims/survivors or their representative put their faith in the NHRCI and NHRCI should be duty bound to hear them and ensure justice.

- (iv) More pressing than who are being appointed is who is appointing them and the process for the same. As discussed in Chapter 2 of this report, the appointment committee has to be restructured. The expert team had observed that the appointment committee is on most occasions in favour of the government of the day. The team suggests that the appointment committee to be reconstituted in a manner it is not dominated by the representatives of the ruling dispensation and which also has representation from among others, the Supreme Court. The NHRCI and the CSOs need to hold extensive deliberation on the same and refer to best appointment models in the region and beyond. Section 4 of the PHRA<sup>23</sup> needs to be amended to ensure a transparent appointment process through advertising vacancies, inviting nominations and applications and ensuring an appointment process where transparency is assured in the shortlisting and selection of the proposed candidate to ensure that there will be no bias in the appointment process.

- (v) By just the amendment in Section 3 of the PHRA and to increase the number of members of NHRCI by one additional member and keeping at least one non-judicial post reserved for women is not going to address the concerns regarding diversity and pluralism. This is also contradictory to the NHRCI's claims of dealing with a large number of human rights complaints which requires a number of three-member subcommittees system. The expert team suggests that first, the number of members be an odd number instead of an even number like six as proposed. Otherwise, the NHRCI may fall into a deadlock or its chair should be given a casting vote. Second, the number of members should be increased to between 11 to 15 so that all marginalised communities and groups based on religion, caste, gender can be represented and also an equal geographical representation be ensured. The NHRCI would be able to run three to four standing subcommittees to enhance specialisation and efficiency. Finally, number of women members in the NHRCI should at least be equal to men members in the NHRCI.

- (vi) In this mission, the expert team has also observed that too often it takes a long period to fill a vacancy in the membership. There should be a legal provision stipulating that any vacancies should be filled within 60 days, for example, from the day the vacancy has taken place. The team also

<sup>23</sup> 4. Appointment of Chairperson and other Members

<sup>1)</sup> The Chairperson and [the Members] shall be appointed by the President by warrant under his hand and seal; Provided that every appointment under this sub-section shall be made after obtaining the recommendations of a Committee consisting of

(a) the Prime Minister – Chairperson

(b) Speaker of the House of the People – Member

(c) Minister in-charge of the Ministry of Home Affairs in the Government of India – Member

(d) Leader of the Opposition in the House of the People – Member

(e) Leader of the Opposition in the Council of States – Member

(f) Deputy Chairman of the Council of States – Member

Provided further that no sitting Judge of the Supreme Court or sitting Chief Justice of a High Court shall be appointed except after consultation with the Chief Justice of India.

<sup>2)</sup> No appointment of a Chairperson or a Member shall be invalid merely by reason of any [vacancy of any member in the Committee referred to in the first provision to sub-section (1)].

recommends the PHRA to be amended to disqualify any person with the political party membership for NHRCI membership. Members' loyalty should be directed towards international and constitutional human rights norms and principles rather than to their political party or its official positions.

(vii) For a country like India, the NHRCI cannot function with a centralised office in New Delhi. It makes it extremely difficult for victims/survivors or their representatives to approach the NHRCI in cases/instances of human rights violations and for the NHRCI to understand the multiple issues and challenges faced by Indian citizens. An amendment in the PHRA should facilitate the NHRCI to have offices at least in five more regions (West, Central, South, East and North-East) and the current office can attend to issues from northern India. This will not only increase the access of people to the NHRCI but also reflect a stronger human rights protection mechanism and representation on the ground.

(viii) This report noted on the existence of the SHRCs in India, established in accordance with Section 21 of the PHRA. A study of the status of the SHRCs reveals that there are 25 SHRCs in India and out of these, in 10 SHRCs posts of the chairpersons are

vacant; out of total 50 members in these 25 SHRCs, 20 positions of members are vacant and among senior staff, out of 25 registrars for the 25 SHRCs, 14 remain vacant. The situation of the SHRCs in India is worrisome and may need a relook at the efficacy of the SHRCs. Further, the issues undertaken by the SHRCs and the NHRCI are different and divided under central and state lists and hence regional offices of NHRCI will not adversely impact the SHRCs. On a final note, the NHRCI and SHRCs are not courts and victims/survivors or their representatives should have the right to approach which institutions they believe would be able to provide appropriate justice.

(ix) Section 19 of the PHRA<sup>24</sup> needs to be repealed and the NHRCI should have the powers to independently enquire into the human rights violations by armed forces. The NHRCI should be empowered to enquire into all violations of human rights, irrespective of the perpetrator of violations.

(x) Annual report as mentioned in Section 20 of the PHRA<sup>25</sup> should not be held on to for the requirement of it being tabled in the Parliament. Annual report should be released within three months of a calendar/ financial year as people have a right

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<sup>24</sup> 19. Procedure with respect to armed forces

1) Notwithstanding anything contained in this Act, while dealing with complaints of violation of human rights by members of the armed forces, the Commission shall adopt the following procedure, namely:

(a) It may, either on its own motion or on receipt of a petition, seek a report from the Central Government;

(b) After the receipt of the report, it may, either not proceed with the complaint or, as the case may be, make its recommendations to that Government.

2) The Central Government shall inform the Commission of the action taken on the recommendations within three months or such further time as the Commission may allow.

3) The Commission shall publish its report together with its recommendations made to the Central Government and the action taken by that Government on such recommendations.

4) The Commission shall provide a copy of the report published under sub-section (3) to the petitioner or his representative.

<sup>25</sup> 20. Annual and special reports of the Commission

1) The Commission shall submit an annual report to the Central Government and to the State Government concerned and may at any time submit special reports on any matter, which, in its opinion, is of such urgency or importance that it should not be deferred till submission of the annual report.

2) The Central Government and the State Government, as the case may be, shall cause the annual and special reports of the Commission to be laid before each House of Parliament or the State Legislature respectively, as the case may be, along with a memorandum of action taken or proposed to be taken on the recommendations of the Commission and the reasons for non-acceptance of the recommendations, if any.

to know about the work undertaken by the NHRCI. Delaying the release of annual reports beyond this period makes it less useful and this disrupts the accountability mechanism.

- (xi) Overall, the NHRCI should be moved out from the Ministry of Home Affairs and come under the ambit of the Constitution of India. This will not only lead to operational and financial autonomy but also a greater independence and accountability.
- (xii) Most importantly, any amendment in the PHRA should not be done keeping the CSOs and HRDs in isolation and dark. The NHRCI and the Ministry of Home Affairs have the onus and responsibility to call for wide consultations and deliberations or call for comments and inputs on the proposed amendments. Until voices of people are taken on board, the fear of the NHRCI moving further away from PP looms large.

The expert team would like to recall the letter dated 12 April 2017 by the then UN High Commissioner for Human Rights, Mr. Zeid Ra'ad Al Hussein addressed to Ms. Sushma Swaraj, Minister of External Affairs. The expert team is in complete support of the recommendations of the High Commissioner and appeals to the NHRCI and Government of India to seriously consider the same. Following are the recommendations made by the High

Commissioner and some of them are already explained in the earlier section:

- (i) Establishing an open, transparent and merit-based selection process for the members of the governing body of the NHRC<sup>26</sup> by giving equal representation to all sections of the society.
- (ii) Appointing an advisory council to the governing body of NHRC without voting rights comprising NGOs, civil society actors and undefended experts.
- (iii) Empowering NHRC to issue independently its own rules of procedure and guidelines with provisions for citing any person for violations of these procedures and guidelines.
- (iv) Establishing three additional offices of NHRC in Eastern, Western and Southern parts of India and providing the Commission with appropriate funds to carry out its mandate.
- (v) Establishing a toll-free-national-help line for contacting NHRC in emergency and urgent situations of grave violations of human rights.
- (vi) Empowering NHRC to cover all relevant cases involving paramilitary forces and the army, including in the Jammu and Kashmir state.
- (vii) Empowering NHRC to inquire into alleged human rights violations and abuses by the armed forces of India.

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<sup>26</sup> The NHRC in the High Commissioner's recommendations refers to the NHRCI.

## CHAPTER 4 RECOMMENDATIONS

Based on the interaction with the interviewees and study of existing materials, the expert team has shared their observations in the earlier chapters. Following the observations, here is a set of recommendations to the concerned stakeholders:

### GOVERNMENT OF INDIA

- (i) Undertake all measures to ensure that the NHRCI is in complete compliance with the Paris Principles. Towards the same, the NHRCI should follow all the SCA recommendations on transparency in appointment process, calling for nominations for chairperson and members of NHRCI and discussions on annual reports in the Parliament.
- (ii) Undertake all measures to ensure that the amendments to the PHRA are only taken up after a process of discussions and deliberations with CSOs and HRDs in India.
- (iii) Undertake all measures to take appropriate steps to comply with the recommendations of the UN High Commissioner for Human Rights.
- (iv) Initiate actions to ensure greater accessibility to and for NHRCI and take steps towards establishing regional offices of NHRCI.
- (v) Take appropriate measures to transform NHRCI into a constitutional institution and not a statutory institution. Towards the same, engage with all parliamentarians and initiate discussions within and outside the Parliament.

### NATIONAL HUMAN RIGHTS COMMISSION OF INDIA

- (i) Ensure that the amendments tabled in the Parliament are first discussed and debated in the Parliament and outside.
- (ii) Call for a broad consultation with CSOs and HRDs on NHRCI and the PHRA.
- (iii) Make public through NHRCI's website all the recommendations to the Ministry of Home Affairs on proposed amendments to the PHRA.
- (iv) Ensure that the posts of DGI and SG are not seconded from the Government of India and initiate independent and transparent process towards their appointments.
- (v) Advocate with the Government of India for larger presence across the country through regional offices of the NHRCI.
- (vi) Advocate with the Government of India for a larger number of members in the NHRCI to ensure pluralism and diversity and demonstrate inclusion.
- (vii) Advocate with the Government of India that all staff of the NHRCI will be independently appointed by the NHRCI and not seconded from the Government of India and other state governments.
- (viii) Make public all reports of the SRs and special monitors, and make public their appointment criteria and process.
- (ix) Advocate with the Government of India for a constitutional status for the NHRCI.

- (x) Advocate with the Government of India to take actions to all recommendations of the SCA.
- (xi) Advocate with the Government of India to restructure the appointment committee and ensure NHRCI participation in the appointment process.
- (xii) Given the grave violations of human rights and shrinking of democratic space in India, take immediate and appropriate actions to safeguard the constitution and publicly condemn the actions of the government which result in curbing of fundamental rights.
- (xiii) Undertake review of the legislations misused by the government to restrict and criminalise work of human rights defenders. This must include among others, the FCRA, Unlawful Activities Prevention Act (UAPA), and the National Security Act (NSA).
- (xiv) Make public the reports of all the independent investigations undertaken by the NHRCI.
- (ii) Build larger networks of HRDs towards ensuring the NHRCI is an independent institution and fully compliant with the PP.
- (iii) Use litigation as a tool to bring reform within NHRCI and engage with GANHRI, Asia Pacific Forum of NHRIs (APF), UN and other relevant institutions to share information and advocate on NHRCI reforms.
- (iv) Develop factual sheets on the status of each NHRI in India and bring this debate in the mainstream.

### **GLOBAL ALLIANCE OF NATIONAL HUMAN RIGHTS INSTITUTIONS (GANHRI)**

- (i) In the wake of no changes within NHRCI and as the proposed amendments did not pass in the parliament, consider the possibility of a special review of the NHRCI under the rules of procedure of the SCA, 2017.
- (ii) Initiate discussions with all stakeholders on strengthening the SCA review process and consider the possibility of greater engagement of civil society organisations, which engage with GANHRI and its SCA.
- (iii) Consider having independent experts on board of the SCA assisted by a full-time dedicated team of staff that work exclusively for the SCA collecting necessary documents prior to the accreditation process.

### **INDIAN PARLIAMENT**

- (i) Undertake a healthy discussion by engaging with the CSOs on the proposed amendment to the PHRA.
- (ii) Undertake a debate on the annual reports of the NHRCI.
- (iii) Initiate a debate on the possibility of constitutional status to the NHRCI.
- (iv) Have a proactive approach and questioning on human rights and the work of the NHRCI in the Parliament.

### **ASIAN NGO NETWORK ON NHRIs (ANNI)**

- (i) Initiate similar missions in other Asian countries where NHRIs need immediate attention.
- (ii) Take steps to engage in a systematic way with GANHRI and APF and highlight concerns on the specific SCA process.
- (iii) Engage with the UN mechanisms to further the concerns regarding NHRIs in Asia.

### **INDIAN CIVIL SOCIETY**

- (i) Continue engaging with the NHRCI and monitor its functioning critically.

## ANNEX I: LIST OF INTERVIEWEES

Sr. No	Name	Details	Mode
1	<b>Anil Kumar Parashar</b>	Former Joint Registrar Law, NHRC, Served in NHRCI for 23 years	In Person
2	<b>Babloo Loitongbam</b>	Human Rights Alert – Manipur (HRA)	—"–
3	<b>Henri Tiphagne</b>	AiNNI	Online
4	<b>Colin Gonsalves</b>	Senior Advocate, Supreme Court of India	In Person
5	<b>Kirity Roy</b>	Banglar Manab Adhikar Suraksha Mancha (MASUM)	Online
6	<b>Shanta Sinha</b>	Former Chairperson, National Commission for Protection of Child Rights (NCPCR)	—"–
7	<b>V.A. Ramesh Nathan</b>	National Dalit Movement for Justice (NDMJ)	—"–
8	<b>Venkatesh Nayak</b>	Commonwealth Human Rights Initiative (CHRI) and National Campaign for Right to Information (NCPRI)	In Person
9	<b>Shankar Sen</b>	Former Director General of Police and first Investigation Department head of NHRCI	—"–
10	<b>Ravi Nair</b>	SAHRDC	—"–
11	<b>A.P. Shah</b>	Former Chief Justice of Delhi High Court and Chairperson of Law Commission of India	—"–
12	<b>Maja Daruwala</b>	Prison Monitor of NHRCI and Working Group on Human Rights in India and UN (WGHR)	—"–
13	<b>Y.S.R. Murthy</b>	Professor and Registrar, O.P. Jindal Global University, Former Director Research at NHRC	—"–
14	<b>Kavita Srivastava</b>	People's Union for Civil Liberties (PUCL)	Online
15	<b>Vrinda Grover</b>	Advocate, Supreme Court of India	In Person
16	<b>Sudha Bhardwaj</b>	Advocate, Chhattisgarh High Court and Visiting Professor National Law University Delhi	—"–
17	<b>Kalyani Menon Sen</b>	Feminist Learning Partnership and Women against Sexual Violence and State Repression (WSS)	Online
18	<b>Khurram Parvez</b>	Jammu Kashmir Coalition of Civil Society (JKCSS)	—"–

**The Asian NGOs Network on NHRIs (ANNI) is a network of human rights organisations and defenders engaged with national human rights institutions in Asia to ensure the accountability of these bodies for the promotion and protection of human rights**

**The ANNI Members are :**

Advar- Iran;  
Ain o Saish Kendra (ASK)- Bangladesh;  
All India Network of NGOs and Individuals Working with National and State Human Rights Institutions (AiNNI)- India;  
Bytes for All (B4A)- Pakistan;  
Cambodian Human Rights and Development Association (ADHOC)- Cambodia;  
Cambodian League for Promotion and Defence of Human Rights (LICADHO)- Cambodia;  
Cambodian Working Group for the Establishment of an NHRI (CWG)- Cambodia;  
Centre for Human Rights and Development (CHRD)- Mongolia;  
Civil Society and Human Rights Network (CSHRN)- Afghanistan;  
Commission for Disappearances and Victims of Violence (KontraS)- Indonesia;  
Covenants Watch- Taiwan;  
Defenders of Human Rights Centre- Iran;  
Education and Research Association for Consumer Education (ERA Consumer)- Malaysia;  
Hong Kong Human Rights Monitor (HKHRM)- Hong Kong;  
Human Rights Organization of Kurdistan (ALKARAMA);  
Indonesian Human Rights Monitor (IMPARSIAL)- Indonesia;  
Indonesian NGO Coalition for International Human Rights Advocacy (HRWG)- Indonesia;  
Informal Sector Service Centre (INSEC)- Nepal;  
Institute for Policy Research and Advocacy (ELSAM)- Indonesia  
International Campaign for Human Rights in Iran- Iran  
Joint Movement for NHRI and Optional Protocols (Japan)  
Judicial System Monitoring Program (JSMP)- Timor-Leste  
Justice for Peace Foundation (JPF)- Thailand  
Korean House for International Solidarity (KHIS)- South Korea;  
Law and Society Trust (LST)- Sri Lanka;  
Lawyers' League for Liberty (LIBERTAS)- Philippines;  
Maldivian Democracy Network (MDN)- Maldives;  
Odhikar- Bangladesh;  
Peoples' Empowerment Foundation (PEF)- Thailand;  
Philippine Alliance for Human Rights Advocates (PAHRA)- Philippines;  
Potohar Organization for Development Advocacy (PODA)- Pakistan;  
Progressive Voice (PV)- Myanmar;  
Suara Rakyat Malaysia (SUARAM)- Malaysia;  
Taiwan Association for Human Rights (TAHR)- Taiwan;  
Universal Periodic Review- Human Rights Forum (UPRHRF)- Bangladesh