An Interaction on Constitutional Vision and Present Practice of Nepal

PROCEEDING REPORT

(19 September 2019) Hotel Himalaya, Kupondole



Constitution Watch Group Nepal Law Society Babarmahal, Kathmandu

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1. BACKGROUND

Nepal celebrates fourth anniversary of the promulgation of the constitution on 20 September 2019. The constitution was made by an elected Constituent Assembly after six decades of political struggle. With the adoption of the new constitution Nepal has shifted to a federal democratic system from a unitary system. Similarly, it also adopted republicanism, secularism and proportional inclusion as its major features. Promulgation of the constitution was a huge achievement in itself. However, its implementation would be challenging. Even when the constitution was promulgated, it was envisaged that efforts needed to be put in by all the stakeholders for it to be successful. The key features of the new constitution were the federalization of the country, the division of three tiers of governance, new and progressive fundamental rights, as well as provisions to ensure inclusive democracy. Since some of these features are totally new for Nepal, their operationalization would naturally invite challenges. In this context, as the country marks the fourth anniversary of the promulgation of the constitution, and measures the achievements and the challenges faced by the three pillars of the state - the executive, the judiciary and the legislature, an interaction program was organized by the Constitution Watch Group on 19 September 2019 in Hotel Himalaya, Koupondole. The main purpose of the program was to review the implementation of the new constitution, identify the key challenges faced in the last three years and the ways to overcome them. Senior representatives from all three branches of the government presented working papers. The program was organized in the presence of over 80 participants - including officials, Parliamentarians, political leaders, civil society leaders, representatives from diplomatic missions and donor community.

2. CONSTITUTION WATCH GROUP

The Constitution Watch Group is a group of eminent individual as well as organizational experts and intellectuals who wish to play the role of neutral observers to raise their concerns on democracy, freedom, human rights and constitution. At the crucial phase of constitution implementation, there is a need for careful monitoring and evaluation of each and every step of the actors of the constitution by a group of independent and respected members of civil society.

The group can not only identify the problem areas but also help the government, the judiciary, the parliament and the national institutions by pointing out the correct resolution. Their monitoring and recomme-ndations helps the authorities in the proper implementation of constitution. The Group wishes to be a beacon of hope for the common people who will get to know how appropriately their constitution is being utilized. It provides a platform for research, study recommendations that are neutral. and independent and fact-based.



The Group is a network of five organizations - Nepal Law Society, Niti Foundation, Kathmandu University, Nepal Open University and General Elections Observation Committee. The Constitution Watch Group was formed this year and will be organizing various programs throughout the year. This is the second public program organized by the Group.

3. PROCEEDING OF THE PROGRAM:

The program was chaired by Mr. Kalyan Shrestha, Former Chief Justice and the coordinator of the Constitution Watch Group. It was moderated by Mr. Krishna Man Pradhan, Executive Director, Nepal Law Society.

• Professor Dr. Shilu Manandhar Bajracharya, Dean, Faculty of Management and Law, Nepal Open University

Bajracharya welcomed all the Ms. participants on behalf of the group and mentioned that promulgation of the constitution was a historical task for Nepali people. She added that the spirit of the constitution must be implemented for strengthening democracy. She added that there are widespread feelings about the weaknesses in its implementation. She said that it would be appropriate for the leaders of all organs of the state to sit together to discuss these weaknesses and identify the way forward. She said the interaction was held for that noble purpose and the participants have been invited to represent all sectors. She hoped that the



interaction will yield fruitful suggestions which will be beneficial for all.

• Dr. Bipin Adhikari, Senior Advocate and former dean of faculty of law, Kathmandu University

Mr. Adhikari highlighted the objectives of the program. He mentioned that the program has been organized to mark the fourth anniversary of the promulgation of the constitution. He added that

the program was held in order to make an analysis of its implementation post constitution promulgation and provide constructive feedback to constitution implementers. The formation of the governments as envisioned by the constitution is an indicator of success of the constitutional implementation. Similarly, directive principles must be implemented to erode the social discrimination. He said the Constitution Watch Group was formed with the objective of helping in the independent observation and review of the operation of the constitution. He



said such interaction was a part of the Group's objective and should be held regularly. He said

that the representative from the parliament, executive and the judiciary will express the view. After their presentation the floor will be opened for feedback from the participants. He urged everyone to open up and provide valuable feedbacks.

• Ms. Deborah Haley, Senior Country Director, NDI



Ms. Healy expressed happiness to be associated with the interaction on constitutional vision and present practice. She said that the National Democratic Institute for International Affairs (NDI), founded in 1983, is a nonprofit, nonpartisan organization working to strengthen and expand democracy worldwide. In Nepal, too, the NDI's office has been operational since 1997 and has collaborated with the Parliament, political parties, government agencies and civil society. She recalled the historic elections to the three tiers of government in 2017 which saw the introduction of federalism. She said it was fair to say there

are still many questions as to what federalism in

Nepal should look like. She said she believed that the speakers at the interaction will outline what they see as the challenges at the judicial, legislative and executive levels. She talked about the importance of ownership over Constitution. She added that the NDI has no other interest than to see the Constitution fully owned by the people of Nepal and hoped that the interaction will facilitate dialogue and better understanding of its provisions and the challenges.

4. KEY SPEAKERS:

4.1 Mr. Radheshyam Adhikari, Senior Advocate, Member, National Assembly

Mr. Adhikari laid down his observation as a leader of the Nepali Congress. opposition party, regarding the implementation of the constitution and the challenges he foresaw. He presented a paper titled 'Challenges of the Constitution.' In the paper he argued that the term Republic should not merely be understood as absence of monarchy. He said that a republic should mean constitutional supremacy; rule of law; equality before the law; and acceptance that the Constitution should be the first basis of the national unity. However, he asked whether after four years, the



country is in a position to claim that these things have been achieved. Secondly, he said, the basis of constitution is democracy, which means limited government, separation of power and different constitutional bodies exercising their constitutional mandates. He said that the current state of implementation should be examined from these perspectives. He said one should ask if the government alone can save democracy or does it require efforts from us all. He said that the

new constitution has embraced a number of new fundamental rights. He warned that failure to implement these rights in practice would result in widespread disappointment. He then talked about federalism as another huge contribution of the new constitution. But, he said, the federalism has come under attack from several quarters. He also pointed at the provision of proportional inclusion and the state of its implementation. He said the constitution also faces challenges from the ones who do not accept this constitution for various reasons. The constitution, he said, is a dynamic document and should undergo constant change as and when required. Likewise, implementation of fundamental rights and the efforts to increase public trust would be helpful in this direction, he said. Mr. Adhikari also pointed at economic challenges. Public sector is not responsible whereas profit oriented private sectors have not been regulated and there is misuse of the cooperative, he said. He gave an example of the education and health sector. The local government responsible for managing school education has expected 20% of the total budget to be allocated for them whereas only 12 % has reached to them. He said that the constitution is a document of compromises and, hence, this agreement or common Dharma must be maintained.

4.2 Mr. Ishwor Khatiwada, Justice, Supreme Court

Justice Ishwor Khatiwada presented a paper "Judicial Practices and Challenges" on behalf of the judicial sector. He said that the constitution must be the holy document or Guru Mantra for all of us. It must be accepted as dynamic and live document. The content of the Constitution must be translated into people's lives and for that all have responsibility, he said. He pointed that in the preamble of the Constitution, there are three key words on Judiciary - independent, impartial and competent. He said that these words should be the guiding spirit. He said that the constitution has also ensured separation of power. He said that since the list of fundamental

rights is very long, it will require more resources to implement them. He then elaborated about the judiciary. He said formulation of new laws has been completed; the human resources has been trained for the application of new adopted laws and

Fiscal year	Total Registered Case work load	Settled	Carry Forward
2009-2010	124,009	69,295	54,714
2018-2019	236,160	133,827	-

regulations; formulation of new (Fourth) Strategic Plan (SP) has been adopted; 77 district courts, 7 provincial high courts in each provinces and 9 more high courts along with 2 additional benches of such courts have come into operation; similarly as per the constitutional provision, the Constitutional Bench has been constituted and has been operating. Likewise, he presented a data reflecting the state of work load and pending cases in judiciary.



He said that both the total number of case registration and settlement of such cases have been doubled despite the similar size of human resources. Similarly, he said that the independence of Judiciary is equally linked with financial independence. Supreme Court had projected that it would need Rs 14billion but the government only provided Rs 6 billion budget, he complained. Therefore, he said that though holistic reform of Judiciary has been envisioned, it has not been supported by adequate resources. He said that access to justice cannot be a subject that has less priority or is unproductive.

Mr. Khatiwada also highlighted four challenges of judiciary as:

- 1. Strengthening the independence of judiciary with financial and administrative autonomy;
- 2. Building a judiciary that is based on trust and faith of people; that is based on value and ethic;
- 3. Competent judiciary that meets the expectation of the changed society; and
- 4. Ensuring judicial accountability

Fiscal year	Total Registered Case in Constitution Bench	Settled
2015-2016	196	27
2016-2017	42	0
2017-2018	80	90
2018-2019	68	80
June July 2019	3	18
Total	389	215
Due	174	

There are challenges in the judiciary that are both internal and external, as well as structural, he said. A judge cannot come out to publicly defend his/her decision. But the verdict of the Supreme Court can be reviewed academically. The NBA/lawyers, press and aware citizens should analyze them from the jurisprudential perspective. He said that they are making efforts to make the judiciary independent just as the Constitution has dreamt of. He also talked about the controversies surrounding the appointment of judges. He said that after appointment, there is a tendency to doubt and become skeptical. There are rooms for reform. If the situation persists, the coming days will not be so happy ones. To ensure accountability, all state mechanisms must be equally accountable, and there should be no excuse for judiciary as well, he said. Judiciary has protected the system courageously in the past, he recalled and added that it was capable in the past and present and remain so in the future.

4.3 Mr. Subas Chandra Nemwang, Chairperson of the CA

Mr. Nemwang made a presentation of reflections about the experience of law making process by the parliament. The title of his paper was 'Parliament in the Implementation of the Constitution.' He said that the constitution drafting process was quite inclusive. He said that Part 8 of the Constitution provides for the Federal Parliament; Part 14 provides for the Province Assemblies; and Part 18 provides for Local Level Legislatures. He talked about mixed election system to elect these bodies and the provisions inserted about the conditions regarding the registration of vote of no confidence in order to ensure stability. This is the first constitution whose source of the real power is people, he said. The paper highlighted some key features of the new constitution vis-à-vis the operation of the legislature including the provisions for the operation in transitional period. He said that within seven days of the promulgation of the constitution, election of new prime minister, president and vice president could be held and how the then Constituent Assembly was transformed into Legislature Parliament. About the implementation of the constitution, the paper talked about the election of all three tiers including the Local Level, Province,



and the Federal Parliament. He added that the constitution not only prescribed 31 fundamental rights but also ensured their implementation in Article 47, stated that laws to which operationalize the fundamental rights must be enacted within three years. He said that the remaining tasks of the peace including transitional process justice are in final stage. The paper also listed a number of challenges including the prevailing mindset. lack of essential structures, management of human resources and staffing; lack of laws, confusion in list of rights and lack of experience. He said that people were more focused on benefits than delivering service and indulged in unhealthy competition. He compared the situation during the drafting of the constitution and the current reality. He said that people had huge expectations, which if unfulfilled, can result in disenchantment. Therefore, he said, there is a need to fill the gap between the people and the politics.

4.4 Mr. Ishwar Pokharel, Deputy Prime Minister, Government of Nepal

Deputy Prime Minister Mr. Pokharel also gave a brief presentation about the state of implementation of the constitution titled 'Foundation and Challenges.' He analyzed the constitution from the perspective of the government. said that the guiding He principle of the government is the constitution. He said that the government believes and is committed to all the rights and freedom guaranteed by the constitution. He said that the full implementation of the constitution requires cooperation



from all sectors including the civil society, opposition and common people. He said that in the short period Nepal has seen election of all three tiers and all three tiers are functioning as per the constitution. He said that the formulation of laws related to fundamental rights can also be termed as an achievement. He said that mobilization of human resource in the Province and the local level is challenging; so is the case with the financial resource. He pointed at the challenge of scattered financial liability. He said there are certain limitations for the government; one of them is mindset in bureaucracy. He said it will take time to overcome these challenges. He talked about the government's policy of economic development. He said that management of security challenges have been going well. He said that there are still many challenges that remain. But, he said, the government was committed to work with all to overcome them. He appreciated the interaction program and said that the government will listen to the constructive feedbacks from the civil society and experts.

5. FEEDBACK FROM PARTICIPANTS:

After the presentation the floor was opened for discussion:

✿ Mr. Amresh Kumar Singh, Member, House of Representative



Mr. Singh said there was widespread disappointment in the public. He questioned how the public feedback from common people were incorporated into the constitution drafting process. He doubted that the bags of sheets of public opinion were ever opened. He complained that the provision on proportional representation has not been respected. Similar is the case with the Judiciary. He said that judiciary was seen as a branch of the Executive. Likewise, he pointed at the problem of over taxation; similarly there is a growing disparity between the poor and the rich people. There is a whole

nexus of rich people encircling the government, he

said. Mr. Singh also complained that the Freedom of Expression has been compromised. He asked if the government was willing to listen to its criticism. He said that the government is inflicting damages on foreign policy.

Mr. Krishna Bhakta Pokhrel, Chairperson, Committee of Law, Justice and Human **Rights**, House of Representative



Mr. Dhungana said that the implementation of the constitution is directly linked with the people. The government observed the first few years as years of implementation of the constitution, he said. He urged the stakeholders to carefully consider the expectations of the people. He said that as per the spirit of the constitution, local level governments are the primary centers for the people. But, they are not given as much priority and importance in practice, he said. Likewise, he said that judiciary, too, has not been able to deliver service as envisaged by the

constitution. One reason, he said, was

Mr. Pokharel said that the constitution is the most democratic in terms of drafting. Just as there were some problems in drafting, there are some problems in its implementation, he said. Mr. Pokharel pointed at the enactment of laws to implement fundamental rights by consensus as major success. He said that such consensus among the political is must for the parties full implementation of the constitution.

K. Bhim Dhungana, Secretary General, Municipal Association of Nepal



due to political appointment of judges. He called for reforms in this area. Unlike the claim made by the Deputy Prime Minister, the implementation part of the constitution is weak. Delivery of only 12% resource at the local level is an indicator of the federal government not respecting

constitutional provision. Constitutional rights have been reduced. Mindset of bureaucracy is an impediment, he said.

∳ Ms. Mohna Ansari, Commissioner, National Human **Right Commission**

Ms. Ansari said that instead of comparing the constitution of Nepal with the constitutions of other countries, it would be more appropriate to focus on its successful implementation. Likewise, she added, the discussion should be centered around the problems that have



emerged in course of the implementation. She pointed that people at the local level have not been able to enjoy service delivery and development because of lack of human resources and non-availability of the resources. She said that over the years there have been enough discussions about human rights but very little discussion on remedies if someone's rights are infringed.

Mr. Balananda Poudel, Chairperson, National Natural Resources and Fiscal Commission

Mr. Poudel suggested imposing strict timeline in enforcing the constitution. He said that there are 36,000 lawmakers in the 753 local level. He added that capacity building of these lawmakers will help in the implementation of the constitution. Mr. Poudel said that in a democratic system of governance, imposition of tax is illegal except if it is imposed by law. Same spirit is true in the expenditure of resources, he said. He



called for formulating necessary guidelines for taxation and expenditure.

Mr. Komal Prakash Ghimire, Senior Advocate, Former Chairperson, Nepal Law Society

Mr. Ghimire said that resource is a must for successful implementation of federalism. He said that attracting Foreign Direct Investment is important and that FDI should occupy substantive portion of the national economy. However, figure of FDI in Nepal is very discouraging because of poor economic diplomacy, he said. There was lack of proper follow to the investors who had promised to invest. Only with strong economy can the provisions of the constitution such as



operationalization of fundamental rights and federalism be successfully enforced, he said. He

also advised reforms in the system of appointment of judges. He advised adopting democratic procedures to discuss and settle problems faced in course of implementation of constitution.

Mr. Sher Bahadur Tamang, Member, House of Representative, former Minister of Law, Justice and Parliamentary Affairs

Mr. Tamang said that every stakeholder has important role to play to ensure the success of the constitution. He said that if all of the



people present in the interaction program are committed to implement the constitution, there is much more possibility of attaining such success.

♥ Ms. Ila Sharma, Former Member, Election Commission

Ms. Sharma also pointed at the spending importance of wisely resources. She cited the example of judiciary. She said that mere adoption of laws and guidelines are not enough for enhancing the performance of judiciary. Instead, she said, the government should ensure adequate resources for them. Otherwise, she warned. there will be public frustration. She also gave the example of providing resource to implement rights such as the right to food and food sovereignty. She said that one should not add fundamental rights in constitution without the guarantee that they can be implemented. She also



pointed at the lack of implementation of rights to women and cited the example of how even the bigger political parties have not followed the provision of Political Party Act to ensure at



least 33 percent women in leadership role.

♥ Mr. Prakash Man Singh Raut, Justice, Supreme Court

Mr. Raut said that the respect for the judiciary increases only through the faith and trust of the people. He warned against any attitude or behavior that can lessen the respect towards the judiciary. He also advised for efforts to increase the level of public acceptability towards the functions carried out by the executive, legislature and judiciary.

Mr. Ram Narayan Bidari, Member, National Assembly

Mr. Bidari spoke at length about the politics and judiciary. He recalled that during the partyless Panchayat system, only those people could be appointed as judges who had no political affiliation. Hence, he said, there should be discussion on why party-affiliated person cannot be appointed as judge in the present multi party system. It is true that everyone should abide by the decision of a court. However, he added, that one



can study, review as well as criticize the decision. Such practice will only increase the respect for the Judiciary, he said. He said that opposition is very important part of a democracy. Everyone should respect healthy opposition and criticism, he said.

Prof. Kapil Shrestha, Former Member, National Human Rights Commission



Prof. Shretha said that in a democracy, civil society is not a doormat or a doorman. Rather, they should be accepted by the state as the watch dog or whistle blower. He said that the state of constitution implementation can be measured by the extent to which people have owned up the constitution. He said that the government has not been able to deliver in most aspects except in and supply. power generation He questioned the ability of the state to ensure successful implementation of constitution. He also warned that the present tendency of the government was not tilted towards democracy as it was trying

to squeeze the space of the civil society. He added that without proper coordination between the government and the opposition, no democracy can sustain.

Mr. Bansa Lal Tamang, General Secretary of National Association of Rural Municipality Association

Mr. Tamang said that acts and rules must be formulated as per the spirit of the constitution for its successful implementation. He said that lack of formulation of some key laws has resulted in various confusion and division. He urged timely enactment of such laws for the coordination among the three tiers of the government. He also emphasized the aspect of resource sharing for this purpose. He said that since education is the main foundation of development, there should be enough investment and resources for education. Local level is provided with the right to administer education but the center is trying to interfere in the name of concurrent list, he said. Mr. Tamang warned that such moves by the center can result in impediments in the implementation of the constitution. He also advised to provide political empowerment and capacity building for women elected representatives of the local level.

6. **RESPONSE FROM THE KEY SPEAKERS:**

✿ Mr. Ishwor Khatiwada, Justice, Supreme Court

Mr. Khatiwada responded to some queries that were raised about judiciary. Many participants had questioned about the current system of appointment of judges and the political influence involved in the process. Mr. Khatiwada said that the time has come to review and reform the appointment system. He said that whereas it is natural for politicians to try to influence, the judges themselves should be aware about their duty. There were also some queries about the lack of effective service delivery by the courts. Mr. Khatiwada replied by saying that the Supreme Court has tried to overcome this problem by formulating periodic strategic plans and objectives. He, however, added that the government should stop treating judiciary as unproductive sector and start providing it with necessary resources - both human and financial. There were also some queries about the state of inclusion in judiciary. He answered by saying that the court was very serious about ensuring inclusion. Such seriousness can be seen in new appointments, he said, adding that there is room for improvement in this field.

Mr. Subash Chandra Nemwang, Chairperson Constituent Assembly

Mr. Nemwang responded to some queries that were raised about legislature. Some participants questioned about the problem in law making and the influence of the executive in the parliament. He replied that gradually the parliament is proceeding smoothly to carry out its task

of law making. He said that since the parliament is a common platform of ruling as well as opposition parties, even though the executive may try to influence, there will be extensive discussions among all sides before any law is formulated. He said that the current practice is to try to forge consensus, as far as possible, in the matter of law making. There were also some queries about appointment of neutral person in judiciary. He replied that in the current situation, it would be impossible to find apolitical person. He said that everyone should focus on the judgment delivered and not the background of judge.

7. REMARKS FORM CHAIRPERSON:

Following the comments and question from the participants, the presenters gave their brief responses. It was followed by the closing remarks from the chairperson Mr. Kalyan Shrestha. He said that the Constitution Watch Group was formed with the noble objective of reviewing the state of implementation of the constitution and provide constructive feedback to all organs of the state. He said that the interaction was also held for the same purpose. He expressed happiness over the extensive discussion and review of performance of various organs of the state. He said that as there is no formal forum for interaction



among the three state organs, this program was important since it provided such platform. He said that the criticism of the constitution must be warmly welcomed for the success of the Constitution. Without proper coordination with the constitutional commissions, opposition and the people, the government cannot successfully enforce the constitution. He also complained about the culture of enacting laws at the eleventh hour, without proper consultation with the experts and stakeholders. He urged for complete stop to such practice. He said that while it is natural to witness opposition to the constitution from those who were against it from the very beginning, it was strange to find even those that support the constitution squabbling among themselves. He said that the country is still in the process of constitution building. He said that constitution not only creates problems but also provides way out. He called for appropriate political culture for the success of the constitution. At the end, he thanked the leaders of the government, the parliament and the judiciary for participating in the program and providing their observations. He also thanked the participants for their inputs, suggestions and feedback. He said that the Constitution Watch Group will hold similar interaction program after three months.

8. OUTCOMES OF THE PROGRAM:

- Utilization of the Constitutional Watch Group program as a common platform by leaders from all three organs of the state,
- Review of performance of last four years by the officials and leaders of the government, the parliament and the judiciary themselves,
- Sharing of challenges in the law making, and the implementation,
- Sharing of challenges faced by judiciary, which is unitary in nature, in the current set up by a senior judge of Supreme Court,
- Sharing of perspective by civil society and experts in the performance of all three organs of the state,

- ✤ Discussion of challenges by all three organs under the same roof helped in formulating strategy for coordination, cooperation and resolution of challenges,
- Understanding reached that the Constitution Watch Group should continue holding such reviews and interaction, by reviewing in detail the performance of all the stakeholders of the constitution

9. DETAIL PROGRAM

AN INTERACTION ON CONSTITUTIONAL VISION AND PRESENT PRACTICE OF NEPAL 19September 2019 (2076/6/2) Thursday HOTEL HIMALAYA, KUPONDOLE

Organized by

Constitution Watch Group

Detail Program

2.30-3.00	:	Tea/ Coffee
3.00- 7.30	:	WORKING SESSION
Chair	:	Hon'ble Justice Mr. Kalyan Shrestha, Coordinator, Constitution Watch Group (Former Chief Justice of Nepal)
Welcome	:	Prof. Dr. Shilu Manandhar Bajracharya, Dean, Faculty of Law and Management, Nepal Open University
Objective Highlights	:	Dr. Bipin Adhikari, Senior Advocate, former Dean, Law Faculty, Kathmandu University
Brief Remarks	:	Ms. Deborah Healy, Sr. Country Director, NDI
Brief Issues presentation	:	Challenges of Constitution
		- Mr. Radheshyam Adhikari, Member of National Assembly, Senior Advocate, Former Chairperson, Nepal Bar Association
	:	Judiciary Practices and Challenges
		- Hon'ble Mr. Ishwor Khatiwada, Justice, Supreme Court
	:	Parliament Practices and Challenges
		- Hon'ble Subas Chandra Nemwang, Former CA Chairperson
	:	Government Foundations and Challenges
		- Hon'ble Ishwor Pokharel, Deputy Prime Minster, Nepal Government
Inputs from Participants		
Remarks from the Chair	:	Hon'ble Justice Mr. Kalyan Shrestha, Coordinator, Constitution Watch Group (Former Chief Justice of Nepal)
Facilitator	:	Mr. Krishna Man Pradhan, Executive Director, NLS
7.30 pm	:	Reception cum Dinner

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