

# Why Nepal's 'Other' Commissions Matter for Justice and Inclusion

Strengthening Constitutionalism in Nepal





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This note has been developed by Niti Foundation and Social Science Baha with support from the National Endowment for Democracy. It is part of a series that explores how Nepal's constitutional bodies can strengthen constitutionalism.

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# Foreword

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This note on the constitutional bodies included in Part 27 of the 2015 Constitution of Nepal, known as ‘Other’ Commissions, was produced by Niti Foundation—a Nepali not-for-profit public interest organization that accompanies locally-led policy reform, in partnership with Social Science Baha (SSB) and the National Endowment for Democracy.

Nepal’s ‘Other’ Commissions are critical actors in the constitutional framework to ensure the rights of specific minority and historically marginalized groups in the country. It is essential to explore their new constitutional role in federal Nepal to see how they can effect societal and legislative reform for these groups. This note was commissioned with this purpose.

This note examines: the history behind the formation of the ‘Other’ Commissions; the mandate of these commissions; their performance; and the challenges they face for effective delivery of their mandates. This note also provides strategic recommendations for future engagement by the ‘Other Commissions’ to ensure effective fulfilment of their mandates going forward.

We are grateful to Tara Kumari Kanel for leading the inquiry; Deepak Thapa of SSB for analytical and written contributions and editorial direction; George Varughese and Mohan Das Manandhar for strategic oversight and review; Iain Payne for analytical support and written input; and Shreya Paudel, Ranju Bista and Sneha Ghimire for their support.

We also thank Mario Gomez and the other participants of the workshop on ‘Fourth Branch in South Asia’ for valuable comments.

We hope that this note is a useful baseline for further consideration of the role of the ‘Other’ Commissions to ensure justice, equity, and inclusion in federal Nepal.

# Abbreviations

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CA	Constituent Assembly
CA1	First Constituent Assembly
CEDAW	Convention on the Elimination of All Discrimination Against Women
CIAA	Commission for the Investigation of the Abuse of Authority
CPA	Comprehensive Peace Accord
CPN	Communist Party of Nepal
CSCB	Committee to Decide on the Structure of Constitutional Bodies
CSO	Civil Society Organization
ECN	Election Commission of Nepal
GBV	Gender Based Violence
INC	Indigenous Nationalities Commission
KII	Key Informant Interview
MdC	Madhesi Commission
MsC	Muslim Commission
NDC	National Dalit Commission
NFDIN	National Foundation for Development of Indigenous Nationalities
NHRC	National Human Rights Commission
NHRI	National Human Rights Institution
NIC	National Inclusion Commission
NNRFC	National Natural Resource and Fiscal Commission
NPR	Nepalese Rupees
NWC	National Women Commission
OBC	Other Backward Classes
PSC	Public Service Commission
SC	Scheduled Caste
SCD	Sickle Cell Disease
ST	Scheduled Tribe
TC	Tharu Commission
UN	United Nations
USD	United States Dollars

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# 1. Introduction

The Constitution of Nepal 2015 (hereafter, the Constitution or the 2015 Constitution) provisions for 13 independent constitutional bodies, each with specific mandates. These bodies are designed to be independent from the other branches of government and together are meant to serve as a check on the executive and make it accountable towards fulfilling the promises made to the Nepali people in the Constitution. As they do not neatly fit into the traditional tripartite division of the executive, legislature and judicial branches of government, these kind of independent bodies are sometimes referred to as 'fourth branch' institutions.<sup>1</sup> They are thus envisaged to play important roles to ensure the development and sustenance of the rule of law, an egalitarian society, social justice, social and cultural solidarity, federalism, multiparty democratic governance, civil liberties, fundamental rights, human rights, adult franchise, and periodic elections.

A number of measures have been written into the Constitution to ensure that these bodies are independent of the executive: their commissioners are appointed by the President on the recommendation of Constitutional Council;<sup>2</sup> the commissioners are appointed for fixed terms;<sup>3</sup> the eligibility criteria for their appointment are stipulated in the Constitution;<sup>4</sup> the commissioners' remuneration and conditions of services cannot be altered to their disadvantage;<sup>5</sup> and the mandates of the most of the constitutional bodies are constitutionally stipulated so that they cannot be circumscribed through the ordinary political and legislative process.<sup>6</sup>

Eight of these thirteen constitutional bodies were created for the first time in the 2015 Constitution while others had been carried over from Nepal's previous constitutions. Among the latter are: the Commission for the Investigation of Abuse of Authority (CIAA), the Auditor General, the Public Service Commission (PSC) and the Election Commission of Nepal (ECN), which were included in the Constitution of the Kingdom of Nepal 1990, while the Interim Constitution of Nepal 2007 accorded constitutional status to the National Human Rights Commission (NHRC). The additions in the 2015 Constitution were: the National Natural Resource and Fiscal Commission (NNRFC), and the 'Other' commissions, located in Part 27, which consist of the National Women Commission (NWC), the National

1 On the fourth branch generally, see Tarun Khaitan, 'Guarantor Institutions' [2021] Asian Journal of Comparative Law 1; Elliot Bulmer, 'Independent Regulatory and Oversight (Fourth-Branch) Institutions' (International IDEA 2019) Constitution-Building Primer No 19.

2 Constitution of Nepal 2015, arts 238(2), 240(2), 242(2), 245(2), 248(2), 250(2), 252(2), 255(2), 258(2), 261(2), 262(2), 263(2), 264(2).

3 Ibid, arts 238(3), 240(3), 242(4), 245(3), 248(3), 250(3), 252(3), 255(3), 258(3), 261(3), 262(3), 263(3), 264(3).

4 Ibid, arts 238(6), 240(6), 242(7), 245(6), 248(6), 250(6), 252(6), 255(6), 258(6).

5 Ibid, arts 238(7), 240(7), 242(8), 245(7), 248(7), 250(7), 252(7), 255(7), 258(7).

6 Ibid, arts 239, 241, 243, 246, 249, 251, 253, 256, 259. In the case of the four commissions added towards the end of the constitution-drafting process — the Adibasi Janajati Commission, the Madhesi Commission, the Tharu Commission and the Muslim Commission — the Constitution is silent on the provisions regarding eligibility criteria, remuneration and conditions of service of commissioners as well as their mandate.

Dalit Commission (NDC), the National Inclusion Commission (NIC), the Indigenous Nationalities Commission (INC),<sup>7</sup> the Madhesi Commission (MdC), the Tharu Commission (TC) and the Muslim Commission (MsC). Except for the National Inclusion Commission (NIC), these ‘Other’ commissions have been given the mandate to protect and promote the human rights of specific marginalised and minority groups mentioned in the names of the commissions themselves.<sup>8</sup>

Article 265 of the Constitution requires the ‘Other’ commissions to be reviewed by the federal Parliament ten years after the promulgation of the Constitution — that is, in 2025.<sup>9</sup> With six of the 10 years already past, this policy brief provides a review of how these commissions have fared thus far.

### 1.1. Scope

The Preamble of the 2015 Constitution declared that the state recognises the diversity of Nepal arising out of the existence of multiple castes/ethnicities, languages, cultures, and geographical regions. It commits the state to ending discrimination arising out of differences in class, caste/ethnicity, region, language, religion and gender as a means of promoting ‘diversity, social and cultural solidarity, tolerance and harmonious attitudes’ while creating ‘*an egalitarian society* on the basis of the principles of proportional inclusion and participation, to ensure equitable economy, prosperity and *social justice*’.<sup>10</sup> Besides other legislative means, one of the paths to achieving the above goals is through the work of these ‘Other’ commissions. In this context, this policy brief has been prepared with the following specific objectives:

- To examine how the new human rights institutions grouped together in Part 27 of the Constitution — the ‘Other’ commissions — are progressing towards meeting their mandates;
- To highlight the challenges and opportunities facing these bodies as they seek to make the state more accountable; and
- To identify the steps necessary for these bodies to become fully functional in line with the spirit of the Constitution.

The policy brief thus goes beyond examination of institutional capacity. Rather, it seeks to explicate how these bodies’ potential can be strengthened so that they meaningfully contribute to the promotion of accountable government and support societal transformation in Nepal.

### 1.2. Methodology

Information for the policy brief was collected using a variety of qualitative methods as follows:

*Desk Review:* The research team reviewed the relevant laws, policies, reports, and other published material on human rights institutions in the context of Nepal and beyond.

*Key informant interviews:* Key informant interviews (KII) were conducted using pre-developed checklists. The informants included both current and former commissioners of the human rights commissions; officials posted to these commissions; a lawmaker involved in the drafting of the 2015 Constitution; and individuals representing civil society organisations as well as human rights activists.

*Consultation workshop:* A consultation workshop was organised with the help of the Constitution Watch Group to receive feedback on the draft brief in May 2021. Given the restrictions in place due

<sup>7</sup> Indigenous Nationalities are also referred to as Adibasi Janajati in this policy brief.

<sup>8</sup> The National Inclusion Commission (NIC) is not linked to any specific group per se and is meant to cover a number of groups that are not based on ethnicity although its mandate also covers groups such as the Khas Arya and minorities.

<sup>9</sup> Constitution of Nepal 2015, art 265.

<sup>10</sup> Constitution of Nepal 2015, Preamble.

to the Covid-19 pandemic, the workshop was held virtually with over 50 participants, ranging from a former Chief Justice of the Supreme Court of Nepal, former commissioners of the National Human Rights Commission, members of the Nepal Bar Association, human rights lawyers, representatives of donor and development organisations, and researchers. The feedback on the draft from the workshop was subsequently incorporated into the final version of the policy brief.

*Workshops:* Another draft was presented at the workshop 'Fourth Branch in South Asia' hosted by Niti Foundation in June 2021, in which human rights experts from several South Asian countries participated. It was also presented at a workshop in which five previous commissioners of the National Human Rights Commission participated and provided the research team with their feedback on the brief.

## 2. Why National Human Rights Institutions

Recent decades have seen the proliferation of independent institutions in many countries.<sup>11</sup> In many instances in the Global South, these have emerged following political transitions either from dictatorship to democracy or from war to peace, and are entrusted with the preservation and promotion of the democratic gains that resulted from the respective political changes.<sup>12</sup> Countries undergoing political transitions have thus established different kinds of national human rights institutions (NHRIs), which have come to be considered as critical actors that can contribute to the implementation of constitutional promises by making governments accountable to these commitments.<sup>13</sup> Although the concepts of ‘separation of powers’ and ‘check and balance’ have traditionally been espoused to ensure limited and accountable governments, Murry argues that human rights institutions serve a complementary role. Likewise, Khaitan differentiates constitutional promises between ‘self-enforcing’ and ‘non-self-enforcing’.<sup>14</sup> According to him, constitutional promises that state actors, particularly the executive government, are likely to continue or have reason to continue to uphold do not require additional institutional protection. However, ‘non-self-enforcing constitutional norms’ with regard to which the state has an incentive to renege on are in need of additional institutional protection. NHRIs thus have a role, among an array of ‘fourth branch’ institutions, to ensure the accountability of the government in keeping these ‘not-self-enforcing’ constitutional promises. Given this role to guarantee that key constitutional promises are respected over the time, Khaitan has termed such constitutional bodies as forming a ‘guarantor branch’ of the state.<sup>15</sup>

As for how NHRIs can hold governments accountable, Murry posits two such ways: first, by forcing the governments to be transparent regarding their decisions, including the facts and reasons upon which such decisions are based; and second, by providing advice and persuasion — i.e., ‘cooperative control’.<sup>16</sup> Since NHRIs do not govern and are not in place to enforce punishment or other negative sanctions, employing the persuasive technique is the only means they have to ensure compliance. In this regard, it is very important to have a critical mass stand with NHRIs in order to persuade governments take their findings seriously and follow their recommendations. Coordination and cooperation between NHRIs and with other stakeholders, including civil society, is thus very important.<sup>17</sup>

11 See generally Bulmer (n 1).

12 Mario Gomez, ‘The Right to Information and Transformative Development Outcomes’ (2019) 12 Law and Development Review 837.

13 Christina Murray, ‘The Human Rights Commission Et Al: What Is the Role of South Africa’s Chapter 9 Institutions?’ (2009) 9 Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 122.

14 Khaitan (n 1).

15 *ibid.*

16 Murray (n 13).

17 See also John M Ackerman, ‘Understanding Independent Accountability Agencies’ in Susan Rose-Ackerman and Peter Lindseth (eds), *Comparative Administrative Law* (Edward Elgar Publishing 2010) 269.

International human rights instruments are also equally important in elevating the role of NHRIs to ensure the implementation of constitutional promises regarding human rights. For instance, both the Convention on the Elimination of All Discriminations Against Women (CEDAW) and the Beijing Declaration foresee an independent and neutral national institution to monitor the situation of women in the country.<sup>18</sup> Likewise, International Labour Organization's Indigenous and Tribal Peoples Convention, 1989 (No. 169) suggests the same to protect the rights of indigenous and ethnic groups.<sup>19</sup> Moreover, the Paris Principles, under which more than 100 states have accredited NHRIs, constitute internationally accepted minimum standards for effective and credible human rights institutions (see Box 2).

## 2.1. India

Provisioning for separate commissions for particular segments of a state's population, including ethnic minorities and other marginalised groups, is not altogether uncommon. For instance, the Constitution of India provisions for three national human rights commissions that have a specific focus for historically marginalised minorities — the National Commission for Scheduled Castes, the National Commission for Scheduled Tribes, and the National Commission for Backward Classes.<sup>20</sup> A statutory commission for scheduled castes (SCs) and scheduled tribes (STs) was constituted in 1978 to serve as an advisory body to the government on matters concerning those two groups. The 65th amendment of the Constitution of India changed this commission's status into a constitutional body, with the National Commission for Scheduled Castes and Scheduled Tribes formed in 1992. Another amendment split the National Commission for Scheduled Castes and Scheduled Tribes and accordingly in 2004, the National Commission for Scheduled Castes and the National Commission for Scheduled Tribes came into existence. The National Commission for Backward Classes has its origins in a Supreme Court of India's judgement in 1992 which directed the Union Government to establish a permanent body to look into the matters concerning inclusion of Other Backward Classes.<sup>21</sup> At the same time, the Supreme Court also defined 'backwardness' in terms of only social and educational — and not economic — terms. In line with the judgement, the statutory National Commission for Backward Classes was formed in 1993 and was accorded constitutional status in 2018.

Beside these three constitutional commissions, India also has statutory commissions to protect the rights of marginalised communities, including women. Accordingly, National Commission for Women was established in 1990, the National Commission for Minorities in 1992 with six religious communities — Muslims, Christians, Sikhs, Buddhists, Zoroastrians and Jains — defined as minority groups. Finally, the National Human Rights Commission of India was set up in 1993 as the nodal body responsible for protecting human rights in India.

## 2.2. Pakistan

Pakistan has three separate statutory bodies, the National Human Rights Commission (2012), the National Commission on the Status of Women (2000) and the National Commission on the Rights of Children (2020). In addition, following years of delay after the Supreme Court directed the Government of

18 United Nations Office of the High Commissioner for Human Rights, 'Convention on the Elimination of All Forms of Discrimination Against Women', New York, December 18, 1979, available from <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>; United Nations, 'Fourth World Conference on Women: Beijing Declaration', September 1995, available from <https://www.un.org/womenwatch/daw/beijing/platform/declar.htm>.

19 International Labour Organization, 'C169 – Indigenous and Tribal Peoples Convention, 1989 (No. 169)', Geneva, June 27, 1989, available from <https://bit.ly/3o1zDLU>.

20 Constitution of India, arts 338 – 338B.

21 Indra Sawhney & Others vs. Union of India, Supreme Court of India, November 16, 1992.

Pakistan in 2014 to set up a statutory body to protect minority rights, in 2020, the National Commission for Minorities was formed — not as a statutory body but as an extension of the executive.<sup>22</sup>

### 2.3. South Africa

Another example can be found in South Africa where its 1996 Constitution provided for three constitutional human rights institutions: the South African Human Rights Commission, the Commission for Gender Equality, and the Commission on the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities.<sup>23</sup>

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22 Zia Ur Rehman, 'Rights Groups Reject Summary for Formation of "Sham Commission on Minorities"' *The News International* (4 May 2020) <<https://www.thenews.com.pk/print/653749-rights-groups-reject-summary-for-formation-of-sham-commission-on-minorities>> accessed 5 June 2020.

23 Constitution of South Africa 1996, art 181(1).

## 3. History: Discourse on Social Inclusion and Introduction of Human Rights Institutions

Following the global trend, in Nepal, too, many human rights institutions emerged following the end of internal conflict in 2006 and subsequent political transformation and state restructuring. While the Maoist conflict was an important catalyst, the demands for greater social inclusion and the beginnings of a state policy shift in that direction, which led to the creation of these new bodies, can be traced back to the political transformations that began in 1990.

### 3.1. Pre-2006

#### 3.1.1. 1990 Constitution of the Kingdom of Nepal

The Constitution of the Kingdom of Nepal 1990 is the outcome of the first People's Movement of 1990 for the reinstatement of democracy and relegation of the monarchy to a constitutional status. Besides representing a political transformation from autocratic monarchy to multi-party democracy and constitutional monarchy, the 1990 change also heralded a shift, albeit mostly limited to rhetoric, from the perspective of social inclusion. Thus, from being simply a 'monarchical Hindu state' in the earlier 1962 Constitution, the 1990 Constitution declared Nepal to be a 'multiethnic' and 'multilingual' 'Hindu and constitutional monarchical kingdom'.<sup>24</sup> Likewise, while Nepali was the only language recognised in the 1962 Constitution, the 1990 Constitution recognised all the mother tongues spoken in the country as national languages.<sup>25</sup> Even more crucially, while the right to equality had been enshrined in both constitutions, the latter also allowed for special provisions to 'women, children, the aged or those who are physically or mentally incapacitated or those who belong to a class which is economically, socially or educationally backward'.<sup>26</sup> Under 'State Policies', Article 26.10 declared that it would make 'special provisions with regard to their education, health, and employment' for those belonging to 'economically and socially backward groups and communities'.<sup>27</sup>

Notwithstanding the above provisions concerning right to equality, the 1990 Constitution included some provisions that essentially went against the principles of the right to equality. For instance, instead of promoting multiethnicity and multilingualism, it granted precedence to the majority religion, the majority culture and the majority language which was seen as a way of assimilating minority groups into the majority. The 1990 Constitution thus underscored the exclusionary nature of the Nepali state and took an assimilationist approach.<sup>28</sup>

<sup>24</sup> Constitution of Nepal 1962, art 3; Constitution of Nepal 1990, art 4.

<sup>25</sup> Constitution of Nepal 1962, art 4; Constitution of Nepal 1990, art 6.

<sup>26</sup> Constitution of Nepal 1990, art 11.

<sup>27</sup> Ibid, art 26(10).

<sup>28</sup> Yash Ghai, 'Ethnic Identity, Participation and Social Justice: A Constitution for New Nepal?' (2011) 18 International Journal on Minority and Group Rights 309.

The unitary nature of the state meant that policies could not be formulated at the local level. The 1990 Constitution also withheld recognition of any political party formed on the basis of religion, community, caste, ethnicity or regionalism.<sup>29</sup> According to Ghai, the lessons from the failure of the 1990 Constitution is that for a liberal constitution to succeed in a multi-ethnic society, there has to be substantive equality of opportunity and access.<sup>30</sup>

### 3.1.2. Maoist Insurgency

The historical exclusion and discrimination of people along a variety of parameters, including class, caste, ethnicity, geographic location, and gender, was partly responsible for the Maoist insurgency in the country that lasted from 1996 to 2006.<sup>31</sup> Although true to its name, the Communist Party of Nepal (Maoist) ostensibly decried class marginalisation but it did not shy from focusing on caste, ethnic and gender discrimination as well. The Maoist championing of excluded groups clearly benefitted the former during and after the conflict, including helping them emerge as the largest party in the 2008 election to the first constituent assembly.<sup>32</sup>

What the insurgency was successful in achieving, however, was bring to the centre-stage of national politics the discourse on social exclusion. Not that nothing was being done by the government at the time, at least on paper, such as the ‘special socio-economic programmes... for socially and economically weaker sections of the rural population, ethnic groups and women’ (Eighth Plan, 1992-1997) or the very similar sounding ‘special socio-economic development programmes... for the welfare of economically and socially weak groups, ethnic people and women community of the society’ (Ninth Plan, 1997-2002) and the national programme for the upliftment of Dalits.<sup>33</sup> In fact, in 1997, the Upekchhit, Utpidid ra Dalit Barga Utthan Bikas Samiti (Committee for the Upliftment and Development of the Neglected, Oppressed and Dalit Class) and the Rastriya Janajati Bikas Samiti (Committee for the Upliftment and Development of Janajatis) were formed.<sup>34</sup> The two Committees’ objectives were similar: to develop and implement development programmes aimed at their respective target groups, including by mainstreaming in government’s programmes; to conduct research on the situation of the said groups, etc.<sup>35</sup>

Although too early for the insurgency itself to have influenced the government decision to set up the Committee or the need for special programmes for marginalised groups, the conflict certainly contributed to other initiatives aimed at countering the Maoist hold on such groups.

Thus, in 2002, the government formed the National Women Commission (NWC) and the National Dalit Commission (NDC), by executive order of the council of ministers, along with the National Foundation for Development of Indigenous Nationalities (NFDIN) which was created as an autonomous statutory body.<sup>36</sup> It should be noted that these bodies were not formed solely as a result of the Maoist conflict

29 Constitution of Nepal 1990, art 112.

30 Ghai (n 28).

31 John Bray, Leiv Lunde and S Mansoob Murshed, ‘Nepal: Economic Drivers of the Maoist Insurgency’ in Karen Ballentine and Jake Sherman (eds), *The Political Economy of Armed Conflict: Beyond Greed and Grievance* (Lynne Rienner Publishers 2003).

32 Tafadzwa Pasipanodya, ‘A Deeper Justice: Economic and Social Justice as Transitional Justice in Nepal’ (2008) 2 International Journal of Transitional Justice 378.

33 National Planning Commission, *Eighth Plan (1992-1997)* (1992) <[https://www.npc.gov.np/images/category/eighth\\_eng.pdf](https://www.npc.gov.np/images/category/eighth_eng.pdf)> accessed 4 March 2021; National Planning Commission, *Ninth Plan (1997-2002)* (1997) <[https://www.npc.gov.np/images/category/ninth\\_eng\\_2.pdf](https://www.npc.gov.np/images/category/ninth_eng_2.pdf)> accessed 4 March 2021.

34 The two Committees was formed under Article 3 of the Development Board Act 1956, which allows the government to establish specific boards to execute development plans or development works. The Committees was placed under the then Ministry of Local Development.

35 The Committee for the Upliftment and Development of the Neglected, Oppressed and Dalit Class still exists although it appears to be dormant, while the Committee for the Upliftment and Development of Indigenous Nationalities was scrapped with the establishment of the National Foundation for Development of Indigenous Nationalities in 2002.

36 As statutory and executive entities, these bodies functioned under the then Ministry of Women, Children and Social Welfare (NWC) and the then Ministry of Local Development (NDC and NFDIN).



but was a combination of long-standing demands by the different groups which had gone unheeded till then and an attempt to counter the rapid rise of the Maoists championing those very groups.

A definite shift in government policy towards social inclusion became evident with the Tenth Plan (2002-2007). The Plan introduced a new approach to characterising poverty from a multi-dimensional perspective comprising income-based poverty, human development indicators, and social exclusion. Accordingly, the Plan considered social discrimination to be one of root causes of poverty. Similarly, after 2002, the successive periodic plans made commitments on human rights, including recognising people's welfare as a human right, mainstreaming human rights in government policies and programmes, and strengthening institutions related to human rights.

## 3.2. Post-2006

### 3.2.1. Comprehensive Peace Agreement

The Comprehensive Peace Accord (CPA) that brought the 10-year conflict to the end in November 2006 was not only a political breakthrough but also highlighted the need to ensure social and economic justice. The Agreement not only called for political, economic, and social transformation but demanded an end to discrimination, introduction of land reform and recognition of economic, social, and cultural rights and positive action to support economically backward classes. The rights guaranteed by the CPA were subsequently enshrined in the Interim Constitution of 2007.<sup>37</sup>

### 3.2.2. Interim Constitution 2007

The major focus of the Interim Constitution of 2007, adopted after the CPA, was on progressively restructuring the state in order to resolve the many issues arising out of differences among classes, castes/ethnicities, regions, and gender. This was reflected in the provision of women's rights to reproductive health, right against violence, equal property rights and social justice.<sup>38</sup> Similarly, Article 21 guaranteed 'economically, socially, or educationally backward women, Dalits, Adibasi Janajati, Madhesi' (along with 'oppressed classes, poor farmers and labourers' the right to participate in state structures on the basis of principles of proportional inclusion. Article 63 introduced a mixed electoral system for the election to the Constituent Assembly as a means of ensuring proportional representation of all marginalised groups.

The Interim Constitution was also a turning point for human rights institutions since it transformed the National Human Rights Commissions from a statutory to a constitutional body. Just a day before the Interim Constitution was promulgated in January 2007, the parliament also enacted the National Women Commission Act, changing its status from wing of a governmental ministry to statutory body.<sup>39</sup> The status of the National Dalit Commission, however, remained unchanged.

Even more pertinently, Article 154 of the Interim Constitution opened the avenue for the creation of more human rights institution to protect and promote the human rights of minority and marginalised groups.<sup>40</sup> That provision can be considered the beginning of the discussion on the 'Other' commissions. Yet, besides the already formed commissions for women and Dalits, no other commission was established, leading a Madhesi rights activist to file a mandamus writ at the Supreme Court seeking an order directing the government to set up one for Madhesi. In response, in March 2015, the Supreme Court issued a mandamus order 'ordering the defendants to form a commission

37 Malcolm Langford and Ananda Mohan Bhattarai, 'Constitutional Rights and Social Exclusion in Nepal' (2011) 18 International Journal on Minority and Group Rights 387.

38 Interim Constitution of Nepal 2007, art 20.

39 See National Women Commission Act, 2063.

40 Interim Constitution of Nepal 2007, art 154; The Interim Constitution spelt out the following groups for whom commissions can be formed: women, Dalit, indigenous nationalities, Madhesi, disabled, labourers or farmers.

and enact a law as per the demand of the petitioner to empower the Madhesi community and guarantee the right to equality'.<sup>41</sup> The Court order however, was not fulfilled since other developments took over, primarily the massive earthquake weeks later and the constitution-drafting process that consumed all political attention.<sup>42</sup>

### 3.2.3. Agreements between Government and Various Social Groups

During the transitional period after 2006, particularly between 2007 and 2010, the government entered into agreements with various social groups which had raised demands concerning structural issues believed to be detrimental to their empowerment. Among these were the establishment of human rights institutions focusing exclusively on particular communities. Two examples stand out: the first was the August 2007 agreement between the Government of Nepal and the Nepal Federation of Indigenous Nationalities and the Indigenous Nationalities Joint Struggle Committee, which included a commitment to establish an Indigenous Nationalities Commission.<sup>43</sup> The second was the agreement reached between the Government of Nepal and the United Muslim National Struggle Committee in March 2009 also had a provision to form a National Muslim Commission.<sup>44</sup> The setting up of the Backward Community Upliftment Development Committee was declared through a formation order in February 2009.<sup>45</sup> But it took rounds of agitation by the Other Backward Classes (OBC) before the Committee received full shape.<sup>46</sup> It took another four years before the government recognised 29 groups as OBCs.

## 3.3. Constituent Assemblies

### 3.3.1. First Constituent Assembly

Given the context of Maoist insurgency, the Second People's Movement, the CPA, the Interim Constitution, various social movements seeking rights and the fact that all the major political parties also had specific wings catering to different social groups, there already existed a conducive environment for the establishment of human rights institutions focusing on particular communities by the time the first Constituent Assembly (CA1) was elected in 2008. One of the committees formed by the CA1 was the Committee to Decide on the Structure of Constitutional Bodies (CSCB), comprising 43 CA members and headed by a CA member from the Madhesi community. Among the sub-committees constituted within the CSCB, one such, headed by a CA member from the Indigenous nationalities community, was assigned to define the number and structure of human rights institutions for the minority and marginalised communities. The CSCB proposed six such commissions: i) for women; ii) for Dalits; iii) for Adibasi Janajati; iv) for people with disabilities, minority and marginalised groups and people of backward regions; v) for Madhesi; and vi) for Muslims.<sup>47</sup> (The 'Other' commissions in the 2015 Constitution are these very ones but for the differential status as 'national' and otherwise, the addition of one for Tharus, and the designation of the fourth one as the National Inclusion Commission.)

41 Sunil Ranjan Singh vs. Prime Minister of Nepal and Council of Ministers & Others, Supreme Court of Nepal, Order No 067-WO-0962, March 9, 2015. A full version of the order in English can be found at <<http://tjcnepal.blogspot.com/2015/06/full-text-of-decession-for-madhesi.html>>. See also 'SC Orders Govt to Form Madhesi Commission' *The Kathmandu Post* (10 March 2015) <<https://kathmandupost.com/valley/2015/03/10/sc-orders-govt-to-form-madhesi-commission-402626>> accessed 7 August 2021.

42 It should be pointed out though that there was no mention a Madhesi Commission in the first draft of the 2015 Constitution either.

43 See Izumi Wakugawa, Prawash Gautam and Anil Shrestha (eds), *From Conflict to Peace in Nepal: Peace Agreements 2005-10* (Asian Study Center for Peace & Conflict Transformation 2011) 95.

44 See *ibid* 142.

45 Like the Committee for the Upliftment and Development of the Neglected, Oppressed and Dalit Class and the Committee for the Upliftment and Development of Indigenous Nationalities, this, too, was formed under Article 3 of the Development Board Act 1956, and placed under the then Ministry of Federal Affairs and Local Development.

46 See the government agreements with the Federation of Other Backward Community on 24 March and 21 June 2009 with reference to the formation and operation of the Committee. Wakugawa, Gautam and Shrestha (n 43).

47 Committee to Decide on the Structure of Constitutional Bodies, *Awadharanapatra Sahitko Prarambhik Masyauda Pratibedan 2066* (Constituent Assembly 2009) [Report of Preliminary Draft including Concept Paper 2066].

**Table 1: Differences Between the Draft Constitution and the Final Constitution of 2015 with Respect to the 'Other' Commissions**

Commission	Draft	2015 Constitution
National Women Commission, National Dalit Commission, National Inclusion Commission	<ul style="list-style-type: none"> <li>• Clause 4(d) is about post vacancy in case the Chair/member dies (which is 4(e) in 2015 constitution).</li> <li>• Age for eligibility for Chair/members is 40 (Article 5(c)).</li> </ul>	<ul style="list-style-type: none"> <li>• Clause 4(d) added to conditions for vacancy of Chairperson/ member) (she/he removed by President on recommendation of Constitutional Council if found unable to discharge duties of his/her office)</li> <li>• Age for eligibility for Chair/members to commission is 45 (Article 6(c)).</li> <li>• Allows for establishment of offices in the province as necessary.</li> </ul>
National Inclusion Commission	<ul style="list-style-type: none"> <li>• Clause 1: Commission consists of Chairperson and as many as eight other members</li> <li>• Functions and Duties include protection of Adibasi Janajatis, Madhesis, Tharus and Muslims in addition to those mentioned in the final version</li> </ul>	<ul style="list-style-type: none"> <li>• Clause 1: Commission consists of Chairperson and at most four other members</li> <li>• Functions and duties include protection of Khas Arya, backward classes, persons with disability, senior citizens, labourers, peasants, marginalized and minority communities, people of Karnali region and economically disadvantaged people; no explicit mention of Adibasi Janajatis, Madhesis, Tharus or Muslims although people from these communities would also form part of the groups like the disabled, labourers, marginalized, senior citizens, and economically disadvantaged.</li> </ul>
Adibasi Janjati Commission, Madhesi Commission, Tharu Commission, Muslim Commission	<ul style="list-style-type: none"> <li>• No mention of any of these commissions</li> </ul>	<ul style="list-style-type: none"> <li>• Present as Articles 261, 262, 263 and 264</li> <li>• No conditions for eligibility or functions and duties mentioned in the constitution as with the other commissions (Clause 4 of all states that everything shall be according to federal law)</li> </ul>
Article 265: Review of Commissions	<ul style="list-style-type: none"> <li>• Does not exist in the draft.</li> </ul>	<ul style="list-style-type: none"> <li>• Provides for a review of 'Other' Commissions 10 years after the promulgation of the Constitution</li> </ul>

Explaining how they came up with these six commissions, the chairperson of the sub-committee said: 'The major political parties including the then CPN (Maoist) had similar fronts defined by caste and ethnic groups within their structure. In a sense these commissions were created to institutionalise and replicate similar structures within the state structure.' In the case of Tharu Commission, however, he said that it was the outcome of the Tharu Movement in August 2015 since one of its demands was to have a separate independent commission for the promotion of Tharu community's human rights and their inclusion in the state.<sup>48</sup> The role of ethnicity-based fronts was mentioned by a Dalit rights activist as well. 'The demand for National Dalit Commission was championed mostly by the sister organizations of the mainstream political parties,' he said.<sup>49</sup>

### 3.3.2. Second Constituent Assembly

Although the second CA had accepted all the proceedings of the CA1, when the draft of the constitution was unveiled in June 2015, there was no mention of commissions for Adibasi Janjatis, Madhesis or Muslims as mentioned in the report of the CSCB. The Tharu Commission was also missing but that had not been recommended by the CSCB either. What changed the dynamic thereafter was the grievances among the

<sup>48</sup> Interviewed on March 31, 2021.

<sup>49</sup> Interviewed on April 12, 2021.

identity groups regarding the form of federalism, including a sustained movement by the Tharus in the far-west Tarai opposed to being incorporated in a province that was dominated by the hills. Things came to a head in late August, when several policemen were killed in clashes with Tharu demonstrators.<sup>50</sup>

Given the fluid political situation at the time and the fact that agitations were ongoing in different parts of the country, when the second draft of the constitution was presented in early September, it included all those commissions recommended by the CSCB as well as one for Tharus. The hurried manner in which these commissions were inserted into the Constitution is clear from how they have been mentioned in the Constitution.

In fact, the creation of the Tharu Commission has also been viewed by some Adibasi Janajatis as a ploy to divide the Adibasi Janajati since Tharus are also among the groups recognised by the government as being Adibasi Janajati. That is not necessarily a view shared by Tharus who argue that since Tharus are among the most marginalised communities within the Adibasi Janajati group, a separate commission serves the purpose of supporting them alone.

For an overview of the differences between the July 2015 draft constitution and the final Constitution, promulgated on 28 September 2015, as regards the 'Other' commissions, see Table 1.

### 3.4. The National Human Rights Commission and the 'Other' Commissions

First established in 2000, the National Human Rights Commission (NHRC) remained a statutory body until 2007 before the Interim Constitution 2007 accorded it constitutional status, an arrangement that was carried over into the Constitution of Nepal 2015. Given the prominent role that the NHRC has played in the human rights arena in Nepal, it is sometimes argued that Nepal does not require additional human rights institutions. While there are arguments for having just a single commission there are others in support of separate commissions to better protect and promote the human rights of specific marginalised and minority communities. It is not the remit of this paper to take sides in the argument but given its thrust some of the justifications put forward in favour of the formation of and constitutionalising all such commissions are mentioned with a view to assessing their performance against them.

#### 3.4.1. Different Needs

Nepal's minority and marginalised groups are diverse in many respects: i) their socio-economic status is not similar with some better off than others; ii) they have different agenda, and the root causes of their marginalisation are also different; and iii) accordingly, they require different approaches and policies, sometime even conflicting with each other, to be pursued for their human rights to be fulfilled. Indeed, the country's diverse minority and marginalised groups face very different structural impediments and areas of major human rights violations, as Table 2 highlights.

As Ghai points out, 'Marginalised groups are united in their opposition to the present dispensation but divided (at least objectively) on what remedies and policies must be pursued... Dalits want the abolition of the caste system, while the agenda of other groups depends on the recognition of caste, ethnic and linguistic distinctions.'<sup>51</sup> A Dalit rights activist interviewed also argued for a separate commission to look into Dalit issues. He said, 'Dalits in Nepal have specific concerns and requirements which justify the creation of National Dalit Commission. For instance, the historical discrimination through state structure, religion, culture, towards Dalits is deeply entrenched. The essence of the same cannot be and has not been captured by NHRC alone.'<sup>52</sup>

50 Tufan Neupane, 'Tikapur's Protracted Trauma' *Nepali Times* (21 August 2021) <<https://www.nepalitimes.com/banner/tikapurs-protracted-trauma/>> accessed 21 August 2021.

51 Ghai (n 28) 326.

52 Interviewed on April 12, 2021.

**Table 2: Structural Issues and Areas of Major Human Rights Violations**

Marginalised and Minority Communities	Structural Issues
Women	<ul style="list-style-type: none"> <li>• Gender-based violence (GBV) and discrimination</li> <li>• Non-implementation of proportional representation</li> </ul>
Dalit	<ul style="list-style-type: none"> <li>• Victims of untouchability</li> <li>• Caste-based discrimination and violence</li> <li>• Denial of the access to education and other services</li> <li>• Poverty</li> <li>• Non-implementation of proportional representation</li> </ul>
Adibasi Janajati	<ul style="list-style-type: none"> <li>• Non-recognition of identity, languages, festivals, culture</li> <li>• Deprived of customary rights to common goods</li> <li>• Non-implementation of proportional representation</li> </ul>
Madhesi	<ul style="list-style-type: none"> <li>• Non-recognition of identity, languages, culture</li> <li>• Discrimination against acquiring citizenship</li> <li>• Economic marginalisation</li> <li>• Non-implementation of proportional representation</li> </ul>
Muslim	<ul style="list-style-type: none"> <li>• Non-recognition of identity, language and culture,</li> <li>• Protection and recognition of mosques and madrassas</li> <li>• Resource constraint to operate madrassas</li> <li>• Encroachment of traditional and holy places</li> <li>• Undercounting of population</li> <li>• Inadequate awareness about human rights</li> <li>• Economic marginalisation</li> <li>• Non-implementation of proportion representation</li> </ul>
Tharu	<ul style="list-style-type: none"> <li>• Non-recognition of identity, culture and languages</li> <li>• Deprived of citizenship</li> <li>• Dispossession of land</li> <li>• Non-resolution of the issues of kamaiyas and kamlaris</li> <li>• Non-recognition of the badghar system</li> <li>• Deprived of getting primary education in the mother tongue</li> <li>• Economic marginalisation</li> <li>• High prevalence of sickle-cell disease (SCD) among Tharus that it should be declared a public health crisis</li> <li>• Non-implementation of proportional representation</li> </ul>

Derived from responses from key informants interviewed for this policy brief along with issues raised during the constitution-making process as reflected in the publication, *Sambhidhan Yatra* (Journey towards the Constitution).<sup>53</sup>

53 See Himal Media (ed.), *Sambidhan Yatra: Naya Sambidhan ra Sanghiyata sambandhi Bahas* vol. 1 (Himal Media Private Limited 2009); and Rajendra Dahal and Dhruva Simkhada (eds.), *Sambidhan Yatra: Naya Sambidhan ra Sanghiyata sambandhi Bahas* vol. 2 (Himal Media Private Limited 2009) [Journey Towards the Constitution: Arguments related to the New Constitution and Federalism].

A similar sentiment is expressed in the report of the Committee to Decide on the Structure of Constitutional Bodies of the CA1 which proposed the inclusion of the following in the preamble of the constitution:

*...the institutional development of democracy, sustainable peace, stability and economic and social transformation is possible only after building an inclusive state, while making women, Dalits, indigenous people, Madhesi, Muslims, disabled people, and people of minority and marginalized groups and backward region and class participate in all the organs of state restructuring on the basis of proportionate representation and inclusiveness to ascertain their (own) rights and interests and for their upliftment and development, and removing all kinds of discrimination and inequality and thereby providing equal opportunities in economic, political, social, and educational sectors to pursue social justice as well as in establishing harmony among various castes and ethnicities, religions, languages, origin, ethnicities and communities...*<sup>54</sup>

### 3.4.2. Focus on Cultural, Social and Economic Rights

According to the Committee to Decide on the Structure of Constitutional Bodies of the CA1, since the NHRC is focused on civil and political rights, there is a need of similar institutions for the economic, social, and cultural transformation of marginalised groups.<sup>55</sup> That the NHRC is concerned more with civil and political rights was also evident from their annual reports and the recommendations provided to the government in the past. This is particularly pertinent since the Constitution of Nepal 2015 has emphasised eradication of poverty and social and economic inclusion and most of the fundamental rights guaranteed are also concerned with social rights. A lawyer who participated in one consultation workshop organised for this brief put it as such: ‘The Constitution has given equal priority to both civil-political rights and economic, social, cultural rights. But both the government and the commissions have not given consideration to the economic, social, cultural rights and are limited to civil and political rights. This is one danger and everyone should pay attention to this issue.’<sup>56</sup>

### 3.4.3. Failings of Statutory Commissions

As argued by the CA Committee, the statutory human rights institutions formed according to Article 154 of the Interim Constitution 2007 (that is, the Women and Dalit commissions) could not function independently and effectively.<sup>57</sup> Therefore, ensuring their independence via constitutional entrenchment was critical, particularly since there is an absence of trust that the executive will ensure the fulfilment and protection of the human rights of minority and marginalised groups.<sup>58</sup>

54 Committee to Decide on the Structure of Constitutional Bodies (n 47) 3.

55 *ibid* 97.

56 In a consultation workshop held by Niti Foundation in May 2021.

57 Committee to Decide on the Structure of Constitutional Bodies (n 47) 97, 98.

58 *ibid*.

## 4. The Design of Nepal's 'Other' Commissions

Besides the commitments enshrined in its Preamble, as described above, the 2015 Constitution, guarantees a comprehensive set of human rights as the fundamental rights of citizens.<sup>59</sup> In comparison to Nepal's previous constitutions, particularly the Constitution of Nepal 1990, the 2015 Constitution is seen more focused on consolidating human rights and social justice in a number of different ways. First, it defines human rights in a more holistic way and embodies the indivisibility of human rights. For example, the 1990 Constitution did not incorporate social rights as the fundamental rights of citizens, whereas Part 3 of the 2015 Constitution dealing with fundamental rights spells them out in detail: a right to education, a right to employment, a right to health, a right to food, and a right to housing.<sup>60</sup> Second, the 2015 Constitution ensures special protection and special human rights for some of the country's historically marginalised groups. For example, Article 38 guarantees women with rights to equal lineage, proportional inclusion and affirmative action, while Article 40 ensures Dalits' proportional inclusion, free education and affirmative action. Third, the Constitution recognises social justice as a fundamental right.<sup>61</sup> It ensures the participation of marginalised and minority groups in state bodies on the basis of the principle of proportional inclusion; it promises these groups special opportunities and benefits in education, health, housing, employment, food, and social security for their protection, upliftment and empowerment; and guarantees their equal access to public services and facilities.<sup>62</sup>

### 4.1. Mandates

The 'Other' commissions, established by Part 27 of the Constitution, have been granted a particular mandate to protect and promote the above-mentioned special human rights guaranteed by the Constitution for marginalised and minority groups while also ensuring social justice for them. The legal mandates provided to the 'Other' commissions are arguably broad enough to make the government accountable towards fulfilling the promises in the Constitution of Nepal towards marginalised and minority groups, and ending their historical marginalisation and discrimination.

The mandates of the commissions are broad and encompass the provision of recommendations to government and other concerned bodies, conducting research, formulation of policies and programmes, programme implementation, individual complaint handling, and coordination and liaison with public entities (see Box 1).

<sup>59</sup> Constitution of Nepal 2015, arts 16 – 45.

<sup>60</sup> Ibid, arts 31 – 37.

<sup>61</sup> Ibid, art 42.

<sup>62</sup> Ibid, arts 42(1) – 42(3).



### Box 1: The Constitutional and Legal Mandates of the ‘Other’ Commissions

Mandates	
<b>Providing recommendations to the government or other concerned bodies</b> <ul style="list-style-type: none"> <li>• Reforms in laws, policies and institutions</li> <li>• Implementation of domestic and international laws and policies</li> <li>• Implementation of the policies and programmes developed by the Commissions themselves</li> <li>• Protection and promotion of minority groups’ languages, cultures, traditions and arts</li> <li>• Ensuring proportional representation of minority and marginalised groups in state bodies and the national development process</li> <li>• Enlisting groups as belonging to particular communities, namely, Dalits, Adibasi Janajati, Madhesi, Muslims and Tharus</li> <li>• In the case of the National Women Commission and the National Dalit Commission only, filing legal cases in the courts</li> <li>• In the case of the rest of the commissions, investigating individual complaints</li> </ul>	<b>Conducting studies and research, including monitoring and evaluation in the following areas</b> <ul style="list-style-type: none"> <li>• Existing laws and policies to ascertain whether reforms are necessary</li> <li>• Implementation status of domestic and international laws and policies, and programmes</li> <li>• Implementation of constitutional/legal provisions of proportional representation of different groups in state bodies and development process</li> <li>• Status of the protection, empowerment and development of the concerned communities as expected and provisioned in the laws</li> <li>• Situation analysis of concerned communities to understand any area (policy, legal, and institutional) for reform</li> <li>• Implementation status of the recommendations provided by the Commissions themselves</li> <li>• On languages, culture, history, tradition, literature, and art</li> <li>• Effectiveness of the awareness programmes implemented by the government and other organisations</li> <li>• Whether Nepal has reported to the treaty bodies pursuant to the international treaties and conventions</li> </ul>
<b>Formulate policies and programmes on the following subjects and recommend for implementation</b> <ul style="list-style-type: none"> <li>• Protection and promotion of the rights of the concerned communities</li> <li>• Preservation and development of language, culture, history, tradition, literature and art</li> <li>• Elimination of harmful superstitions, malpractices and exploitation</li> <li>• Protection and promotion of historical places</li> </ul>	<b>Programme implementation</b> <ul style="list-style-type: none"> <li>• Awareness-raising programmes on the rights of the people for their empowerment</li> <li>• Public hearing over matters concerning to the rights, interest and concerns of their constituencies</li> </ul>
<b>Individual Complaints Handling</b> <p><i>National Women Commission and National Dalit Commission</i></p> <ul style="list-style-type: none"> <li>• Receive and register the individual complaints</li> <li>• Initiate preliminary investigation over complaints.</li> <li>• Conduct or cause to conduct detailed investigation, including taking personal statements, reviewing relevant documents, inspecting sites, collecting any deeds or its copy</li> <li>• Recommend the concerned bodies to file legal cases against any persons/bodies on matters of violence against women and on matters of violence/discrimination/untouchability/ill-practices against Dalits</li> <li>• To facilitate reconciliation between the parties where the laws allows</li> </ul> <p><i>Rest of the commissions</i></p> <ul style="list-style-type: none"> <li>• Receive complaints and make recommendations to the concerned bodies for investigation into the complaints</li> </ul>	<b>Coordination and liaison</b> <ul style="list-style-type: none"> <li>• Coordinate and cooperate with government agencies and public entities as required</li> <li>• Coordinate with the Government of Nepal and other organisations in the context of policies/programmes concerning their respective constituencies</li> <li>• The National Women Commission to liaise with the Ministry of Women, Children and Social Welfare</li> <li>• The rest of the commissions to liaise with the Ministry of Federal Affairs and General Administration</li> </ul>

Source: Constitution of Nepal 2015; National Women Commission Act, 2017; National Dalit Commission Act, 2017; National Inclusion Commission Act, 2017; National Indigenous Nationalities Commission Act, 2017; Muslim Commission Act, 2017; Madhesi Commission Act, 2017; Tharu Commission Act, 2017.



Most of the stakeholders interviewed, however, were of the view that these mandates are not enough. The discontent springs from two factors. First, these commissions can do nothing by themselves as their mandates are limited to providing the government with the recommendations and such recommendations are not necessarily binding for the government. A Dalit rights activist interviewed by the authors said: 'The current legal provisions do not capture the political spirit that led to the creation of the National Dalit Commission. For that to happen, the Commission should have been given the mandate to direct the government to rectify its actions and to follow the Commission's recommendations mandatorily.'<sup>63</sup> A similar opinion was expressed by an indigenous rights activist who said that the legitimacy of the Adibasi Janajati Commission is undermined since it is only a recommending body.<sup>64</sup>

The second reason for dissatisfaction was over the limited authority of the commissions to investigate and provide remedy into the individual complaints concerning the violation of human rights. An indigenous rights activist says, 'Regarding the Adibasi Janajati Commission, Adibasi Janajatis' demand was to have a very powerful constitutional body with quasi-judicial authority. We have a deep resentment against the main political parties for making such a weak commission.'<sup>65</sup> Likewise, a commissioner of Madhesi Commission says, 'These commissions seem to be toothless constitutional bodies in the absence of mandate to investigate human rights abuses.'<sup>66</sup>

Despite such views of misgivings, upon comparison with international practice, it is clear that the mandates given to these commissions are as broad as that of similar commissions in India, South Africa and other countries. The only difference is, for example, in India all the constitutional commissions are authorised to investigate human rights abuses cases, which some of the commissions here in Nepal lack. As the stakeholders argue, there is no obvious reason for providing the complaint hearing authority to some but not others in Nepal, and that appears to be a valid point. It should be pointed out that the Paris Principles also do not require NHRIs to have a complaints-hearing mandate to be considered effective and credible.

## 4.2. Alignment with Paris Principles

In terms of their formation and mandate, most of the constitutional and legal provisions concerning these commissions are aligned with the 'Paris Principles', which constitute internationally accepted minimum standards for effective and credible national human rights institutions. As mentioned, the Constitution and the individual acts formulated to govern each of these 'Other' commissions, have served to make these institutions independent of the executive and provide them with broad mandates. These include the appointment of the commissioners to be made by the President on the recommendation of the Constitutional Council,<sup>67</sup> stipulation of the eligibility criteria of commissioners,<sup>68</sup> guarantee against the alteration of commissioners' remuneration and conditions of service to their disadvantage,<sup>69</sup> fixed terms of office of the commissioners,<sup>70</sup> and allocation of broad mandates to the commissions.<sup>71</sup> Despite these seemingly empowering provisions, there are, however, many challenges for these commission to function independently.

63 Interviewed on April 12, 2021.

64 Interviewed on April 12, 2021.

65 Interviewed on April 10, 2021.

66 Interviewed on April 1, 2021.

67 Constitution of Nepal 2015, arts 252(2), 255(2), 258(2), 261(2), 262(2), 263(2), 264(2).

68 Ibid, arts 252(6), 255(6), 258(6), 261(4), 262(4), 263(4), 264(4).

69 Ibid, arts 252(7), 255(7), 258(7), 261(4), 262(4), 263(4), 264(4).

70 Ibid, arts 252(3), 255(3), 258(3), 261(3), 262(3), 263(3), 264(3).

71 Ibid, arts 253, 256, 259, 261(4), 262(4), 263(4), 264(4).

## Box 2: The Paris Principles

Formally known as the 'Principles relating to the Status of National Institutions' adopted by the General Assembly in 1993, the 'Paris Principles' are so called since the first International Workshop on National Institutions for the Promotion and Protection of Human Rights was held in Paris in 1991. The Paris Principles thus constitute internationally accepted minimum standards for effective and credible national human rights institutions. These include:

### ***(a) Competence and responsibilities:***

National institutions shall be given as broad a mandate as possible to:

- submit opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights;
- examine legislations, administrative provisions, bills and proposals to ensure that these provisions conform to the fundamental principles of human rights;
- investigate situations of violation of human rights;
- prepare reports on the national situation regarding human rights;
- draw the attention of the government to the situation of the violation of human rights, suggesting the initiatives to put such situation an end;
- promote and ensure the harmonisation of national laws and practices with the international human rights instruments;
- encourage ratification to international human rights instruments;
- contribute to reports which states are required to submit to UN bodies and committees and other treaty bodies; and
- cooperate with the United Nations and other organizations competent in the protection and promotion of human rights.

### ***(b) Composition and guarantees of independence and pluralism***

- Pluralist representation;
- Appropriate infrastructure, adequate funding; and
- Stable mandates for the specific duration for the members.

### ***(c) Methods of operation***

- Freely consider any question falling within its competence;
- Hear any person and obtain information and any document;
- Address public opinions;
- Establish working groups, and local and regional sections as needed; and
- Maintain consultations with stakeholders with the similar mandates, and non-governmental organizations involved in the human rights sector.

### ***(d) Additional principles concerning status of commissions with quasi-jurisdictional competence***

concern national institutions authorised to hear and consider complaints and petition concerning individual situations, seeking settlements, hearing complaints or referring them to competent authorities, and making recommendations to the competent authorities.

Source: United Nations Office of the High Commissioner for Human Rights, 'Principles relating to the Status of National Institutions'. <https://www.ohchr.org/en/professionalinterest/pages/statusofnationalinstitutions.aspx>

### 4.3. Differential Treatment

Even though all the seven human rights institutions come under the same heading 'Other' Commissions in the Constitution, the Constitution treats them differently in three ways.

First, three of the commissions, have 'national' prefixed to their names – a distinction not granted to the remaining four. Hence, the 'Other' Commissions comprise (emphasis added):

1. the **National** Women Commission,
  2. the **National** Dalit Commission, and
  3. the **National** Inclusion Commission
- as well as
4. the Adibasi Janajati Commission,
  5. the Madhesi Commission,
  6. the Tharu Commission, and
  7. the Muslim Commission.

Second, the Constitution specifically defines the mandates of the three 'national' commissions while relegating the definition of the mandates of the other four to federal law. Thus, each of the 'national' commissions are detailed in three articles with a total of 11 clauses, and 17 sub-clauses dealing with their formation, mandates, remuneration, and functions, duties and powers, and the possibility of establishing provincial offices.<sup>72</sup> The other four commissions, on the other hand, are dealt with summarily in one article each with just four clauses, mentioning the appointment and tenure of the commissioners while the 'qualifications, conditions of vacancy, remuneration and conditions of service of the Chairperson and members of...Commission and other provisions related to functions, duties and power of such Commission shall be according to the federal law'.<sup>73</sup>

Third, with regard to the commissions' jurisdictions in dealing with human rights violations, the National Women Commission and the National Dalit Commission are authorised to investigate complaints<sup>74</sup> (as the National Human Rights Commission is also empowered), whereas other commissions' authority is limited to receiving complaints but they need to refer the cases to the concerned authorities for further action, including investigation.

This differential treatment has created resentment among the marginalised and minority groups. Echoing the views expressed by others, a Tharu activist said: 'The state treated Tharu community unfairly by not giving Tharu Commission with the national status'.<sup>75</sup>

According to Khaitan, constitutional bodies are those whose authority is recognised as entrenched against ordinary political-legal processes.<sup>76</sup> Since the mandates of the four commissions can be amended at any time by a simple parliamentary majority, there is anxiety amongst minority communities that these commissions lack the core elements of being termed constitutional

<sup>72</sup> Constitution of Nepal 2015, art 252 – 260.

<sup>73</sup> Ibid, arts 261 – 264.

<sup>74</sup> These bodies can provide recommendations to concerned authorities on filing petitions in the relevant court in accordance with the law in the case of gender based violence, gender or caste based discrimination or victimization due to social malpractices. See Constitution of Nepal 2015 arts 253(1), 256(1). However, provisions related to handling of complaints, including investigation are only explicated in the respective federal Acts, not in the Constitution itself. See National Women Commission Act 2017 s 9-10, National Dalit Commission Act 2017 s 9-10.

<sup>75</sup> Interviewed on April 12, 2021.

<sup>76</sup> Khaitan (n 1).

bodies. One of the commissioners of the Madhesi Commission said, for example: ‘In the absence of constitutional mandates, there is confusion as to whether these four commissions are constitutional or statutory bodies.’<sup>77</sup>

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77 Interviewed on April 1, 2021

## 5. The Performance of Nepal's 'Other' Commissions

### 5.1. Mandate vs Performance of 'Other' Commissions

An analysis of the annual reports of the 'Other' commissions and interviews with commissioners and officials show that the commissions are yet to fulfil the core functions that they have been established for: to generate evidence to demonstrate the gaps in the laws/policies/programmes/institutions and provide the government with recommendations for reforms or for their effective implementation. Since these commissions do not have the power to impose punishments or any such negative sanction, the only recourse left to them is to use persuasion for change by providing evidence to underpin their recommendations.

From the interviews, however, it was evident that none of the commissions were actively engaged in providing such evidence-based recommendations to the government for policy reform. Instead, they were found tied up with peripheral tasks such as running preparatory classes for their respective constituencies for government service, distributing aid to populations affected by emergencies, recommending to the government to include certain populations groups into the official lists of the macro group that the commissions catered to, and conducting events to raise awareness. The interest of the commissioners comes through in the response from one of them to the question what tasks would be prioritised for the upcoming year if provided with adequate resources: 'I would like to plan for vocational training classes for unemployed youth from my community.'

Such activities are undoubtedly important for the community concerned given their state of marginalisation. However, such work can easily be taken up by the government and other stakeholders and should not be part of their core functions. Asked why the commissions end up limiting themselves to such tasks, a former commissioner said: 'The reason for the commissions getting engaged in minor activities, such as running exams preparation classes, is out of compulsion since there is resource constraint but also pressure to meet the expectations of the target groups and this is to show their existence.'

One of the secretaries, the highest government official in the commissions, was of a different opinion: 'Honestly speaking, neither of us [the commissioners and the staff] clearly understand the Commission's roles and responsibilities.' A similar view was expressed by a former commissioner of the NHRC: 'This might have been caused by the failure within the commission and their stakeholders regarding the mandates and terms of reference for the commission.' A government official said: 'I have been in meeting with many of the commissioners and they do not seem to be conceptually clear regarding their duties.'

### 5.2. Collaboration and Coordination

Working in isolation, the commissions cannot deliver the broad mandates they have been entrusted with. It is critical for them to collaborate and coordinate with different stakeholders including their counterparts on human rights commissions, the NHRC, civil society organisations and the government

at the different levels. The Acts regulating the commissions also require them to coordinate and collaborate with the Government of Nepal and other organisations in the context of taking policy/ programmatic measures concerning their respective constituencies.

There exist some informal coordination efforts among and between the human rights institutions, including with the National Human Rights Commission. Monthly meetings are held among seven 'Other' commissions in which the commissioners and the secretaries participate. As informed by the commissioners and bureaucrats to the research team, the agenda of the meetings are mostly concerned with the common problems the commissions face, such as lack of resources and difficulty in coordinating with federal government. One example of collaboration with the NHRC was the Madhesi Commission and the NHRC having established human rights monitoring mechanisms at the district level working with youth committees to report on human rights issues and the cases of individual human rights violations. According to a commissioner from Madhesi Commission, these committees have served as a bridge between the Commission and the public. According to him, on average, seven human rights violation cases are reported to the Madhesi Commission per day with most of these cases having been referred to by these committees.

Engagement with civil society and the space NHRIs provide to civil society to influence their work will have an impact on the realisation of human rights. Gomez outlines the significance of such engagement in the following terms: partnerships with civil society help monitor and add to the pressure for the implementation of NHRIs' recommendations to state entities; drive innovative and bold interventions; and allow them stay resilient, robust and independent during democratic backsliding.<sup>78</sup> As reported by the research participants, there is a complete lack of engagement between the commissions and civil society organisations, apart from a few exceptions. A Dalit activist said, 'At this moment, since the [Dalit] Commission is new, its engagement with civil society organisations is not yet pronounced. In the future, requirements of the Commission might guide the positioning of civil society organisations within their working modality. To ensure and demand accountability, there is a need for the civil society organisations to function as a critical mass that regularly channelise feedback to the Commission. The creation of the Commission is a result of demand from the civil society organisations and political sister organizations. Now, the need is for CSOs to take ownership of the constitutional Commission, support and backstop its functions as required. It should also work towards demanding accountability and help identify strategic areas of priority.'

With regard to how such a relationship could be built, the same activist said: 'Rather than a formal mechanism, a conducive environment is needed that would facilitate and encourage collaboration and engagement between these actors. The National Dalit Commission is recognized as an entity of the state that has the sole mandate of focusing on Dalit rights. The National Dalit Commission should hence identify and locate civil society organisations and individuals' expectations and plan the arenas where they can be engaged.'

All the 'Other' commissions have been assigned ministries to serve as their liaison with the government. All the commissioners were of the view that they should have direct access to the Prime Minister's office and not have to work through ministries. At the province level, there is a complete gap in communication between the commissions and provincial governments, let alone coordination and cooperation. However, according to a commissioner from the Madhesi Commission, the Madhesi Commission had assigned commissioners to coordinate with provincial governments. At the local level there was some kind of coordination and collaboration between the local governments and commissions more broadly. The local governments were reported to have been helpful implementing the commissions' activities and commissions also reported to advocating with the local governments for the allocation of local budget for the benefit for their respective constituencies.

<sup>78</sup> Mario Gomez, 'Advancing Economic and Social Rights through National Human Rights Institutions' in Jackie Dugard and others, *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Edward Elgar Publishing 2020).

## 6. Challenges

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### 6.1. Non-Cooperation from the Government

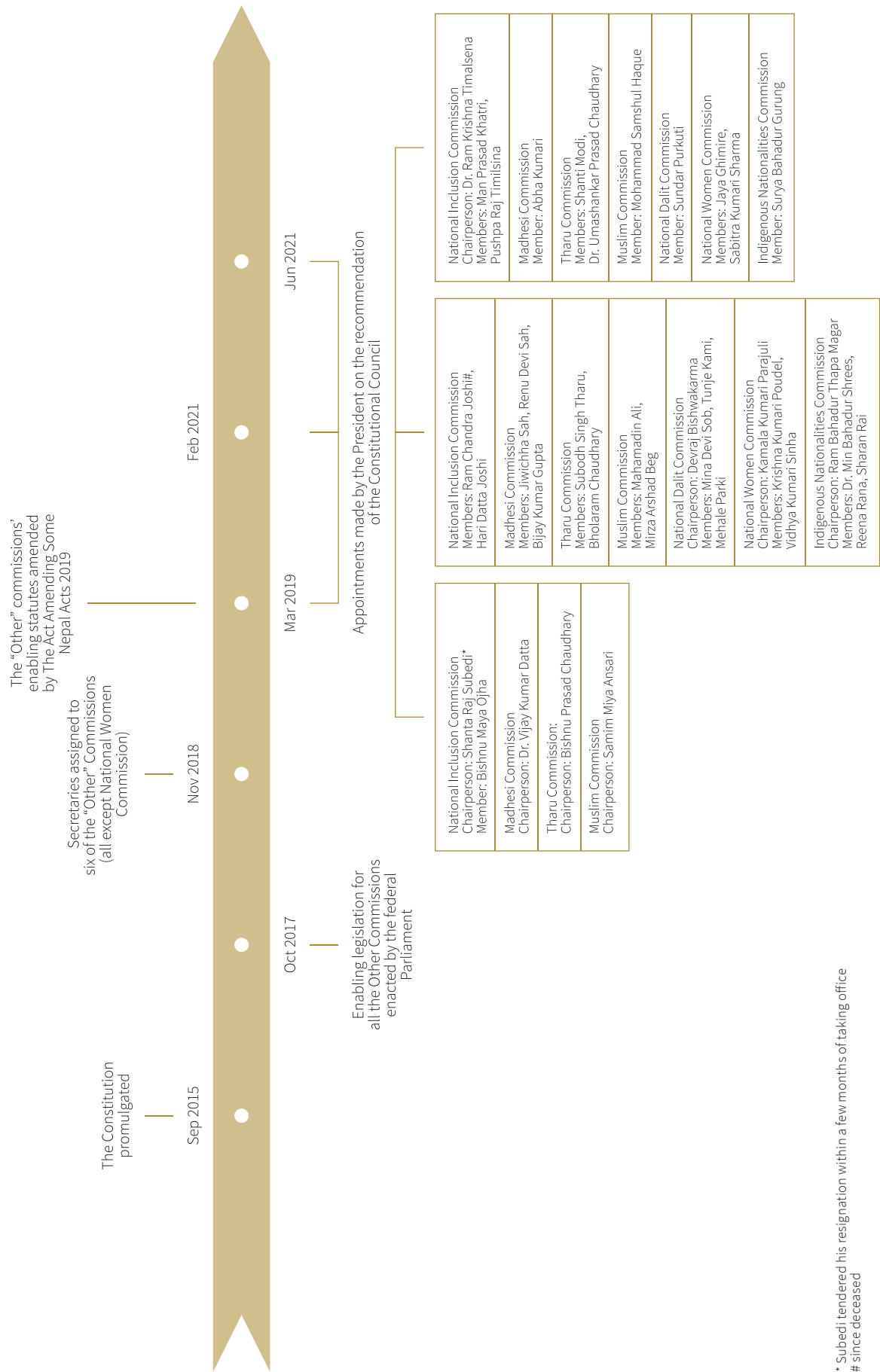
The paradox the 'Other' commissions find themselves in is that they need to be independent of the government to effectively deliver on their mandates while at the same time they cannot do without its support and cooperation. This is fundamentally because the commissions are completely reliant on the government for the resources they require. The Acts regulating all these commissions uniformly state that the government will decide the organisational structure of the commissions as well as the quantum of human resources required for their functioning.

Almost all the commissioners and officials interviewed for this research were of the view that the government has not been cooperative. For example, regarding the allocation of human resources one of the secretaries said, 'Major decisions concerning the Commission such as creation of positions for human resources are made by the Ministry without consultation with the Commission. Hence there is a question of the Commission's independence from the government.'

A Janajati activist even claimed that the government was deliberately making the commissions dysfunctional by reducing resources with the aim of disbanding the commissions after ten years by declaring them to be ineffective. During the consultation workshop, a former Supreme Court chief justice said: 'I think such commissions were included in the Constitution because they were relevant. However, they have become disregarded.'

The views expressed above are substantiated by some of the facts on the ground. First, the government took more than five years to fill all the positions in the commissions. Second, appointments to the commissions have been made through patronage. Third, the annual reports submitted to the President are not always tabled in the Parliament as prescribed by the law. Fourth, the government has arbitrarily decreased the resources allocated to these commissions and transferred staff as well. The frequent transfer of staff without consultation with the commissions was reported by all the commissioners as a major challenge they faced.

Figure 1: Timeline of Development and Appointments to the ‘Other’ Commissions



\* Subedi tendered his resignation within a few months of taking office  
# since deceased



Finally, the government has relegated the 'Other' commissions to lower rank by allocating only a gazetted first-class officer to serve as the secretary, the highest-ranking bureaucratic position in the commissions. That it appears to be a deliberate attempt to undercut their standing and reduce their worth is borne out by the fact that until 2018, under the Acts originally enacted, the post of secretary was to be filled by a gazetted special class officer level. A law passed in 2019 amended all the 'Other' commissions Acts and lowered the rank of the secretaries (see Box 3). Other constitutional bodies, including the NHRC and government ministries, are still headed by secretaries of the special class. Regarding the implication of this, a commissioner said, 'This has resulted in unequal power relationships between the secretaries appointed to the commissions and those in other government offices such the ministries and other constitutional bodies. Due to these rank differences, the secretaries of the commissions cannot discuss on an equal footing with those in the Ministries.'

### Box 3: Amended to Irrelevance?

Apart from downgrading the top government official in all the 'Other' commissions from special class to first class, the Some Nepal Acts Amendment Act 2019, also amended two key provisions (with the exception of the National Women Commission because the National Women Commission Act did not have those provisions to begin with.)

The first amendment dealt with the functions, duties and powers of the commissions. One such was the power to issue the necessary *directives* to the government regarding compliance with international treaties and conventions that Nepal is party to and that affect the particular group that the said commission was catering to. The new wording relegated the commissions to merely make *recommendations* and provide *suggestions*. The second substantive amendment was the removal of the provision that any vacancy among the commissioners would be filled within 35 days. In the case of the Adibasi Janajati Commission, the Amendment Act also removed the provision allowing it to operate offices at the local level.

Thus, the amendment downgraded the 'Other' commissions' authority in a meaningful way, limited the Adibasi Janajati Commission's capacity to engage locally, and even absolved the government of ensuring that the commissions have a full complement of commissioners.

Source: Some Nepal Acts Amendment Act, 2019. <https://bit.ly/3rSYu5F>

## 6.2. Resource Constraints

Having highly constrained financial resources has impeded the functioning of the commissions. Determination of budget is a way through which the executive exercises its control over the NHRIs, including the quality of their human resources. In almost all the commissions, human resources were reduced from an initial number of around 30 to just a dozen or so. The acute shortage of financial resources can be better understood from this statement by a secretary in one of these commissions: 'The commission has only NPR 400,000 [ca. USD 3300] for the programme to be conducted this year. Of that, NPR 200,000 will be spent while submitting the report to the president and similar amounts to mark various special days.'<sup>79</sup>

Although somewhat of an exaggeration for the sake of effect, there is more than an element of truth in the above assertion. For instance, according to the annual report of the National Dalit Commission for the fiscal year 2020/21, of the little over NPR 23 million (ca. USD 200,000) spent, programmatic expenses, consisting of three headings—promotional and awareness programmes related to Dalit rights, commemoration day to mark ending of caste-based discrimination and untouchability, and publicity of laws related to Dalit rights—accounted for just 12 per cent.<sup>80</sup>

<sup>79</sup> Interviewed on April 11, 2021.

<sup>80</sup> National Dalit Commission, *Annual Report 2077/78* (2021) < [http://ndc.gov.np/images/category/Annual\\_Report\\_2077-0781.pdf](http://ndc.gov.np/images/category/Annual_Report_2077-0781.pdf) > accessed 18 January 2022.

### 6.3. Erosion of Legitimacy

All the commissions were created and adopted in the Constitution as per the demand of the people, hence the commissions are themselves legitimate bodies and the marginalised communities still have high expectations that they will make positive changes in their lives. The legitimacy is, however, being eroded in the public eye, with civil society organisations sceptical about the legitimacy and independence of these commissions.

The way the commissioners were appointed and the choice of individuals for the commissioners' positions have further contributed to the scepticism. That two of the commissioners appointed in December 2020 refused the offer and that two others did not meet the stated qualifications made a sham of the appointment process.<sup>81</sup> A Dalit activist said: 'The appointment procedures adopted by the government derails the essence of these commissions, ultimately affecting their legitimacy and independence.'<sup>82</sup>

Pluralism is one of the indicators defined by the Paris Principles to assess the independence of NHRIs. As a Janajati activist put it: 'The Commission's legitimacy in public's view has been impaired by the current government's way of appointing its patronages into its leadership, the lack of knowledge and expertise in the appointees, and the fact that three of five of the appointees for the Adibasi Janajati Commission are from the same community, Magar, excluding other Indigenous groups.'<sup>83</sup>

The legitimacy of the commissions has also been called into question due to their seeming ineffectiveness in proactively speaking out about the burning issues of their respective constituencies and against the incidences of human rights abuses. For example, the Secretary at the National Dalit Commission (NDC) conceded that Dalit activists are not happy with the NDC for its silence in infamous Rukum case of June 2020 in which Dalit youths were killed for one of them allegedly attempting to elope with a girl of 'higher caste'. That the NDC did not have any commissioners may have contributed to this lack of any response.

### 6.4. Questionable Appointments

According to the Constitution, the chairpersons and members of all the NHRIs are appointed by the President on the recommendation of Constitutional Council, consisting of the Prime Minister as the Council's chairperson, and the Chief Justice, the Speaker and Deputy Speaker of the House of Representatives, the chairperson of the National Assembly, and the Leader of the Opposition Party as members.<sup>84</sup> The Constitutional Council Act 2009 details the procedure to followed by the Council while making recommendations to constitutional bodies, including the NHRIs: attendance of five members and the chairperson to fulfil the quorum for the meeting to go ahead, and all those recommended to undergo a parliamentary hearing before being endorsed by the President.<sup>85</sup>

In order to bypass this procedure, the then Prime Minister amended the Constitutional Council Act through an ordinance, reducing the quorum to a simple majority and decisions to be taken on the basis of majority.<sup>86</sup> Given that the position of Deputy Speaker of the House of Representatives was vacant, this provision allowed just three members of the Council, including the Prime Minister, to recommend appointments to the constitutional bodies. The then Prime Minister made various

81 'Ordinance on Constitutional Council Act Scrapped' *The Kathmandu Post* (18 July 2021) <<https://kathmandupost.com/national/2021/07/18/ordinance-on-constitutional-council-act-scrapped>> accessed 7 August 2021.

82 Interviewed on April 12, 2021.

83 Interviewed on April 10, 2021.

84 Constitution of Nepal 2015, art 284.

85 Constitutional Council (Functions, Duties, Powers and Procedures) Act 2010, arts 5 – 7.

86 With a new government in place July 2021, the ordinance was scrapped. See 'Ordinance on Constitutional Council Act Scrapped' (n 81).

appointments to NHRIs twice in 2021, including chairpersons of the National Human Rights Commission, National Women Commission, National Dalit Commission, National Inclusion Commission and Adibasi Janajati Commission, and members to various commissions. Since the Parliament had been dissolved, the President endorsed their appointments without their going through parliamentary hearing process either.

Since the above appointment process did not adhere to domestic laws or the Paris Principles, the issue of credibility of the NHRIs has been raised at both national and international levels. The Global Alliance of National Human Rights Institution has decided to review the accreditation status of the National Human Rights Commission and the UN special rapporteurs urged the Government of Nepal to rectify the appointments.<sup>87</sup> Previous commissioners of NHRIs, who participated in one of the consultation workshops, have decried that these appointments have damaged the NHRIs' reputation, independence, legitimacy and credibility. Several writ petitions have been filed at the Supreme Court challenging the legality of these appointments, however, to date the Court has yet to determine the matter.<sup>88</sup>

## 6.5. Overlapping Jurisdictions

An obvious potential drawback to having so many commissions is the overlap in jurisdictions among and between the seven commissions, with the National Human Rights Commission, and even with some government agencies. Thus, the National Inclusion Commission's mandate overlaps with all the other commissions since its mandates covers almost all Nepali citizens. There is no clear demarcation between the various mandates either. For example, a violation of the human rights of a Tarai Dalit woman would automatically involve three of the commissions — the National Women Commission, the National Dalit Commission and the Madhesi Commission — in addition to the National Human Rights Commission. In fact, in a case of sexual abuse of a Dalit women in Bardiya district, three human rights institutions — the NHRC, the National Women Commission and the National Dalit Commission — conducted separate monitoring visits and submitted separate reports with conflicting details. Something similar happened regarding another incident in Kavrepalanchowk district in which a young Dalit girl had been sexually assaulted. The Central Child Welfare Board<sup>89</sup> and the National Women Commission conducted separate investigation, resulting in conflicting conclusions which then led to delays in action from the government.

A former commissioner of the National Human Rights Commission said: 'Such jurisdictional overlapping has weakened both the NHRC and other NHRIs. There are nine thematic desks within the NHRC and the mandates of these desks are quite similar to that of the individual seven Commissions. There is an urgent need to define and demarcate the mandates between the NHRC and the other commissions.'

Moreover, duplication of jurisdiction is also evident between the 'Other' commissions and some executive bodies. For instance, some of the mandates of the Adibasi Janajati Commission and the Tharu Commission overlap with each other — since Tharus are also counted among Adibasi Janajati — and of both with the National Foundation for Development of Indigenous Nationalities (NFDIN). According to the deputy chair of NFDIN, although NFDIN and these commissions have fundamentally different purposes to serve, the Indigenous Nationalities Commission Act and the Tharu Commission Act were drafted in a rush and some of the provisions in the NFDIN Act were copied in for both

87 Binod Ghimire, "A" Status of Rights Commission under Threat Due to Controversial Appointments' *The Kathmandu Post* (4 July 2021) <<https://kathmandupost.com/national/2021/07/04/a-status-of-rights-commission-under-threat-due-to-controversial-appointments>> accessed 7 August 2021.

88 Tika R Pradhan, 'Hearing on Cases Related to Constitutional Appointments in Limbo' *The Kathmandu Post* (5 September 2021) <<https://kathmandupost.com/politics/2021/09/05/hearing-on-cases-related-to-constitutional-appointments-in-limbo>> accessed 14 January 2022.

89 The Central Child Welfare Board is a statutory body formed under the Children's Act 1992.

commissions. He refrained from being overtly critical of the government and brushed those anomalies aside by calling them errors while drafting the later Acts.

## 6.6. Non-Implementation of Recommendations

A major issue is that the commissions' recommendations are not necessarily binding on the government or other institutions addressed by the commissions. For example, Article 13.3 of the National Women Commission Act 2017 provides the Attorney General and other concerned bodies with the discretionary power whether to file a case as recommended by the Commission or dismiss it thereof. Similarly, Article 15.3 of the same Act provides other agencies to which the Commission furnishes recommendation with the same discretionary powers. This is the case for all other commissions as well.

In such a situation, the commissions' recommendations are very likely to go unimplemented. The commissioners interviewed for this study were quite concerned that non-implementation of their recommendations ultimately results in the erosion of the commissions' legitimacy. In the view of one of them: 'What happen if the concerned authorities do not file cases or investigate the complaints as recommended by the commissions? Such recommendations should be made mandatory as it is in the case of National Information Commission according to the Right to Information Act.' That was a reference to the National Information Commission, which despite not being a constitutional body, can force government agencies to heed its directives. In this sense, the National Information Commission, a statutory body, is more powerful than the constitutional 'Other' commissions.

## 7. Looking to the Future

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The seven 'Other' commissions have been created with a specific mandate to protect and promote the human rights guaranteed by the Constitution for marginalised and minority groups while also ensuring social justice for them. Therefore, these commissions have an important role to play in ensuring that the promises of the new constitutional dispensation — more balanced and equal development, greater appreciation for religious and ethnic diversity, and increased peoples' participation, especially of historically marginalised groups — become real for all Nepalis.

To date, six years after the ratification of the 2015 Constitution and well over halfway to the constitutionally mandated ten-year review of these bodies, while some progress has been made to establish these institutions, much remains to be done to see them flourish and become fully functional in line with the intention of the Constitution. The 'Other' commissions face many challenges as they seek to make the state more accountable.

While the Constitution places the 'Other' commissions together in the same Part (27), it treats them differently in a number of respects: it gives recognition as 'national' commissions to some but not others; some enjoy constitutional mandates while others' mandates are subject to the federal laws; some are authorized to investigate individual complaints but other are not. This differential treatment has caused resentment among some stakeholders. The commissions have been found to be engaged in various peripheral activities such as providing recommendation to the government to enlist the surnames belonging to a particular ethnic group, conducting awareness raising events, distributing aid materials, administering hotline services, and conducting exam preparation classes for government employee prospects. They are, however, not progressing at all towards the stated core mandates for which they were established and that make them distinct from other state bodies, including the government and civil society organizations. Coordination among and between the commissions is confined to discussion of the shared problems but not the shared mandates.

Having commissions progressing towards these mandates necessitates them to be independent of other state bodies particularly the government, and technically and politically capable of performing the mandates. Currently, both these prerequisites are missing. The commissions' independence has been curtailed by the significant cutting back of their resources by the executive, controversial and delayed appointments to their leaderships, and the frequent and arbitrary transfer of their personnel. The capacity of the commissions to understand and fulfil their mandates is also found lacking.

Based on the findings of this study, the following elements of support could be provided for Nepal's 'Other' commissions:

- To be thoroughly conversant about their and peer mandates, conduct mandatory induction and ongoing orientation for commissioners, commission officials, and other stakeholders.
- To improve coordination and reduce duplication, establish a mechanism to share annual workplans among all NHRIs during the drafting process.
- Following submission of their annual reports, provide a public forum where all the human rights institutions, including the NHRC, can present and discuss the contents of the reports.
- Support periodic, strategic conversations between and among the various commissions of (a) their commissioners and (b) their professional staff to exchange experiences and advocate for shared concerns.
- A needs assessment of the constituencies served by the commissions should be undertaken and capacity building of the staff should be pursued to allow for those needs to be fulfilled.
- Allow commissions to generate funds from other internal/external sources, especially for unanticipated and emergent needs.
- Allow decentralisation of the commissions to the subnational level where required.
- Form an expert committee within the Constitutional Council with the mandate of developing a roster of qualified candidates to serve as commissioners of the 'Other' commissions.
- As with the NHRC, authorize the other commissions to hire and manage their own personnel.
- As necessary, avail of the Supreme Court's jurisdiction to guard and empower the commissions. For instance, under Article 133 of the Constitution, the Supreme Court can declare void any law that restricts the commissions' constitutional jurisdiction.<sup>90</sup>

For the 'Other' commissions' potential to be fully realized, it is vital for the government to demonstrate respect for the commissions' independence in line with the constitutional spirit by committing resources to build their capacity. Additionally, resources must be committed to institutionalize mechanisms and processes that foster collaboration among and between the commissions and with other stakeholders, particularly CSOs, so that they better complement each other and accomplish their shared goals.

<sup>90</sup> Some laws have limited the commissions' jurisdiction conflict with provisions guaranteed by the Constitution. For example, Article 253 of the Constitution empowers the National Women Commission to make recommendations to concerned bodies, including the Attorney General, about various matters concerning women such as filing court cases or introducing reforms in laws/policies and institutions. However, this power has been undermined by Articles 13(3) and 15(3) of the National Women Commission Act 2017.





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