



संयुक्त राष्ट्र संघका लागि नेपालको स्थायी नियोग
**PERMANENT MISSION OF NEPAL
TO THE UNITED NATIONS
GENEVA**

Ge.OHCHR.SP.2021.118

The Permanent Mission of Nepal to the United Nations Office and other International Organizations in Geneva presents its compliments to the Special Procedures Branch, Office of the High Commissioner for Human Rights (OHCHR), and with reference to AL NPL 2/2021 Joint Communication dated 19 April 2021 sent by the Special Rapporteur on the rights to freedom of peaceful assembly and of association; Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on the independence of judges and lawyers and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, has the honour to enclose herewith response of the Government of Nepal on the matters regarding the National Human Rights Commission of Nepal raised in the Joint Communication.

The Permanent Mission of Nepal to the United Nations Office and other International Organizations in Geneva avails itself of this opportunity to renew to Special Procedures Branch, Office of the High Commissioner for Human Rights (OHCHR), the assurances of its highest consideration.



Geneva, 29 April 2021

Special Procedures Branch
Office of the High Commissioner for Human Rights (OHCHR)
Geneva

**Response of the Government of Nepal
to the Joint Communication from Special Rapporteur on the Rights to
Freedom of Peaceful Assembly and of Association; Chair-Rapporteur of the
Working Group on Enforced or Involuntary Disappearances; Special
Rapporteur on the Situation of Human Rights Defenders; Special Rapporteur
on the Independent of Judges and Lawyers; Special Rapporteur on Torture and
Other Cruel, Inhuman or Degrading Treatment or Punishment**

**A. Appointment of the Office Bearers of the National Human Rights
Commission**

- Nepal remains fully committed to the democratic values and principles as enshrined in the Constitution including civil liberties, human rights, adult franchise, full press freedom, independent judiciary, and the rule of law. The Government of Nepal (GoN) is committed to ensuring the independence and autonomy of the National Human Rights Commission (NHRC) as per the Constitution of Nepal and the Paris Principles.
- The Constitution of Nepal has provided for the establishment of NHRC and seven other thematic human rights related constitutional commissions; National Women Commission, National *Dalit* Commission, National Inclusion Commission, Indigenous Nationalities Commission, *Madheshi* Commission, *Tharu* Commission, and Muslim Commission as the NHRIs.
- The NHRC was established in 2000 as a statutory body by the National Human Rights Commission Act, 1997 in compliance with the Paris Principles for the protection and promotion of human rights. In 2007, the Interim Constitution of Nepal elevated the status of NHRC to a constitutional body which has been given continuity by the current Constitution. Pursuant to Article 248 of the Constitution of Nepal, the NHRC consists of a Chairperson and other four Members appointed for a term of six years by the President of Nepal on the recommendation of the Constitutional Council. The Constitution has prescribed the qualification of candidates to be appointed as Chairperson and Member of the NHRC. To be eligible for the appointment to the post of Chairperson, one should be a retired Chief Justice or a retired Justice of the Supreme Court and has rendered an outstanding contribution to the protection and promotion of human rights or is a renowned person having been active for at least twenty years in and has rendered an outstanding contribution to the protection and promotion of human rights or to various fields of national life. Similarly, to be eligible for a post of a Member, one should be involved in the field of the

protection and promotion of human rights or rights and interests of the child or is a renowned person having been active for at least twenty years in and has rendered an outstanding contribution to various fields of national life. Besides, one must have graduated with a bachelor's degree from a recognized university and has attained the age of forty-five years. Moreover, one must not be a member of any political party at the time of appointment and must possess high moral character.

- Pursuant to Article 249 of the Constitution, the Functions, Duties and Powers of the NHRC is to respect, protect and promote human rights and ensure effective enforcement thereof. For the accomplishment of the duty, the NHRC has the power to inquire and investigate any complaint of human rights violation on its own initiative or on petition or complaint by a victim or any person on his or her behalf or on information received from any source and make a recommendation for action against the perpetrators. Similarly, it has also the necessary power to make recommendation to the concerned authority to take departmental action against official who fails or shows reluctance to fulfil or perform his or her responsibility or duty to prevent violations of human rights; make recommendation to file a case in the court in case it is required to institute a case against any person or organization who has violated human rights; coordinate and collaborate with civil society in order to enhance awareness on human rights; carry out periodic reviews of the relevant laws relating to human rights and make recommendation to the GoN for necessary improvements in and amendments to such laws; make recommendation with reasons to the GoN to become a party to any international treaty or agreement on human rights; and monitor its implementation; publish the names of the officials, persons or bodies who have failed to observe or implement any recommendations or directives made or given by the NHRC and maintain records of the violators.
- Article 284 of the Constitution provides for the provision of the Constitutional Council for the recommendation for the appointment of the Chief Justice and Chiefs and officials of the Constitutional Bodies including NHRC. The Constitutional Council is Chaired by the Prime Minister and is comprised of the Chief Justice of the Supreme Court, the Speaker of the House of Representatives, the Chairperson of the National Assembly, the Leader of the Opposition Party in the House of Representatives, and the Deputy Speaker of the House of Representatives. As per the Constitutional provision, the Council should make recommendation for the appointment before one month of the

vacation of the office of the Chief Justice or a chief or official of a Constitutional Body.

- Although the Constitution of Nepal has provided for the establishment of seven constitutional commissions, the Commissions like the National Women Commission, National *Dalit* Commission, Indigenous Nationalities Commissions remained vacant since the date of their establishment and many other Commissions were partially fulfilled. The tenure of the outgoing Chairperson and Members of the NHRC ended on 3rd November 2020. As per the Constitutional requirement, new Chairperson and Members of the NHRC were to be recommended within one month (which is 3rd December 2020). However, the Constitutional Council could not recommend to the vacant Constitutional Bodies within that period due to various reasons.
- Numerous writs were filed and are still *sub-judice* in the Supreme Court regarding the nonfulfillment of the vacant posts in these Commissions. The situation that prevailed then demanded the appointment in the vacant posts of the Commissions as soon as possible to ensure their smooth and full functioning.
- Detail procedural provisions of the Constitutional Council are laid down in the Constitutional Council (Functions, Duties, Powers and Procedures) Act, 2010. The Act provides for the procedures to be followed for convening the meeting of the Council, setting out qualification and the reasons and grounds of recommendation including social prestige, high moral character, honesty, public attitude, previous service, and professional experience of the nominee.
- Before amendment of the Act by the Ordinance on the First Amendment to the Constitutional Council (Functions, Duties and Procedures) Act, 2020, the Act provided that the Council may hold a meeting if the Chairperson and at least other five Members were present. Likewise, the Council, generally, takes decisions unanimously. If the Council fails to take a decision unanimously, the matter is discussed in the next meeting. However, even if the said meeting fails to decide on consensus, the decision is taken by the majority votes of the total members of the Council. Moreover, any recommendation made by the Council is forwarded to the Secretariat of the Federal Parliament for parliamentary hearing, which then forwards it to the Office of the President for the appointment.
- Regarding the recent recommendations to the Constitutional Bodies including NHRC, the first meeting of the Constitutional Council was scheduled for 13

December 2020 which was later cancelled due to the absence of the Speaker of the House of Representative. Likewise, the second meeting on 15th December 2020 was also cancelled due to the absence of the Speaker of the House of Representative and the Opposition Party Leader. The requisite quorum could not be met in the aforementioned meetings of the Council.

- Considering the situation of indecision, an Ordinance on the First amendment to the Constitutional Council (Functions, Duties and Procedures) Act, 2020 was approved by the President on 15 December 2020, as per the recommendation of the Council of Ministers pursuant to Article 114(1) of the Constitution. The Ordinance made some amendments regarding the quorum for holding meetings and making decisions. The amended provisions enabled to hold a meeting even if only three members are present, and the decision may be taken based on majority of the members present in the meeting including the Chairperson.
- After amendment of the Act by the Ordinance, the meeting of the Council was held on 15 December 2020 which recommended 38 names for 11 Constitutional Commissions including the Chairperson and Members of the NHRC. The recommended persons are eligible to their respective posts pursuant to Article 248(6) of the Constitution and the Constitutional Council (Function, Duties, and Procedure) Act, 2010.
- Although the Constitutional Council recommended the names for the appointment at the various Constitutional Commissions, the Parliamentary Hearing could not be conducted by the Parliamentary Hearing Committee as the House of Representatives was dissolved by the President on the recommendation of the Council of Ministers on 20 December 2020.
- The matters relating to the procedures of Hearing are governed by the Joint Meeting of Federal Parliament and Joint Committee (Work Operation) Regulation, 2018. Pursuant to Rule 26(2) of the above regulation, there would be no obstruction for the recommended people to assume office in the Constitutional Bodies if the Parliamentary Hearing Committee fails to take any decision within 45 days of receiving the letter from the Council. Therefore, based on these provisions, the recommended persons were appointed and thus took the oath of office and secrecy on 3rd February 2021 after the lapse of 45 days. Subsequently, the Chairperson and Members of the NHRC and other constitutional bodies joined their respective duties on the same day. The dissolved parliament was reinstated by the Supreme Court on 23rd February 2021, three weeks after the assumption of their duties by the newly appointed

office bearers of the Constitutional Bodies as per the prevailing laws at the time of their appointments.

- The newly appointed Chairperson and Members of the NHRC are qualified and have proven competence in their respective areas as required by the Constitution and Constitutional Council (Function, Duties and Procedure) Act, 2010. The appointed Chairperson served as a Justice of the Supreme Court and the Members had required qualifications with integrity and long experience in the field of promotion and protection of human rights.
- Writ petitions were filed in the Supreme Court demanding immediate nullification of the appointment of the Chairpersons and Member of the Constitutional Bodies. These writ petitions were heard by the Constitutional Bench of the Supreme Court which denied issuing a stay order as demanded by the petitioners. The Supreme Court only issued a show cause order in this regard and the case is still *sub judice* in the Supreme Court. By implication, the issuance of show cause order instead of stay order means the complaint does not bear merit under the prevailing laws. The GoN believes in the rule of law and is committed to abide by the final decision of the Supreme Court.
- The NHRC is accredited with "A" status for many years by the Global Alliance on National Human Rights Institutions(GANHRI). As stated above, the NHRC is one of the important constitutional bodies and has been enjoying constitutional independence and autonomy. It is vested with all the powers and autonomy required by the Paris Principles and has been discharging its duties as entrusted by the Constitution.
- The appointment of the Chairperson and Members of the NHRC was made by the President on the recommendation of the Constitutional Council which decided transparently and unanimously in the presence of the Prime Minister, the Chief Justice of the Supreme Court, and the Chairperson of the National Assembly of the Federal Parliament.
- The concerns raised are not based on facts but lack good faith. The appointment process and the outcome, both are legal and legitimate.
- Therefore, the GoN would like to reiterate that the appointments to the Constitutional Bodies including NHRC were made as per the provisions of the Constitution and prevailing law of Nepal. The Constitutional bodies including NHRC are autonomous and function independently as per their respective mandates provided for in the Constitution of Nepal.

B. Amendment to the NHRC Act

- The GoN is committed to ensuring the independence and autonomy of the NHRC as per the Constitution of Nepal and the Paris Principles. The Constitution of Nepal empowers the Attorney General to make a final decision as to whether to institute any case on behalf of the GoN in any court, judicial body, or authority. He/she also decides whether to institute any case in respect of violations recognized as a criminal offence under the existing law. The proposed Amendment Bill clearly specifies in Section 17A. that NHRC sends its investigation report and evidence of human rights violations to the Attorney General to institute the case. It further states that after studying the recommendation and evidence, the Attorney General must institute the case in the concerned court or judicial body. If the Attorney General deems it necessary to conduct further investigation or to collect more evidence to institute the case, he or she may request the NHRC. Upon such request, the NHRC should conduct further investigation and collect more evidence and send the same to the Attorney General. After receiving the investigation report and evidence from the NHRC, the Attorney General has to decide to institute the case. Therefore, the amendment intends to implement the recommendations of the NHRC by instituting cases in the court of law with a strong legal and evidential base and with sufficient investigation. This is intended to ensure that the cases thus instituted stand legally and procedurally strong during the court proceeding.
- The National Human Rights Commission (First Amendment) Bill, 2019 is under consideration of the Federal Parliament. The Parliament has the supreme authority in relation to the enactment of legislations. The Parliament is free to consider the Bill for aligning it with the elevated status and mandates of the NHRC as per the Constitution and the decision of the Supreme Court and Paris Principles.

C. Implementation of the NHRC's Recommendations, including its Report of October 2020

- The GoN remains committed to implementing the recommendations of the NHRC. Out of 1195 recommendations, 78.9% of recommendations are related to the allegations that are supposed to be addressed by the Truth and Reconciliation Commission and Commission of Investigation on Enforced Disappeared Persons, for which, separate transitional justice mechanisms have been established. About 15% of the recommendations, related to providing relief, assistance or compensation or treatment, have been implemented or are

in the process of implementation. Remaining recommendations are under consideration of the GoN.

D. Appointment Process to the NHRC in Compliance with the Paris Principles and By passing of Parliamentary Hearing Process

The Paris Principles envision the independence of the NHRIs, including legal, operational, policy, financial and independent function of the members. It also includes broad mandate and functions, adequate powers and resources, pluralism, and collaborative work as well as international engagement of the Human Rights Commission.

In case of Nepal, all these requirements are ensured by the Constitution of Nepal. The Constitution exclusively provisions for the functions and autonomy of the Commission, including the appointment of the Members based on the Paris Principles as well as the commitments of the GoN to over two dozen human rights instruments alongside seven core ones. As those appointments were within the provision of the Constitution, so is the case now under the discussion.

As mentioned above, these writ petitions were heard by the Constitutional Bench of the Supreme Court which denied the plea for issuing a stay order as they were not grounded on a *prima facie* rule and issued only a show cause order in this regard and the case is still *sub judice* in the Supreme Court.