

OUR FIVE OBSERVATIONS AS CONSTITUTION ENTERS FIFTH YEAR

20th September 2019 marked the fourth anniversary of the promulgation of the Constitution of Nepal, 2015. Despite dissatisfaction of Madhesi, Tharu, indigenous nationalities, women, Dalits and other marginalised groups and communities over the constitution, the statute has successfully been implemented in last four years.

As Nepal enters into the fifth year of the statute implementation, THRD Alliance - - which has closely been following the implementation of the constitution -- puts forth its observations on five different issues/aspects. These issues are related to the state of human rights, social justice and the rule of law in the country.

Hence, we would like to urge the government to pay heed to the issues mentioned below. We would also like the concerned stakeholders and the international community to continue their engagement with the government to resolve the issues.

OBSERVATION -1

RESISTANCE AGAINST THE CONSTITUTION CONTINUES

Although the government issued an edict¹ telling the government employees and the public to celebrate the “Constitution Day and National Day” on 20 September 2019² with much fervor, disaffected groups - Madhesi, Tharus, Janajatis and women - staged demonstrations on the Constitution Day to oppose some provisions of the constitution that they deem discriminatory. These groups and communities have been observing “black day” on the constitution day to highlight their protest against the constitution. Madhesi have been saying that the constitution was promulgated amid bloodshed in the Terai and hence they cannot celebrate it as a happy occasion. The division on observation of the constitution day was seen among political parties³. Nepal Community Party—the ruling

¹Constitution Day holiday is not for drinking and dating: Information Minister Baskota
<https://myrepublica.nagariknetwork.com/news/minister-baskota-urges-up-to-mark-constitution-day/>

²The government wants you to put on t-shirts with national flag emblem
<https://kathmandupost.com/national/2019/09/08/the-government-wants-you-to-put-on-t-shirts-with-national-flag-emblem>

³Government celebrates Constitution Day while Madhesi and indigenous groups protest
<https://kathmandupost.com/national/2019/09/21/government-celebrates-constitution-day-while-madhesi-and-indigenous-groups-protest>

party—and Nepali Congress Party celebrated the constitution day, while the Madhes-based political party-- Rastriya Janata Party Nepal -- and Tharu and Janajati groups observed the “black day”, staging demonstrations and rallies in different parts of the country.

During demonstrations, at least 12 protesters were arrested from Nepalgunj, Dang and Kathmandu, but were later released.

Two Madhesi parties- Rastriya Janata Party Nepal (RJP-N) and Samajwadi Party Nepal (SP-N) did not celebrate the Constitution Day. While the RJP-N observed Black Day, the SP-N which is a coalition partner in the KP Sharma Oli-led government, neither celebrated nor opposed the Constitution Day. These two parties have formed their government in Province-2. RJP-N ministers in e Province 2 however, observed “black day” on 20 September 2019⁴.

SP-N leaders and cadres organized or participated in the interactions on the need and importance of constitution amendments. The observation of “black day” by the disgruntled groups shows that the constitution is far from being accepted by all stakeholders of the country even after the first amendment to the constitution was made in January 2016. This reminds the government and major political parties to address people’s grievances through constitution amendment.

However, the government, which commands two-third majority in the Parliament required for amendment to the constitution, has not shown any signs of the possibility of amending the constitution in near future. Government ministers’ arrogant statements against those opposed to the provisions of the constitution indicate that the government is trying to implement the constitution forcefully.

⁴ Province 2 ministers mark Constitution Day as ‘Black Day’
<https://myrepublica.nagariknetwork.com/news/province-2-ministers-mark-constitution-day-as-black-day/>

OBSERVATION – 2

VICTIMS OF CONSTITUTION-RELATED PROTESTS AWAITS JUSTICE

The victims of human rights violations, including excessive use of force, extrajudicial killings and torture, that occurred during the constitution-related protests in 2015/16 still await justice

While the protests were still on, Human Rights Watch (HRW) documented the killings of 25 people, including 9 police officers and 16 members of the public, in five Terai districts between 24 August and 11 September 2015. The HRW's report titled "Like We Are Not Nepalis": Protest and Police Crackdown in the Terai Region of Nepal⁵ had found no evidence that any of these victims, including the police, was posing a threat to another at the time they were killed.

Similarly, THRD Alliance and Asian Human Rights Commission's Special Report 'Protest and Repression – State Responsibility for 37 Killings During Protests in Terai' concluded that the security forces engaged in a consistent pattern of excessive use of force, resulting in the deaths of 34 people and three others died in situations where the police could have intervened to stop their killing by counter-protesters⁶.

Most importantly, a High-level Inquiry Commission (HLIC) under the leadership of former Supreme Court Justice Girish Chandra Lal was formed on 18 September 2016 to investigate the state atrocities during the 2015 Madhes movement. The commission after completing its mandate within 14 months, submitted its report to the then Prime Minister Sher Bahadur Deuba on 15 December 2017⁷.

Nearly two years has passed since the submission of the HLIC report and yet the government has not made the report public.

⁵"Like We Are Not Nepalis": Protest and Police Crackdown in the Terai Region of Nepal
<https://www.hrw.org/report/2015/10/16/we-are-not-nepali/protest-and-police-crackdown-terai-region-nepal>

⁶Protest and Repression – State Responsibility for 37 Killings During Protests in Terai'
http://www.thrda.org/wp-content/uploads/2016/06/Protest_And_Repression_in_Terai.pdf

⁷THRD Alliance Calls to Make Public the Inquiry Commission's Report on the Terai Killings
<http://www.thrda.org/situation-update/thrd-alliance-calls-make-public-inquiry-commissions-report-terai-killings/>

On 7 June 2017, the government of Nepal has received a joint communication sent by the UN Special Rapporteurs⁸, concerning several incidents of alleged extrajudicial executions and excessive use of force by Nepalese security officers between 2013 and 2017, including during demonstrations held by ethnic minority groups, which resulted in over 40 persons killed and several others injured, in Nepal's Terai region.

But, as per our information, the government of Nepal has not furnished answers to the aforesaid joint communication within the given two months, which ended on 7 August 2017.

On 22 August 2018, the victims with the help of THRD Alliance filed a writ-petition in the Supreme Court challenging the government's reluctance to publish its report. The petitioner victims demanded that the HLIC report be made public.

Earlier this year, the government promised to make public the HLIC report⁹ after the opposition party – Rastriya Janata Party Nepal–obstructed the proceedings in the House of Representatives.

In March, Kailali District Court convicted¹⁰ RJP-N lawmaker

Highlights of HLIC Report

- The commission received a total of 3,264 complaints including 1938 complaints from Madhesi political parties and 1326 from others.
- Despite all these problems and a huge number of complaints, the commission visited all places of incidents and interacted with almost all the victims and injured persons and could submit its report within 14 months.
- 66 people — including 10 police personnel, an 18-month-old, four-year old Chandan Patel and 15-year-old Nitu Yadav—were killed during the movement. Of them, 62, including the police officials, were declared martyrs while four had not been conferred the status. The report recommended the government that four of those killed during the movement should also be declared martyrs.
- The commission also recommended the government to strengthen the mechanism to control riots and agitations in a proper way.
- The commission has recommended legal action against those responsible for human rights violations during the Madhes movement.

⁸NEPAL: An Open Letter from the Asian Human Rights Commission to the Minister for Foreign Affairs, and to the relevant authorities

<http://www.humanrights.asia/news/ahrc-news/AHRC-OLT-004-2017/>

⁹Govt agrees to publicize Lal panel report

<https://myrepublica.nagariknetwork.com/news/govt-agrees-to-publicize-lal-panel-report/>

¹⁰On March 6, 2019, Kailali District Court sentenced 11 to life imprisonment, pronouncing them guilty for their involvement in the Tikapur massacre of

2015. <https://www.recordnepal.com/wire/after-years-of-media-trial-a-stunning-verdict-in-the-tikapur-case/>

Resham Lal Chaudhary in the 2015 Tikapur violence even after he was sworn in as a member of the House of Representatives. Eleven persons, including Chaudhary are currently serving a life term.

Meanwhile, recently Co-Chair of the Communist Party of Nepal Pushpa Kamal Dahal 'Prachanda', addressing Tharu communities amid a function in Sunsari district, indicated that Resham Chaudhary and others convicted in the Tikapur violence might be freed soon¹¹. He said that his party, which is ruling the government, had decided in principle to withdraw false charges levelled against Tharus in connection with the Tikapur violence.

The human rights community, including THRD Alliance, which facilitated the commission to carry out its mandate, is of the view that once the HLIC report is made public, it will give a hope for justice to many members from Tharu and Madhesi communities who were killed and tortured and suffered from human rights violations during the constitution-related protests in 2015/16.

In a news report published recently¹², Kantipur National Daily claimed that it has leaked the HLIC report and attempted to bring it into controversy. Based on the information in the background section of the report, the media reported that the HLIC had breached its mandated jurisdiction in preparing the report. This is absolutely a false claim, according to the members of the commission. This was further refuted by former SC justice Lal in an interview published by the news portal -OnlineKhabar¹³.

Hence, THRD Alliance would like to urge the government of Nepal to publicize the commission's report and bring those responsible to justice. It will also urge the concerned stakeholders to pressure the government in responding to the joint communication from Special Procedures. This level of neglect by the government of Nepal raise doubts on the effective implementation of the court verdicts and investigation of Terai killings in anti-constitution protests, and other human rights violations.

¹¹Resham Chaudhary may be freed, hints Dahal

<https://thehimalayantimes.com/nepal/resham-chaudhary-may-be-freed-hints-dahal/>

¹²HLIC Report's Explanation of the Royal Massacre Goes Beyond Its Mandate [EngTranslation]

<https://ekantipur.com/news/2019/08/17/156600523565765203.html?fbclid=IwAR0dKfIEeGswcVr9cgkQlBlqeKjlyl0-Z8BqFs9dqWb5gkMUCZ1GBTBWbJM>

¹³There is nothing in the HLIC report which cannot be made public [English Translation]

<https://www.onlinekhabar.com/2019/08/790232?fbclid=IwAR1LbcxY5KRUnEIQtU6mzUBbH9Xttl9tqrGxdOhqHN3rpvuZHeA0ZvcTtw>

OBSERVATION – 3

CONSTITUTIONAL COMMISSIONS REMAIN NON-FUNCTIONAL

Even after four years since the commencement of the constitution, the seven thematic commissions, which were mandated to ensure the rights of the marginalized communities, have not yet got complete shape. These commissions, include National Women Commission, National Dalit Commission, National Inclusion Commission, Madhesi Commission, Tharu Commission, Indigenous Nationalities Commission and Muslim Commission.

The chairpersons of the four commissions –Madhesi; Muslim; Tharu; and Inclusion commissions—were appointed recently.

These bodies lack required members, human resources, funds and infrastructures. In the absence of the prerequisite resources, they have largely remained ineffective and non-functional. On top of that, these constitutional commissions have not been given adequate power to investigate the acts of discrimination, and recommend actions to the government, issue directives and prosecute the perpetrators. This is contradictory to the Paris Principles relating to the Status of National Institutions. Without required power, autonomy and independence, these commissions have remained to be toothless.

According to the Office of Prime Minister KP Sharma Oli, these commissions do not fall under the priorities of the government¹⁴. Such an apathy shown by the government has rendered them ineffective. Failure of these bodies to properly carry out their mandated tasks also contradicts the constitutional provisions. The constitutional spirit behind the formation of these commissions is to empower the marginalized groups (Madhesi, Tharu, Janajatis, Dalits, Muslimism and Women), which have suffered discrimination and marginalization for centuries.

The implementation of the constitution means the implementation of the constitutional provisions relating to these commissions as well.

THRD Alliance calls on for the formation of fully-fledged commissions and effective function as per their mandate.

¹⁴Government's apathy renders constitutional commissions ineffective
<https://kathmandupost.com/national/2019/07/06/governments-apaty-renders-constitutional-commissions-ineffective>

OBSERVATION—4

FUNDAMENTAL RIGHTS YET TO BE REALIZED BY CITIZENS

The Constitution of Nepal, in its Part III, encoded 31 fundamental rights, as included from Article 16 to Article 46. The implementation of the fundamental rights requires the enactment of laws, policies, guidelines and regulations. Article 47 of the constitution stipulates that the state shall, as required, make legal provisions for implementation of rights within three years of the commencement of this constitution.

A year since the deadline mandated by the Constitution to enact necessary laws to implement fundamental rights has passed but all the laws have not been enacted yet.

So far, the Parliament has enacted 16 laws relating to fundamental rights even though a year has passed. These laws alone are not enough, but regulations and directives are required for the effective implementation. As of now, only two regulations relating to right to social security and right to employments were made¹⁵.

All tiers of the government are required to enact these regulations necessary to implement fundamental rights but they have not done yet. In the absence of those regulations, many citizens have not been able to enjoy their fundamental rights guaranteed by the constitution.

Fundamental rights are the basic human rights of the citizens. The delays in enacting the required regulations has plagued the constitutional obligations to ensure the enjoyment of fundamental rights.

Fundamental Rights

1. Right to live with dignity
2. Right to freedom
3. Right to equality
4. Right to communication
5. Right relating to justice
6. Right of victim of crime
7. Right against torture
8. Right against preventive detention
9. Right against untouchability and discrimination
10. Right relating to property
11. Right to freedom of religion
12. Right to information
13. Right to privacy
14. Right against exploitation
15. Right to clean environment
16. Right relating to education
17. Right to language and culture
18. Right to employment
19. Right to labour
20. Right relating to health
21. Right relating to food
22. Right to housing
23. Rights of woman
24. Rights of the Child
25. Rights of Dalit
26. Rights of senior citizen
27. Right to social justice
28. Right to social security
29. Rights of the Consumer
30. Right against exile
31. Right to constitutional remedies

¹⁵No regulation to implement acts related to fundamental rights

<https://thehimalayantimes.com/nepal/no-regulation-to-implement-acts-related-to-fundamental-rights/>

OBSERVATION-5

PROPOSED BILLS/AMENDMENTS CAUSE CONTROVERSY

Over the past four years since the commencement of the constitution, Nepal has enacted a significant number of laws¹⁶. THRD Alliance's observation shows that the government has not only failed to timely formulate the draft laws and pass them but it also lacked broad and meaningful consultation with the relevant stakeholders and civil society. Consequently, this has brought the draft bills into controversy.

The controversial bills, which consist of Nepal Media Council Bill, Bill on Mass Communications, Information Technology Bill, Federal Civil Service Bill, NHRC Act (Amendment) Bill, and National Security Council Bill among others¹⁷, have received widespread criticism from several quarters, including the opposition parties, human rights community, civil society, media and the general public. Some bills are aimed at curtailing people's freedom of expression and press freedom.

Last June, the government had to withdraw the controversial Guthi Bill from the Federal Parliament after the members of civil society and Guthi organizations staged a huge protest against the proposed legislation aimed at nationalizing properties of *guthis*.

The government must take a lesson from this. The government should extend broad-based consultation with relevant stakeholders and public while formulating and enacting laws and policies. The formulation and enactment of laws and public policies

Controversial NHRC Act (Amendment) Bill

The National Human Rights Commission (NHRC) Act Amendment Bill tabled by the government in the Parliament aims to weaken the constitutional human right watchdog. The amendment bill gives the Attorney General discretionary power for the investigation and the implementation of recommendation made by the NHRC (Section 17a), Government's interference in financial autonomy of the rights body (Section 18) and the cancelation of provincial and contact offices of the Commission, (Section 26, 2) in particular. This will ultimately lead to failure of human rights protection system in the country.

In response, civil society and human rights community¹ have expressed their deep concern. They are of the view that the provisions of the bill have limited the jurisdiction, autonomy and independence of the commission. On top of that, the bill contravenes the provisions relating to NHRC as enshrined by the Constitution of Nepal, the Supreme Court's decision and the United Nations' Basic Principles for National Human Rights Institutions (NHRIs). They demanded that the provisions of the current bill must be revised in line with the NHRC's suggestions to maintain it as an independent, autonomous, dignified and effective constitutional body.

Meanwhile, the UN Special Rapporteurs made a joint communication with the government of Nepal, showing concerns over an **amendment bill to revise the existing act of NHRC Act-2012**, stating that it will potentially severely undermine the NHRC's authority, effectiveness and independence and limit the Nepali people's ability to access justice.

¹⁶See at <http://hr.parliament.gov.np/np/bills?type=auth&ref=BILL>

¹⁷ Six bills on hold following controversy
<https://myrepublica.nagariknetwork.com/news/six-bills-on-hold-following-controversy/>

through a broad-based consultation is recognized by international standards, including International Covenant on Civil and Political Rights (ICCPR) and it is an obligation of signatory countries to abide by its provisions.

Hence, THRD Alliance urges the government to follow the obligations and standards for the formulation and enactment of laws and policies.

###

The Terai Human Rights Defenders Alliance (THRDA) is a non-governmental organization registered under Nepali law and is working to protect and promote human rights through research, legal intervention and advocacy. It works in close coordination with Nepal's National Human Rights Commission, and reports to international human rights organizations, including the UN Office of the High Commissioner for Human Rights.