

## Appraising and Supporting Democratic Consolidation in Federal Nepal Synergising Fourth Branch Institutions

Contemporary constitutions subject the executive to the scrutiny not only of the political opposition and the judiciary, but also various ‘fourth branch’ institutions — so-called because they do not neatly fit into the traditional tripart division of the executive, legislature and judicial branches of government.<sup>1</sup> These institutions are now ‘considered among the core elements of modern constitutionalism’.<sup>2</sup> The fourth branch, however, is ‘one of the most important — and least studied or understood—trends in constitutional design’.<sup>3</sup>

As their number has proliferated in constitutions around the world and their ambits have expanded, scholarship has begun to turn attention to the ways in which fourth branch institutions function within liberal democracies.<sup>4</sup> This scholarship increasingly presents the fourth branch as providing important checks on executive aggrandisement and protection to key constitutional values such as democracy, legality, impartiality, probity, and human rights — fourth branch institutions are, in the view of many, important tools in the fight against democratic decay.<sup>5</sup> ‘[I]f well designed’, Fombad argues, they can provide ‘considerable scope for countering the numerous threats posed by majoritarian abuses and can also protect ordinary citizens from the consequences of their own naïveté, ignorance and impetuosity’.<sup>6</sup> The centrality of the fourth branch has also been advanced in recent accounts for more positive pro-poor liberal democratic practice.<sup>7</sup>

Nepal’s 2015 Constitution follows the global trend in elevating the fourth branch in constitutional governance. The place of previously established bodies such as the National Human Rights Commission (NHRC) and Commission for the Investigation of the Abuse of Authority (CIAA) have been maintained, while fresh space has been designated for numerous new institutions such as the Madhesi, Muslim, and Tharu commissions. These bodies are designed to assume various independent regulatory and oversight roles, including managing essential functions of the state (such as the Election Commission and the National Natural Resource and Fiscal Commission); constraining opportunistic behaviour and supporting the rule of law (such as the CIAA and the Auditor General); and promoting and protecting rights, inclusion, plurality, fairness, equality, and justice for the country’s heterogeneous population (such as the NHRC, the National Inclusion Commission, and the Indigenous Nationalities Commission).

In Nepal, strong institutional governmental accountability has only ever been weakly present in oppositional politics;<sup>8</sup> from the judiciary;<sup>9</sup> and from fourth branch institutions such as the NHRC;<sup>10</sup> the CIAA;<sup>11</sup> and the transitional justice commissions.<sup>12</sup> Thus, under the new constitutional dispensation, the burden on the fourth branch is not only to prevent democratic decay but also to help move the state towards consolidated liberal democracy with its healthy checks on power. These commissions are therefore critical to achieve democratic dividends under Nepal’s new constitutional order.

While Nepal’s fourth branch must play multiple and critical roles, its place within the broader constitutional architecture of government remains largely unexplored. Since 2015 the influence of the pre-existing commissions has shrunk, and almost all of the newly created commissions are only partly established and languish in various states of dysfunction.<sup>13</sup> While nearly all of Nepal’s fourth branch institutions have ongoing capacity building programs, none of these efforts look at how any or all of these commissions relate to each other in a substantive effort to provide, promote, and protect fundamental democratic values and principles. Little is known about their performance and their relationship to other parts of government. There has also been little analysis of role of the fourth branch in relation to the newly established subnational tiers of the Nepali federation.<sup>14</sup> Moreover, there is limited to no inter-commission coordination or collaboration — even among the constellation of eight human rights-focused institutions.<sup>15</sup> In light of the crisis induced by the COVID-19 pandemic, functional coherence among these constitutional bodies is more essential than ever, especially in the public imagination of their custodian role of constitutional principles and democratic values.

Partnering with a network of former constitutional commissioners and constitutionalism advocates in collaboration with select fourth branch institutions, Niti Foundation is curating and supporting strategic discussions on the roles and functions of fourth branch institutions in Nepal’s governance architecture. This inquiry and discourse is seeking to foster constitutional imagination for the ways that these institutions can play to support constitutionalism, human rights and democratic consolidation. Moreover, the iterative process of inquiry and discourse will build relationships that will surface commissions that are mission critical and ready to engage strategically in further activities.

<sup>1</sup> Sometimes, especially in the United States, the 'fourth branch' is used to refer to the media, public administration or even civil society. Nonetheless, there is growing consensus in comparative constitutional scholarship around its use to denote independent regulatory and oversight institutions. See AJ Brown, 'The Integrity Branch: A "System", an "Industry", or a Sensible Emerging Fourth Arm of Government?' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press 2014); Elliot Bulmer, 'Independent Regulatory and Oversight (Fourth-Branch) Institutions' (International Institute for Democracy and Electoral Assistance 2019) 19.

<sup>2</sup> Charles Fombad, 'The Diffusion of South African-Style Institutions? A Study in Comparative Constitutionalism' in Rosalind Dixon and Theunis Roux (eds), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence* (Cambridge University Press 2018) 370.

<sup>3</sup> David Landau, 'A Dynamic Theory of Judicial Role' (2014) 55 Boston College Law Review 1501.

<sup>4</sup> See Bruce Ackerman, 'The New Separation of Powers' (2000) 113 Harvard Law Review 633; Richard Albert and Michael Pal, 'The Democratic Resilience of the Canadian Constitution' in Mark Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018); Fombad (n 2); Bulmer (n 1).

<sup>5</sup> See, eg, Tarunabh Khaitan, 'Executive Aggrandizement in Established Democracies: A Crisis of Liberal Democratic Constitutionalism' (2019) 17 International Journal of Constitutional Law 342.

<sup>6</sup> Fombad (n 2) 361.

<sup>7</sup> Tarunabh Khaitan, 'Political Insurance for the (Relative) Poor: How Liberal Constitutionalism Could Resist Plutocracy' (2019) 8 Global Constitutionalism 536.

<sup>8</sup> The Asia Foundation, *Political Economy Analysis of Local Governance in Nepal with Special Reference to Education and Health Sectors* (The Asia Foundation 2012); Aditya Adhikari and others, 'Impunity and Political Accountability in Nepal' (The Asia Foundation 2014).

<sup>9</sup> David Pimentel, 'Constitutional Concepts for the Rule of Law: A Vision for the Post-Monarchy Judiciary in Nepal' (2010) 9 Washington University Global Studies Law Review 283; David Pimentel, 'Judicial Independence at the Crossroads: Grappling with Ideology and History in the New Nepali Constitution' (2011) 21 Indiana International & Comparative Law Review 207; Niti Foundation, 'An Essential Balance: Federalism, Rule of Law and the Judiciary in Nepal' (2019).

<sup>10</sup> Andrea Durbach, 'Human Rights Commissions in Times of Trouble and Transition: The Case of the National Human Rights Commission of Nepal' in Hitoshi Nasu and Ben Saul (eds), *Human Rights in the Asia-Pacific Region: Towards Institution Building* (Routledge 2011); Gyan Basnet, 'Nepal Human Rights Commission: Defender or Pretender?' (*Foreign Policy Journal*, 15 December 2012) <<https://www.foreignpolicyjournal.com/2012/12/15/nepal-human-rights-commission-defender-or-pretender/>>.

<sup>11</sup> Abisha Lamichhane, 'Commission for the Investigation of Abuse of Authority (CIAA): An Assessment of Institutional Capacity to Combat Corruption in Nepal' (Master in Public Policy and Governance, South Asian Institute of Policy and Governance, North South University 2019).

<sup>12</sup> Renee Jeffery, 'Nepal's Truth and Reconciliation Commission Limpson' (The Lowy Institute 2019) The Interpreter <<https://www.loyyinstitute.org/the-interpreter/nepal-truth-and-reconciliation-commission-limps>>.

<sup>13</sup> INSEC, *Nepal Human Rights Year Book 2020* (Informal Sector Service Centre 2020).

<sup>14</sup> Bhim Bhurtel, 'Fiscal Federalism: An Analysis of Its Initial Implementation in Nepal' (International Alert and Saferworld 2020) Volume 6 18.

<sup>15</sup> INSEC (n 13). These are the National Human Rights Commission, the Women Commission, the Dalit Commission, the National Inclusion Commission, the Indigenous Nationalities Commission, the Madhesi Commission, the Tharu Commission and the Muslim Commission.

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