

Human Rights Commission: A Global Perspective

By Dr M Ershadul Bari

ALTHOUGH the concept of the human rights commission for the promotion and protection of human rights at the national level developed during the 1970s, 1980s and 1990s at the initiative of the United Nations, the original concern of the UN for such an institution had to be traced back to 1946 when the Economic and Social Council asked Member States to consider "the desirability of establishing information groups or local human rights committees within their respective countries to collaborate with them in furthering the work of the Commission on Human Rights". In 1960, the Economic and Social Council adopted a resolution in which the unique role that the national institution could play in the promotion and protection of human rights was recognised and governments were requested to encourage the formation and continuation of such an institution. Later in September 1978, a seminar on National and Local Institutions for the Promotion and Protection of Human Rights was held in Geneva in pursuance of the decision of the Commission on Human Rights in which guidelines for the structure and functioning of such a body were adopted. These guidelines were subsequently endorsed by the Commission on Human Rights and by the General Assembly. The Commission called all Member States to take appropriate steps for the establishment, where they had not already existed, of national institutions for the promotion and protection of human rights.

The United Nations continued to take an active interest in national institutions throughout the 1980s and 1990s. Several reports prepared in this regard by the Secretary-General were submitted to the General Assembly.

In October 1991, the United Nations convened in Paris, France, the first International Workshop on National Institutions for the promotion and protection of human rights to explore, *inter alia*, ways of increasing the effectiveness of national institutions previously created by national representatives of institutions, states, the United Nations, its specialised agencies, intergovernmental and non-governmental organisations. The workshop drafted the "Principles Relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights". The "Paris Principles", the internationally accepted benchmark concerning national institutions, were approved by the United Nations Commission on Human Rights on 3 March 1992 and endorsed later by the General Assembly on 20 December 1993. These "Principles" provide that a national institution must be independent, have as broad a mandate as possible, be characterised by regular and effective functioning, pluralistic and representative composition and adequate funding, and be easily accessible to the public.

Two other international workshops concerning national institutions, one in Tunis in 1993 and the other in Manila in 1995, were sponsored by the United Nations. These workshops basically reiterated the Paris Principles. The last meeting in this regard was held in Merida, Mexico, in November 1997.

Importance of the National Human Rights Commission

The necessity of a national human rights commission to ensure respect and protection of human rights is keenly felt in a state professing the rule of law for several reasons.

In the first place, the commission may provide easy access for the most vulnerable and disadvantaged groups in society including the homeless, refugees, migrant workers, indigenous peoples, minorities, those with intellectual disabilities, the mentally ill, children and others. The reality, even in developed countries, is that the courts are inaccessible to a large proportion of the population because of the high costs involved although "Equal access to law for the rich and poor alike is essential to the maintenance of the Rule of Law. The national human rights commission can, by reaching so many, transform the rhetoric of the national and international instruments into reality for millions of people for whom the term "human rights" has previously had no meaning at all. It can investigate complaints without recourse to cumbersome rules of evidence and procedure and settle complaints by negotiation, conciliation or arbitration — procedure which are not only more "cost effective" than more traditional adversarial or inquisitorial procedure, but also more "user-friendly" to groups which have traditionally been disempowered and frequently find the trappings of traditional courts quite intimidating.

Secondly, the human rights commission may resolve complaints more speedily than the courts for the benefit of those whose rights have been violated.

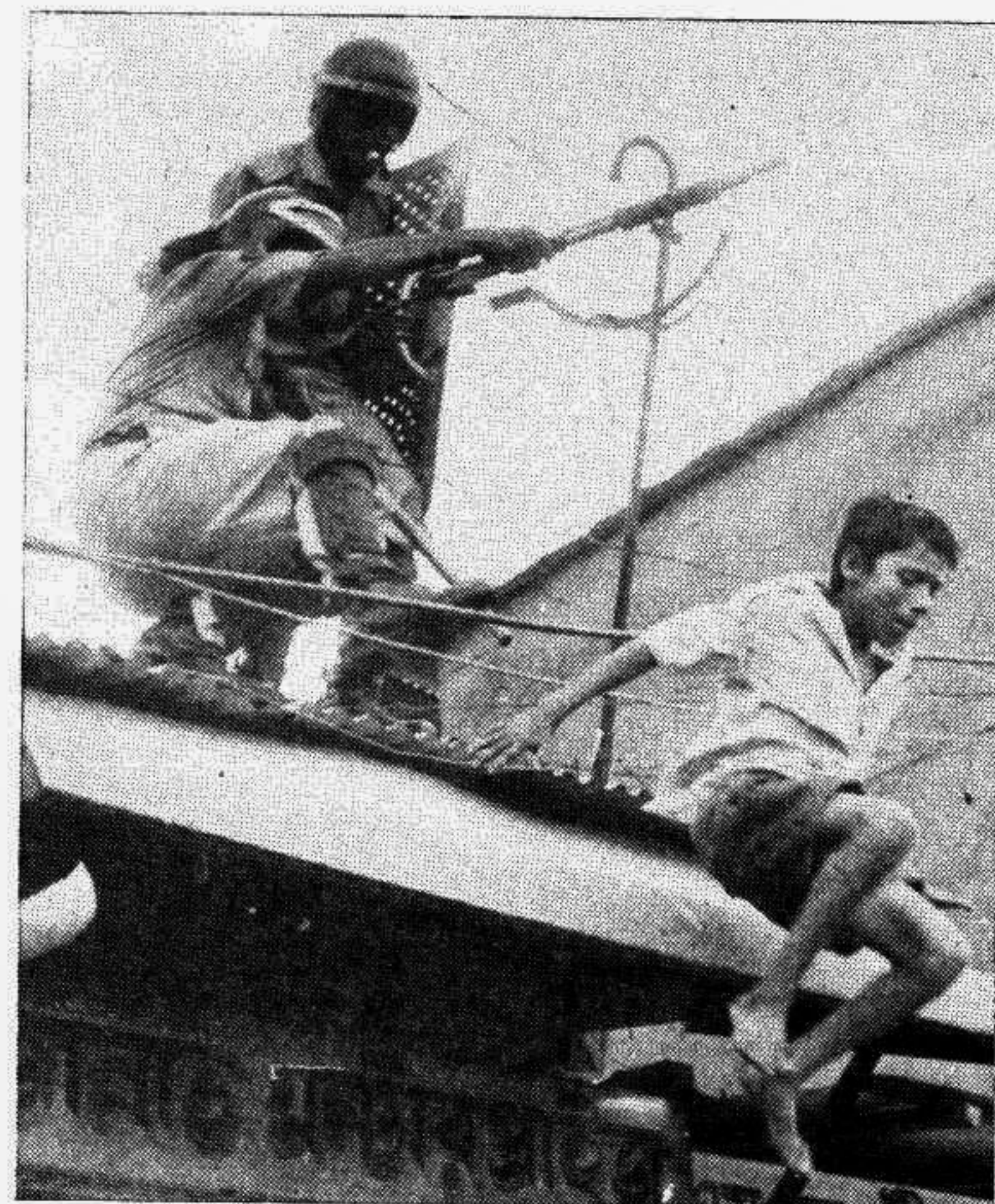
Thirdly, the Commission may provide the most effective means of preventing human rights violations through educating individuals that they have rights, balanced by responsibility which government, private sector and other individuals must respect. It can play a valuable role in relation to research, publication and dissemination of information about human rights. Formal and informal human rights education can contribute to prevention of human rights violations by promoting a human rights culture.

Fourthly, the Commission may play an important role in helping both government and non-governmental organisations to give practical effect to the international principles they are committed to observe.

Fifthly, the national commission can contribute to and monitor the integrity of government reports to international treaty bodies, reflecting the reality of human rights beyond the perception of bureaucratic ensconced in national capitals.

Sixthly, they can provide constructive, well-informed criticism from within, which is frequently important in corroborating or balancing criticism from foreigners — often dismissed by government subject to criticism as based on ulterior or illegitimate motives.

Seventh and finally, the existence of a national mechanism with the power to investigate abuses and provide relief to victims can, of itself, discourage acts or practices inimical to the enjoyment of human rights.



Police atrocity would be an important agenda for action of the proposed National Human Rights Commission of Bangladesh. — Star file photo

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It should be stressed here that the role of the national human rights commission, designed to facilitate the informal, speedy, effective and cheap resolution of complaints, should be seen as complementary/supplementary to the judiciary. It is precisely the ability of the commission to contribute substantially to the realisation of the rights of minorities and other vulnerable groups which makes it so significant. An independent and autonomous commission with a mandate and appropriate powers to monitor and protect human rights can considerably attenuate the demonstrable deficiencies of democratic governments, constitutional "guarantees" and often inaccessible court system.

Therefore, all the States attending the Second World Conference on Human Rights in Vienna in 1993 emphasised the importance and role of national institutions in promoting and protecting human rights.

The World Conference encourages the establishment and strengthening of national institutions, having regard to the "Principles relating to the status of national institutions" and recognising that it is the right of each state to choose the framework which is best suited to its particular needs at the national level.

Composition of the Commission

The composition of the human rights commission is considered basic for its credibility and effective functioning. An effective, credible commission will be one which reflect in composition the community it is established to serve. It should compose of men and women

who have a proven expertise, competence, experience and interest in the field of human rights and should be drawn from diverse backgrounds, including relevant professional groups and the non-governmental sector. The "Paris Principles" stress emphasis on the pluralist representation of all segments of the society.

Investigation into Alleged Violation of Human Rights

One of the most important functions with which a human rights commission may be entrusted in the investigations of complaints from individuals or groups alleging violation of human rights enshrined in domestic law and/or those set out in international treaties which the state concerned has ratified. The commission's power to accept representative complaint from any person or group of persons, association or organisation including trade unions and non-governmental organisations on behalf of victims specially belonging to vulnerable and disadvantaged groups is important. For such victims may be reluctant to lodge complaints or even may not be conscious about their rights or may not be in a position to engage advocates to act on their behalf. It may also be given the power to investigate on its own initiative situations and cases of published violations of human rights. The ability of a commission to initiate enquiries on its own behalf is an important measure of its overall strength and probable effectiveness especially with regard to situations involving persons or groups who do not have the financial or social resources to lodge individual complaints. Offices of national human rights commission should be established also in places other than the country's capital to decentralise its operations and

increase its physical accessibility to those individuals or groups who are the most vulnerable and disadvantaged. Where decentralisation of the commission is not a practical option, provision shall be made for the recruitment of field officers to serve in different regions. Flexible rules of procedure, e.g. accepting complaints through the post or over the telephone, will enhance commission's accessibility.

In order to discharge its investigative responsibility effectively, a national human rights commission may be granted a range of powers enabling it to summon and enforce the attendance of witnesses and examine them on oath, receive evidence on affidavits, issue commissions for the examination of witnesses or documents, and requisition any public record or copy thereof from any office.

Resolution of Alleged Violation of Human Rights

The human rights commission may provide an informal, inexpensive, quick and amicable resolution of complaints of human right violations through conciliation and/or arbitration. In the process of conciliation, the commission will make an attempt to bring the two parties together in order to achieve a mutually satisfactory outcome. If conciliation fails to resolve the dispute, the commission may be able to resort to arbitration in which it will, after a hearing, issue a determination.

It is not usual for a human rights commission to be granted authority to impose a legally binding decision on parties to a complaint. This does not mean that the settlement or appropriate remedial steps recommended by the commission can be ignored. The principle force behind the recommendations of the commission addressed especially to the government agency is the public opinion. The weight of its recommendation depends on the credibility of the commission in the society, on the public perception of its independence, sincerity and commitment and on the composition which is enhanced by the fact that failure to comply with its recommendations will be commented the periodic reports which would imply a high political cost for the authority concerned. However, in some cases the commission may be able to transfer unresolved complaints to the courts for taking a final and binding decision. Thus the commission can potentially strengthen human rights protection without replacing the court or diminishing its authority in this regard.

Providing Assistance and Advice to Government for the Promotion and Protection of Human Rights

The human rights commission may be given the task to review systematically the government's human rights policy in order to detect shortcomings in human rights observance, to review human rights legislation in order to identify areas where legislation requires improvement because of technical defects or inadequacies and to

make recommendations for the amendment of such legislation. It may submit opinions on proposed or existing legislation to ensure that their provisions conform to the basic principles of human rights. It can also have the power to make recommendation for the introduction of new legislation concerning human rights. It may be entrusted with responsibility for drawing government's attention to situations of human rights abuse and making specific proposals aimed at preventing such abuse. Since over the years, violations of human rights in jail, prison and detention centres committed in most cases by the government agencies have become a regular phenomena, the commission may make such recommendation as may be necessary for improving the situation in these places.

Human Rights Commission may play an important role in monitoring the implementation of international human rights instruments through advising the government concerning acceptance of international instruments and means necessary to ensure compliance with international obligations. It may further assist the government to fulfil its reporting obligations to various international treaty bodies.

Human Rights Education

In recognition of the fact that the realisation of human rights cannot be achieved solely through legislation and administrative arrangements, the human rights commission may be entrusted with the important responsibility of educating individuals about their rights — which government, the private sector and other individuals must respect. Once people are educated about and aware of their human rights, they can demand for the observance and advancement of those rights, can build public opinion and generate public pressure for the compliance with those rights. There is a growing awareness that the preventive strategies must be adopted for the promotion and effective protection of human rights and among the most effective of those strategies are appropriate education and training in human rights. Indeed, without education and training, no other preventive strategy can or will succeed. This is the basic premise underlying the United Nations Decade for Human Rights Education, launched in 1995. The Human Rights Commission may develop practical strategies for promoting and educating about human rights which can involve collection, production and dissemination of human rights publication, human rights literacy campaign, organising seminars, workshops and other promotional activities, holding counselling services, informing the public about the commission's own functions, and the development and implementation of training programmes for a variety of audiences.

In the next episode the writer will analyse the independence of Human Rights Commission and discuss the recent government initiative to set up a Human Rights Commission in Bangladesh.

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Law Watch

Towards Gender Equality in India

By Jayantha Natarajan

ON February 18, 1999, the Supreme Court handed down a judgment that can be described as a ray of hope for Indian women on the eve of the new millennium. Though, on another level, one might have wished that the court had gone even further and struck down the offensive Section 6A of the Hindu Minority and Guardianship Act (HMG) and 19 (a) of the Guardian's and Wards Act as being gender discriminatory, and therefore unconstitutional, the judgment will go a long way in correcting a historical injustice that has remained unchallenged in the statute books for over 43 years.

As heartening as the judgment is the fact that the petitioner, Ms. Gita Hariharan, author, was fully supported by her husband, Mr. Mohan Rao, who was in fact the competitor. Ms. Hariharan had applied to the Reserve Bank in connection with some relief bonds in the name of her minor son, acting as his guardian. In a characteristic display of bureaucratic density, the RBI refused to entertain her application on the ground that it did not contain the father's signature, who was the natural guardian of the minor. Enraged, she moved the Supreme Court and her petition, along with one from Ms. Vandana Shiva, social activist, came up before it.

The court held that "in all situations where the father is not in actual charge of the affairs of the minor, because of his indifference or because of an agreement between him and the mother of the minor (oral or written) and the minor is in the exclusive care and custody of the mother or the father for any other reason is unable to take care of the minor, because of his physical or mental incapacity the mother can act as the natural guardian of the minor." The court added "all her (the mother's) actions would be valid even during the lifetime of the father who would be deemed to be absent for the purposes of the two Sections of the Act."

Till date, Indian society has expected women to bear the full burden of all domestic duties, particularly child-rearing without any kind of concomitant privilege when these responsibilities enter the public domain, especially on issues relating to property. When thousands of women are forced to give up lucrative careers in order to fulfil their child-caring responsibilities, it is totally unjust to arbitrarily deny them a say in managing the affairs of their children. And indeed, if men are to enjoy henceforward the privilege of dealing with the official and legal affairs of their children, they should earn that privilege by assuming greater childcare responsibilities. Just as the Supreme Court has recognised maternal rights, it is time society at large took note of paternal responsibilities.

Section 6A of the HMG Act is not only reactionary but also blatantly violative of the Equality guaranteed in the Constitution. According to this Section, "in the case of a boy or unmarried girl, the father and, after him the mother, provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother, (b) in the case of an illegitimate boy or an illegitimate unmarried girl, the mother, and after her, the father, (c) in the case of a married girl, the husband."

It is amazing that this section has never been challenged before. In any equitable consideration, it defies logic why the mother should be the guardian only after the father and, how in the case of illegitimate children, the mother suddenly becomes capable of being the guardian. More pernicious is the clause which says the husband is the guardian of the married girl. In any successful marriage, it is only ties of trust and affection that do (or should) bind parties and, in that sense, both are custodians of each other. It is utterly reactionary, therefore, to unilaterally anoint the husband as the guardian of the married girl.

Further, over the years, courts have rendered some amazing decisions based on this Section. In the Sundaramurthy vs. Sharmuaga Nadar (AIR 1980 Mad 207) case, it was held that "even if the father neglects to look after or to discharge his obligations towards the minor, or refuses to act as the natural guardian, the mother cannot be the natural guardian, so long as the father is alive."

However, though courts have always given the utmost priority to the welfare of the minor (as they should), the rights of women were never taken into account. In the latest judgment, the Supreme Court has done this for the very first time and though some may have wished for more, this is certainly a major step in the right direction.

Today the courts have stepped in to do the work of the legislature and the Government. The pioneering efforts by concerned citizens and the vision of the Supreme Court have resulted in this pathbreaking judgment. However not all women have the courage or resources to take the battle for their rights to its logical conclusion. Also, the Supreme Court cannot be expected to legislate and to govern the country, in addition to interpreting the law. It is to be hoped that lawmakers and the Government will follow the court lead and make genuine efforts to see that the existing and future laws become gender sensitive and equitable.

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Thoughts Before Adoption

The National Human Rights Commission Act

By Ahmed Ziauddin

Setting up the Commission

Section 3 (1) of the draft Bill deals with the Constitution of a National Human Rights Commission. It says, "The President in consultation with the Committee consisting of: (a) Prime Minister (b) Speaker of Parliament (c) Chief Justice of Bangladesh (d) Leader of the Opposition in the Parliament shall constitute a body to be known as the National Human Rights Commission for Bangladesh to exercise powers conferred upon, and to perform the functions assigned to it under this Act."

Sub-section (2) states that "The Commission shall consist of: (a) a Chairperson and four members from among persons having knowledge of, or practical experience in, matters relating to human rights. Provided that in making the selection the Commission shall ensure the pluralistic representation of the civil society involved in the promotion and protection of human rights; and Provided further that at least one member should be a woman."

The question here, who will constitute the National Human Rights Commission — the Committee of four or the Parliament? As a matter of fact, the Committee will be constituted by the President for appointments of the Chairperson and Members. Like India, the Chairperson and Members of the Commission are appointed by the President of India on the basis of the recommendations of a Committee comprising the Prime Minister as the Chairperson, the Speaker of the Lok Sabha and the Rajya Sabha and Deputy Chairmen of the Rajya Sabha as members.

However, most worrying concern here is the cooperation

of the Leader of the Opposition in Parliament, where law enjoin both the government and the opposition. Judging by the "Opposition culture" in Bangladesh, the proposed Human Rights Commission might stumble here.

Members of the Commission

The Bill does not require special qualifications for the Members of the Commission except knowledge and practical experience of human rights. Whether this broad criteria would be good enough remains to be seen. Membership, according to Section 5 is for a fixed five years with prohibition for reappointment. The Bill also makes ineligible for further employment of Members, once over, under the government of Bangladesh.

Writs to High Court Division

This brings to questions relating to the rights of the Chairperson, of the Members and Commission's employees. The Commission, under Section 9 of the draft Bill, may appoint officers and employees to discharge its functions, and in doing so, the Commission shall also determine the terms and conditions of the service. However, the Bill has no provision for an aggrieved person to take recourse to, and in future situations could very well arise to determine whether the Chairperson, Members and the employees have got rights to resort to Article 102 of the Constitution.

Independence of the Commission

The draft Bill has gone a long way to ensure the independence of the Commission. Section 16(1) obliges the Commission and every member of its

staff to function without political or other bias and to be independent and separate from any party, government, administration, or any representation of interest of any entity. Again, in Sub-section (5), it re-states all over again that "Notwithstanding any personal opinion, preference or party affiliation, serve impartially and independently and perform his or her duties in good faith and without fear, favour, bias or prejudice." It appears, such repetitions are unnecessary to make the same point. Moreover, in gender related phrase, the Bill has used one place "his" and in other "his or her", which should be corrected.

In independent functioning of a body like the Human Rights Commission, mere structural independence or guarantee would not be enough for its independent operation. The other important ingredient would be independent character of the people involved and as such, it is almost obligatory to add with the qualification of the Members of their knowledge and practical experience, their "independent mind". Only independent minded persons can work independently in an independent institution.

Trust Fund

According to the draft Bill, the salaries and allowances of the members of the Commission shall be determined by the Parliament and shall be charged in the Trust Fund. Under Section 21, the government shall establish a fund and that there shall be two sources of fund; namely, money appropriated by Parliament for the purposes of the fund and "money donated or contributed to the Fund from any source, subject to the satisfaction of the Commission."

There cannot be any ques-

tion about the State money appropriated by the Parliament. However, the other source described as "any source" might create controversies unless some guidelines are put in place or are further cleared.

Functions of the Commission

Section 10 of the draft Bill as many as thirteen broad functions of the commission, which includes inquiry of violation of human rights and negligence of the part of public servants, to intervene in any ongoing proceedings in court involving violation of human rights, visit jails and other institutions, review the Constitution to protect rights and recommend measures, review terrorism related phenomenon and suggest remedies, study international instruments and recommend its implementation, examine the draft bills in light of human rights standards, encourage further ratification of international human rights instruments, assist in teaching programmes and spread human rights literacy, encourage non-governmental etc.

It appears, the Human Rights Commission will act as guardian of human rights in Bangladesh, a body to monitor and intervene, inquire and investigate whenever necessary. Along with these core functions, some other functions have also been assigned to the Commission, which it is better to be left for some other organisations.

Investigation

One of the Commission's important functions would be to investigate human rights violations. Section 13 (1) states that "The Commission shall have its own investigation agency for the purpose of conducting any investigation and may utilise the services of any officer or in-

vestigation agency of the Government." However, there is nothing mentioned in the Bill about the nature, composition etc of the Commission's "own investigation agency".

Investigation of human rights violation is a complex operation requiring various skills, instruments and capacity, from forensic to DNA analysis technology. Moreover, from the experience, as most of the violations are perpetrated by the police and other security services, it is highly unlikely that services of any of such agencies in investigation in human rights violation will at all be credible. Instead, the Bill should clearly provide that all investigations shall be carried out by the Investigator of the Commission, and if and when, services of the other agencies of the Governments are required, the agencies shall conduct such investigations under the supervision of the Commission's Investigators. On other occasions, such agencies shall extend their cooperation only.

The Commission shall also have possibility to hear evidences in camera.

Inquiry

The other function of the Commission according to Section 17 of the draft Bill is to inquire into the complaints of human rights violations. After conclusion, the Commission can recommend the Government to take action. It may also approach the High Court Division of the Supreme Court for directions, orders or writs as appropriate. Thus the Commission has, by law, a *locus standi* in the Supreme Court and would be considered as an "aggrieved person" within Article 102 of the Constitution.

The Commission can also, under Section 17(3), "recommend to the Government or authority for the grant of such immediate interim relief to the

victims or members of his family as the Commission may consider necessary." Although financial compensation or reparations has not been explicitly mentioned here, under this provision, the Commission most likely will recommend for pecuniary compensations.

However, if Indian examples of such practices are examined, the Government is usually reluctant to comply with such recommendations. In India, the National Human Rights Commission can direct the government to pay immediate interim relief, whereas, the draft Bill proposes that the Commission can only recommend such relief.

The best option is to set-up another Trust Fund for the victims of human rights violations, to be entirely funded by the Government, managed by the Human Rights Commission to pay out immediate and interim compensation. The final compensation, however, should be paid by the institutions or individuals responsible for such violations.

If properly established and manned by committed, honest and capable individuals, the National Human Rights Commission will bring major development in enjoyment of human rights in Bangladesh. It is a right institution, a right structure, a necessary one for Bangladesh. The Government should launch massive publicity campaign for the people to come forward with their complaints for the Commission to deal with. It is right to hold optimistic views about the Commission, which is expected to make a difference in quality of lives for the people of Bangladesh.

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BANGLADESH will have a National Human Rights Commission soon. The sponsoring ministry, Ministry of Law and Parliamentary Affairs, has almost finalized a Bill for this purpose. The Members of Parliament will then adopt the Bill into a law to establish the Human Rights Commission.

There are numbers of countries where such approaches of human rights commission have been followed, notably India and South Africa. In most developed societies, however, Human Rights Commissions are rare species. As a matter of fact, in a society where judicial system works effectively, vibrant media exists and other institutions operate, such institutions are irrelevant.

While conceiving the idea, the government has actively sought opinions of various segments of the society including members of civil societies to build up the National Human Rights Commission.

A project named Institutional Development of Human Rights in Bangladesh was set up earlier to lead the process.

Purpose
The draft Bill proposes that a National Human Rights Commission will be established "for the protection, promotion and creation of conditions for the enjoyment of human rights". The Bill refers second part of Bangladesh Constitution and in particular Article 11 which declares that "The Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed."

From its preamble, it appears that the government has proceeded to fulfill Constitutional commitment as well as to respond to growing international concern for promotion

and protection of human rights. The government realizes that setting-up of a Human Rights Commission will enhance its image abroad and facilitate in international negotiations, where human rights often featured prominently.

However, the Human Rights Commission will not be a constitutional institution and establishment of this Commission alone will in itself not meet government's constitutional obligations.

What are the human rights?

Under the headline "Definitions", Section 2 (d) states: "Human Rights" includes the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution of the People's Republic of Bangladesh and such rights embodied in the International Human Rights Instruments adopted by the General Assembly of the United Nations which have been acceded to and ratified by the People's Republic of Bangladesh.

This is not a definition of human rights but it enumerates rights that falls within the purview of human rights. In its simplest term, human rights are the laws and practices that have evolved over the centuries to protect ordinary people, minorities, groups and races, from oppressive rulers and governments. Human rights thus are the recognition of the inherent dignity and of the equal and inalienable rights of all members of human family.

In its definition, only the rights guaranteed by the Constitution get covered along with rights under international instruments adopted by Bangladesh. The key phrase for consideration here has been "guaranteed".