

Your Excellency President of India Shri. Pranab Mukherjee, Hon'ble Prime Minister Shri. Narendra Damodardas Modi, Hon'ble Minister of Home Shri. Rajnath Singh, Hon'ble Speaker of Lok Sabha Smt. Sumitra Mahajan, Hon'ble Deputy Chairman of Rajya Sabha Shri. P J Kurien, Hon'ble Leader of Opposition in Lok Sabha Shri. Mallikarjun Kharge and Hon'ble Leader of Opposition in Rajya Sabha Shri. Ghulam Nabi Azad,

Greetings from the All India Network of Individuals and NGOs working with National and State Human Rights Institutions (AiNNI)!!

Executive Summary:

Expressing grave concerns, dismay and disappointment about the independence of the judiciary and the adherence of the National Human Rights Commission to the UN Paris Principles, based on a newspaper report dated November 27, 2015, that the current Chief Justice of India, Hon'ble Mr. Justice H L Dattu, is being considered by the government for the post of NHRC Chairperson. The report also claims that other former Chief Justices were contacted by the government but they rejected the post.

As per the provisions of the Protection of Human Rights Act (PHRA) Section 4, the Government of India is bound to discuss the names of the possible candidates for this post in the appointment committee which consists of Leaders of Opposition from both Houses of Parliament, Deputy Chairman of the Upper House, Speaker of the Lower House along with the Prime Minister and Minister of Home Affairs. This method of selection is detrimental to the functioning and reputation of the Supreme Court of India, to the NHRC and such measures lead to the formation of a trust deficit in the Supreme Court of India itself.

Also, when the Chief Justice of India, Mr. Justice H L Dattu is continuing in office, already communicating with him about a future post-retirement position as the future Chairperson of NHRC, seriously affects the independence of the judiciary and provides the candidate with the scope to lose his independence in various judgments he delivers being a Constitutional functionary. It is also no secret that Chief Justice Dattu has continued to handle sensitive cases against the government and its functionaries till date, leading to the perception that independence of the judiciary may be compromised.

An appointment suggested outside of the statutory process is preemptive, suborns the process, and would be open to challenge as well as cause reputational risk to the NHRC. We appreciate that delay in the appointment of the NHRC head is undesirable, nevertheless the process requires to be beyond reproach. We therefore ask that a meeting of the appointment committee is called immediately and the candidature of Mr. Justice H L Dattu be put up before it along with all the other candidates who qualify, be deliberated upon and announced only after all processes have been completed as per the statute.

We ask that all vacancies be immediately filled through proper process. We urge this in the interests of transparency and diversity as required for the NHRC to retain its 'A' status at the International Coordination Committee's Sub-Committee on Accreditation (ICC-SCA) before which it comes for review in 2016.

Memorandum:

We are writing to you on behalf of the All India Network of NGOs and Individuals working with National and State Human Rights Institutions (AiNNI). AiNNI is a national forum of individuals and organisations from across the country, to monitor and strengthen the functioning of human rights institutions like the National Human Rights Commission, the National Commission for Women, the National Commission for Minorities, the National Commission for Protection of Child Rights, the National Commission for Scheduled Castes, the National Commission for Scheduled Tribes, the Central Information Commission, the Central Commissioner for Persons with Disabilities, the National Commission on Safai Karmacharis and their state counterparts for their full compliance to the UN Paris Principles, their founding law and to activate them to better equip themselves for the protection and promotion of human rights. AiNNI is also a member of the Asian Network of NGOs working with National Human Rights Institutions [ANNI] and ANNI is known to work in close collaboration with the Asian Pacific Forum of NHRIs [APF] of which the NHRC in India is a founding member since 1998.

AiNNI in the past has intervened and raised concerns with regard to the appointments of several Members and officers of the NHRC. The most recent among them has been that of Justice Cyriac Joseph [the present Acting Chairperson] and Mr. Sharad Chandra Sinha IPS [the present Member] when our present Finance Minister, Hon'ble Mr. Arun Jaitley and our present Minister for External Affairs, Hon'ble Mrs. Sushma Swaraj, had both then served in the NHRC's appointment committee during the UPA-II government, in their capacities as the Leaders of the Opposition in the Upper House and Lower House. Both of them were dissenting members in the committee, in which they are bound to remain in minority, but had strongly recorded their objection in writing to the proposed names of the candidates on the grounds of they were still in service, had no record and experience in human rights and on the ground that independence of the Supreme Court would be compromised due to the lure of post retirement benefits.¹ More recently former Chief Justice of India, Mr. Justice Lodha

¹ 'Dissenting Note of Mr. Arun Jaitley, Member of the Selection Committee dated 29 March 2013 and 16 May 2013 respectively:

[29.03.2013] In recent years there has been an impression that the investigative agencies are not functioning independently. Government control of investigative agencies is primarily responsible for compromising their independence and autonomy. Additionally, it has been felt that heads of investigative agencies discharge a function which should be completely independent of the Executive. They must function without fear or favour. While in service they must have security of tenure and full authority to independently investigate. Similarly there must be no temptation of a future favour by the government. It is this temptation of a future favour which is seriously compromising the functioning of heads of investigative agencies. Ever since the UPA Government came to power, it has appointed four CBI Directors, three of whom have since retired. Shri Vijay Shankar Tiwari after retirement was made a member of the Justice MM Pubchi Committee on Centre – State Relations. Shri Amar Pratap Singh has been appointed the Member of the UPSC and now Shri W. Ashwani Kumar has been appointed the Governor of Nagaland. If this pattern were to continue every retiring CBI director would expect to continue in government assignment even post retirement. Now there is a proposal to appoint the Head of NIA, Shri SC Sinha IPS as a Member of the NHRC. That is in the chain of post retirement appointments given to heads of investigative agencies by the UPA Government. It has been done in all cases of retiring CBI Directors. There is not a single exception. I am completely opposed to this compromise with the autonomy and independence of the CBI and NIA. I therefore am unable to agree with the appointment of Shri SC Sinha as a member of the NHRC.

Additionally, there would be several persons from the civil service as also from civil society who would be committed to the cause of those who suffer the maximum deprivation of human rights. It would be advisable if a panel of such names is prepared and the most suitable amongst them is selected for the post.

Sd. (ARUN JAITLEY) Leader of Opposition (Rajya Sabha)

has expressed his disapproval of this practice in strong words precisely on the ground that it will lead to a perception in the public mind that pre-retirement judgments are given under the influence of getting post retirement appointments, and Mr. Arun Jaitly has also once again endorsed this view. AiNNI in 2011 had also intervened in the Sub-Committee on Accreditation (SCA) of the International Coordination Committee of the National Human Rights Institutions (ICC). AiNNI's 2011 report was released by former Chairperson of NHRC, Late Mr. Justice J.S. Verma.

It is imperative to mention here that at present there are two vacancies in the National Human Rights Commission (NHRC). The position of Chairperson of the NHRC is vacant from the month of May 2015 (6 months - vacated by Mr. Justice K.G. Balakrishnan) and a Member from the month of March 2014 (20 months - vacated by Mr. Satyabrata Pal IFS (Retd)). These vacancies have severely hampered the efficacy of the NHRC and to the extent that NHRC is not in a position to constitute its two division benches and two single member benches unable to respond to the immense volume of cases pending before it. Moreover, the posts seem to have been deliberately kept vacant for "suitable" candidates.

Raising specifically the concerns with regard to the appointment of the Chairperson of the NHRC, it is now being reported in a newspaper that the current Chief Justice of India, Hon'ble Justice H L Dattu, is being considered by the government for the post of NHRC Chairperson. The news also claims that other former Chief Justices were contacted by the government but they rejected the post. If this news is to be believed, it is extremely disturbing to anyone concerned about the independence of the judiciary and the adherence of NHRC to the UN Paris Principles.

As per the provisions of the Protection of Human Rights Act (PHRA), the Government of India is bound to discuss the names of the possible candidates for this post in the appointment committee which also consists of Leaders of Opposition from both Houses of Parliament. This method of selection is detrimental to the functioning and reputation of the Supreme Court of India, to the NHRC and such measures lead to the formation of a trust deficit in the Supreme Court of India itself.

2. [16.5.2013] The Government has proposed three names for appointment of a Judicial Member from amongst the sitting or retired judges of the Supreme Court. The names of three retired judges, namely, Justice Cyriac Joseph, Justice B. Sudershan Reddy and Justice V.S. Sripurkar have been proposed. I am of the considered opinion that Justice Cyriac Joseph, retired judge of the Supreme Court is completely unsuitable for being appointed as a Member of the National Human Rights Commission. He has been a judge of the Kerala High Court and Delhi High Court, the Chief Justice of Karnataka High Court and a judge of the Supreme Court. As a judge he was known for not writing judgments. As against a few hundred judgments authored by every judge of the Supreme Court, during his tenure Justice Cyriac Joseph is believed to have written only six judgments. He has been, even during his tenure as a judge, perceived to be close to certain political and religious organizations. His close proximity to religious organisations is evident from the fact that media reports have indicated that when certain Nuns were sexually assaulted, as a sitting Judge of the Supreme Court he chose to visit the institutions where Narco analysis of the accused were being carried out in Karnataka. This was strongly objected to by Members of the Bar Association in Kerala who protested against the same. He was quoted in the media as having stated that for him his religious affinity was more important than his commitment as a Judge. When there are other eminent names of retired judges eligible for appointment available, which include Justice B. Sudershan Reddy, Justice V.S. Sripurkar, suggested by the Government and Justice Ravinderan, Justice H.S. Bedi, Justice Deepak Verma as suggested by some of us, I am unable to persuade myself to concur to the appointment of Justice Cyriac Joseph as a Member of the National Human Rights Commission.

Sd. (ARUN JAITLEY) Leader of Opposition (Rajya Sabha)

Also, when the Chief Justice of India, Mr. Justice H L Dattu continuing in office, already communicating with him about a future post-retirement position as the future Chairperson of NHRC, seriously affects the independence of the judiciary and provides the candidate with the scope to lose his independence in various judgments he delivers being on a Constitutional functionary. It is also no secret that Chief Justice Dattu has continued to handle sensitive cases against the government and its functionaries till date, leading to the perception that independence of the judiciary may be compromised.

It is equally disturbing that despite the post being vacant for six months and going by public knowledge, government has not called for one meeting of the appointment committee and undertaken the initiative to appoint the NHRC Chairperson.

Earlier to this, it was widely reported in the Indian media that the Government of India was considering the name of Justice (Retd.) Mr. P Sathasivam, a former Chief Justice of India (CJI) and currently Governor of the state of Kerala for appointment as the Chairman of the NHRC, succeeding Justice (Retd.) K G Balakrishnan who completed his five-year term in May 2015. It was also reported that Justice Sathasivam was being considered as the sole contender for NHRC's top post despite there being other qualified retired CJIs. The people of the country were already disturbed about his appointment as Governor immediately after his retirement as such appointments compromise the independence of the judiciary leading to unhealthy practices of judges developing closeness to the government of the day in the hope of post retirement appointments. It is only public protest against the proposed appointment that stopped the appointment. The proposed appointment of Justice Sathasivam for the office of Chairperson of NHRC raised serious concern regarding the selection and appointment process to the NHRC which makes the institution lose its independence, accountability, transparency, and effectiveness.

Any candidate who is a part of the executive branch of the Government according to the Indian Constitution should be kept away from the post of NHRC because the body is responsible to deal with complaints of rights violation against the government. Appointing such a person to head the NHRC would also affect the very integrity, credibility and authority of the institution meant to protect human rights of citizens.

AiNNI believes that the appointment of the new Chairperson in a non-transparent and non-consultative manner directly contradicts the UN Paris Principles [UN Guidelines for the Establishment of National Human Rights Institutions]. Independence, diversity, impartiality, and fairness are the main pillars set out in the UN Paris Principles for NHRIs' operations. Two of the six key elements of the 'Paris Principles' require NHRIs to be autonomous and independent of the government in all their functioning².

² As per Paris Principles, the composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:

- (a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;
- (b) Trends in philosophical or religious thought;
- (c) Universities and qualified experts;
- (d) Parliament;

The appointing committee of the NHRC should take into consideration the contributions to human rights made by each of the eligible retired Chief Justices of the Supreme Court of India for appointment as the Chairperson of the NHRC. There is an urgent need for evolving definite criteria to be put in place to evaluate each of these eligible candidates which then forms the basis of selection by the appointing committee. There should be a panel of eligible persons, published in advance and made available for considerations so that the respective merits and demerits of candidates can be evaluated. Complete adherence to the UN Paris Principles is needed to ensure independence and autonomy of the institution. This amounts to greater significance given that Indian NHRC is due for its next review before the ICC-SCA in 2016³.

The recently decided NJAC judgment has held that independence of the judiciary is a basic feature of the Constitution and any law that compromised that independence would be null and void. We believe that independence of the judiciary can be compromised in many ways, one of them being offering post retirement sops to judges on the verge of retirement. It is for this reason also, that there are rules in place in government prescribing a “cooling off” period before a retired government servant can be offered public appointments. The same principle must be followed in the case of appointments to the NHRC.

Another concern, with regard to vacancy of a member in the NHRC, vacant since March 2014, it is imperative to bring to your kind notice that as per PHRA, this position has to be filled by ‘those having experience and knowledge of human rights’. However, since inception of the NHRC, this category has only seen people who have been formerly members of IPS, IFS and a Rajya Sabha Secretary General being appointed to this post. Never has there been a civil society representative appointed in this position. The last women member in the NHRC had completed her term in 2004. It has been more than 11 years since NHRC has had a woman member on board. This goes against the principles of plurality and diversity in composition as mentioned in the Paris Principles.

The appointing committee should take into consideration the contributions to human rights made by each of the eligible candidate being considered for the post of Member of the NHRC. It would be desirable that the allotment for this vacancy is fulfilled through a public announcement that calls for applications/nominations. There is also the urgent need for definite criteria/indicators to be put in place to evaluate each of these eligible candidates which then forms the basis of selection by the appointing committee. It would be apt that for the present vacant post, the appointment committee considers a woman from civil society, preferably a dalit, tribal or muslim woman, who has substantial knowledge and experience in the field of human rights. This will also ensure that India abides by the principles of pluralism as laid down in the UN Paris Principles and also the May 2011 ICC-SCA’s recommendation to India.

(e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).

³ NHRC last went for reaccreditation to the International Coordination Committee of NHRIs (ICC) in the year 2011 and it is due for its next review in 2016. At the time of reaccreditation in 2011, concerns were expressed by the ICC- Sub Committee on Accreditation (ICC-SCA) with regard to the composition and pluralism of the board of NHRC, appointment of its Secretary General and the Director of Investigation from the Central Government, relationship with civil society, the complaints handling mechanism of the NHRC being not efficient and independent and, non-publication of the annual reports of the NHRC before it is presented to Parliament. All the concerns observed by the ICC-SCA are serious and need immediate and urgent attention especially given that NHRC will soon be under review again in the year 2016.

We humbly request you to urgently intervene in this matter to ensure that due process of appointment to NHRC is followed. We also request that such appointments respect the fundamental principle of transparency and adherence to the accepted international standards and norms as laid down in the UN Paris Principles. The NHRC appointment committee should hold its meeting urgently and consider all names eligible for the post of Chairperson and Member. The Appointment Committee should be required to be convened with due advance notice. This Appointment Committee requires the presence of the Leader of Opposition in the House of People which the House now does not have and hence the Leader of the largest party in the House of People should be formally invited to the meeting of the Committee and such a decision regarding the Chairperson and Member of the NHRC should only be held in a full meeting of the said appointment committee. The committee should then assess them on criteria and indicators well accepted also taking into account their record, experience and concrete contributions to human rights during their career. Incidents such as these take away the merits of the vital statutory institutions such as the NHRC, lead to trust deficits and government high-handedness curtails them from being independent and autonomous. Most severe of all, it hampers the independence of our judiciary which is critical to the functioning of this democracy.

AiNNI is willing to work as closely as required with the government to enhance the quality of our National Human Rights Commissions. NHRC is the most important among other national human rights institutions in our country enhancing access to justice to the poorest of the poor who suffer from violations of human rights. The NHRC has made several historical contributions and now needs to expand further in their commitment and work while adhering to UN standards relating to such institutions.

We therefore hope that through this letter addressed to your good self, AiNNI and the Government of India can work closely to ensure institutions of greater significance to the people and upholding justice in democratic India.

Thanking you for your patient reading of this memorandum.

Yours sincerely



(Henri Tiphagne)

National Working Secretary,

All India Network of Individuals and NGOs working with National and State Human Rights Institutions [AiNNI]