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NON-IMPLEMENTATION OF THE 17TH AMENDMENT TO THE CONSTITUTION - PERSPECTIVES FROM THE PROVINCES

DUE PROCESS AND THE POLICE

LAW & SOCIETY TRUST

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Editor's Note ... ...

The *Review*, in this Issue revisits concerns that may, at first glance, ring a tired refrain to many in this country, namely, the due implementation of the 17th Amendment to the Constitution with particular emphasis on the proper functioning of the National Human Rights Commission (NHRC) and the National Police Commission (NPC).

Regardless of the familiar tone of such concerns, the *Review*, in the first discussion paper by ***Chandralal Majuwana***, publishes refreshingly different perspectives from people reflecting a wide gamut of the citizenry from the provinces in Sri Lanka in relation to these vital constitutional human rights monitors.

The perspectives emerged from a ten-month long series of provincial consultations conducted by the Civil & Political Rights Programme of the Law & Society Trust in selected provinces in Sri Lanka. A high level of dissatisfaction was expressed by participants at these consultations in regard to the unsatisfactory functioning of the NHRC and the NPC, even during the period when these bodies were fully in existence to all intents and purposes.

At the current point of time, the situation is worse; the terms of the members of both these bodies have expired but fresh appointments have not been made. While the NPC is non-functional, the NHRC appears to maintain an office and conducts inquiries. In both instances, this is not by any means, a happy fate to be visited on these constitutional monitors.

The *Review* publishes this discussion paper in an effort to indicate that concerns regarding adherence to the Constitution by those in government are not limited to those living in the capital city alone. Rather, they are shared by people of the provinces whose experiences with these human rights monitoring bodies are often far more practical and realistic, instead of being limited to academic or idealistic responses.

A majority of the participants at the consultations had a negative experience in one way or the other with the systems of hierarchical power, whether at a police station or at a public administrator's office. Disgruntled with their experiences and in some cases, mentally or physically affected, they have been unable to find redress in any forum. The thought of going to Court is often only an unrealistic objective given the time and the cost involved. Ultimately they remain vehemently angry not only at the injustice that was meted out to them but also by the fact that no authority or official afforded

them redress. Such individual or collective anger remains deeply disturbing to the societal fabric of any country; this perhaps must be the one imperative reason as to why the public call for the revitalization of our constitutional institutions must not be abandoned as being futile, however tempting this thought may be.

As a supplementary to these discussions, the *Review* publishes extracts from a 2009 report by the New Delhi based ***Commonwealth Human Rights Initiative*** (CHRI) on the Indian experience with its own police monitors. As in Sri Lanka, India has long grappled with the problem of translating impressive Court directions as to the safeguarding of rights into actual practice. Here too, the CHRI study examines the manner in which, despite an explicit Supreme Court directive (2006) in regard to the effective establishment of Police Complaints Authorities, such directives have been rendered nugatory in actual reality.

The Indian experience has however been far more involved than ours and offers valuable lessons in regard to future attempts to bring back Sri Lanka's NPC to an appreciable level of independent and effective functioning.

Kishali Pinto-Jayawardena

SRI LANKA'S CONSTITUTIONAL INSTITUTIONS: PERSPECTIVES FROM THE PROVINCES

Chandralal Majuwana[*]

1. Introduction

During September 2008-June 2009, 183 grassroots activists, lawyers, public administrators and activists in various provinces in Sri Lanka signed a public petition at the culmination of fourteen one-day consultations conducted by the Law & Society Trust at the regional level in Nuwara Eliya, Kandy, Galle, Baddegama, Ratnapura, Puttalam and Anamaduwa.[1]

The petition called upon the government to enhance the independence of the National Human Rights Commission and the National Police Commission, establish the Constitutional Council without further delay, ensure the right of the public to complain to the National Human Rights Commission without any limitation, speed up the Public Complaints Procedure of the National Police Commission and ensure the safety of complainants, victims and the witnesses in regard to cases of grave human rights violations.

The consultations focused on the non-implementation of the 17th Amendment to the Constitution, and on the performance of the National Human Rights Commission (hereinafter 'NHRC') and the National Police Commission (hereinafter 'NPC').

Concerns regarding the functioning and the practical viability of these overseeing mechanisms had been visible in the public domain and the failure to duly carry out their functions had been strongly criticized and questioned by the public. These attitudes were well reflected in the public consultations conducted during this period at which interesting perspectives emerged from the participants in regard to the functioning of the NHRC and NPC. For example, an observation made in regard to the National Human Rights Commission by a retired school principal Mr. Ranjith Premathilake at the Ratnapura consultation was as follows; "there is no earthly reason why the NHRC should continue as a statutory body. It is only a drain on the public purse".[2]

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[*] Attorney-at-Law; Project Officer, Civil and Political Rights (CPR) Programme, Law & Society Trust, 2008-2009. The author acknowledges Ms. Madushika Jayachandra, Attorney-at-Law and Programme Officer, CPR Programme, February 2009-June 2009, for her contribution to this paper.

[1] Coordinators and resource persons for the consultations were as follows. Mr. Chandralal Majuwana, AAL and LST Project Officer, Civil and Political Rights Programme; Mr. Trini Rayan, AAL (resource person for the Nuwara Eliya consultation); Mr. Keerthi Rajapakse, AAL (resource person for the Kandy and Ratnapura consultations); Mr. Sarath Widanapathirana, Senior AAL (resource person for the Puttalam and Anamaduwa consultations); and Mr. Nalin Abeyratne, AAL (resource person for the Galle consultation. Ms. Kishali Pinto-Jayawardena, AAL and Deputy Director/Head of the Civil and Political Rights Programme, Law & Society Trust and Dr. Jayantha De Almeida Guneratne, President's Counsel and Consultant to the Programme advised and directed the work. All annexes referred to in this paper are available for reference at the LST office, while only Annexure G is published in this Issue due to lack of space.

[2] See, Annexure D, Summary of Report of consultation held in Ratnapura.

The consultations conducted by the Civil and Political Rights Programme of the Law & Society Trust (LST) brought together 183 participants representing various fields, professions and organizations who attended the consultations. The following table provides an overview of the number of participants who attended each consultation and their background.

Region	No. of Parti-cipants	Background of the Participants		
		Professions/Occupa--tions represented	Organizations represented	Other
Nuwara Eliya	43	Attorneys-at-Law, etc.	PALM Foundation, Legal Aid Commission, Sinhala Tamil Rural Women's Organization, United Lanka Welfare Foundation, Jayamaga Development Foundation, Foundation for Co-existence, Emai Agam Youth Association, Asian Human Rights Office Kandy, Prayathna, J.D.F., S.L.T.S., Department of Education, etc.	Law students
Kandy	23	Chartered Accountants, Attorneys-at-Law, Clerks, Businessmen, Programme Coordinators, Samurdhi Development Officers, Teachers, Grama Niladhari, Farmers, etc.	Prayathna, etc.	Vihara--dhipathi, Students
Galle and Baddega--ma	40	Attorneys-at-Law, Divisional Director of Education, etc.	Galle Human Rights Protection Org., Rural Women Front, Galle District Media Association, Human Strength Foundation, Amalgamated Organization of Persons Aggrieved by the Highway, TEAM-8, Galle Law Association, Baddegama South United Welfare Society, Baddegama Gal Lella, Trade Unions, Baddegama "Sa" Organizaation, etc.	
Ratnapura	36	Retired Government Servants, Retired Archaeological Officer, Vice Principal of Sunday School, Attorneys-at-Law, Teachers, Businessmen, etc.	Civil Safety Committee, Children's Society, Amadyapa, Women's Society, etc.	Students

Puttalam and Anamadu--wa	41	Attorneys-at-Law, Grama Niladhari, Security Guards, Secretaries, Clerks, Media Personnel, Photographer, Farmers, Businessmen, etc.	Civil Safety Committee, etc.	

In addition to the public consultations, LST staff also engaged in meeting provincial staff members of the NHRC and NPC who preferred to remain anonymous due to the negative impact that disclosing information regarding the functioning of these two institutions may have on their employment. In particular, officers of the NHRC were highly sensitive to speaking with the LST due to the prohibition placed on disclosing any information to NGOs imposed by the NHRC head-office. Consequently, the consultation team was careful in this respect to preserve the anonymity of those who spoke to the team.

Based on feedback received from the participants at these regional consultations and field visits to the NHRC/NPC offices during 2008 and 2009, this Briefing Paper evaluates public perspectives at the provincial level in Sri Lanka towards the status, mandate and performance of the Human Rights Commission and the National Police Commission.

2. The History and Background of the 17th Amendment to the Constitution and the Functioning of the NHRC/NPC[3]

The 17th Amendment to Sri Lanka's Constitution was certified by the Speaker of Sri Lanka's Parliament on 3rd October 2001. In a House, consisting of parliamentarians otherwise divided on party political lines, this constitutional amendment was passed without opposition with one particular purpose in mind; that is, to restore public confidence in the rule of law.

The main reason for its passing was the public outcry to bring back a measure of de-politicization to the Sri Lankan public service, which had been deprived of credibility due to long and consistent political interference with appointments, transfers, dismissals and disciplinary control of public servants. As a result, the functioning of the public service had deteriorated. In addition, it was felt that human rights monitors should be vested with greater independence and more substantial powers, while political interference with the police force should be checked.

Thus, the provisions of the 17th Amendment strengthened the process of appointment to existing key institutions such as the Public Service Commission, the NHRC and the Bribery Commission. It created two new rights monitoring bodies, the NPC and the Elections

[3] Much of the discussion in this segment is drawn from the Briefing Paper by the Civil & Political Rights Programme of the Law & Society Trust sent to the Special Rapporteur on Torture, Prof. Manfred Novak; see "Briefing Paper forwarded to the Special Rapporteur on Torture, prior to his Mission Visit to Sri Lanka", 29 October 2007 (unpublished).

Commission. Members to these Commissions were appointed by the President on the recommendation of a newly created Constitutional Council (CC).

The CC was comprised of five individuals of high integrity and standing in public life and with no political affiliations, out of which three members represented the minorities, and had to be nominated jointly to the CC by the Prime Minister and the Leader of the Opposition. One member had to be nominated by the smaller parties in the House, which did not belong to either the party of the Prime Minister or the Leader of the Opposition. These six appointed members held office for three years. They could be removed only on strictly mandated grounds and any individual appointed to vacancies created held office for the un-expired portion of that term.

In addition, the President appointed a person of his or her own choice. The rest of the CC comprised the Leader of the Opposition, the Prime Minister and the Speaker of the House *ex officio.* The terms of office of its six appointed members expired in March 2005. But the vacancies arising therein were not filled which resulted in the lapsing of the CC. Though names of five nominated members were agreed upon by the Prime Minister and the Leader of the Opposition and communicated to the President for appointment as constitutionally required in late 2005, these appointments were not made. The deliberate delay on the part of the smaller political parties in parliament to agree by majority vote on the one remaining member to the CC was cited as the reason for the CC not being brought into being. Representations made to the President by civil society groups that the one vacancy in the CC should not prevent the appointment of the members nominated already and that the proper functioning of the body was essential to the good administration of the country, were disregarded.

Shortly thereafter, President Mahinda Rajapakse made his own appointments to the commissions, including the NPC and the NHRC. Despite protests by civil society and some concerned members of the public that these appointments were unconstitutional, the appointments were not revoked.

The government then initiated a Parliamentary Select Committee process in mid 2006 to examine as to the manner in which the 17th Amendment could be improved. This Committee sat for more than a year and a half with no perceptible results. From late 2009, constitutional commissions such as the NHRC and NPC lapsed altogether due to the terms of some of their members expiring. New members were not appointed.

Implementation of Article 41A and 41B of the 17th Amendment to the Constitution bringing the CC into being and re-constituting the 'independent commissions' including the NPC with the new members being nominated by the CC as constitutionally required, remains of extreme importance.

2.1 National Human Rights Commission (NHRC)

One of the first decisions of the NHRC consequent to its members being unconstitutionally appointed by the President after the lapsing of the Constitutional Council (CC) was to stop inquiring into the complaints of over 2,000 disappearances of persons that had been initiated by the previous Commissioners. The reason given for stopping their inquiries "for the time being, unless special directions are received from the government" was that "the findings will result in payment of compensation, etc".[4]

Though this decision was reversed later following public protests, there was no significant outcome as a result of these inquiries. Later, the Commissioners imposed a three-month time limit for accepting complaints regarding violations of fundamental rights, despite the fact that the NHRC Act, No.21 of 1996 (hereafter, the NHRC Act) had specifically not imposed such a time limit due to the difficulty of people from remote places travelling to the NHRC offices to lodge complaints. However, this time limit continues to be in operation. In recent times, the NHRC has also stated that suspects arrested under emergency laws have no right to confidential legal representation.

In 2008, the International Coordinating Committee (IC) of National Human Rights Institutions (NHRI) of the United Nations downgraded the status of the NHRC from category 'A' to category 'B' due primarily to concerns raised regarding its independence from government and its failure to submit Annual Reports. This downgrading was continued in the years thereafter.

Specific Concerns regarding the NHRC's Statutory Mandate

Apart from the independence of the institution, there are specific concerns regarding the limitations of its statutory mandate. The NHRC is designed to provide relief through informal procedures and perform other functions to promote and protect human rights. However, it inquires only regarding complaints of 'fundamental rights' that are defined in narrow terms in the Constitution and does not include the broad spread of rights recognised in international instruments, including the right to life. Though past Commissioners had attempted to transform the NHRC into an effective human rights monitor, their efforts were hampered by specific defects which would be briefly examined below. The NHRC's recommendations are not legally enforceable; instead, it can only conciliate and mediate between the parties. In many instances, its recommendations are simply ignored by government bodies.

A central function of the NHRC is to investigate human rights violations. Monitoring bodies set up under Sri Lanka's obligations to international treaties have affirmed—in their Concluding Observations to periodic reports of the State, submitted under the reporting

[4] See, verbatim citation from a note of the Secretary to the Human Rights Council, dated 29 June 2006.

procedure—that there is a dire need to strengthen "the capacity of the National Human Rights Commission to investigate and prosecute alleged human rights violations".[5]

A good example of this deficiency is seen in the way the NHRC addresses torture even though it has adopted a specific policy against torture in its various National Strategic Plans of Action. In the past, the NHRC had failed to develop proper procedures for the conduct of investigations into cases of torture and its district coordinators followed the practice of settling such cases for nominal monetary compensation. Responding to significant public concern, the NHRC made a policy decision in 2004 not to mediate/conciliate complaints regarding Article 11 (freedom from torture). However, a prevailing problem is its limited capacity to conduct detailed investigations of a criminal nature into complaints of torture.

Another problem identified in respect of the Commission's investigative functions was that, even in cases where it investigates an allegation of torture and sends the matter to the Attorney General (AG), the AG "again relies on police investigations".[6] This duplicates and prolongs the investigative process and lends credence to criticism that the NHRC does not undertake serious and thorough investigations. Recent decisions by the police have resulted in NHRC officers being hampered in their statutory task of monitoring places of detention to ensure that abuse of detainees does not occur.

It is problematic that the Executive can make regulations in regard to the operational aspects of the NHRC and that Sec.31 of the Act confers powers to the Minister to make regulations regarding implementation, including conducting investigations. This provision violates the Paris Principles in that an effective national institution will have drafted its own rules of procedure and these rules should not be subject to external modification.

Further, according to the Paris Principles on National Human Rights Institutions, an important aspect of independence is the financial autonomy of a national human rights institution, which autonomy must be accompanied by adequate and continuing funding. The State has to provide adequate resources to enable the NHRC to function effectively. The possibility of manipulating financial allocations to undermine the independence of such institutions is very real. Adequacy of financial resources is also linked to the issue of public accessibility to the NHRC. It must have sufficient resources to have an adequate number of regional offices in order to widen access to the public.

Currently, there is minimal co-operation of the NHRC with NGOs. As in the case of the Nepali National Human Rights Commission during the time that its Commissioners were appointed by the former monarch and civil society thereafter refused to recognise the NHRC as a properly constituted body, some Sri Lankan activists have also followed similar patterns of protest in regard to the present Commissioners.

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[5] For example, see, "United Nations Committee Against Torture, Concluding Observations on Sri Lanka (2005)", CAT/A/LKA/CO/2, 15.12.2005.

[6] Law & Society Trust, "Briefing Paper forwarded to the Special Rapporteur on Torture, prior to his Mission Visit to Sri Lanka", 29 October 2007 (not published).

2.2 The National Police Commission

2.2.1 Sri Lanka's Policing System – The Historical Critique and Its Present Deterioration

A historical critique of Sri Lanka's policing system is contained in several government commissions which released detailed reports in relation to the same, including the Justice Soertsz Commission of 1946, the Basnayake Commission of 1970, the Jayalath Committee of 1995 and the Commissions of Inquiry into the Involuntary Removal and Disappearance of (Certain) Persons which were established in 1994/1998 and whose final reports were submitted in 1997/2001.

In particular, the Basnayake Commission recommended an independent Police Service Commission to be in charge of the appointments, transfers, dismissals and the disciplinary control of police officers. However, the reality is perhaps far worse than what these official reports suggested. After decades of civil and ethnic conflict, what the country was left with was more a system of military style social control than a sophisticated crime investigation institution.

Reported instances of abuse by police officers have been legion. Many victims brought such cases to the Supreme Court resulting in a voluminous number of judgments and the awarding of compensation. In early 2003, the Supreme Court observed in one case that "the number of credible complaints of torture and cruel, inhuman and degrading treatment (showed) no decline".[7] Cases of torture included numerous complaints of brutal assault. These included a labourer assaulted with batons and sticks while in army detention, the cleaner of a van assaulted after being blindfolded, an Attorney-at-Law pulled out of his car and assaulted, a reserve police constable subjected to assault by a reserve sub inspector, another Attorney-at-Law who was a by-stander at a protest demonstration (and not a participant) shot at close range, and an alleged army deserter tortured to the extent that he died in police custody.[8] Such cases revealed a wide range of circumstances in which brutal treatment had been meted out by the police or service personnel—the very people who are expected to protect and safeguard the fundamental rights of members of a society. Torture was therefore clearly not an isolated phenomenon confined to a few rogue policemen but had become an endemic problem.

On 21 November 2004, a victim of police brutality who dared to fight it out in the legal sphere, Gerald Perera was shot in broad daylight and died thereafter in hospital, days before he was due to give evidence in a High Court trial instituted by the Attorney General's Department under the Torture Act, No.22 of 1994. Perera had earlier, obtained judgment by

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[7] Per Justice M.D.H. Fernando in *Sanjeewa* v. *Suraweera* (the Gerald Perera case) 2003[1] SLR 317.

[8] See: *Konesalingam* v. *Major Muthalif and others,* SC(FR) No.555/2001, S.C. Minutes 10.02.2003; *Shanmugarajah* v. *Dilruk, S.I., Vavuniya,* SC(FR) No.47/2002, S.C. Minutes of 10.02.2003; *Adhikary and Adhikary* v. *Amerasinghe and others*, SC(FR) No.251/2002, S.C. Minutes of 14.02.2003; *Ekanayake* v. *Weerawasam*, SC(FR) No.34/2002, S.C. Minutes of 17.03.2003; *Sujeewa Arjuna Senasinghe* v. *Karunatilleke and others*, SC(FR) No.431/2000, S.C. Minutes of 17.03.2003; *Silva* v. *Iddamalgoda,* F.R. Application, 2003[2] SLR 63; *Harindra Shashika Kumara* v. *D.I.G. De Fonseka and others*, SC(FR) No.462/2001, S.C. Minutes of 17.03.2003.

the Supreme Court declaring that he had been subjected to severe torture. Ironically, at the time of his death, a major portion of the medical re-imbursements had yet not been paid to him. Subsequent investigations identified the perpetrators of his murder as including some of the very same police officers who were found responsible for the torture. Indictment has been filed at long last though the trial is still pending and calls made to expedite this process have been to no avail.

In this case as well as in countless others, the Supreme Court called upon the National Police Commission (NPC) and the Police Department to take stringent steps to subject erring individual officers to appropriate disciplinary action. Towards this end, the Registrar of the Supreme Court had been directed to send copies of the judgments to the Inspector General of Police as well as the NPC. Yet, the effect of such directions has been minimal, a fact remarked upon by the judges themselves on occasion. The following judicial quote is instructive in this regard.

> *"The number of credible complaints of torture and cruel, inhuman and degrading treatment whilst in police custody shows no decline. The duty imposed by Article 4(d) [of the Constitution] to respect, secure and advance fundamental rights, including freedom from torture, extends to all organs of government, and the Head of the Police can claim no exemption. At least, he may make arrangements for surprise visits by specially appointed Police officers, and/or officers and representatives of the [National] Human Rights Commission, and/or local community leaders who would be authorized to interview and to report on the treatment and conditions of detention of persons in custody.*
>
> *A prolonged failure to give effective directions designed to prevent violations of Article 11, and to ensure the proper investigation of those which nevertheless take place followed by disciplinary or criminal proceedings, may well justify the inference of acquiescence and condonation if not also of approval and authorization)".*[9]

For long years, even where police officers (junior as well as senior) have been identified in courts of law as personally responsible for acts of torture, we have seen no internal departmental action taken against them or successful prosecutions. Directions of the Supreme Court to the police hierarchy to initiate disciplinary action against erring police officers were blatantly ignored. Senior police officers cited lacunae in the Establishments Code as reason for the inability to take disciplinary action against police officers found guilty of fundamental rights violations and have engaged in debate with civil society as to how this obstacle could be overcome.[10] However, substantive initiatives towards the correction of such legal lacunae and the enforcement of the appropriate disciplinary sanctions against erring police officers continued to be lacking.

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[9] The Gerald Perera case, *supra*, as per observation of Justice Mark Fernando.

[10] See, *LST Review*, Vol. 15 Joint Issue 208 & 209 (February-March 2004). Similar directions have been issued by Court to other department heads whose officers have also been found to have violated rights of persons in their custody, as for example, directions issued by the *Wewelage Rani Fernando* case to the Commissioner General of Prisons, SC(FR) No.700/2002, SCM 26.07.2004, judgment of Justice Shiranee Bandaranayake with Justices JAN de Silva and Nihal Jayasinghe agreeing. There appears to be no discernible compliance with these orders as well.

Instead, official resistance to these pronouncements by the Court was high and there was not even minimum acknowledgement that Sri Lanka was facing a serious problem. The police department set up funds to provide for lawyers to appear for the accused police officers as well as indeed, in some cases, to pay the sums of compensation due personally from the implicated officers.

2.2.2 The Structure of the NPC

The NPC comprises a body of seven persons whose security of tenure is explicitly provided for (vide 17th Amendment, Article 155A). It is firstly, vested with the powers of appointment, promotion, transfer, disciplinary control and dismissal of all officers other than the Inspector General (vide 17th Amendment, Article 155G(1)(a)). Secondly, the NPC is compulsorily required (*'shall'*) "to establish procedures to entertain and investigate public complaints and complaints from any aggrieved person made against a police officer or the police service... [italics added]"(vide 17th Amendment, Article 155G(2)).

Though the NPC, in its first term, attempted to fulfill some of their constitutional tasks, such as the interdicting of police officers indicted for torture and preventing the political transfer of police officers during the pre-election period, it did not do as much as was expected, including putting the complaints procedures in place. In its second term, the members to the NPC were appointed unconstitutionally by the President bypassing the approval of the Constitutional Council. The Chairman of the NPC was the former secretary to the Ministry of Labour when the current President was the Minister.

2.2.3 Disciplinary Control of Police Officers

Insofar as the first mandate is concerned, since its inauguration in November 2002, the NPC concerned itself with matters relating to promotions, particularly the filling of about 4,000 vacancies in important posts which remained vacant due to inaction under the earlier system of administration. Resolving this problem of vacancies was deemed as a priority in order to get the system to function properly. The promotion scheme itself was, however, subjected to much public criticism (and challenged in court).

In so far as the disciplinary control of police officers were concerned, the NPC decided early on to delegate to the IGP the disciplinary control of subordinate police officers vested in it,. Such delegation was justified on the basis that it was considered necessary for the IGP to administer his own department. The IGP in turn referred the cases to his subordinate officers, or to a special investigation unit. However, as police officers continued to investigate other police officers, no effective change took place in the rampant indiscipline of the service. In addition, as the higher ranking officers who earlier oversaw the conduct of such inquiries were accustomed to making settlements between complainants and alleged perpetrators rather than conducting inquiries in an objective manner, most complainants were rightly distrustful of these inquiries.

Due to public criticism, the NPC decided in mid 2004 that it would recall its delegated powers and assume as mandated by the 17th Amendment, substantive disciplinary control over police officers of all ranks, excepting the IGP. This decision was taken amidst claims by frontline ministers that the independence of the NPC was not needed and that the Inspector General of Police (IGP) should be involved in the decision-making processes of the NPC. Hostility was evidenced between the IGP and the NPC where the former considered that the creation of the NPC had imposed an unwarranted fetter on his powers.

Despite this hostility, the NPC (in its first term) prevented politically motivated transfers of police officers prior to elections. It also interdicted police officers indicted of torture under the Convention Against Torture (CAT) Act, No.22 of 1994. The CAT Act contains severe punishments for law enforcement officers found culpable of torture.[11] Despite the severity of these provisions[12] due to the lack of immediate disciplinary action against errant police officers and the total absence of a witness protection mechanism, victims are threatened, terrorised or even killed as evidenced most particularly by the fate that befell Gerald Perera. When alleged perpetrators of torture and other serious crimes are allowed to continue in the same posts and even considered for promotions,[13] this makes a mockery of the entire system of justice. The perpetrators are also in a position to destroy vital evidence, with the Supreme Court itself remarking that it is common for the police to fabricate evidence and alter documents.[14]

In this context, the decision taken by the NPC to interdict police officers indicted under the Torture Act was one of the most positive steps taken by this body during 2004.

2.2.4 The Public Complaints Procedures

Insofar as the second mandate is concerned, Article 155G(2) of the Constitution clearly requires the mandatory establishing of meticulous procedures regarding the manner of lodging public complaints against police officers and the police service. The NPC also has a duty to recommend appropriate action in law against police officers found culpable in the absence of the enactment of a specific law whereby the NPC can itself provide redress. Though a Public Complaints Procedure was put into place[15], its efficacy was in doubt during the brief period that it was functional.

There is no doubt that a properly functioning NPC should exercise proper disciplinary control over the police force. The NPC had itself informed us in interviews that despite thousands of

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[11] Section 2 of the Act makes torture, or the attempt to commit, or the aiding and abetting in committing, or conspiring to commit torture, an offence. A person found guilty after trial by the High Court is punishable with imprisonment for a term not less than seven years and not exceeding ten years and a fine not less than Rs.10,000 and not exceeding Rs.50,000.

[12] Some legal professionals argue that the very severity of the said provisions have, at times, deterred judges from handing down convictions.

[13] See, *The Sunday Times* of 11.07.2004. Though indictments are issued against particular police officers, there is a lapse in time between issuance and the serving of the indictment resulting in interdicted officers still serving in their posts.

[14] *Kemasiri Kumara Caldera* case, SC(FR) Application No.343/1999, S.C.M. 06.11.2001.

[15] Gazette No.1480/8-2007 of 17.01.2007 – see annexure to this paper.

complaints having been received against police personnel, from the rank of Constable to that of a Deputy Inspector General, only 73 indictments had been filed in 2005 and that too for relatively minor offences.

However, even in terms of the procedures that were in operation, it appeared that disciplinary control of the officers found responsible in the investigations initiated continued to remain in the hands of the IGP in accordance with applicable departmental procedures. This made the procedures themselves rather impractical.

The experiences of other countries have been different. In many instances where prosecutions have in fact failed, the UK's Independent Police Complaints Commission (IPCC) has, in fact, proceeded with suitable disciplinary control against the relevant police officers. In contrast, it is difficult to find even one such instance in Sri Lanka despite numerous judgments of the Supreme Court recommending such action, as already pointed out in this paper.

3. A Practical Evaluation of the Status, Mandate and Performance of the NHRC and the NPC as Manifested through the LST sponsored Public Consultations and Field Visits

In the background of the theoretical discussion above, we will detail the observations of the participants and the conclusions arrived at by LST during the field visits and consultations conducted during the project period.

3.1 Concerns regarding the National Human Rights Commission of Sri Lanka

One of the glaring revelations emerging from these consultations was the dissatisfaction with the functioning of the NHRC expressed by almost all the participants. This general public perception is reflected in the statement made by an activist, Mr. Duminda Rajapaksha at the Galle consultation, "that the existence of NHRC has not helped to deter the violations of human rights in the country".[16] Certain concerns raised by the participants regarding the unsatisfactory performance of the NHRC require separate consideration.

3.1.1 Unconstitutional status

As explained above, given the failure to duly form the Constitutional Council in 2006, the President made his own appointments to the NHRC that were inconsistent with the mandatory procedure laid down under the 17th Amendment. The continued failure to give effect to the provisions of the 17th Amendment and to reactivate the Constitutional Council was discussed at each of the regional consultations. The adverse impact of this failure on the independent character of the Commission and the negative effect on the protection of human rights was also considered. The discussions hosted by LST culminated in reaching a "general consensus

[16] See, Annexure C, Summary of Report of the consultations held in Galle and Baddegama.

regarding the need to sign a public petition to implement the 17th Amendment and lobby towards the re-establishment of the Constitutional Council".[17]

Participants were well aware mainly through media reports in regard to national and international concern raised in reference to the failure of the government to appoint the commissioners and the sub-committee on accreditation of the International Coordinating Committee (ICC) of National Human Rights Institutions downgrading the status of the NHRC from category 'A' to category 'B'.[18]

3.1.2 Inaction and delays in investigating human rights violations

Inaction and delays were two of the major causes, which hindered the effectiveness of the investigations carried out by the NHRC according to the individual and collective experiences of the participants. In response to these wide ranging critiques, lack of resources and lack of funds were cited as the major reason for this factor by the NHRC and NPC staff when LST research officers visited their provincial offices. NHRC staffers were also acutely aware of the fact that there was extensive public criticism regarding the commissions being 'pro-governmental'. Considerable resentment was also evidenced by what they felt was insensitive handling of the local staff by the head office and the lack of human resource management particularly by the NHRC where provincial staffers were compelled to resign due to their being 'too activist' in the handling of complaints. The feeling was that the NHRC was not keen on any substantive work being done in monitoring human rights violations when this involved civil and political action by government forces.

Insofar as the public response was concerned, the failure of the NHRC to take timely action about complaints was widely acknowledged by the participants. The adverse effects resulting from delays is reflected in one of the examples cited by a teacher who participated the Galle consultation who said, "NHRC has taken eight months to give its recommendation on a Grade One school admission issue, which has affected the primary education of an innocent child".[19]

On the other hand, the inaction of the Commission and the abandonment of investigations without disclosing reasons were raised at the consultations. "The main complaint in this regard was that the NHRC office in Kandy lends a deaf year to complaints made against Police Officers (mainly, cases involving arrests without warrant) and that some NHRC officers are taking the side of the police".[20]

Another participant, Mr. E.K.W. Jayasekera was of the view that "many fundamental right violations occurred during the land acquisition process relating to the Southern Highway and that no human rights organization including the NHRC helped them in their grievances and

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[17] See, Annexure E, Summary of Report of the consultations held in Puttalam and Anamaduwa.

[18] Law & Society Trust, Monitoring Report on the performance of National Human Rights Institutions, "*The Human Rights Commission of Sri Lanka: Sombre Reflections and a Critical Evaluation*", submitted at the 12th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions (APF), Sydney, Australia, 24-27 September 2007.

[19] See, Annexure C, Summary of the Report of the consultations held in Galle and Baddegama.

[20] See, Annexure A, Summary of the Report of the consultation held in Nuwara Eliya.

ultimately the victims formed into an organization",[21] under which they managed to get some relief after conducting several protest campaigns.

Positive stories were however few and far in-between. In general, the common lament on the part of the participants was "whether there is a legal remedy against the NHRC when it refuses to entertain an application to it"?[22] This is a question that we will return to later.

Another concern voiced by the participants was whether the NHRC is under a duty at least to assist the complainant in obtaining the necessary documents from the public authorities. The concern arose as a result of an experience disclosed by one of the participant public servants, who had not been promoted though having fulfilled the required period of service. He disclosed that having made a complaint to the NHRC, the only response he received was that "necessary documents are not available".[23] In the middle of this heated discussion, one of the participants made the observation that if at least there is no duty on the NHRC to obtain necessary documents to inquire into a complaint, "there is no earthly reason why the NHRC should continue as a statutory body. It is only a drain on the public purse".[24]

This useful discussion gave rise to the issue as to the possibility of seeking a *writ* (*Mandamus*) under Article 140 of the Constitution or filing a fundamental rights application under Article 126 of the Constitution against the NHRC.[25] The same problems including inaction on the part of the NHRC and the NPC surfaced regarding the absence of replies to complaints, as well as refusal to entertain complaints on the basis of the time limit imposed at the consultations held in Puttalam and Anamaduwa.[26]

3.1.3 Lack of enforcement of the NHRC's Recommendations

A major deficiency in the mandate of the NHRC is that the NHRC does not possess enforcement powers. Since the NHRC is empowered only to make recommendations, even where the NHRC has made a positive recommendation regarding a rights violation, its directions are disregarded by the relevant public authorities, aggravating the victim's despair.

Due to the non-binding nature of its decisions, making complaints to the NHRC has become a futile process. This has weakened the public confidence reposed in the NHRC. At the regional consultation held in Ratnapura, an issue was raised that "even if the NHRC cannot give a binding decision or even so much a recommendation having looked into the complaint, is there not a duty at least on the NHRC to obtain necessary documents to inquire into a complaint?", which query was posed by Mr. U.P. Dharmadasa, a retired school teacher.[27] A further reflection on the same lines emerged that "the NHRC's failure to do so constitute in

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[21] See, Annexure C, Summary of the Report of the consultations held in Galle and Baddegama.
[22] See, Annexure A, Summary of the Report of the consultation held in Nuwara Eliya.
[23] See, Annexure D, Summary of the Report of the consultation held in Ratnapura.
[24] *Ibid.*
[25] *Ibid.*
[26] See, Annexure E, Summary of the Report of the consultations held in Puttalam and Anamaduwa.
[27] See, Annexure D, Summary of the Report of the consultation held in Ratnapura.

fact and in the context of the functions the NHRC is charged with under the NHRC Act, a dereliction or breach of its duty".[28]

Public criticism leveled at this deficiency is evident from the opinion expressed by a community worker Mr. Padmasiri Herath at the Anamaduwa regional consultation that, "if the NHRC is not empowered to make any meaningful order, then a law must be put in place to implement a positive recommendation made by the NHRC and if this is not acceded to, then the NHRC must be scrapped".[29]

3.1.4 Time limit applicable in regard to making complaints

Participants at Nuwara Eliya, Kandy and Galle consultations voiced equal concerns as to the time limit applicable in regard to making complaints and the difficulty of making complaints within a year, which time limit has been imposed by internal circular of the NHRC. It was brought to the notice of the participants at every consultation that, this period had later been further reduced to 3 months by another internal circular.[30] Participants vehemently protested against this further reduction and pointed out the unfairness of imposing such a short period. Such a time limit is in fact unreasonable since the NHRC Act does not prescribe any time bar for making complaints.

In contrast, an LL.B. (OUSL) aspirant who participated in the Nuwara Eliya consultation revealed that, "how, on his intervention, he had been able to persuade the NHRC to entertain an application made after 1 year and how at the end of the inquiry he had been able to secure a positive recommendation from the NHRC".[31] The plight of illiterate aggrieved parties in this context is very clear.[32]

3.1.5 Lack of a proper investigation mechanism

The absence of a proper investigation procedure is problematic and Mr. Dilan Priyanga Godakandea, a retired public administrator pointed out at the Galle consultation that the "NHRC should develop a methodology to hear and finalize the complaints received by it as early as possible".[33]

3.1.6 Victim and witness protection

By and large, the participants were unanimous as to the need to initiate an effective victim and witness protection programme which was highlighted by an attorney-at-law Mr. Deepthi M. Dalugama at the Anamaduwa consultation. He expressed the "imperative need for not only a Witness Protection Law but also a Complainant Protection Law".[34]

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[28] *Ibid.*
[29] See, Annexure E, Summary of the Report of the consultations held in Puttalam and Anamaduwa.
[30] See, Annexure A, Summary of the Report of the consultation held in Nuwara Eliya.
[31] *Ibid.*
[32] *Ibid.*
[33] See, Annexure E, Summary of the Report of the consultations held in Puttalam and Anamaduwa.
[34] *Ibid.*

3.1.7 Lack of adequate trained staff and resources

Many participants stressed the need to strengthen the capacity of the NHRC to investigate and prosecute alleged human rights violations. Public dissatisfaction with the lack of trained and skilled staff was evident from the observation made by a community worker Ms. C.S. Liyanamohotie, that "personnel attached to the NHRC offices have hardly any knowledge of the Constitution and the law".[35] The same concern was raised at the Galle consultation by a teacher Mr. Nimal de Silva as "NHRC should improve its men and material ideally with people with legal backgrounds".[36]

Participants highlighted that in the absence of a satisfactory NHRC office in Galle, some non-governmental organisations (NGOs) are exploiting the innocent victims for their fund raising activities.[37] Lack of sufficient district branches of the NHRC to entertain complaints resurfaced at the Puttalam and Anamaduwa consultations.[38] The need to establish more branches at municipal and village levels was emphasized.

3.1.8 Disciplinary control of NHRC's officers

Some officers of the NHRC are accused of colluding and intimating with perpetrators of human rights violations. It was revealed at the consultations that some NHRC officers continue to engage in settling complaints by requiring the perpetrators to pay small sums of money to the victims and in certain instances by collaborating with the police to cover up the incidents. Some NHRC officers are also alleged to reveal the information of complainants to the perpetrators, which leads to the complainants and witnesses been intimidated by the perpetrators.

3.1.9 Lack of accountability

Another equally grave concern was the lack of accountability of the NHRC to the public. It was inquired by the participants as to whether there was "any provision in the NHRC Act imposing a duty on the NHRC to present Annual Reports to the Parliament".[39]

Participants stressed the need to amend the NHRC Act to provide for annual reports and situation reports to be submitted by the NHRC to Parliament to ensure continuous monitoring that "this is an aspect that must be examined. If there is no provision a public campaign must be launched to have the law amended. If there is such a provision, nevertheless the NHRC Act needs to be amended providing for periodic (preferably quarterly) Situation Reports."[40]

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[35] See, Annexure B, Summary of the Report of the consultation held in Kandy.
[36] See, Annexure C, Summary of the Report of the consultations held in Galle and Baddegama.
[37] See, Annexure C, Summary of the Report of the consultations held in Galle and Baddegama and Annexure D, Summary of the Report of the consultation held in Ratnapura.
[38] See, Annexure E, Summary of the Report of the consultations held in Puttalam and Anamaduwa.
[39] See, Annexure B, Summary of the Report of the consultation held in Kandy.
[40] *Ibid.*

3.2 Concerns regarding the National Police Commission of Sri Lanka

At the consultations conducted at the regional level, "general consensus was reached in regard to the need to compel the NPC to be a viable functionary for which it was primarily created for having regard to its constitutional functions/duties to at least (in the minimum) to implement and act upon the Public Complaints Procedure".[41] This view manifests the inadequacy of the NPC.

3.2.1 Questionable status

The National Police Commission (NPC) was established under the 17th Amendment to the Constitution with a view to depoliticize the institution of the police.[42] The NPC was established in accordance with its constitutional mandate and its members nominated by the Constitutional Council in its first term. However, the Constitutional Council, which was supposed to nominate the members of the Commission, was not appointed since 2006 and the President made direct appointments to the NPC in its second term. As a result the very purpose of its creation, namely to be an independent overseeing body to alleviate the extreme politicization of the police service, is defeated.

Given the fact that the decisions of NPC (in contrast to the NHRC) are amenable to judicial review in terms of the fundamental rights jurisdiction of the Supreme Court, it was observed at the Puttalam and Anamaduwa Consulations that, the said institution must be preserved.[43] However, the need to reinforce the provisions of the 17th Amendment and to reactivate the Constitutional Council in making good appointments to the body was emphasized.

3.2.2 Lack of awareness as to the existence of the NPC and clarity as to its functions among the public

It was revealed at the regional consultations that very few participants were aware of the existence of the NPC. Even if some were aware of its existence only an insignificant number of participants had a clear idea as to the nature of the functions carried out by the NPC. Surprisingly, "not a single participant was aware of the purpose for which the NPC had been created and its functions" at the Nuwara Eliya consultation.[44] In comparison, there was greater public awareness of the NHRC.

At the Kandy consultation it was observed that "not a single participant was aware that the Kandy district had a NPC branch".[45] Only one participant at the Galle consultation indicated that he had resorted to this procedure and stated that though "he has made several complaints to the National Police Commission in writing", no inquiry has been held so far.[46] The general impression entertained by the participants who attended the Ratnapura consultation was that,

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[41] See, Annexure E, Summary of the Report of the consultations held in Puttalam and Anamaduwa.
[42] Articles 155A-155N.
[43] See, Annexure E, Summary of the Report of the consultations held in Puttalam and Anamaduwa.
[44] See, Annexure A, Summary of the Report of the consultation held in Nuwara Eliya.
[45] See, Annexure B, Summary of the Report of the consultation held in Kandy.
[46] See, Annexure C, Summary of the Report of the consultations held in Galle and Baddegama.

"the NPC is Police Department for the Police".[47] Similar public unawareness of the NPC's functions and duties was apparent at the Puttalam and Anamaduwa consultations. It was further revealed that there is no NPC branch in Puttalam and/or Anamaduwa. Therefore, if such awareness is generated, there is a need to establish more NPC branches for the aggrieved persons to air their grievances".[48]

3.2.3 Unknown Public Complaints Procedure

Under Article 155G(2) of the Constitution as amended by the 17th Amendment, the Commission is vested with the power to establish procedures to entertain and investigate public complaints and complaints of any aggrieved party made against a police officer or the public service. After a few years of reluctance to initiate the relevant rules, relying highly on the excuse of lack of resources,[49] the NPC finally adopted the Rules of Procedure (Public Complaints) in January 2007.[50]

A special division under the NPC called Public Complaints Investigation Division (PCID) was established to inquire into the complaints lodged against police officers. In terms of Rules 2 and 3, such complaints may be made by not only an aggrieved person, but also by an Attorney-at-Law on behalf of an aggrieved person, a social organization, a public organization or a non-governmental organization.

It was noticeable at the Kandy consultation that "no one indeed was aware of the Public Complaints Procedure sanctioned by the NPC".[51] However, many participants were anxious to know information regarding the Public Complaints Procedure. Accordingly, all the participants were apprised of the fact that, an aggrieved party has a right to make a complaint against a police officer to the NPC.

At a later national consultation with officers of the NPC, these officers pointed out that complaints are sent to the NPC without adequate factual information, making it difficult for the NPC officers to follow up the complaint. This problem was evidenced even in the information sent by non-governmental organizations. Requests made to them to provide the missing details had not met with any response.[52]

The breakdown of the categories of complaints in the Public Complaints Procedures that had been gazetted was then examined. It was pointed out to the NPC officers that the civil society

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[47] See, Annexure D, Summary of the Report of the consultation held in Ratnapura.

[48] See, Annexure E, Summary of the Report of the consultations held in Puttalam and Anamaduwa.

[49] Kishali Pinto-Jayawardena, "The Constitutional Mandate of the NPC", Focus on Rights, *The Sunday Times*, 01 August 2004.

[50] Gazette No.1480/8-2007 of 17 January 2007. See also Annexure G in this paper. These rules were formulated based on a draft submitted to the NPC in its first term by independent consultants Kishali Pinto-Jayawardena, senior legal consultant and attorney-at-law; Dr. J. de Almeida Guneratne, President's Counsel; Basil Fernando, attorney-at-law and Executive Director, Asian Human Rights Commission; and Ali Saleem, then Programme Officer, Asian Human Rights Commission.

[51] See, Annexure B, Report of the consultation held in Kandy.

[52] See, Annexure F, Minutes of a consultation with the National Police Commission, 13 March 2009.

draft submitted to the first NPC had specified no such breakdown but that this had been changed in the gazetted version. The categorization of complaints was problematic and the distinction drawn between torture and assault was not logical as assault in some cases may, in fact, amount to torture.[53]

In response, it was pointed out that the categorization was done at the request of senior police officers who had requested that the current mechanisms of investigations into complaints against the police should not be disturbed beyond a point as this would cause resentment within the police.[54]

3.2.4 Inaction on the part of the NPC

Despite the establishment of this procedure, few complaints are made to the PCID and fewer complaints are duly investigated by the PCID. The participants' general concern was that "if such a procedure is there, and if the NPC is not following it, is there not a remedy which an aggrieved party could pursue"?[55]

At the Galle consultation, Mr. Sunil Santha Ganewatta representing the Galle Organization for the Protection of Human Rights cited an incident where a person arrested by Elpitiya police died in the police cell due to severe assault and referred to the fact that nobody came forward to bring justice to the deceased victim.[56] This raises an interesting issue as to why the commissioners are not initiating investigations into such incidents on their own without waiting for a complaint to be made. In contrast, in the United Kingdom, the superior officers are automatically required to report categories of grave incidents to the Independent Police Complaints Commission, whether a complaint is made or not.[57] The Independent Police Complaints Commission of the United Kingdom can decide either to supervise police investigations into serious complaints or independently investigate them by itself.[58]

Given a case where the NPC is found to be in breach of and/or lackadaisical in the discharge of its functions, the question as to what options are available to an aggrieved person to put such breach or lackadaisical discharge of functions on the part of the NPC was specifically in issue at the Puttalam and Anamaduwa consultations.[59]

3.2.5 Disciplinary control of subordinate police officers

In terms of Article 155G(1)(a) of the Constitution as amended by the 17th Amendment, the NPC is vested with the powers of appointment, promotion, transfer, disciplinary control and dismissal of all police officers other than the Inspector General of Police.

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[53] *Ibid.*
[54] *Ibid.*
[55] See, Annexure C, Summary of the Report of the consultations held in Galle and Baddegama.
[56] *Ibid.*
[57] Independent Police Complaints Commission, "*Making the Complaints System Work Better*", at p.34, http://www.ipcc.gov.uk/stat_guidelines.pdf.
[58] *Ibid.*
[59] See, Annexure E, Summary of the Report of the consultations held in Puttalam and Anamaduwa.

However, two practices adopted by the NPC hinder the effective disciplinary control of police officers. On one hand the NPC has the power to refer complaints made against police officers listed in Segments B and C of the Rules of Procedure to be investigated by the police itself, which then results in unsatisfactory and partial investigations. The question then arises as to why, when public complaints are referred to the PCID of the NPC, they are forwarded to the police of the area for investigation.[60]

On the other hand, even if an inquiry into a complaint is carried out by the NPC and the alleged police officer is found guilty, it does not directly exercise the disciplinary control of such officer as the power of disciplinary control of police officers below the rank of Chief Inspector has been delegated by the NPC to the Inspector General of Police.[61] Such delegation can be criticized on the ground that this defeats the main objective of the establishment of the NPC—that is, to take away specific administrative powers of the Inspector General of Police and other senior police officers in order to prevent undue political influence on the police service.[62] As police officers continued to investigate complaints against other police officers, no effective change took place in depoliticizing the police service.[63] This practice is inconsistent with the practice commonly followed by oversight bodies in many other jurisdictions. For example, the Independent Police Complaints Commission of the United Kingdom exercises direct disciplinary control over offending police officers.

Notably, the decision to recall the delegation of authority was reversed by the NPC in its second term, due to the fact that the IGP had found it difficult to maintain control over his police officers with the disciplinary control being vested elsewhere. During the term of the first NPC, such hostility had been evident. However, NPC officials themselves have conceded that the delegation had caused some problems—for example, the officer-in-charge (OIC) who had caused an innocent individual Gerald Perera to be tortured, had merely been subjected to minor disciplinary action by the IGP and though the NPC had requested that stern action be taken, this was not done.[64]

It is not surprising that the statistics also point towards the failure of the NPC to properly investigate public complaints. The Progress Report of the PCID for the Year 2008 revealed that only 46 percent of the complaints received were finalized.[65] Out of the 629 finalized complaints, 81 complaints had been withdrawn, 70 had been proved to be false, 93 not proved due to lack of evidence and 28 complaints had been amicably settled. Legal action had been instituted only in 5 cases, amounting to only 1 percent of the finalized complaints, which casts doubt on the impartiality and effectiveness of investigations carried out by the NPC.

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[60] See, Annexure F, *supra.*

[61] Circular No.1703/2003, dated 26 March 2003. See also Annexure G in this paper.

[62] Transparency International Sri Lanka, *In Pursuit of 'Absolute Integrity'; identifying Causes for Police Corruption*, 2006, at p.41.

[63] Kishali Pinto-Jayawardena, "Regretting What Might Have Been; A Critique of the National Police Commission of Sri Lanka", CHRI Seminar Discussions, 23-24 March 2007, New Delhi.

[64] See, Annexure F, *supra.*

[65] Progress Report of the PCID – Head Office and the Provincial Offices, for the Months of January-December 2008.

Moreover, not a single police officer had been dismissed, transferred or subjected to summary punishment during 2008.[66] Though alleged police officers were charge-sheeted in 2 percent of the finalized complaints, only one officer was indicted.[67]

Due to the lack of public confidence on the NPC, a gradual decrease in the number of complaints being submitted to the NPC is visible. According to the Annual Report of the NPC for the Year 2007, it had received 1,940 complaints during that period.[68] In contrast, in 2008 the total number of complaints received had been reduced to 1,380.

3.3 Some General Concerns and Reflections

Apart from the concerns raised with regard to the functioning of the NHRC and the NPC, the following general concerns were expressed by the participants at the consultations. These concerns brought to light several different perspectives to the main theme of the consultations and ensued in useful discussion on those points.

A fundamental shortcoming existing in the prosecutorial system as accentuated by the participants at the Galle and Baddegama consultations is "the refusal on the part of the police to record a complaint and reduce the same to writing".[69] It was suggested that the procedural law must be amended providing for a complaint to be sent by registered post to effectively counter the belated complaint criterion which had lead to numerous acquittals in the 1989/1990 period.

The futility of appointing Commissions of Inquiry and such commissions being a drain on the public purse was touched upon at the Galle and Baddegama consultations. Consensus was reached that, in future if such Commissions are to be appointed, then at least a complaint made to it must be regarded as first information".[70]

Ms. Indika Shiromani, representing the Galle Law Association, pointed out the plight of a Tamil motorist accosted by the police for a traffic offence and raised the difficulty to ensure the accuracy of the statement, where a Sinhala speaking police officer records the explanation.[71] She further voiced that there are instances where the police officers refuse to record the statements due to language constraints. In the light of this it was discussed whether such a matter could also be referred to the NHRC.

Another interesting issue that arose at the consultations was whether the NHRC's functions are broader or narrower than the NPC's functions and the possible conflict between the two

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[66] Progress Report of the PCID – Head Office and the Provincial Offices, for the Months of January-December 2008.
[67] *Ibid.*
[68] National Police Commission, Annual Report, 2007, at page 84.
[69] See, Annexure C, Summary of the Report of the consultations held in Galle and Baddegama.
[70] *Ibid.*
[71] *Ibid.*

mandates, which was identified to be a topic requiring detailed examination in the future.

As Mr. P. Liyanamohitie, a Chartered Accountant indicated, people are always talking of their rights but not of their duties to others.[72] This useful point led to a discussion, which ultimately culminated in a consensus being reached as to the need for formation of Citizens' Committees at grassroots level to apprise the people in regard to co-relative concepts of rights and duties. To achieve this end, conducting legal education programmes was said to be important. However, it was pointed out that, a single organisation is not equipped to make the entire society into a University of Law and that awareness in regard to the co-relative aspects of rights and duties must be built at the school level.[73]

Ms. S. Malini Gunaratne, a Divisional Director of Education expressed the view that large scale human rights violations are taking place in schools, but nobody has shown any interest to educate the school community in respect of these human rights violations.[74] At the Kandy consultation it was brought to the notice of the forum that a proposal by the Government to include law in the school curriculum had proved to be unsuccessful.[75] Discussion as to whether activists should take the lead in facilitating basic legal education to school children then followed.[76] Moreover, the significance of obtaining media participation in raising awareness was also considered.[77]

At the Ratnapura consultation, it was pointed out that there are Public Petitions Committees in all the Provinces. In the Sabaragamuwa Province, the Government has in fact complied with several recommendations made by the Public Petitions Committee and the question arose whether this function ought to be performed by the NHRC.[78]

Diverse views were expressed on the issues arising from legal representation and the legal aid concept at the Kandy consultation. During the discussion, Mr. Keerthi Rajapakse, AAL made the statement that "the Legal Aid Commission has proved to be ineffective".[79] A contrary view was also expressed that "it is because private lawyers who are recruited by the said Commission and understandably, if they have their own (private work) then it may be that their legal aid work suffers (for it is for a pittance that the said legal aid work is done)".[80] Invariably only junior members of the bar lend their services for legal aid work. The quality of legal representation was raised at the Puttalam and Anamaduwa consultations as well.[81]

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[72] See, Annexure B, Summary of the Report of the consultation held in Kandy.
[73] *Ibid.*
[74] See, Annexure C, Summary of the Report of the consultations held in Galle and Baddegama.
[75] See, Annexure B, Summary of the Report of the consultation held in Kandy.
[76] *Ibid.*
[77] *Ibid.*
[78] See, Annexure D, Summary of the Report of the consultation held in Ratnapura.
[79] See, Annexure B, Summary of the Report of the consultation held in Kandy.
[80] *Ibid.*
[81] See, Annexure E, Summary of the Report of the consultations held in Puttalam and Anamaduwa.

4. Realistic Recommendations

4.1 General Recommendations

A. Initiating a Signature Campaign and Submitting a Public Petition

The most widely advocated suggestion was the initiation of a signature campaign and to present a public petition demanding the Government to re-establish the Constitutional Council.[82] In addition to ensuring the appointment of the Constitutional Council, it was suggested that village level movements, followed by town and city level movements must be organized, ultimately elevating such movements to a provincial level and finally to a national level.[83]

Further, it was recommended that a questionnaire should be prepared on the issues that surfaced at the workshops so far held, and that responses should be sought from a larger public pool by getting the leading participants who have been so far involved in the programme. The objective of the above is to develop a public strength concept, of which the ultimate aim is to formulate a Public Interest Petition in regard to the following.

i. The re-establishment of the Constitutional Council and the implementation of the 17th Amendment;

ii. Bringing to the public forum, the role of the NHRC and its performance supported by substantial and concrete data;

iii. Making public the functions of the NPC and

iv. Other consequential aspects/issues arising from the above.[84]

B. Generating Public Awareness

More public awareness programmes followed by test actions should be arranged with the involvement of civil rights groups and more public interest groups should be formed[85] on the lines suggested by the Supreme Court in *Rodrigo* v. *Imalma, SI Kirulapona and others*.[86] In future public awareness programmes, it was recommended that a questionnaire must be handed over to the participants concerned addressing the said issues and imploring the respondents to make a commitment to the exercise under consideration.[87] To alleviate the 'fear syndrome', the panel of experts emphasized the need for collective action through organized public interest initiatives.

Such public awareness programmes should especially focus on enlightening the public on the

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[82] See, Annexure B, Summary of the Report of the consultation held in Kandy.
[83] *Ibid.*
[84] See, Annexure D, Summary of the Report of the consultation held in Ratnapura.
[85] See, Annexure A, Summary of the Report of the consultation held in Nuwara Eliya and Annexure C, Summary of the Report of the consultations held in Galle and Baddegama.
[86] 2007(2) ALR 1.
[87] See, Annexure B, Summary of the Report of the consultation held in Kandy.

functions of the NPC, the Public Complaints Procedure and the Public Complaints Investigation Division operating under the NPC.

C. Availability of remedies against the NHRC and the NPC for inaction/failure to take speedy action

The LST team is of the view that "this is an issue that demands serious research and study"[88] on the following lines.

i. Orders that the S.C. could make if it is inclined to accept the *prima-facie,* 'arbitrariness' argument against the NHRC decision not to entertain a complaint beyond the said period it has imposed.

ii. "Entertain and consider on merits after inquiry" could be such an order. But given the *recommendatory nature* of a NHRC decision (on the merits) could *futility* be raised as a defence? In which event only an order for compensation could be made?

iii. Would the S.C., in those circumstances, hold the view that, *in any event*, to compel the NHRC to "entertain and consider on merits after inquiry by the S.C. under *Article 126(2)* within one month an aggrieved party is attempting to achieve indirectly what he/she could not have achieved directly?

iv. Given those possibilities, would an application for *writ* in the Court of Appeal (CA) then be a more result yielding remedy? Given the statutory functions of the NHRC under the statute where 'a duty' could be extracted therefrom bringing in the principles of public trust, the concept of people's sovereignty, etc?[89]

D. Areas calling for further study and research

i. Statistical Data Collection Component

It is recommended that a study be carried out with regard to the number of complaints made to the NHRC over a given period of time and out of those:

a) How many complaints have been referred to a judicial body in terms of Section 15(3) of the Act?
b) How many complainants have received positive recommendations?
c) How many complaints have been rejected and on what grounds?
d) How many complainants have not received any response whatsoever?

And once such a compilation is obtained, explore the possibility of an appropriate course of action, *viz*;

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[88] See, Annexure A, Summary of the Report of the consultation held in Nuwara Eliya.
[89] See, Annexure A, Summary of the Report of the consultation held in Nuwara Eliya.

a) Orders in the nature of writs under Article 140 of the Constitution;
b) Fundamental rights violations under Article 126 of the Constitution;
c) Declaration of a right or status in terms of Article 217(G) of the Civil Procedure Code (CPC)[90].

ii. Extensive Research Component regarding Judicial Advances

Exhaustive research into case law and recent judicial advances in the following areas need to be carried out to determine the element/s "that may be employed in an application or proceedings envisaged above;

a) Concept of a right, interest and/or legitimate expectation (the expanding frontiers)
b) The public trust and accountability doctrine
c) The interlink between (a) and (b) above and the concept of good governance, transparency and public interest".[91]

The following practical measures were recommended by the LST team to conduct the aforementioned research.

a) In the first instance, LST to take the initiative in writing to the NHRC seeking the necessary statistical data;

b) Should the response be negative, whether by silence or an expressed negative response, it would be necessary to pursue legal action on the lines indicated earlier (Article 140 and/or Article 126 of the Constitution;

c) For which purpose, the broad question will need to be posed as to 'what function is the NHRC performing at the cost of the public purse?'[92]

iii. Research regarding disbandment of public institutions in other jurisdictions

It was further suggested that additional research would have to be done drawing from other jurisdictions, where institutions maintained by the public purse have been admonished leading to their disbandment.[93]

iv. Research regarding Public Petitions Committee

The constitutional/legal status of the Public Petitions Committees must be examined.[94]

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[90] See, Annexure B, Summary of the Report of the consultation held in Kandy.
[91] *Ibid.*
[92] See, Annexure B, Summary of the Report of the consultation held in Kandy.
[93] *Ibid.*
[94] See, Annexure D, Summary of the Report of the consultation held in Ratnapura.

v. Research regarding relative powers, duties and functions of the NHRC and the NPC

A comparative study on the relative powers, duties and functions of the NHRC and the NPC should be carried out to identify which institution possesses broader powers and the differences between institutional structure, enforcement of findings and accountability.[95]

vi. Research regarding status, origin and functions of the Community Development Officer

Present status, origin and role of the so called Community Development Officers should be examined in order to develop the idea for the need of a Police Ombudsman.[96]

E. Provision of Legal Aid

It is necessary to provide effective legal aid to aggrieved persons who do not have sufficient means to secure legal representation. Measures should be taken to ensure the quality of such legal representation supplied.

F. Establishing a Victim, Complainant and Witness Protection Programme

It is imperative that a proper mechanism for the protection of complainants, victims and witnesses be established[97] to prevent them from being intimidated and thereby discouraged from pursuing complaints.[98]

G. Guaranteeing Right to Information

A Right to Information—in the minimum, in specific contexts—should be recognized in the form of a law conferring rights.[99]

H. Complaints to be sent by Registered Post

To prevent police from refusing to record a complaint, it was suggested that the procedural law must be amended providing for a complaint to be sent by registered post.[100]

I. Facilitation to Overcome Language Barriers

Some provision of law should be introduced for a person of Tamil ethnicity to seek the assistance of a fellow citizen to overcome communication problems when accosted by a

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[95] See, Annexure B, Summary of the Report of the consultation held in Kandy.

[96] See, Annexure D, Summary of the Report of the consultation held in Ratnapura.

[97] Basil Fernando, "The Human Rights Commission of Sri Lanka – 2004", in *Sri Lanka State of Human Rights*, Law & Society Trust, 2005.

[98] See, Annexure D, Summary of the Report of the consultation held in Ratnapura.

[99] The UK Independent Police Complaints Commission has recognized the right to information believing that it will make the police complaints system as open and transparent as possible, which will in turn help to increase public confidence in the Complaints System; see, Independent Police Complaints Commission, "Making the Complaints System Work Better", at p.30, http://www.ipcc.gov.uk/stat_guidelines.pdf.

[100] See, Annexure C, Summary of the Report of the consultations held in Galle and Baddegama.

Sinhala speaking police officer or army personnel.[101] At the same time, the Tamil language should be introduced with greater emphasis into the curriculum of the training courses provided for police officers and army personnel and Tamil speaking officers should be recruited.

J. Further Training for Armed Forces Personnel

An awareness study course, even by correspondence, on the distinction between 'mere suspicion' and 'reasonable suspicion' to arrest and to hold a person in custody should be introduced to the police officers and armed service personnel, the broader objective of it being to effect a shift in the mindset of the police and the armed forces.[102]

4.2 Specific Recommendations

A. The National Human Rights Commission of Sri Lanka

i. Recommendations of the NHRC should be made legally enforceable. Upon failure thereof, the possibility of filing a *writ* action under Article 140 of the Constitution or a FR action under Article 126 should be recognized.[103]

ii. The time limit imposed on the filing of complaints should be removed and the right of the public to complain to the NHRC without any limitation should be ensured.

iii. A proper preliminary inquiring procedure to investigate into complaints should be established.

iv. Any person or public interest organization should be permitted to complain to the NHRC an infringement or an imminent infringement of human rights.

v. A disciplinary code should be adopted for the NHRC officers and punishments should be imposed on NHRC officers colluding with alleged perpetrators of human rights violations.[104]

vi. The Supreme Court should lay down the Rules of Procedure providing for the NHRC to refer cases to the appropriate court.

vii. Basic legal education should be provided to the NHRC officers and they should be especially trained in law governing human rights. Measures should be taken to recruit adequate staff for the proper functioning of the regional centers.[105]

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[101] See, Annexure B, Summary of the Report of the consultation held in Kandy.
[102] *Ibid.*
[103] See, Annexure D, Summary of the Report of the consultation held in Ratnapura.
[104] Basil Fernando, "The Human Rights Commission of Sri Lanka - 2004", in *Sri Lanka - State of Human Rights*, Law & Society Trust, 2005.

viii. More regional NHRC centers should be established.

ix. The NHRC Act should be amended requiring the NHRC to submit Annual Reports and periodic (preferably quarterly) Situation Reports to Parliament, which will assist continuous monitoring of the NHRC's work, thus holding the NHRC accountable to the public through Parliament.[106]

x. Mandate of the NHRC should be expanded so as to permit it to inquire not only into fundamental rights violations, but also into any human rights violation.

xi. Section 31 of the NHRC Act empowering the Minister to make regulations regarding the implementation of the Act should be repealed.[107]

xii. The NHRC should be allowed to inspect not only the cells of police stations, but the entire precinct including the toilets and kitchen, which are often the very places to which detainees are taken and tortured. The stipulation that all arrests made under emergency should be notified to the NHRC, should be strictly observed and penalties imposed on erring officers in the case of non compliance.

xiii. Rectify other faults in the functioning of the NHRC such as the failure to keep complainants informed of the progress of their cases; case files sometimes going missing from the head office; and complaints by victims that the 24-hour hotline is not always accessible.

B. The National Police Commission of Sri Lanka

i. The NPC should revoke the disciplinary powers delegated to the Inspector General of Police.

ii. The NPC should be equipped with a trained, independent set of investigators to inquire into the public complaints made against police officers.

iii. More regional NPC centers should be established.

iv. There should be an officer under the NPC, independent and unanswerable to the IGP or to the Police, to act as a check on the activities of the police and report to the NPC. For this purpose the possibility of creating an office of a Police Ombudsman should be examined.[108]

v. The NPC should develop its own independent database on all police personnel. This will facilitate the functions the NPC is legally bound to implement, such as the provision that

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[105] *Ibid.*
[106] See, Annexure B, Summary of the Report of the consultation held in Kandy.
[107] *Ibid.*
[108] See, Annexure D, Report of the consultation held in Ratnapura.

a law enforcement officer indicted for a criminal offence should be immediately suspended from his employment pending trial.[109]

5. Conclusion

The above wide ranging consultations with regional level activists and interest groups, representing different strata of society as well as retired public servants, administrators and schoolteachers/principals from Sri Lanka's provincial centres taken together with field visits to the provincial offices of the NHRC/NPC, reveal the enormity of public dissatisfaction with the current unsatisfactory performance of the NHRC, the lack of awareness as to the existence of a Public Complaints Procedure under the NPC, and the general stature of the NPC even at a time when both these institutions were functioning to all intents and purposes. As participants themselves emphasized, there is a necessity of continuing these types of consultations and awareness programmes,[110] since public awareness cannot be achieved overnight.

In order to compel the Government to give effect to the provisions of the 17th Amendment, organized collective action is imperative. New voices must be heard in the debates on de-politicization of these oversight mechanisms. Constant pressure needs to be put on the Government demanding the restoration of the independent character of the NHRC and the NPC for the effective fulfillment of their mandate.

Annexure – Public Complaints Procedure of the National Police Commission

The Gazette of the Democratic Socialist Republic of Sri Lanka
Extraordinary – No.1480/8 of 17.01.2007
Part I: Section (I) - General

Constitution of the Democratic Socialist Republic of Sri Lanka

Rules made by the National Police Commission by virtue of the powers vested in it under paragraph (2) of the Article 155G of the Constitution.

Neville Piyadigama
Chairman
National Police Commission

Colombo, 17th January 2007

Rules

1. These rules may be cited as the Rules of Procedure (Public Complaints) 2007.

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[109] Basil Fernando, "The National Police Commission of Sri Lanka – 2004", in *Sri Lanka - State of Human Rights*, Law & Society Trust, 2005.

[110] See, Annexure C, Report of the consultations held in Galle and Baddegama.

2. Any person specified in Rule 3, who is aggrieved by an act or omission of a police officer, or the police service in carrying out his or its lawful duty may lodge a complaint against such police officer or the police service with the Public Complaints Investigation Division (hereinafter referred to as 'PCID') established by the National Police Commission (hereinafter referred as 'the Commission') and seek appropriate redress in accordance with law.

3. A complaint against police officer or the police service may be made to the PCID by –

(a) an aggrieved person;
(b) a social organization, public organization or non-governmental organization; or
(c) an Attorney-at-Law on behalf of an aggrieved person;

which shall be entertained by the Director or Deputy Director or a Provincial Director of the PCID.

4. Every complaint received at the respective office of the officers specified in Rule 3, shall be serially numbered and registered in a Record Book and acknowledged within seven days of the receipt thereof. The complaint and all relevant Documents, if any, shall be maintained at the respective offices.

5. The Deputy Director, and the Provincial Directors, shall categorize the complaints into appropriate segments in Schedule I to these rules and cause forthwith an investigation made thereon. He shall ensure investigations under segment A of Schedule I are completed within thirty days and investigations under Segments B and C are completed within sixty days of the receipt of a complaint.

6. The officers designated as Investigating Officers of the Commission shall conduct investigation on the directions of the Director or Deputy Director or a Provincial Director, as the case may be.

7. The Commission in consultation with the Inspector General of Police shall obtain the service of Police officers who shall be released to the Commission. These officers shall also be designated as Investigating Officers of the Commission and conduct investigations on the directions of the Director, Deputy Director or Provincial Director of the Commission.

8. The Commission in consultation with the Inspector General of Police may empower the Director, Deputy Director, Provincial Director or an Investigating Officer of the Commission to visit any Police Station in order to inspect any person in the Police cells, and to question and examine such person and obtain any copies of statements made to Police by such aggrieved person and also to examine and obtain copies of any other relevant documents and any other information deemed necessary.

9. A Police Officer-in-charge of a Police station or a District, Senior Superintended of Police of a Division, and a Deputy Inspector General-in-charge of a Range are required to give assistance to the Investigating Officers to carry out their duties.

10. The Director or the Deputy Director or the Provincial Director as the case may be, shall as soon as a report of the investigation is received on the complaint of the aggrieved person or on the progress of the investigation of the Investigating Officer, forward such report to the Commission.

11. All Provincial Directors shall forward forthwith, copies of complaints against an act or omission set out in Segment A of schedule I, received at their respective offices with their Reference numbers to Director, PCID.

12. The Provincial Directors shall submit monthly returns to the Director, PCID in respect of all complaints and the progress of investigations made on such complaints. Director, PCID shall maintain a Master Register and a Database of all complaints received in the Commission Headquarters and Provincial Offices.

13. (1) It shall be the primary duty and the responsibility of every senior Police officer-in-charge of a District, Division or Range (territorial and functional) to conduct impartial investigations by independent officers into the category of complaints set out in Schedule I, where such complaint is made to him in the first instance and ensure that proper departmental action is taken in terms of procedures laid down in the Police Departmental Orders or any other regulations governing the discharge of duties by Police Officers.

(2) A senior police officer conducting inquiries shall inform immediately the PCID by fax and submit a report within one calendar month with recommendations on the completion of such investigation.

(3) The Director, PCID shall monitor every investigation and call for reports and give necessary instructions whenever necessary. Director shall take over any investigation if he is of the opinion that an inquiry has been not conducted satisfactorily. Director shall also submit reports to the Commission relating to the manner in which an investigation has been conducted for appropriate action by the Commission against a senior police officer who fails to conduct proper investigations or comply with any Police Departmental order or regulation governing the discharge of duties by Police Officers or directions of the Commission.

14. (1) Complaints against any act or omission set out in Segment A in Schedule I, shall be investigated by a team of Investigating Officers with the assistance of police officers attached to PCID, when such complaints are made direct to the Commission and where the Director opines that it is prudent to carry out such investigations by the PCID.

(2) Preliminary investigations shall be carried out by the PCID or a senior police officer as the case may be, on any complaint against any act or omission set out in Segment A in Schedule I and a report prepared on whether there exists a *prima-facie* case or sufficient material and evidence to prefer criminal or disciplinary charges against the officer against whom such complaint has been made. The preliminary investigations shall be completed within 21 days from the date of receipt of a complaint.

(3) Findings and recommendations of the Deputy Director, Provincial Director and Investigating Officers (Police Commission) shall be submitted to the Commission by the Director, PCID, with his recommendations.

15. The PCID shall refer every complaint against an act or omission set out in Segment B to the Inspector General of Police who shall cause an impartial investigation conducted by an independent officer or officers. Reports and recommendations of Inspector General of Police shall be submitted to the Commission by the Director with his observations.

16. Complaints against an act or omission set out in Segment C shall be referred to a DIG and SSP of a Division in the provinces for impartial investigation by one or more independent officers. The reports received from DIG/Senior Superintendent of Police Division shall be scrutinized by the Deputy Director and the Provincial Directors and may be referred back for further investigations, if necessary.

17. At the conclusion of an investigation, if it is recommended that disciplinary action or prosecution against a police officer shall be instituted, the IG or DIG, as the case may be, shall be notified along with evidence recorded at the investigations and draft charges, to initiate forthwith such disciplinary action according to departmental procedure or prosecution against such police officer.

18. The IG or DIG as the case may be shall send copies of charge sheet, and where criminal proceedings are instituted, furnish copies of complaints, with progress of the case, and in both instances, shall report to the Director, PCID. The final order of the disciplinary inquiry or the findings of the Court shall be intimated forthwith to Director, PCID by the relevant authority.

19. The Commission on receipt of such final order made after the disciplinary inquiry or the findings of the Court shall forthwith grant whatever redress possible, according to the law, to the complainant.

20. Notwithstanding the procedure herein established on the directions of the Commission, the Director or Deputy Director or Provincial Directors shall be empowered to initiate investigations against any police officer or the police service on disclosures received through any source including the print or electronic media and the procedure set out herein shall *mutatis mutandis* apply to such investigations.

21. Where these rules are silent in respect of any matter or procedure, the Commission may decide on the procedure as appropriate for any specific matter.

Schedule I

Segment 'A'

1. Acts in violation of Human Rights.
2. Allegations of torture and/ or cruel, inhuman or degrading treatment and/or injury to a member of public in Police care/custody; and by any action of a Police Officer.

3. Death of a person in Police care or custody.
4. Fabrications of cases and making false reports and statements to Court.
5. Any allegations which attracts public interest and where wide publicity is given through the mass-media demanding independent investigations into such allegations.
6. Cognizable offences, committed by Police Officers.
7. Interference, intimidation, threat to victims and witnesses directly by themselves or by deployment of intermediaries, in cases under investigations; or in respect of disciplinary inquiries and Court cases.
8. Any attempt to coerce/intimidate/subvert evidence /reports of a Medical Officer or any other Public Officer into submitting false documents or engage in dereliction of duties of such officers.
9. Gross abuse of power, neglect of duties and acts bringing into disrepute the Police Service.
10. Incidents of shooting by Police Officers.
11. Illegal arrest and detention.
12. Refusal to record complaints.

Segment 'B'

1. Assault/intimidation/abuse and threat.
2. Refusal/failure/postponement to record a statement required to be made to the Police.
3. Marking deliberate distortions in statements recorded.
4. Failure to maintain records—erasing or otherwise altering the records.
5. Exhibiting partiality towards members of the political parties in carrying out official duties.
6. Miscarriage of justice resulting from misconduct by a Police Officer.
7. Fatal road traffic accident in which a Police officer or a police vehicle is involved.
8. General inefficiency, lapses, indiscipline, etc. of the Police Service , DIG Ranges, OIC SSP Divisions, Districts and OIC Stations.
9. Willful institutions of defective or incomplete criminal charges against the accused persons.

Segment 'C'

1. Undue delay in making available certified copies of statements made to the Police by any person on payment of the usual charges.
2. Discouraging complainants or witnesses form making statements.
3. Use of Abusive words, threats or intimidation on complainants or witnesses.
4. Inaction and partiality by the Police in taking action on complaints made.

COMPLAINTS AUTHORITIES: POLICE ACCOUNTABILITY IN ACTION♦

1. Introduction

Complaints Against the Police

One critical measure of the success of a democracy is the extent to which the police are held accountable. With their full arsenal of law enforcement powers, the police must be accountable at every step. In a truly democratic state, there must be sufficient and easily accessible channels where people can file complaints without fear against police officers for acts of misconduct or possible criminality, and receive prompt, proper investigation.

In India, on the basis of government statistics alone,[1] it is plain to see the high number of complaints made against police officers, and also, the very serious nature of the complaints. The National Crime Records Bureau (NCRB) reports that 51,767 complaints were made against police officers in 2007.[2] These include complaints of human rights violations as serious as disappearances, illegal detention and arrests, extrajudicial killings, extortion, torture, atrocities on scheduled castes and tribes, and crimes against women.[3] These are complaints which were made at police stations, against police officers, requiring tremendous courage on the part of the complainants. 118 deaths in police custody were reported for 2007.[4] What of the response? Departmental, magisterial, and judicial inquiries were instituted. Of the total complaints received against police personnel, more than 50% were either not substantiated or found "untrue" by the inquiring authorities, which means, in effect, that more than half the complaints were disposed of.[5] No information is provided on the investigative steps taken before disposing complaints, and no reasons beyond "not substantiated" or "not found true" are given to explain why the majority of complaints are being disposed of. In the 64 complaints of human rights violations, charges were laid against 37 police officers, but "none of them was convicted for these human rights violations".[6] Even though 33 cases were registered against police officers, the report reveals that there was not a single conviction for any custodial death.[7]

Since their inception, the highest number of complaints to come before human rights commissions in India is of human rights violations at the hands of the police. A full range of

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♦ Reprinted in this Issue of the *LST Review* are extracts from *Complaints Authorities: Police Accountability in Action* by the Commonwealth Human Rights Initiative (CHRI) published in 2009 under CHRI's 'Better Policing Series'. CHRI is based in New Delhi, India.

1 It must be noted here that the government figures are not a reliable measure of crime statistics. These figures are gathered from registration of crime at the police station level. There are many factors at play which make these figures unreliable—all of them to do with police abuse and illegality in registration of crime. These are simply the only figures available to show some aspect of the complaints scenario, but they are grossly inadequate.

2 National Crime Records Bureau, Ministry of Home Affairs, *Crime in India 2007*, Chapter 16: http://ncrb.nic.in/cii2007/cii- 2007/CHAP16.pdf.

3 *Ibid*, see Table 16(E).

4 *Ibid*, Chapter 13: http://ncrb.nic.in/cii2007/cii-2007/CHAP13.pdf.

5 *Ibid*, Chapter 16: http://ncrb.nic.in/cii2007/cii-2007/CHAP16.pdf.

6 *Ibid*.

7 *Ibid*, Chapter 13: http://ncrb.nic.in/cii2007/cii- 2007/CHAP13.pdf.

the most serious police excesses are a regular feature of complaints: refusal to register complaints, custodial death and violence, extrajudicial killings, illegal arrest and detention, disappearances, false implications and crimes against women. This is evidenced by the last available figures from the National Human Rights Commission, which are shockingly already four years old dating from 2004-2005. The total number of cases registered by the Commission in 2004-2005 was 74,401, and of these, 72,775az were complaints of human rights violations.[8] Of the cases involving police officers disposed of after calling for reports from the concerned authorities, 24 related to disappearances, 1086 to illegal detention and arrest, 1213 to false implication by the police, 16 to custodial violence, 84 *fake* encounters, 6833 related to "failure to take appropriate action", and 6488 "related to other alleged police excesses".[9] Of custodial deaths reported in 2004-2005, seven were reported in the custody of defence/paramilitary forces, and 136 in police custody.[10] No information on the reports received (whether received at all) and further consideration and action taken by the Commission in these cases is provided in the Annual Report. The inherently limited powers and structural weaknesses of human rights commissions produce the same denial of justice as the mechanisms above.

The demand for police accountability is tremendously high, as it has always been—this is illustrated by the large number of complaints and their very serious nature. Moreover, the complaints give rise to important equality issues, such as police brutality towards vulnerable groups such as scheduled castes and tribes, women, minorities and the poor in general. On the face of it, India meets the democratic demand of multiple mechanisms for accountability, both within and outside the police. The internal disciplinary mechanisms within the police are handled by the police themselves with insufficient public involvement in the process. As a result, the system is not perceived to be independent. A process which is not open and does not follow principles of natural justice is always likely to be perceived as unfair or biased with the intention to protect the rank and file, no matter how objectively it is carried out. Besides the internal inquiry process, statutory remedies are also available to a victim. The police is an indispensable element of all stages of the criminal process, beginning with the registration of a First Information Report (FIR), an investigation, and then a prosecution. One is only too well aware that all across India, courts are slow, expensive and complex. The criminal justice system is mired in huge backlogs, lengthy delays at trial, as well as the more serious issues of acknowledged corruption. Victimised people are frequently CHRI 2009 | 11 unable to access the courts and even when they can, they are defeated in their quest for justice because they cannot understand the substance or processes. Even where adequate structures and systems for dispensing justice are available, they are not used by the larger citizenry due to lack of knowledge of systems and procedures.

Independent of the police, there are numerous accountability bodies like the National and State Human Rights Commissions, the Scheduled Tribes/Scheduled Castes Commission, the Women's Commission and the Minorities Commission. Each of these bodies has specific mandates to look into violations of human rights, or negligence in the prevention of

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[8] National Human Rights Commission, *Annual Report 2004-2005*, page 23, paragraph 4.3.
[9] *Ibid*, page 24, paragraph 4.5.
[10] *Ibid*, page 23, paragraph 4.3.

violations, by public servants. However there are serious weaknesses in these institutions. The National Human Rights Commission has made positive contributions in the past, but its powers (including the power to conduct investigations) have not been effectively deployed in relation to complaints against police officers. Clearly, there is no dearth of mechanisms but the absence of any demonstrable accountability indicates that these mechanisms fail in every way.

The courts have proven a powerful tool, but are often hampered by lack of evidence, and cases against police officers have to cross the additional hurdle of immunities offered under the Criminal Procedure Code, especially the protection under Section 197. The endemic problem of judicial delay continues to plague our system of justice.

Police Reform and Complaints Bodies

It is high time that critical questions regarding the conduct of police officers and their observance of human rights standards are seen as central to the evaluation of the police. Dedicated complaints bodies, established solely to inquire into complaints against police officers, can play this crucial role—but only if they are sufficiently independent and adequately resourced. Police reform debates in India have recognized the potential of complaints bodies, but not gone far enough to give them the independence they need. In the long list of recommendations for police reform in India, given by various official commissions and committees over several decades, a constant feature is a proposal for police complaints bodies. Since independence, four official commissions have debated and drafted extensive recommendations for police reform—all of them have suggested the creation of dedicated complaints bodies. The National Police Commission (NPC) produced eight reports, including a Model Police Act, between 1979 and 1981. In its first report, the NPC called for the setting up of a District Inquiry Authority in each district with powers to inquire into complaints as well as monitor the police handling of complaints. Both the Ribeiro Committee (1998-1999) and the Padmanabhiah Committee (2000) called for District Police Complaints Authorities to be set up in every district. Each time, the government effort would entirely cease once the Committee reports were published. None of the recommendations were implemented.

In 1996, two former Director Generals of Police filed a public interest petition in the Supreme Court of India, asking the Court to order the central and state governments to implement the recommendations of the National Police Commission. A decade later in September 2006, the Court ruled that given the "gravity of the problem" and "total uncertainty as to when police reforms would be introduced", it would issue "appropriate directions for immediate compliance".[11] In its judgment, the Supreme Court reminded us that, *"the basic and fundamental problem regarding police taken note of was as to how to make them functional as an effective and impartial law enforcement agency fully motivated and guided by the objectives of service to the public at large, upholding the constitutional rights and liberty of the people".*[12] The Court condensed the NPC recommendations into seven directives for

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[11] *Prakash Singh and others* v. *Union of India and others* (2006) 8 SCC 1.
[12] *Ibid.*

police reform. As one of the seven directives, the Court ordered all state governments and union territories to establish Police Complaints Authorities (PCAs) at the state and district levels, with immediate effect. Despite the court order most states are dragging their feet and have been most reluctant to comply with this directive.

The Need for Dedicated Police Complaints Bodies

The sheer volume of complaints against the police, and the endemic lack of justice, is the compelling argument for the need for these bodies which can dedicate themselves to police accountability. There are larger arguments too. In countries that have embarked on extensive police reform, it has increasingly been recognised that it is vital to establish a specialised agency responsible for proper investigation of complaints against police, in the larger interests of building public trust and better protecting human rights. South Africa and Northern Ireland provide two leading examples. In both jurisdictions, the creation of independent police complaints bodies was a major component of profound shifts in policing.

In 1999, the Independent Commission on Policing for Northern Ireland (often referred to as the Patten Commission) issued a report on the future of policing in Northern Ireland. The report contained 175 recommendations, to refashion the Royal Ulster Constabulary into a publicly acceptable police service. One recommendation was to strengthen the Police Ombudsman to make it "fully independent" in its job of investigating complaints against police officers. The Commission stressed: *"We cannot emphasise too strongly the importance of the office of Police Ombudsman in the future policing arrangements proposed in this report. The institution is critical to the question of police accountability to the law, to public trust in the police and to the protection of human rights".*[13]

Similarly, the Independent Complaints Directorate (ICD) was born out of the transition to democracy in South Africa in 1994-95, established in the new 1995 South African Constitution, and was also a recommendation of the South African Truth and Reconciliation Commission. In both places, the emphasis regarding the role of these bodies is that complaints of police misconduct and offences are investigated in an *effective and independent* manner.

> Nigeria's Police Service Commission is a unique hybrid oversight body. It would be one of the most powerful and autonomous civilian oversight institutions in the world, if strengthened and allowed to function as an independent organisation as laid down in the 1999 Nigerian Constitution.
>
> The Commission has been in existence since 1960, but was awarded wider powers with a broader membership in the 1999 Constitution of the Federation. The membership of the Commission includes representatives of the human rights community, the organised private sector, women and the media, as well as a retired justice of a superior court, and only one retired police officer.

[13] The Report of the Independent Commission on Policing of Northern Ireland, Chapter 6, page 38, http://www.nio.gov.uk/ a_new_beginning_in_policing_in_northern_ireland.pdf.

According to the Constitution, the Commission has the power to appoint persons to offices (other than the office of the Inspector General of Police) in the Nigeria Police Force, (NPF) and to dismiss and exercise disciplinary control over persons holding police office. Section 6 of The Police Service Commission (Establishment) Act 2001 further charged the Commission with the responsibility of formulating the guidelines for the appointment, promotion, discipline and dismissal of officers of the NPF; for identifying factors inhibiting and undermining discipline in the NPF; for formulating and implementing policies aimed at efficiency and discipline within the NPF; for performing such other functions as, in the opinion of the Commission, are required to ensure optimal efficiency in the NPF; and carrying out such other functions as the President may from time to time direct.

The power to dismiss and discipline individual police officers, coupled with the statutory obligation to establish an investigative department, provides the Police Service Commission with the ability and legal powers necessary to receive complaints on police conduct, investigate these complaints, and enforce any disciplinary measures it deems fit. Although it has no powers of criminal prosecution, it is able to dismiss officers and refer their cases for criminal prosecution where appropriate. It also has the powers to develop and implement policy for the police force, making a significant contribution to setting higher standards in the force as a whole.

The Commission is equipped to build public confidence in the police by acting to combat impunity. It has been designed as a channel for citizens to exercise some control over the police—unprecedented in Commonwealth Africa. However, the Commission has not been able to realise its full potential as an effective external oversight body due to the lack of resources, the delegation of some of its powers to the police, the absence of an adequate legal framework, and the interference of politicians. There are tremendous lessons here for India and its Police Complaints Authorities—particularly in warning against a wasted opportunity!

In both South Africa and Northern Ireland, the complaints bodies report to the legislature every year through their annual reports. In their reporting, they use statistical data in interesting ways which shed light not only on details of the complaints received against police officers, but also on the quality of their own oversight.

In its annual reports,[14] South Africa's Independent Complaints Directorate provides statistical data—on the number of deaths as a result of police action and in police custody (the police must report all these deaths to the ICD) and on the number of complaints lodged by members of the public with the ICD. The annual report also contains indicators on the ICD's institutional performance. These indicators include: "average number of days taken to finalise investigations", "percentages of investigation reports finalised", number of cases "substantiated", number of prosecutions recommended and convictions obtained.

The Police Ombudsman's annual reports contain comprehensive data including the full scale and details of all complaints handled by the Ombudsman for that year. The following information is fully disclosed in every annual report and is also available for free download

[14] For links to all the annual reports, see http://www.icd.gov.za/documents/index.html.

on the Ombudsman's website:[15]

- Number of complaints received from the public.
- Number of complaints received on referral from the head of police or the Public Prosecution Service.
- Outcomes of cases investigated, which includes information on:
  - number of cases referred for prosecution with criminal charges;
  - number of criminal charges recommended in total;
  - nature and allegations of charges;
  - number of cases referred to police for disciplinary action;
  - ranks of officers subject of complaints; and
  - factors underlying complaints.

The Ombudsman's office keeps up a steady stream of information on complaints flowing to the police, at the level of each district command. Each month, the Ombudsman forwards statistical reports to the police detailing the numbers and types of allegations associated with each station within each district. Also every month, the office reports to local police commanders information on individual officers who have been complained of three or more times in a 12-month period, including the number of complaints, number of allegations and details of the allegations.

In Northern Ireland, equality monitoring is a legal obligation for all public authorities. Section 75 of the Northern Ireland Act, 1998[16] requires designated public authorities to have due regard to the need to promote equality of opportunity between persons of different religious beliefs, political opinions, racial groups, age, marital status or sexual orientation; between men and women generally; between persons with a disability and persons without; and between persons with dependants and persons without. Public authorities are obligated to report regularly, following precise guidelines laid down in law and policy, outlining how they propose to fulfil their obligations under Section 75. The Police Ombudsman collects complainant characteristics to fulfil its Section 75 obligations. Complainants are asked to fill out monitoring forms once they have made a complaint. Every annual report contains an equality monitoring section which provides details and breaks down the information collected on the gender, ethnic origin, marital status, sexual orientation, religious belief and employment status of complainants. Collecting this information on the complainants gives the Ombudsman an idea of who is accessing the office, where the need comes from, and importantly, which groups are not accessing the Ombudsman as much as they should. To truly recognise discrimination and bias inherent in the criminal justice system, this is an important measure which India's authorities can absolutely replicate to suit India's own context. Taking guidance from both the South African and Northern Irish examples, India's Authorities have the opportunity to address both social injustice and police abuse by collecting, disaggregating and widely publishing data on:

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[15] For the latest annual report, see Police Ombudsman for Northern Ireland, *Annual Report and Accounts*, 2007-2008, http://www.policeombudsman.org/Publicationsuploads/PONI%20Annual%20Report.pdf. For information on the website on Complaints Outcomes, see http://www.policeombudsman.org/modules/cases/caseoutcomes.cfm.

[16] http://www.opsi.gov.uk/acts/acts1998/ukpga_19980047_en_1.

- the profile of complainants: gender, religious group, community, level of education, employment status;
- patterns of discrimination (i.e., whether on grounds of gender, etc);
- patterns of police abuse;
- outcomes of complaints inquired into (strictly including the time taken); and
- suggested policy responses, when relevant and necessary.

These broad categories can be further developed and refined as experience grows, but it will be an important first step to institutionalise the collection of this kind of critical information, analyse it, develop policy and wider responses towards the systemic problems, and also use the information to constantly improve the Authorities' functioning. With the needed political will from governments and the enthusiasm to innovate, these Authorities could bring unprecedented dimensions to their mandates.[17]

Aim of the Report

The aim of this report is to provide an assessment for 2008, the first year of operation of India's newly created Police Complaints Authorities. Primarily, this report will offer a broad analysis of legislative provisions, background information on the Authorities which are functioning on the ground, and highlight weaknesses in legislation and practice. The report ends by presenting specific recommendations for the improved functioning of these bodies.

2. State Compliance: A National Overview

Since 2006, 15 Police Complaints Authorities have been set up through either new state Police Acts, or Government Orders until a new Act is passed. These are in the states of Uttarakhand, Sikkim, Tripura, Rajasthan, Punjab, Kerala, Himachal Pradesh, Haryana, Chattisgarh, Bihar, Assam, Goa, Maharashtra and Orissa.[18] CHRI has learned that PCAs are not necessarily functional on the ground, even if legislation has been enacted or a government order has been passed. In actuality, PCAs have been constituted and are functional (to some extent) in only five states—Kerala, Uttarakhand, Goa, Assam and Tripura.

Composition

The Supreme Court expressly ordered that the Chairman of the state-level PCA be a retired judge of the High Court/Supreme Court chosen by the state government out of a panel of names proposed by the Chief Justice. The other members are to be chosen by the government from a panel prepared by the State Human Rights Commission/Lok Ayukta/State Public Service Commission. The composition was designed to ensure that members appointed would by and large be independent-minded individuals who would go about their work without fear or favour.

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[17] It is very encouraging that in Assam, Uttarakhand, and Tripura, the Authorities are mandated to report on similar categories in their Annual Reports, as laid down in the Police Acts, Section 71 of the Tripura Police Act; Section 83 and 86 of the Assam Police Act and Section 73 of the Uttarakhand Police Act.

[18] To note, the Punjab Police Act, 2007 states that these bodies *"may" be set up.*

In practice, however, this direction has been systemically undermined by every state government which has enacted legislation or government orders establishing PCAs. All present members of PCAs across India have been appointed directly by state governments without exception. As these members are essentially political appointees, they will be beholden to the executive, and it is extremely unlikely that they will risk taking actions that may displease the government or the police. Some states, like Kerala subvert the compositional aspect of the Apex Court's direction to the extent that they have appointed *serving police officers* to their authorities. Others, like Gujarat, have appointed *sitting MLAs* as members of their district authorities. With such a composition, it is highly improbable that these PCAs will function as robust, independent oversight mechanisms as intended by the Supreme Court.

To add insult to injury, Orissa and Himachal Pradesh have vested the PCA's powers with its Lokpal and Lokayukta respectively, and Sikkim has charged its newly constituted PCA to also function as its State Human Rights Commission. These "innovations" totally flout the idea of PCAs being bodies that will look *solely* into cases of police misconduct.

Remuneration and Funding

The Supreme Court judgment envisioned that members of the Police Complaints Authorities would work full time and would be suitably remunerated for their services. Whilst most states which have passed legislation have provided for remuneration in their statutes, reality has shown that there has often been a long delay before members actually began receiving their salaries. In Goa, both members and staff waited nearly a year before they were paid, until which the Chairman kept the institution functioning with his own personal funds. Throughout the country, it appears that states have been reluctant to properly fund PCAs. This has led to them operating in conditions that are far from satisfactory. Almost everywhere, PCAs lack permanent offices and even basic facilities such as computers and telephones.

One of the surest ways to cripple an institution is to dry up its funding. In the statutes, no state government has clearly specified where the funding for PCAs will originate from within the state budget. State governments across the country are in non-compliance of the Apex Court's order in letter and in spirit by delaying and/or denying adequate funding for their PCAs. It is no surprise that the PCAs are struggling to fulfil their onerous mandates and produce results. State governments have not given them the chance to succeed.

Mandates

The Supreme Court laid down a mandate for the Police Complaints Authorities in its 2006 judgment.[19] The Court required each state government to set up a Police Complaints

[19] On a comparative note, the mandate laid down by the Court falls in line with the mandates of similar police oversight bodies in South Africa, Northern Ireland, and England and Wales, which all include the investigation of deaths in police custody. Based on this trend, it may be argued that the core mandate of these types of bodies is an obligation to investigate, independently and promptly, deaths

Authority at the state and district-level. The state-level Authority is empowered to look into allegations of "serious misconduct", which includes but is not limited to:

- death;
- grievous hurt; and
- rape in police custody.

The district-level Authorities are empowered to look into complaints which include:

- death;
- grievous hurt;
- rape in police custody;
- allegations of extortion;
- land/house grabbing; and
- any incident involving serious abuse of authority.

The Court laid down that the jurisdiction of the state and district level Authorities are tied to the ranks of officers being complained against. The state-level Authority will look into complaints against officers of the rank of Superintendent of Police and above. The district-level Authority will inquire into complaints against officers of the rank of Deputy Superintendent of Police and below. Importantly, in relation to their mandate, the Court laid down that the recommendations of the Complaints Authorities at both the state and district levels "for any action, departmental or criminal, against a delinquent police officer shall be binding on the concerned authority".

The Court provided a model. In the states where Complaints Authorities have been established, the trend is that states have instituted variations of the Court's formulation for Authorities' mandates, in terms of the Authorities' jurisdiction for both the nature of complaints and ranks of officers. It is important to note that the Court did not lock down the definition of what constitutes "serious misconduct" or lesser "misconduct", leaving room for the possibility of expansive interpretations of the law by Authority Chairs to cast as wide a net as possible over all manner of police misconduct (in just one example, for instance, dereliction of duty). In fact, a few states do reflect such minor innovations.

Widening the Net

The states of Uttarakhand, Tripura and Assam have experimented slightly with the Court's formulation. In these states, the Complaints Authorities can only inquire into complaints of "serious misconduct". The definition of "serious misconduct" is considerably wider, and thereby, the Authorities in these states can receive a greater variety of complaints. Also, and notably, the Authorities in these states have the power to monitor the status of police internal disciplinary inquiries or action, for complaints of "misconduct" which the Authorities themselves do not have jurisdiction over.

in police custody—the only variation is in the other jurisdictions, unlike India, where deaths as a result of police action (in police firing for instance) are also included in the mandates.

In terms of "serious misconduct", the Uttarakhand Police Act, 2007[20] expands the definition to include (in addition to death, grievous hurt, and rape in custody):

i) arrest or detention without following the due process of law;
ii) violation of human rights; and
iii) corruption.

Further, the Act prescribes that the Uttarakhand Police Complaints Authority can inquire into any case that in "the opinion of the Authority" is "fit for independent inquiry".

The 2007 Tripura Police Act mirrors these sections, verbatim.[21]

In Assam, the mandate is also widened to include:[22]

i) arrest or detention without due process of law;
ii) forceful deprivation of a person of his rightful ownership or possession of property;
iii) blackmail or extortion; and
iv) non-registration of First Information Report.

Accessibility

The Supreme Court explicitly ordered that Authorities be constituted at both district and state levels. This is a crucial element in India's context, due to the sheer size and physical distances in the country. In this regard, the Court's reasoning was that people will have easier access to a complaints body in their district, and would not be forced to travel to the state capital. Unfortunately, most states have taken the view that constituting district-level authorities was optional and not a mandatory part of the Court's order. Till date, Kerala remains the only state to have actually established functioning PCAs at the district level. Some states, such as Sikkim, Tripura and Uttarakhand have blatantly ignored the Supreme Court judgment by not mentioning district-level authorities in their legislation. Several other states have inserted provisions for district-level authorities in their new police statutes but have done nothing to actually establish them on the ground.

Certain states have also created unnecessary hurdles that complicate the process and discourage persons from accessing PCAs. Assam, Chhattisgarh, Orissa and Haryana require a sworn statement against police personnel to be submitted by the complainant along with the complaint. Orissa has gone even further by requiring every complaint to be accompanied with a court fee of Rs.50, if the complaint involves an officer of the rank of Assistant Superintendent of Police and above, and Rs.25, if the complaint concerns any other police officer.[23] Himachal Pradesh even threatens complainants with a fine of up to Rs.25,000 if the complaint is found to be "intentionally false, vexatious or malafide". It is difficult to see how these provisions help the cause of police accountability which the Apex Court's order was intended to bring about. Indeed, these provisions are sure-fire ways for state governments to intimidate potential complainants from accessing PCAs.

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[20] Section 71(2), Uttarakhand Police Act, 2007.
[21] Section 66.
[22] Section 78, Assam Police Act, 2007.
[23] Five categories of persons are exempt from paying this fee. These include i.) women; ii) physically challenged persons; iii) persons belonging to the SC/ST community; iv) people falling in the BPL category; and v) persons in custody.

Powers

- Taking Cognisance

All Authorities that have been set up have the power to take cognisance of complaints made by the victim or someone complaining on their behalf. Some states, such as Assam, Sikkim, Tripura, Himachal Pradesh and Haryana, also allow the National Human Rights Commission/State Human Rights Commission to make complaints. In addition, Assam, Haryana, Himachal Pradesh and Rajasthan provide for their complaints authorities to initiate inquiries *suo moto* (on their own initiative).

- Procedural Powers

All states have vested their Authorities with the powers of a civil court trying a suit under the Code of Civil Procedure, 1908. As such, whilst carrying out their inquiries, they have the powers of summoning and enforcing the attendance of witnesses, receiving evidence of affidavits, requisitioning any public record, etc. Despite these powers on paper, however, the Authorities' work has been severely hampered by the fact that none of them have been provided with their own investigating staff till date. Goa is an exception, as the PCA is explicitly authorised to utilise the services of retired investigators. To make matters worse, the funding crunch prevents Authorities from recruiting independent investigators on their own. This is despite the fact that the Supreme Court's judgment clearly states that authorities may utilise the services of retired investigators from the CID, Intelligence, Vigilance or any other organisation. Without independent investigators, authorities face grave limitations on the extent to which they can actually ascertain the facts of cases before them.

- Power to Frame Rules

Being the nascent institutions that they are, PCAs face a pressing need to establish formal rules of procedure detailing how they will deal with complaints received. In most cases, state governments have reserved the power to frame these rules but have yet to notify them. However, even where governments have vested the power to frame rules with the PCAs themselves, such as in Assam, Haryana, Sikkim, Tripura and Uttarakhand, no rules have been framed. An absence of established rules of procedure means that proceedings occur in an ad-hoc and haphazard manner based on the whims and fancies of the Chair, making the entire process opaque and confusing for all parties involved. It is an irony that Authorities intended to bring about accountability have not yet framed rules despite functioning for over a year.

- Recommendations

After completing their inquiries, most PCAs have the power to either register an FIR if an offence is made out, or to initiate departmental action if a breach of discipline is found. Sikkim and Tripura go further in providing their PCAs with the power to direct the government to pay monetary compensation to the victims of police misconduct.

The role of most PCAs comes to an end after submission of their recommendations to the concerned authority. However, Assam, Tripura and Uttarakhand allow their PCAs to call for periodic reports from the Director General of Police (DGP) to monitor the progress of

disciplinary inquiries that they have initiated, and communicate to the DGP periodically to expedite the proceedings of such an inquiry. The DGP has no power to refuse these reports. In cases where the complainant informs the Authorities in these states of any inordinate delay in or dissatisfactory outcome of the disciplinary proceedings, the Authorities have the power to follow up on the matter. They can ask the DGP to report on the same, recommend further action or even order a fresh inquiry. Some acts also go on to state that the PCA can point out trends of police misconduct and even make recommendations for more accountability.

These are welcome initiatives and cast a positive obligation on the PCA to regularly call for such reports. If this reporting becomes regular practice as it should, it can go a long way in documenting observed trends in delay and inadequacy of departmental inquiries, frame recommendations about individual cases, and suggest guidelines for systemic improvements that must be acknowledged and acted upon.

Toothless Tigers?
Dilution of PCAs' Power to Recommend Binding Action Against Police Officers

The Supreme Court judgment made it clear that the recommendations of the Authority against delinquent police officers shall be binding. With the honourable exceptions of Assam, Goa, Himachal Pradesh and Kerala, most states have watered down the powers of their Authorities considerably, by not making their recommendations binding.

Without binding powers, state governments and the police are free to disregard the recommendations of the Authority whenever they find it convenient to do so. PCA reports recommending action against police officers who have political connections will never see the light of day. As such, these "toothless" PCAs will not bring about accountability within the police and will certainly not be able to change the culture of impunity that currently exists within the force.

3. Conclusion

The opportunity to initiate change provided by the Supreme Court's judgment is being wasted. Responding to an acute lack of police accountability, in 2006, all states and union territories were ordered to set up Police Complaints Authorities at both the district and state level. Almost three years after the judgment, only five states have actually established Complaints Authorities—and this implementation is shoddy at best.

In the majority of cases, even after a year of being established, the functioning Authorities are choked due to a severe lack of funds. Most do not have permanent offices, are critically under-resourced, and none have been able to employ independent investigators. None of the Authorities have been guaranteed a fixed allocated budget. Across the board, the members of the Authorities are almost exclusively either retired govt. servants and police officers, or serving govt. servants and police officers. This is in blatant defiance of the Court's demand for independent members, and a serious impediment to the development of truly empowered police complaints bodies. The public has not been properly informed of the existence and mandate of the Authorities, much less provided guidance on how to use the Authorities

suitably. With the exception of minor innovations, the Authorities themselves have not yet established clear procedures for their functioning. This has a serious impact on the outcome of complaints, and more largely, on the degree of accountability assured to complainants.

In sum, the first year of operation of these newly created Complaints Authorities has produced serious failings. The record of implementation is virtually nil; and the quality of implementation is so poor that the Authorities are struggling to just live up to their mandates, much less deliver their mandates. These Authorities are under the care of state governments, who have the obligation to fund and resource these bodies to equip them to carry out their legal mandate. State governments have a responsibility to realize the Court's demand for truly independent bodies, and forge recruitment and membership that can withstand political pressure as well as link the diverse skill-sets and experiences needed to create Complaints Authorities that address human rights and social justice issues head on.

In the absence of any real political will or corrective action, these bodies will become accountability mechanisms only in name, with no demonstrable action or impact. They have already started down the path of other oversight bodies which continue to spend public money but have failed their mandates in every way. In the long-term, this will do even more damage, with the continuation of serious violations at the hands of the police and no accountability, in spite of the existence of dedicated accountability mechanisms.

CHRI appeals to all state governments to turn around this failed first year of operation, by sufficiently equipping these bodies, and paying heed to the Court's requirement that they be truly independent. In the next section, we provide specific recommendations geared towards improved functioning.

Minimum Requirements from a Successful Oversight Body

- Independence: Should be independent of the Executive and the police and empowered to report directly to Parliament.
- Sufficient powers: Should have the authority to independently investigate complaints and issue findings. This requires concomitant powers to conduct hearings, subpoena documents and compel the presence of witnesses including the police. It should also be able to identify organisational problems in the police and suggest systemic reforms.
- Adequate resources: Should have sufficient funds to investigate at least the more serious complaints referred to it. Skilled human resources to investigate and otherwise deal with complaints should also be available.
- Power to follow up on recommendations: Should be empowered to report its findings and recommendations to the public, and to follow up on actions taken by the police chief in response to its recommendations. It should also be able to draw Parliament's attention to instances where police take no action.

4. Recommendations

In view of the urgency, CHRI puts forth the following recommendations:

Membership

Across all the states, in both legislation and practice, the members are either mainly retired government servants and police officers, or serving government servants and police officers. It goes without saying that the overwhelming presence of police officers and IAS officers, serving or retired, kills the spirit behind the urgent necessity of the set-up of these bodies. The presence of *serving* police officers, particularly, entirely defeats any independence for these bodies.

CHRI recommends that serving police officers be barred from becoming members of the Police Complaints Authorities. We suggest that serving police officers who are currently members of Authorities be asked to step down.

The profile of the members—predominantly elder male, and from either a government or security force background—does not even begin to be diverse enough to ensure that functioning will be truly independent, and decisions will be unbiased and fair. A key failing of India's human rights commissions has been that members are not required to have a background or expertise in human rights, and they are all government officers from diverse departments arbitrarily assigned to act as members. At this point, the PCAs are primed to go the same way.

CHRI recommends that a fair balance be struck in membership between retired government officers and independent members, with exactly half as retired officers and half as independent members. To facilitate this, we recommend that applications are opened up and invited from the general public, through newspapers, the Internet and general publicity. We highly recommend that a wider skill set is sought for PCA members, such as social workers, psychologists and lawyers.

Funding

Even with a plethora of powers, oversight bodies are constrained in their ability to hold the police accountable without sufficient financial resources. Even if these are not withheld for illegitimate political reasons, shortage of funds is a serious limiting factor. The debilitating effect of lack of funding on the Authorities is clear—with no permanent offices, no basic infrastructure and no pool of independent investigators. Financial independence can only be ensured when budgets are approved by state legislatures, not the Executive, and then administered by the Authorities themselves without interference.

CHRI recommends that the release of funding for the PCAs is immediately prioritised. We emphasise that the funding for the PCAs must be independent and not part of the police budget. The budget should be approved by the State Legislature and then administered by the

Authorities themselves, with the obligation to report on their spending to the State Legislature.

Publicity

There is no public awareness of the Authorities. If the public is not aware that these bodies exist, and they do not have the proper information concerning their mandates, the Authorities will continue to be under-worked and run foul of their mandates.

CHRI recommends that each state government prioritise an extensive public awareness campaign focused on the PCAs, down to the district level. Every attempt should be made to facilitate access. All the critical information on the PCA mandates, the stages of the complaints process, the names of the members, the full contact details of the Authorities and the rights of complainants, must be spread far and wide. Standards for functioning of the PCAs should be clearly set down and regular feedback from its users should be sought in order to constantly monitor whether the body is realising its mandate or not. Civil society organisations must be co-opted to spread awareness. Awareness could be raised by advertisements in newspapers or holding public meetings.

Minimum Criteria for Complaints

Across the country, the Authorities are disposing of the majority of complaints—largely because they either do no meet the PCA mandate or they do not contain necessary information. The reason for this is the lack of guidance on what to include in a complaint and lack of public knowledge on the PCA mandates.

CHRI recommends that guidelines are immediately issued by the Authorities, providing the basic information needed to substantiate a complaint, with a clear explanation of the types of complaints that fit the Authorities' jurisdiction. We strongly urge that all fines and/or liabilities on the complainant for "vexatious" or "false" complaints are removed.

Powers and Obligations

The Authorities in almost all states have the power to initiate internal inquiry or register an FIR. There are Inherent problems of recommendations with these powers. Sending back a complaint to disciplinary action is as good as giving a clean chit.

CHRI recommends that that there is recognition amongst the PCAs that all serious misconduct amounts to criminal misconduct and they begin to see police misconduct for what it really is. PCAs should invite public scrutiny to check the trends and nature of decisions and to see if criminal charges are even being recommended in the cases.

It cannot be assumed that on receiving and registering complaints and even initiating disciplinary inquiry into the allegations leveled against police personnel, that the disciplinary authority will follow the due process of law within a reasonable time, conclude its inquiry and render its findings.

CHRI recommends that the powers granted to Police Complaints Authorities at both state and district levels be used in concerted action of rigorous, periodic and consistent monitoring of disciplinary inquiry and action to ensure delays are kept out of such proceedings and justice is truly rendered – such as provided for in the Police Acts of Assam, Tripura and Uttarakhand. This monitoring can include calling for periodic quarterly reports from the DGP on departmental inquiries, assessing the progress of inquiries, and advising the police department on completing inquiries without delay. This process carries the potential to inject and instill the notion of scrutiny into internal proceedings.

Experience shows that even independent oversight agencies with sufficient resources and strong investigative powers have proven ineffective if the police and governments routinely ignore their recommendations. If these bodies are to be given only recommendatory powers then they will, like other existing bodies, be reduced to toothless institutions causing public hopes of effective remedies to be quickly lost.

CHRI recommends that all Police Complaints Authorities be given the power to make binding recommendations. The police must be obligated to report back to an Authority on action taken on Authority recommendations, within a stipulated time.

Strong investigative powers are a key factor for the success of oversight agencies. The most effective oversight bodies require not only powers to investigate independently but also to call for evidence and compel police cooperation. They must also be able to make recommendations about individual cases as well as systemic improvements that will be acknowledged and acted upon. Lack of independent investigators—one evil (no funds) leads to another (inability to hire a pool of investigators), will result in PCAs always being dependent on the police and never independent!

CHRI recommends that all Police Complaints Authorities be given investigative powers. For this, they must have a fixed pool of investigators or be able to draw from a pool of investigators on a regular basis. The funding and budgets should be adequately raised to ensure that this happens.

Rights of Complainants

An inquiry process that professes to follow the principles of natural justice must accord the rights due to the complainant in the process. This is vital for both the legitimacy of the process itself, as well as to win public trust.

CHRI recommends that every new Police Act enshrines rights for complainants, to ensure that the complainant is kept informed throughout the inquiry process, can participate in the proceedings and is adequately protected from any threats. The Acts of Assam, Tripura and Uttarakhand contain replicable legislative provisions.

Witness Protection Programmes

No inquiry process can be fair or procedurally thorough without witnesses. It is of utmost importance to protect and support witnesses in the inquiry process, and the onus is on the Authorities to realise this.

CHRI recommends that all Authorities put in place witness protection programmes.

Rule-Making Powers

Experience shows that in the absence of rules/guidelines for effective functioning, monitoring bodies are rendered useless. Till date, none of the PCAs that have been set up have made rules for functioning. Some are dependent on the government to make rules while certain state PCAs have the power to draft their own rules.

CHRI recommends that rules for the functioning of the PCAs be framed and notified without any further delay. Where PCAs have been given the powers to frame their own rules, this should be done at the earliest to ensure the smooth functioning of these bodies.

27/02

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SINHALA TRANSLATION OF –
How to Audit Foreign Debt: An activists' manual edited by B. Skanthakumar.
(Originally published in French, Spanish and in English as *Let's Launch an Inquiry into the Debt: A manual on how to organize audits on Third World debts* by a collective of organizations led by CETIM and CADTM in Geneva, October 2006.)

In 2007 the total external debt of developing countries was estimated to be around US$3,360 billion. It is poor countries and the poorest and most vulnerable within those countries that acutely experience the consequences of the debt crisis.

This manual is written by global justice activists from around the world for the use of other activists. It explains the significance of external debt within developing countries. It argues that citizens and future generations should not be liable for illegitimate or 'odious' debts, that have been illegally or wrongfully contracted or misused by government.

An audit of external debt is necessary to differentiate between legitimate and illegitimate debt, and when conducted by social movements, it can become a tool for popular education on issues of debt, development and democracy. The manual outlines the methodology for conducting a debt audit, and its technical, legal and political dimensions.

JOINT SINHALA-TAMIL TRANSLATION OF –
'Window-Dressing'?: The national Human Rights Commission of Sri Lanka
by B. Skanthakumar.
(Originally published in the *LST Review* on the theme 'Dysfunctional Oversight: Continuing debates on Sri Lanka's Human Rights Commission', v.20, n.262, August 2009.)

In recent years, violations of international humanitarian law, extra-judicial killings, abductions and 'disappearances', verbal and physical attacks on journalists and human rights defenders, spiraling intolerance for dissent, and wanton disregard for constitutional provisions and democratic norms have come to epitomise Sri Lanka's human rights environment.

In this context, the expectations on the National Human Rights Commission of Sri Lanka are inevitably greater; and its alarming unwillingness to recognise the urgency and seriousness of the human rights crisis, are of greater disappointment and enormous concern.

This paper is a review of the role and impact of the Human Rights Commission of Sri Lanka.

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