

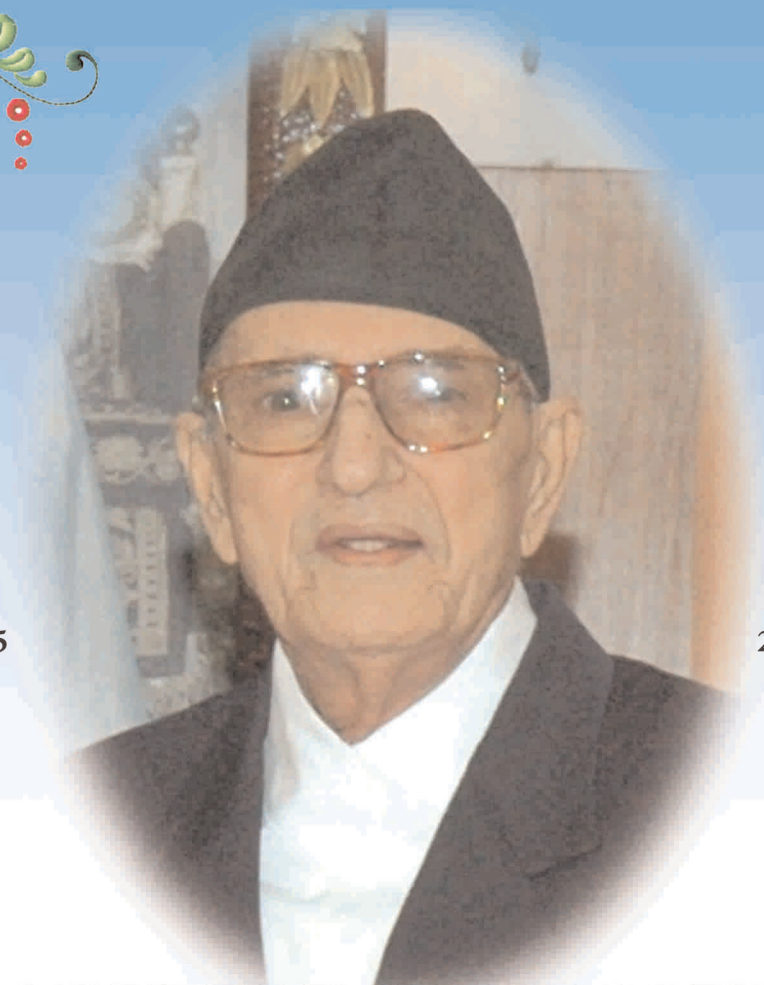
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Drafting Constitution

Fundamental Rights and Jurisprudence



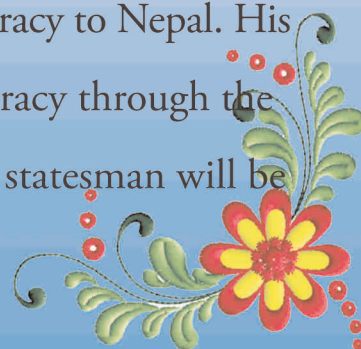
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HEARTFELT CONDOLENCE

INSEC Family expresses its deep condolences over the demise of former Prime Minister and President of Nepali Congress (NC), **Girija Prasad Koirala** and pays reverence to him as the dauntless democrat.

He was an unyielding advocate of peace, democracy and human rights. He will be remembered for generations for his immense and invaluable contribution in bringing peace and democracy to Nepal. His contribution in institutionalizing peace and democracy through the politics of unity and consensus as a mass leader and statesman will be always treasured by the country.





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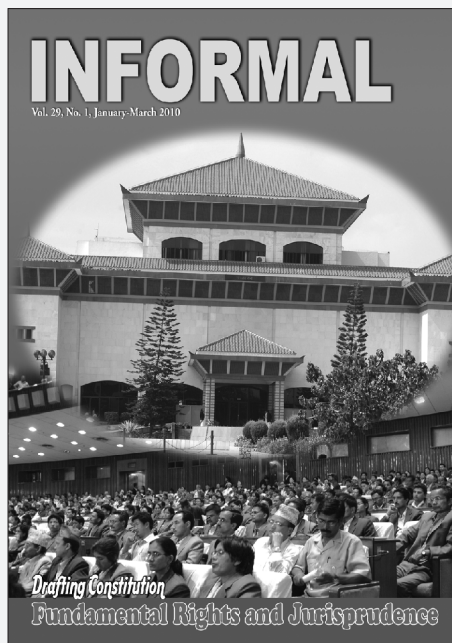
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Do not Ignore Jurisprudence While Drafting Fundamental Rights

Post peace-process political developments in Nepal, undoubtedly, were consensus based and ground-breaking at the same time. Political parties had unprecedented convergence on socio-political and constitutional issues and had also taken bold steps to address the problems and demands of the people realizing that those steps had arisen out of the need of the hour. However, these developments had to tread a bumpy path. Confinement of Maoist combatants in the cantonments, historical declaration of the parliament, election of the Constituent Assembly, declaring Nepal a Federal Republic and formation of different committees under the Constituent Assembly (CA) for drafting constitution were the representative events towards achieving lasting peace. As entrusted with their corresponding tasks, the committees in the CA started to function. Parties in this phase of writing constitution couldn't sweep their differences aside so political problems went further knotty in Nepal. However, some committees accomplished their tasks in time and some others couldn't due to severe political and philosophical departure among the political parties as regards perception of the issues. Committee on Fundamental Rights and Directive Principles is one of the committees that have submitted their draft reports to the Constituent Assembly.

The Fundamental Rights are the basic human rights of all citizens. These rights apply irrespective of race, place of birth, religion, caste, creed or gender. They are enforceable by the courts, subject to specific restrictions. The Interim Constitution of Nepal incorporated new provisions 'Right Regarding Environment and Health' and 'Right regarding Employment and Social Security' among others as fundamental rights but people were not able to enjoy these rights in the absence of proper laws to ensure these rights. So incorporating rights in constitution will be meaningless in the absence of strong political commitment.

Refraining from arbitrary interference on individual matters, allowing the individuals to exercise their rights unimpeded should be the prime concern of the state. For the purpose it is essential to enshrine fundamental rights in constitution properly and to translate the paper into practice honestly. Being the state party to different international human rights related laws and covenants and due to the international obligations arisen from those instruments Nepal is obliged to domesticate the underlying values carried by those treaties and write constitution being guided accordingly. The constitution we are writing should acknowledge that individual liberty should lie at the core of the constitution. Viewing from the human rights approach, the essence of constitution writing totally lies in the respect of human dignity and protection of fundamental freedom of the individuals. The freedoms what Nepali people deem important should be denominated as the fundamental rights. However Jurisprudence must be taken into account while provisioning fundamental rights. The new Nepali constitution, with its emphasis on gamut of rights, should be drafted accepting democratization based also on group rights. Fundamental rights and the provisions included in the constitution should totally avoid the fear of possible repression of the state as well as political parties.

Addressing Transitional Justice issues in New Constitution



» Bidhya Chapagain «

Under Fundamental Rights part, issues such as right to know the truth, right to justice, provisions for amnesty, right to effective remedy, clauses on limitation on serious crimes and, most importantly, provisions of retroactive effect of law on serious crimes should be guaranteed.

With the historic 12-Point Understanding reached between the Seven Party Alliance and the Communist Party of Nepal (Maoist) in November 2005, a new era dawned in Nepal for peace, stability, democracy and prosperity. Establishment of Loktantra in April 2006 was the moment that led the peace process with significant passage. Comprehensive Peace Accord (CPA) signed by the government and Maoists party in November 2006 formally ended a decade-long armed conflict in Nepal. The CPA which has been incorporated as an integral part of the constitution, and Interim Constitution (IC) also laid down the basic framework for the country's political transition.

In Nepal, debate of transitional justice has remained central from the time peace process began and even after the formation of the Constituent Assembly. The November 2006 CPA and the

January 2007 IC recognize the importance of ensuring reparations for victims of the conflict and formation of Disappearance and Truth and Reconciliation commissions. Even after more than three years of signing of the CPA, the government has been reluctant to establish any form of mechanism to investigate the whereabouts of hundreds of persons allegedly disappeared during a decade-long conflict between the state and the CPN Maoist party. Neither has it initiated for forming other high-level commissions as written in the CPA, IC and subsequent political agreements. Despite assurances to the people, formal initiatives for establishing such justice mechanisms are yet to begin

Transitional justice mechanisms guaranteed in various documents ascertain rule of law and sustainable peace and create conditions propitious for national reconciliation. However, there is no coherent state

policy on transitional justice in Nepal. National and international actors have expressed concern over the delay in establishing transitional justice mechanisms fearing that such delay might push Nepal into a critical situation. Debate on transitional justice has remained central from the beginning of peace process and during the process of constitution making through the Constituent Assembly. However, no commitment made on establishing transitional justice mechanisms has been addressed in the draft report. At this critical juncture, it is very important for the members of the Constituent Assembly to discuss constitutional issues pertaining transitional justice in the context of the constitution making process. The constitution making process has offered great hope and opportunities to build a strong foundation based on human rights and justice in Nepal. This process has also paved the way for dealing past

violations for guaranteeing non-repetition of such violations in the future.

Establishment of truth; guarantee of right to justice; impermissibility of amnesties for gross human rights violations constituting serious crimes including enforced disappearance, torture and rape; exception of retrospective criminal law dealing with the violations constituting serious crimes are some major areas that need to be discussed in the context of the constitution making process. Similarly, non-applicability of statutory limitation to such violations constituting serious crimes; the right of victims of such violations to adequate remedy and reparations provisions of appropriate witness and victim protections and institutional reforms are equally important to take into account.

Transitional Justice in Comprehensive Peace Accord

The Comprehensive Peace Accord clearly sees the need to address the past and towards this end includes several important provisions favoring accountability, particularly, in the area of truth seeking and reparations to victims. The Accord provides some specific measures to address the past atrocities, such as, to make the persons disappeared and killed during the armed conflict public within 60 days¹, to establish National Peace and Rehabilitation Commission to maintain peace, to provide relief and reconstruction², to establish a Truth and Reconciliation

Commission, to investigate upon those who have been involved in serious violations of human rights and have committed crime against humanity³ and to create a conducive environment for the return of the internally displaced persons.⁴ The Accord provides three mechanisms -- National Peace and Rehabilitation Commission, Truth and Reconciliation Commission and a

The Comprehensive Peace Accord clearly sees the need to address the past and towards this end includes several important provisions favoring accountability, particularly, in the area of truth seeking and reparations to victims.

High-level Recommendation Commission for the Restructuring of the State⁵. These are supposed to deal with the transitional justice and to implement the Accord, Interim Constitution and all the decisions, agreements and understanding concluded between the Seven Party Alliance, the Government of Nepal and the CPN Maoist party. The par-

ties to the accord also agree to respect and protect right to freedom of movement, freedom to choose the place of residence, subject to legal norms and express the commitment to respect the rights of the persons displaced by the conflict and their families to return to their original residence or to settle in any other places of their choice.⁶

Transitional Justice in Interim Constitution 2007

The Interim Constitution promulgated on 15 January 2007 has some provisions on addressing the past atrocities. The measures prescribed under the responsibilities of the State in the Interim Constitution includes providing appropriate relief, respect and rehabilitation to the family of the killed, or injuries leading to disability being physically unfit during the armed conflict⁷; to provide relief to the victims of the disappeared persons in accordance with the recommendations of the report of the Investigation Commission constituted in respect to the disappeared persons,⁸ launch special programs to rehabilitate displaced persons, provide relief against the destruction of the private and public property and for the reconstruction of the infrastructures⁹ and to establish the Truth and Reconciliation Commission to investigate the persons involved in committing serious human rights violations and crime against humanity¹⁰. The provision of the Interim constitution guides measures to

1. Clause 5.2.3 of the Comprehensive Peace Agreement
2. Clause 5.2.4 of the Comprehensive Peace Agreement
3. Clause 5.2.5 of the Comprehensive Peace Agreement
4. Clause 5.2.8 of the Comprehensive Peace Agreement
5. Clause 8.4 of the Comprehensive Peace Agreement
6. Clause 7.3.3 of the Comprehensive Peace Agreement
7. Article 33 (p) of the Interim Constitution 2007
8. Article 33 (q) of the Interim Constitution 2007
9. Article 33 (r) of the Interim Constitution 2007
10. Article 33 (s) of the Interim Constitution 2007

address the past human rights violations. But, on the one hand, it does not include sufficient provisions and measures to that end and, on the other; it is placed in the directive principles of the state policy.¹¹ Non-implementation of these provisions cannot be questioned in the court.

Transitional Justice in Draft Constitution

The draft preamble recognizes the historical armed struggle, peaceful people's movement, Madhesh movement and abnegation and sacrifice of the people of Nepal, the martyrs, peace, human rights and progress. Similarly, under right to social justice and the directives principles provisions have been made in order to ensure the right of the martyrs' families, the families of the disappeared ones, disabled and the people injured in the past in all the people's movements, people's war and Madhesh movement so that they can participate in all the state structures. It has also been stated that they would be provided with special conveniences in government and public services, education, health, employment, accommodation, social security, relief and pension.

Right to information

Under point 6 of the draft fundamental rights it has been recognized that there will be rights of every citizen to demand or obtain information on any matters of concern to himself or herself or to the public.

Provision has been made in the draft in order to guarantee the right of the victim of the crime to

receive information from the investigating and probing authorities regarding the investigation and probe into the crime of which he or she is a victim and about such cases. Similarly, the draft recognizes the rights of victims of the crime to social rehabilitation and compensation in accordance to law.¹² It shows that the State should play the role of a guardian as regards protecting the victims and the state will be more accountable towards the victims who require protection.

Victims of crimes have right to understand and be aware of all the facts of gross violations of human rights, circumstances and reasons.

However, the draft is silent on right of the victims of crimes to know the truth.

For the implementation of the rights provisioned under Fundamental Rights of the draft, provisions have been made to ensure *right to remedy* and to ensure state's responsibility. For the effective implementation of some fundamental rights, it is essential to make legal provisions as well. Accordingly it has also

been stated that all the laws will be made within two years of the enforcement of this constitution. The draft also has a provision to take measures for the exercise of the rights provided as fundamental rights in the draft.¹³

Issues not Addressed in the Draft

Right to Know Truth

Victims of crimes have right to understand and be aware of all the facts of gross violations of human rights, circumstances and reasons. However, the draft is silent on right of the victims of crimes to know the truth. Justice includes fulfilling the victim's right to know. Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about circumstances in which violations took place and in the event of death or disappearance and the victims' fate. Therefore, it is important for people to have full and effective exercise of the right to truth that provides a vital safeguard against the recurrence of violations. Similarly the draft does not include any provision on establishing Truth and Reconciliation Commission and Commission to Inquiry on Persons Disappeared during the decade long conflict.

Right to Justice

There have been international practices to ensure constitutional recognition to retroactive laws as to ensuring justice to the victims of serious crimes. The draft does not include any provision on enacting laws with retroactive effects. Constitutions of many states have given constitutional recognition to

11. Article 34 (1) of the Interim Constitution 2007

12. Point 6, Report Regarding the Concept Paper and Preliminary Draft 2066

13. Ibid, Point no. 31

the retroactive effect of law to prosecute perpetrators of serious crimes under international law. For instance, the constitution of Republic of Kosovo, 2008 provides for an exception of retrospective criminal law dealing with serious crimes under international law. Though the draft has a provision of right to constitutional remedy, it is silent on right to effective remedy in case of violation of any rights ensured as fundamental rights in the draft. To prosecute serious crimes, principles of retroactive law should be guaranteed to ensure effective constitutional remedy.

The draft does not ensure that the violators of serious crimes would not be granted amnesties or pardon as established by the Supreme Court of Nepal while ruling on disappearances case in 2007. Similarly, article 28 of Constitution of Ethiopia, 1990, article 29 of Constitution of Venezuela, 1999, article 9 of the Constitution of the Republic of Chile, 1980 (revised in 2005) and article 47 of the Constitution of Greece, provide for impermissibility of amnesty, pardon and any form of immunity from punishment who commit crimes defined by the international law such as genocide, summary executions, forcible disappearances or torture.

Right to Reparation

Generally, laws ensure that victims of crimes have right to compensation and right to social rehabilitation.¹⁴ However; the draft does not include any provision regarding reparation to the victims of human rights violations. It only speaks on providing compensation and rehabilitation to the victim. The constitution of Venezuela, 1999 imposes a constitutional obligation to ensure full repara-

tions (not only compensation) to victims of human rights violations.

Issues to be Addressed in New Constitution

To live a dignified life it is imperative to protect and safeguard the right of the victim of the crimes and human rights violations. Considering the provisions related to transitional Justice specified in Comprehensive Peace Accord and the Interim Constitution, Nepal has an international obligation to guarantee

A clause in point no. 6 of the current draft "victim of crime" can be misinterpreted and is ambiguous so 'victim of human rights violation' should be mentioned along with victim of crime.

effective remedy for the victims of human rights violations. Below are some issues of transitional justice that need to be addressed in different section of the draft constitution.

Preamble

The draft preamble recognizes the historical armed struggle, peaceful people's movement and Madhesh movement and pays tribute to the martyrs. The issue of the victims of human rights violation should be addressed, in one way or the other, in the preamble.

Fundamental Rights

Under fundamental rights part, issues such as right to know the truth, right to justice, provisions for amnesty, right to effective remedy, clauses on limitation on serious crimes and, most importantly, provisions of retroactive effect of law on serious crimes should be guaranteed.

Right to Know

As the victims or citizens have right to know the truth and that state has a responsibility to disclose truth, this right should be clearly mentioned in the issue of establishing truth in any human rights violation. Provision of realistic fundamental rights is needed and the same thing should be added under the state responsibility. A clause in point no. 6 of the current draft "victim of crime" can be misinterpreted and is ambiguous so 'victim of human rights violation' should be mentioned along with victim of crime.

Right to Justice

Under Right to Justice it should be stated that the identified perpetrators of human rights violations should be prosecuted to make them individually responsible. Command responsibility should fall under the individual responsibility. It should be clearly mentioned that there would be no pardon or gesture similar to such impunity to persons found guilty of gross human rights violation, crime against humanity, war crime and genocide. It should be ensured that the cases of serious crimes of human rights violation would not be withdrawn under the political veil. It should be clearly mentioned that the serious crimes of human rights violation would be heard in regular court proceeding.

14. "In the cases where the Government under whose authority, to victimizing act or omission occurred is no longer in existence, the State or the Government successor in title should provide restitution to the victims", Para 11 of the Declaration of Basic Prin

Provisions for supremacy of civilian courts over violations of human rights and humanitarian laws should be ensured as in the constitution of Venezuela.

Right to Effective Remedy

As substantive and procedural remedies fall under effective remedy, its effectiveness should be ensured by encompassing all the aspects of substantive rights: compensation, restitution, rehabilitation, satisfaction and guarantee of no repetition. Likewise, it should be clearly mentioned that there would be no time limitation regarding the gross human rights violation. Like in the constitutions of Venezuela, Paraguay and Ethiopia non-applicability of statutory limitation for gross violations of international human rights and humanitarian laws should be ensured. It should be mentioned in clear words that the perpetrators of gross human rights violation should be brought to justice by formulating retrospective laws.

Responsibility of the State

To end impunity, state should investigate the human rights violations and crimes, victims should be repaired and institutional reforms should be done to ensure non-repetition of crimes in the future. Constitution of Venezuela, 1999 has a provision to impose an obligation upon the state to investigate and legally punish human rights violations.

There should be a mandatory provision to implement the recommendations made by National Human Rights Commission and other future specialized commissions. Similarly, provisions related to security system reform should be included

so as to end the state of impunity in the future. To ensure effective justice to the victim, state should be given the responsibility of capacity building of security authority, state mechanism and judicial system and development of readiness among the security bodies to carry out the responsibility.

Transitional Justice Provisions

Provisions should be included on the establishment of Truth and Reconciliation Commission and Disappearances Commission guaranteeing implementation of the recom-

To ensure effective justice to the victim, state should be given the responsibility of capacity building of security authority, state mechanism and judicial system and development of readiness among the security bodies to carry out the responsibility.

mendations of these commissions. In addition, provisions related to vetting should be incorporated to ensure independence, impartiality and accountability of the judiciary.

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►► Dr. Bipin Adhikari ◀◀

Towards Effective and Realistic Rights Enforcement Mechanisms

The concept paper and preliminary draft submitted by the Constituent Assembly (CA) Committee on Fundamental Rights and Directive Principles, no matter how good they are, cannot be properly studied without referring to the reports of the Committee on Judicial System. The latter recommends infamous provisions in the new constitution belittling the parameters of the Supreme Court as the guardian of the Constitution, and robs the power of judicial review from the Supreme Court in a significant sense.

Fundamental Rights are those rights and freedoms of the people that enjoy constitutional recognition and guarantee. There is no point in designing ideal constitutional provisions on fundamental rights without incorporating effective and realistic enforcement mechanisms for the practical implementation of such provisions simultaneously.

Broadly speaking, the Concept Paper and Preliminary Draft submitted and released by the Constituent Assembly Committee on Fundamental Rights and Directive Principles contains a very impressive list of fundamental rights to be guaranteed to the people. It is impressive for a number of reasons. First, the list of enumerated rights in the proposed

draft has exceeded the prevailing national standards, both in terms of their number and magnitude. Secondly, the Committee draft has tried to cover a striking list of economic, social and cultural rights that were not included in the past by any of the constitutions of Nepal so liberally. The third, and probably so important in political sense, is that these fundamental rights, in their current forms or structures, seem to have satisfied most of the pressure groups and political constituencies existed so far. There are ample instances of definitional ambiguities, but, more or less they have been acceptable to these stakeholders. Despite all these positive features, the provisions in the draft are not going to impress the country's lawyers and

many other critical thinkers. Major problem with the draft is the problem of judicial sanction.

Lack of Effective Enforcement Mechanism

The issue of sanction is too crucial in the jurisprudence of fundamental rights. A right without remedy is not a right at all. In a way, even the Panchayat Constitution of 1962, criticized on so many grounds, guaranteed a list of basic fundamental rights. Some rights were guaranteed only to Nepali citizens, and some were guaranteed to both citizens and non-citizens. The right to proceed to the Supreme Court for the enforcement of these rights was guaranteed by Article 16, and the court was empowered with extra-ordinary juris-

diction to deal with any eventuality of violation of the rights subject to the provisions of the constitution.

Like the constitution enacted in 1959, the Panchayat Constitution also provided for a Supreme Court, a court of record with the power to impose punishment for contempt of court. The king was to appoint its Chief Justice after consulting, if he so desired, the members of the State Council and other judges after consultation with the Chief Justice. Apart from ordinary jurisdiction, it also had extraordinary jurisdiction to issue directives, orders or writs for the enforcement of fundamental rights, or in cases where no other remedy is provided, for the enforcement of rights conferred by any other laws for the time being in force.

The decision of the Supreme Court was to be the final. The Judicial Committee which could ask the king to order a revision of a case was basically the king's committee. In any case, the principle of law declared by the Supreme Court in cases within its jurisdiction was binding on all courts. A Judicial Service Commission was also created to organize judicial service. However, the functional aspect of the Supreme Court was not promising.

The constraints on the Supreme Court under the constitutionally exercised judicial powers of an absolute monarch were many. Nevertheless, the Supreme Court had performed its due role in the sensitive and serious cases of political nature involving the monarchy, foreign relations and politics. It, in many instances, exercised its extraordinary power of judicial review assertively and effectively on the grounds of violation of natural justice and refusal of right to legal representation, non-

conformity with the procedure prescribed by law, dismissal under a wrong way, non-disclosure of grounds and so forth.

There were some decisions which equally put questions on the status of the Supreme Court. The court was not able to maintain consistency in its decisions in several cases, notwithstanding publicly expressed commitments and empha-

The constraints on the Supreme Court under the constitutionally exercised judicial powers of an absolute monarch were many. Nevertheless, the Supreme Court had performed its due role in the sensitive and serious cases of political nature involving the monarchy, foreign relations and politics.

sis of justices in favor of judicial control for preserving the rule of law. The area of dissatisfaction against the passive stand taken by the Supreme Court was related to restrictions on fundamental rights imposed by Article 17 (2) and 11 (2A).

The court had, no doubt, failed in some instances to support the cause of the constitution by withdrawing itself from going into the

property of the Act simply because the preamble of the enactment had shielded it with the "firewall" of "public good", hence the judicial activism.

When the constitution of 1990 was promulgated 28 years after the promulgation of Panchayati Constitution, all these problematic issues were reconsidered and some outstanding arrangements were made to make sure that the Supreme Court, which got continuity in its form, changed significantly in terms of its substance. Not only was its power as the guardian of the constitution acknowledged, but efforts were also made to make sure that it was independent and able to protect the fundamental rights of the citizens.

In fact, as a Duke Professor Donald L. Horowitz has emphasized in an article in 2006, as of 2005 more than three quarters of the world's states had some form of judicial review for constitutionality enshrined in their constitutions. Reviewing has been a very popular constitutional process. Even some undemocratic countries take review as a feature that constitution should inculcate (even if in substance they imply quite a different angle). Although constitutional experts may be divided on whether the power of judicial review shall lie in the Supreme Court or a Constitutional Court separate from this conventional institution, it has become more and more difficult for constitution makers to avoid judicial review. Introduction of the Supreme Court in the United Kingdom provides greater clarity in our constitutional arrangements by further separating the judiciary from the legislature.

The concept paper and preliminary draft submitted by the

Constituent Assembly (CA) Committee on Fundamental Rights and Directive Principles, no matter how good they are, cannot be properly studied without referring to the reports of the Committee on Judicial System. The latter recommends infamous provisions in the new constitution belittling the parameters of the Supreme Court as the guardian of the Constitution and robs the power of judicial review from the Supreme Court in a significant sense. It also makes sure that the Supreme Court and its judges are under parliamentary control in all matters relating to their appointment, dismissal and the job of judicial decision making.

The Committee on Judicial System has proposed a Federal Legislature Special Judicial Committee. This has been proposed to make recommendations and give advice concerning the appointment of, transfer of, disciplinary action against, dismissal of the Chief Justice and other judges of the Federal Supreme Court and other matters relating to judicial administration. The committee comprises of the vice-chair of the Federal Legislature (Chairperson), the Federal Minister of Law and Justice (member), other members not exceeding nine, as elected by the Federal Legislature amongst its members, based on the number of population represented in the legislature, proportionally and on the basis of the principle of inclusiveness (members).

The Federal Legislature Special Judicial Committee, in the case of contradiction, has power to interpret the Constitution and federal laws and the matters relating to the positions of the persons of national importance and the matters directly concerning to politics. The position

of national importance shall include the head of the state, or the executive head or any position that is elected by the legislature. It is its responsibility

Apparently, the Supreme Court that lacks independence, which has to be accountable to a legislative committee, and which is always under the threat and duress of a legislative majority cannot protect any fundamental rights whatsoever. If this is so, the question is how the concept paper and preliminary draft submitted by the CA Committee on Fundamental Rights and Directive Principles can safeguard the fundamental rights of the Nepali people.

to prepare a required list of the candidates for the Chief Justice and other judges of the Federal Supreme Court, on the basis of the principle of inclusiveness and proportional representa-

tion, and submit to the federal legislature for the approval. The head of the state shall appoint the Chief Justice or any other judge of the federal Supreme Court to a person amongst the list as has been approved by the Federal Legislature.

In the same vein, the committee also recommends the head of the state to remove or dismiss Chief Justice and other judges of the Federal Supreme Court from the post in the cases of complaint appointment, disciplinary actions and also recommends on the matters related to judicial administration. The vice-chair of the Federal Legislature shall chair the Special Judicial Committee and the Federal Minister for Law and Justice shall be one of the members in the committee. In addition to that, not exceeding 9 in number, the federal legislature shall elect other members of the committee among its members proportionally and based on the principle of inclusiveness. The head of the state has to approve the recommendation so presented. But while dismissing on a charge of corruption, it should be in accordance with the decisions of the Special Court as constituted by the Special Judicial Committee of Federal Legislature. The functions carried out and the decision taken by the Special Judicial Committee of Federal Legislature and the decisions of the Special Court constituted pursuant to clause (b) shall be final. No appeal, complaint or writ can be lodged at any court against this.

Apparently, the Supreme Court that lacks independence, which has to be accountable to a legislative committee, and which is always under the threat and duress of a legislative majority cannot protect any fundamental rights whatsoever. If

this is so, the question is how the concept paper and preliminary draft submitted by the CA Committee on Fundamental Rights and Directive Principles can safeguard the fundamental rights of the Nepali people. A list of rights without inbuilt judicial sanctions can't be worthwhile.

Economic, Social and Cultural Rights

The problem of enforcement of economic, social and cultural (ESC) rights, as are set forth in the committee draft, cannot be overlooked either. It is simply beyond the capacity of the state to enforce those economic, social and cultural rights which are guaranteed, in broader terms ignoring economic and technical capacity of the country in the state of its present development. In fact, the realization of economic, social and cultural rights is a universal challenge. To assume that the state will be able to implement them within two years through new laws is simply over ambitious assumption.

It is the duty of the international community, especially of the countries with abundant resources at their disposal, to assist the developing world to implement pledges in favour of socio-economic rights, and their progressive but steady realization. There is already much demand in the international arena that the richer states should be compelled to respond to these situations through well-defined international channels. Article 28 of the Universal Declaration of Human Rights already states that everyone is entitled to a "social and international order in which the rights and freedoms set forth in this declaration can be fully realized." While increased attention

has been paid in recent years to the collective responsibility of states to ensure respect for human rights and humanitarian principles, this should not prevent individual state from doing what they can through an effective rights regime. For example, the right to self determination should include the internal aspects of the relations between the people and their state as the democracy and self-government component of this internal aspect is always important for the

Additionally, some of the ESC rights overlap with the directive principles, which are not judicially sanctioned. This can create confusion, and even derogate the standards of the enforceable fundamental rights. It is wise therefore to avoid overlapping treatment.

protection of human rights. Even though Nepal cannot guarantee all of the many socio-economic rights at the moment, it should undoubtedly provide the basic level of all these rights.

Guaranteeing constitutionally what cannot be achieved only leads to frustration, something that is harmful in the long term. A progressive nature is a feature of international formulations on socio-economic rights. It is

wise for Nepal as well to identify which of the economic, social and cultural rights are capable of immediate implementation, and guarantee their enforcement right away. The rest could be left with the government, and the legal process. The challenge lies in striking an appropriate balance between the progressive realization of these rights and their immediate enforceability. But, what has been proposed by the Committee draft seems to be problematic.

Additionally, some of the ESC rights overlap with the directive principles, which are not judicially sanctioned. This can create confusion, and even derogate the standards of the enforceable fundamental rights. It is wise therefore to avoid overlapping treatment.

Conventional Techniques

To ensure effective and realistic rights enforcement regime, it is important to go beyond the concept that only governmental agencies pose threats to the people. In the 21st century, however, in this decade of the globalization, corporate power poses at least an equal threat. The Committee report is oblivious of this important change in the requirements of the victims of human rights violations.

Similarly, the approach that has so far been followed in the Committee draft only takes judicial remedy as the remedy. Potentiality of the vast spreading, able non-governmental organizations and civil society institutions should have been constitutionally accepted to the extent possible to provide remedy to the needy human rights victims.



» Dipendra Prasad Pant «

Report of the Fundamental Rights Committee and Social Justice

Farmers, laborers and the people living in the backward geographical regions are, normally, poor and absorbing such sector of people in the structure and public service of the state will be a hard nut to crack for a poor country like Nepal given the current political culture and economy. Optimistically, state is ready to guarantee such rights, and, cynically, state is going to redefine state structure and public service in such a way that the targeted groups won't realize any particular comforts and the government also won't have to bother at all for the exploitation and mobilization of resources.

Introduction

This article has attempted to present a critique on the draft report submitted by Constituent Assembly Committee on Fundamental Rights and Directive Principles. Of the multiple facets of the draft report, this write-up has concentrated on the directly mentioned social justice related rights and the provisions included in the draft that, after all, are included for the broader notion of social or distributive justice. This article mightn't meet the expectation of many as it is not thoroughly analytical based on the articles one after another. Analyzing the draft report linking the context what necessitated the drafters to include the social justice related rights the way these are encompassed and

examining the draft through social justice perspective giving the constitutional history of inclusion of social justice in Nepal will be the intent of this article.

Social Justice

Social justice is an idea that has captivated philosophers ever since Plato in the 'Republic' formalized the argument that an ideal state would rest on virtue- social justice together with wisdom, courage and moderation. Fairness of the society in its divisions and distributions of rewards and burdens with a distributive agenda is social justice. Social justice has to be interconnected with distributive justice.

Distributive justice demands that there should be equal share of

material goods to all members of society. In the mean time *difference principle* allows allocation that doesn't conform to strict equality so long as the inequality has the effect that the least advantaged in society are materially better off than they would be under strict equality. Fundamentally, this principle believes that material goods and services have no intrinsic value and are valuable only in so far as they increase welfare.

Internationally, questions about the social basis of support have re-emerged in the social science discussion of contemporary global social movements, impelled by the obvious heterogeneity in the social background of the activists of protest campaigns on issues such as debt relief, international trade rules and barriers,

global taxation, fair trade and peace. Similarly, different treaties and instruments under the UN, especially the Convention on Economic Social and Cultural Rights and women and minorities related instruments have obliged the states to include the rights of social justice the way they have included in their constitutions and domestic laws.

Being affected by the afore-said factors of the re-emergence of social basis of support directly or indirectly, the notion and necessity of social justice in Nepali context holds that historically existed inequities-social, cultural, economic and in any other forms, should be corrected until the actual equities are achieved. To be precise, social justice is for the redistribution of wealth, power and status for the individual, group and community in a just manner for the societal good.

Inclusion of Social Justice in the Draft: Necessity and Context

Nepali people's struggling lives in geographical isolation, long suffering from poor domestic communication, hardships induced by difficult landscape, the widespread poverty and the concomitant results in Nepal, widening gap between the rich and the poor, persistently existing problems of women and indigenous people and Muslim community have demanded social justice besides corrective justice. Social justice by now, nevertheless, has become the most extensively used and the most vibrant issue in political discourse. Primarily this issue had been more vociferous in political discourse in Nepal following the turbulent political development and subsequent intellectual debates delving into the causes of armed conflict.

Social justice requires that

everyone's need be met according to a common standard of need. Multitude of factors determine common standard of need in Nepali context. Primarily region, religion, gender, and culture constitute common need in ours. Of the factors stated, distinction in culture, like in other multicultural society, has been expressed in Nepal through language, cuisine, family structure, life styles and attire. While multiple cultures have existed throughout the history,

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whoever were in the margin of socio-economic life are still living under the same plight.

Dissimilar cultural, linguistic, regional and religious groups have to be the concern of social justice. Except taking the shape being molded into the political molds, there has never taken place an open and far-reaching deliberation as to what shape to give to the existing Nepali socio-cultural and economic structure. Nepali intellectuals and political

components in the steering seat never debated theoretically on whether to make Nepal a *melting pot* that changes the different socio-cultural heterogeneity into a harmonious whole or *salad bowl* (these terms haven't been used here in American context only but have been used in relation with Nepali cultural diversity and latest assimilation) that maintains that cultural differences to be revered and maintained distinct. Still, the development of mass transportation, transformational industries, the internet, migration, especially north to south and rural area to urban area mobility, have allowed for an unprecedented convergence of culture assimilating Nepali people. Viewing historically and politically, the Panchayat era, to some extent, seemed to have deliberately attempted for the melting pot structure of Nepali society.

However, with the restoration of democracy in 1990 especially extremely left political leaders and ethnic intellectuals and NGO activists seem, as the part of disseminating the knowledge gained in the foreign universities and the trainings attended abroad, to have advocated the multicultural and heterogeneous maintenance of Nepali society theoretically. Afterwards, present UCPN Maoist party seems to have utilized the theoretical tool of heterogeneity and multiculturalism into practice with political motive. With their much hyped platitude of "gender, class, region, and religion, linguistic..." empowerment during the armed struggle, as the policy of not exposing violence in isolation detaching from political programs, had tried to take Nepali society towards *salad bowl*. Whatever political agreements took place and the policies were made as regards social justice following the peace agreement in Nepal, were the

upshots of political debates following 1990s. Since 1990 a variety of groups within Nepal – religious groups, ethnic groups and the groups defined by gender and sexual orientation, and so on – increasingly asserted their separate cultural identities and demanded that those identities be given political recognition. The draft report submitted by the Constituent Assembly Committee on Fundamental Rights and Directive Principles has tried to encompass all those very issues floated on the surface since then. The issues related with social justice have been included the way they are encompassed in the draft is also because almost all the political parties have converged that they are living through the time of intense historical changes, cultural ferment, and social and political reforms aimed at achieving a more efficient moral and socially just democracy.

Social Justice and Constitutional History in Nepal

Historically viewing, Government of Nepal Act 1948, the first documented main law of the land, didn't have any specific mentioning regarding social rights. However, through its preamble, the act brought at the time of Ranacracy had declared to give Nepal a rightful place in the comity of nations also through social developments. Rather, this constitution had stated that public welfare needed to be promoted as the part of the duty of a citizen.

Nepal Government Act 1951 mentioned about social justice in directive principles of the state. It was written that his majesty's government would strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which social, economic and political justice in all the institutions

of the national life. The provisions didn't specify any particular groups regarding benefiting with social justice.

Article 6 had written that his majesty's government shall, within the limit of economic capacity and development, make effective provision for securing the right to work, education and public assistance in cases of unemployment, old age, sickness, disablement and any other cases

Since 1990 a variety of groups within Nepal – religious groups, ethnic groups and the groups defined by gender and sexual orientation, and so on – increasingly asserted their separate cultural identities and demanded that those identities be given political recognition.

of deprivation.

Article 10 mentioned that His majesty's government would promote with special care the educational and economic interests of the weaker section of the people and shall protect them from social injustice and all forms of exploitation.

Article 15(1) stated "there shall be equality of opportunity for all citizens in matters relating to employment and or appointment to any

office under his majesty's government". And, it also had written that nothing in this section would prevent his majesty's government from making any reservations of appointments in favor of any backward class of citizens, which in the opinion of his majesty's government, is not adequately represented in the service under his majesty's government.

Such provisions in the constitution were quite motivated by politically and socially vibrant activities of the then newly established parties in Nepal and the changes that had been taking place all over the world following the end of World War II especially due to the decolonization of India and their constitution making process.

Constitution of Nepal 2019 B.S under directive principles of the Panchayat system stated – "no individual or class is able to exercise undue economic pressure upon another individual or class". This vaguely written provision seemed to have tried to do away with and preventing unjust economic practice and it can be inferred that such provision was aimed at providing social justice.

Constitution of Nepal 1990 under directive principles stated- "the state shall pursue arrangements in matters of education, health and social security of orphans, helpless women, the aged, the disabled and incapacitated persons will be ensured their protection and welfare". Similarly, it was written that the state would pursue a policy which would help promote the interests of the economically and socially backward groups and communities by making special provisions with regard to their education health and employment.

Interim constitution of Nepal 2007 has the provisions regarding social justice as follows- "Every citi-

zen shall have the right to employment as provided for in the law". Women, laborers, the aged, disabled as well as incapacitated and helpless citizen shall have the right to security as provided for in the law. Under article 21 it has written that women, dalits, indigenous, ethnic groups, Madhesi community, oppressed group, the poor farmers and laborers who are economically, socially and educationally backward shall have the right to participate in the state institutions on the basis of principles of proportional inclusion.

Critique on the Draft Report

Prior to the implementation of the constitution of 1990 there was not any agreement and serious debate towards the notion that poverty fosters frustration, ill feeling and brooding sense of injustice. Post 1990 political developments and liberal and intellectual discussions in relation with justice enshrined in the constitution of 1990 had opened up avenues to converge on the need of social justice. However, the stakeholders responsible didn't have any firm steps as to materializing the social justice enshrined in the constitution and efficacy of the rights provisioned in the constitution was always questioned.

Socio-economic inequalities and state's insouciance towards the people living in hardship could be addressed by simultaneous application of corrective and social justice; this has been a common issue among the political parties in Nepal. Present draft seems to be incorporating the issues raised by the strata of people living on the verge of social-political and geo-religious life. When Nepali society seeks to meet the challenges of socio-economic inequality by its constitutional provisions and with the

assistance of the rule of law, if implemented properly following the promulgation, and revered by all the stakeholders it is likely that the draft will work towards achieving socio-economic justice without any violent conflict. This draft has been prepared in such a way that the ideal of welfare state that postulates unceasing pursuit of the doctrine of social justice will be applied in Nepali constitutional development.

Post-CA election constitution writing process included possible all rights related to social justice. It

It seems that the committee has paid equal attention towards social justice and at the same time it seems that provisions in the draft have elicited out the inherent tensions between individual liberty and social justice.

seems that the committee has paid equal attention towards social justice and at the same time it seems that provisions in the draft have elicited out the inherent tensions between individual liberty and social justice. There is a wide contrast between lofty ideals of constitutional provisions regarding social justice and the to-be-promulgated programmatic actions of the government to translate those provisions into practice.

This draft report has been emerged out of the conflicting politi-

cal and philosophical differences of the parties in Nepal. The contents and the differing points of the parties reflect this. Dissenting points and the provisions in the draft show that it has tried to maintain democratic homeostasis that imposing unnecessary legislative regulations and prohibitions with boldness and attacking the problem of inequalities of the past refusing to provision the reasonable regulatory measures are equally detrimental. Balance on these two notions is not seen in the draft still it is highly likely that ensuing discussions on the draft for the finalization will be the discussions for the balance.

The problem of poverty and sheer inequality of the distribution of wealth may be confined to the bigger cities (still with agrarian influence) and towns in Nepal but the problem accentuated by the vice of social disparity existing in a gross form prevails in all of our villages. Issues of landlessness, geographical alienation, gender discriminations, untouchability, basic health problems, and problems of legal system should secure that such system should promote justice but, in particular, such constitutional provisions should also have free legal aid to certain groups under affirmative actions.

Very positively, this preliminary draft paper submitted by the Constituent Assembly Committee on Fundamental Rights and Directive Principle has the provision that socially backward women Dalit Madhesi, indigenous people Janajatis, minorities and marginalized people, Muslim, sex and gender based minorities, differently-able persons, youth, backward community, peasants and laborer community and the people living in difficult and ignored geographical locations will have right to participate in the structure and

public service of the state on the basis of the principle of inclusion and proportionate participation. Such provision included in the article 27(1) in the draft report sounds that it has equivocated. In the mean time 27(2) seeks its safe side that while implementing such provisions economically poor citizens will be prioritized. Such provisions still have posed questions. Farmers, laborers and the people living in the backward geographical regions are, normally, poor and absorbing such sector of people in the structure and public service of the state will always be a hard nut to crack for a poor country like Nepal given the current political culture and economy. Optimistically, state is ready to guarantee such rights, and, cynically, state is going to redefine state structure and public service in such a way that the targeted groups won't realize any particular comforts and the government also won't have to bother at all for the exploitation and mobilization of resources. Given the weak political will power, absence of basic infrastructure in the country and also due to the provisions in the article 31(1, 2, 3) one can doubt that the right to social justice, among other rights stated in the article, will be implemented within two years' time.

Further, unemployed citizens are subject to receive allowances as provided by law. Such conditional provisions included in the constitution can't have assurance and efficacy of implementation in order to permit the judicial review on such terms and conditions and appropriateness of the allowances, if the word 'reasonable' was inserted before such provisions people could have a sense of opti-

mism that they would be justly dealt.

The draft states about the basic health whereas basic health hasn't been defined and it should have mentioned that people have the right to the highest attainable standard of physical and mental health services free of cost. Such provision only could make the present draft distinct from and more progressive than the previous constitutions and their provisions regarding social justice. Its sub-article (3) talks about right to food sovereignty and the same right is repeated in sub-article (4) as farmers' rights in Article 27 under the right to social justice. Many rights related with social justice are mentioned as the fundamental rights and in the mean time those very rights are repeated as the directive principles of the state relegating the rights to the position of directive principles.

The sub-article (1) states that in order to enforce the economic and social rights the state shall make appropriate provisions such provision seriously limits the range of all rights provided in this chapter.

A progressive nature is an attribute of international formulations on socio-economic rights. It is wise for Nepal as well to make out which of the economic, social and cultural rights are capable of urgent execution. Many issues can be address through formulation of laws a well.

It is the growth and development of this wider matrix of written and unwritten provisions in the constitution regarding social justice that will determine, as it does in every case, the significance of Nepal's forthcoming constitution and will make the constitution worth remembering. For the moment, such a sketch may

be useful in identifying basic issues and potential paths of development; but the real meaning and interest of the constitution will only be shown by the shape that it takes in the hands of the elected representatives, political leaders, and ultimately the people of Nepal.

This draft submitted by the CA committee on Fundamental Rights and Directive Principles has unprecedented liberalism, though it has been criticized by many as megalomaniac, as regards inclusion of provisions related with social justice. It is seen that there has never been any such liberal inclusion of provisions in any constitution as regards benefiting Nepali people through social justice.

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Report of the Fundamental Rights Committee of the Constituent Assembly: A Critique



» Hari Phuyal «

Equal protection of law to all persons is undermined and scope of illegal detention and possible disappearance or mistreatment is permitted. The sub-article (4) talks about the principle of prohibition on retrospective law, however, it fails to mention a well established exception that such rule does not apply to the international crimes such as, crime against humanity, war crimes and genocide.

Introduction

This article attempts to comment on the preliminary draft produced by the Fundamental Rights Committee of the Constituent Assembly. It only touches upon the citizenship and directive principles provisions and mainly focuses on fundamental rights part. Comments are based on the international human rights treaties, but without references to make it readable for the common persons. Most of the comments are followed by recommendations to be taken by the Constitutional Committee in the final negotiation.

Comments on the Report

Article 1(1) talks about the 'right to live with dignity'. However, the right to life is much broader than the right to live with dignity. Some jurisprudence, for instance the one from India, under the right to life,

talks about the right to live with dignity in the context of interpreting economic and social rights. However, wherever independent economic and social rights exist, such interpretation may not require. Therefore, it may be considered to make this article a combination of right to life and the right to live with dignity.

Article 2 talks about freedoms of opinion and expression, assembly, association, political parties, movement, profession, employment, industry and trade. However such rights are limited to the citizens only. Freedom to open a political party is exclusively of the citizens, but rest of the other rights are for any persons. Further, limitation imposed on such freedoms goes beyond the established principles that restriction can only be imposed on the grounds of national security, public order and to protect the rights of others. Such restrictions can only be clamped in accordance

with the norms of a democratic society, only as it is necessitated and in a proportionate manner to the threat created to impose the restrictions. The restrictions prescribed in the freedoms go beyond such norms. Therefore, freedoms prescribed above should be provided to all the persons and restrictions imposed must be liberalized.

Article 3, the right to equality, is much improved in comparison with the provisions of the Interim Constitution. However, it fails to incorporate a provision on substantive quality and only focuses on formal equality. Such as, people with physical disability may not be able to enjoy the rights equally as the able persons do. Therefore, this article should have a separate provision to incorporate the substantive equality.

Article 4 talks about the right regarding mass communication. However, restrictions imposed on

INFORMAL had talked with professional leaders and rights activists on what they have to say about the provisions in the draft report. Excerpts:



Dharmendra Jha
Chairperson, Federation of Nepali Journalists

We haven't got what we expected from the draft report. We are optimistic that things will go positively following the revision. Imprecisely, it seems that state has desired its controlling role against press freedom.

This draft is not substantially different from the Interim Constitution in terms of rights to information. However, we find subtle progressive orientation. So far as press freedom is concerned, no provisions are necessary if we can write in our constitution, as the American constitution has written, that parliament won't formulate any laws that violate press freedom. Provision to compensate the victims is new provision included in the draft as we demanded. Federation of Nepalese Journalist (FNJ) has been demanding that even at the time of emergency periods press freedom shouldn't be suspended but it has been envisaged in the draft that all sorts of fundamental rights will be suspended.

The provisions included in the draft can't safeguard the professional security of the journalists and right to information of the people. Article 4.1, under rights regarding Mass Communication, states that there shall be no prior censorship. However, article 4(4) has prohibitory clause. So, it is likely that media and means of communication can be obstructed. Prior to this draft it was stated that except in accordance with law, press, electronic transmission and telephone could be obstructed.

This draft report has tried to curb the press more than giving rights to it and has borne negative attitude. Given that there remain such words and clauses, press will be the victim of ambiguity in the future. It is possible that such provisions might be subjectively interpreted and will create problem in the future. We expect this will be reformed. Optimistically, preamble of the constitution too has included 'Freedom of mass communication' and mass communication has been one of the six unalterable provisions of the constitution. So we are hopeful that professional security of media persons and open society won't be threatened.

We are thinking of an open society so we are optimistic that such prohibitive words and phrases won't be there in the forthcoming constitution and it will be a press-friendly.



Gauri Pradhan
Member, National Human Rights Commission

Once some particular rights are included in constitution those rights have to be guaranteed, these come under the obligation of a state and the state has to fulfill these rights. Earlier, right to life and freedoms were perceived as the fundamental rights but now even education, health and employment have been encompassed within fundamental rights. So, the draft submitted by the committee has increased number of fundamental rights. Such increment can be justified if we internalize the broader and liberal definition of human rights as the indicator of increment. However, to include too impossible issues in a constitution won't be wise.

To question whether or not the state can cope with the rights of progressive realization is really crucial. State has to be able to cope with the fundamental rights of its people. Some aspects included in the draft might be realized progressively but some aspects have to be instantly addressed. Depending on the urgency of issues state has to act. State, primarily, is the guardian of the poor, suppressed and marginalized people so the issues related with such group of people have to be promptly addressed, however, people also shouldn't have the expectation that all the provisioned rights will be given

straight away.

Many rights included in the draft come under fundamental rights and some other have to be brought under human rights. Though these issues are closely linked and interdependent, I think there needs demarcation between fundamental rights and human rights. In the mean time, it is wrong to perceive these terms synonymously.

Some countries have prioritized Economic Social and Cultural rights and some others have been limited only in Civil and Political Rights. Latest constitutional development and formulation worldwide has given high priorities to economic, social and cultural rights. Nepal also couldn't be exceptional in this matter. International movement of social inclusion and the indicators of national living standards of different groups of people in Nepal have compelled the drafters to include the provisions the way they have included in the draft.



Nainakala Thapa

Chairperson, National Women's Commission

Nepal's constitution is going to be the youngest one. So, we got opportunity to study the provisions and practices of different progressive constitutions of the world so as to including fundamental rights in our draft. This draft report has strived to eliminate discriminatory provisions.

The equal ancestral rights provided to every woman are really significant. The provision that no physical, mental sexual, psychological or other form of violence or exploitation shall be inflicted on any woman on the basis of religious, social and cultural tradition, custom or any other grounds and such an act shall be punishable by law and the victim woman shall have the right to receive proper compensation is worthy to mention. It has specified the types of torture and exploitation and has tried to guarantee compensation. We have felt that this draft has been prepared keeping women's concerns, especially gender discrimination, in mind. However implementation aspect is still to see. The draft has opened up avenues for the women to involve in national service as it has theoretically attempted to solve the long existing problems of women through guarantee of their rights.

Existing laws regarding women are not complete. The compensatory provision has provided women a situation where they can live self-esteemed life with pride.

Discriminations have been tried to be avoided providing citizenship on the basis of heredity. However, it is still debatable that to acquire citizenship hereditarily both the parents have to be Nepali. Issue has been raised that one should be granted citizenship hereditarily if his/her any one of the parents is Nepali. Other disputes are there. Our say is that the children born in Nepal due to rape and other existing traditions like Deuki should get citizenship on the basis of hereditary.

Women are also marginalized group and the present draft has attempted to solve the problems of marginalized groups. If women become conscious for their rights forcing the state to implement the provisions included in the constitution, I feel women's rights can be assured.



Prem Bahadur Khadka

President, Nepal Bar Association

Problem lies with the fact that the draft submitted by the committee has not reached to consensus. This draft report submitted by the committee is not free from dissents and differing views. We have assessed that this report has not been submitted the way it had to.

Fundamental rights are truly fundamental rights if only people are able to exercise them. The present draft has increased the number of fundamental rights but it has remained silent on the remedial aspects. Provisioning fundamental rights without strong remedial aspects can't be fundamental rights per se. Increment can be important but implementation is more important than inclusion of increased number of rights.

So far as implementation of the provisioned rights is concerned, the courts might deal in their own way but problems might be there at the time of implementing the order of the courts. Even the fundamental rights included in the interim constitution are not implemented. Delayed process in the court is equally responsible for the non-implementation of the rights. Nepal has signed and shown solidarity to different UN related treaties and instruments including the big six treaties. These rights have been included as per those instruments and international practices but it is very difficult to be assured that these rights will be implemented. Moreover, the provisions in the report are still to undergo changes and modification in the Constituent Assembly so it can also be hoped that things will be improved.

them are similar to the freedoms provided in article (2). Therefore, such restrictions must be liberalized.

Article 5 talks about the right to (criminal) justice. The sub-article (1) talks about the reason for and information of arrest. In order to reduce the ambiguity, it can be said to provide arrest letter and detention letter at the time of arrest and detention. The sub-article (2) talks about the right to choose a lawyer during the arrest and trial, but such right during the investigation is missing. Further, the same sub-article in its proviso authorizes the arrest and detention of a non-Nepali citizen and a citizen of an enemy state without 'reason' and 'information'. These provisions are ambiguous and do not follow the equal protection of law to all persons. The sub-article (3) prescribes 24 hours' time to produce an arrested

the fair trial rights should also be included.

Article 8 talks about the right against preventive detention. It underlines possible preventive detention for breaching sovereignty, national integrity and public order. It also puts aside the scope to provide information, but with ambiguity and having no constitutional and legal meaning. Preventive detention is allowed in limited conditions in international law, but with maximum safeguards. Given to the history of misuse and court's rejection in Nepal of such orders, it is advised to remove this article and make offences to the grounds of issuing preventive detention.

Article 14 talks about right against exploitation. In its sub-article (4), it prohibits to any work without consent or will. However, its proviso,

participate to and protect the cultural life. This article fails to combine the spirit of ILO Convention 169 in it. It should have been made as mini ILO convention 169. Article 18 talks about the right to employment. Its sub-article (1) talks about the terms and conditions of the employment as provided by law. Further, unemployed citizens are subject to receive allowances as provided by law. In order to permit the judicial review on such terms and conditions and appropriateness of the allowances, the words 'reasonable' must be inserted before such provisions. Article 20 talks about the right to health. It states about the basic health whereas it should have stated as the right to the highest attainable standard of physical and mental health services free of cost. Article 21 talks about the right to food. Its sub-article (2) talks

The concept of compulsory work and condition of public purpose must be defined to prevent possible misuse of this proviso in the future.

person before the authority, however, person detained under the preventive detention and a citizen of an enemy state are exempted. The equal protection of law to all persons is undermined and scope of illegal detention and possible disappearance or mistreatment is permitted. The sub-article (4) talks about the principle of prohibition on retrospective law, however, it fails to mention a well established exception that such rule does not apply to the international crimes such as, crime against humanity, war crimes and genocide. The sub-article (10) talks about the legal aid, but it is limited to the criminal cases. This sub-article may be an independent article allowing legal aid to the civil and other cases. The whole article may be re-written and some other provisions to incorporate

allows compulsory work to any citizen for public purpose. The concept of compulsory work and condition of public purpose must be defined to prevent possible misuse of this proviso in the future.

Numbers of articles talk about economic, social and cultural rights as fundamental rights. Most of the economic and social rights are limited to the citizens whereas such limitation discriminates non-citizens who are legally living in Nepal. Article 16 talks about the right to education. The sub-article (3) talks about free tertiary education to underprivileged people as provided by law. The phrase "as provided by law" reduces the status of this right to the legal right. Article 17 talks about the right to language and culture. It talks about the use of language, par-

about the protection of life from unavailability of food and repeats the provision of right to food or fails to define the situation like right to food in pandemic situation. Its sub-article (3) talks about right to food sovereignty and the same right is repeated in sub-article (4) as farmers' rights in Article 27 under the right to social justice.

Article 28 talks about the right to social security. It mentions the groups may be able to receive the social security as prescribed by law. Social security is for those who are in need. Prescribing certain groups may exclude others in need and able person in the groups may also be automatically receiving such benefits. Therefore, this article must delete the groups mentioned and the phrase "as prescribed by law" and provide that

'everyone has the right to adequate or reasonable social security when in need'.

Article 30 talks about the right against exile. Given to the situation of Nepal that numbers of foreigners are arbitrarily deported, one more provision must be inserted regarding deportation or extradition to any person and due process shall be followed in order to protect their life land liberty.

Article 31 talks about the enforcement and right to remedy of the fundamental rights provided in the chapter. The sub-article (1) states that in order to enforce the economic and social rights state shall make appropriate provisions. However, it does not define what such "appropriate provisions" are. It gives the impression that independent articles are subject to Article 31 and thus will have severe consequences for the enforcement by the courts. The sub-article (2) states that in order to implement the rights mentioned in this chapter, the state shall make laws, as needed, within two years. This provision seriously limits the scope of all rights provided in this chapter. The court, in order to implement each right in this chapter, will ask such laws to enable the judicial review. Therefore, these two sub-articles are redundant and must be scrapped and, instead, this article should have a provision on obligation to investigate on any violation of rights enumerated in this article.

Need of some More Provisions

Interpretation of the provisions mentioned in the chapter of Fundamental Rights is very important. Currently, the Nepal Treaty Act, 1990 gives primacy to international law in case of conflict with the

domestic law. This is a weaker provision to mention in the statute and may have problems in dealing with bilateral treaties with neighboring countries as they do not provide primacy to the international law. Therefore, it is advisable to insert an article stating that while interpreting the articles of the fundamental rights chapter, international human rights treaties ratified by Nepal shall be referred by the courts.

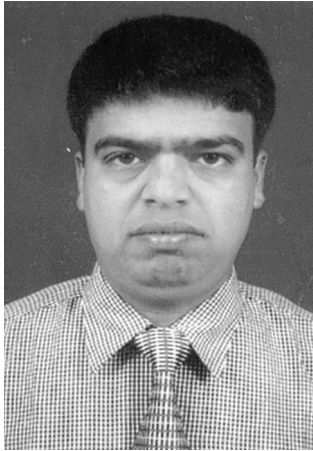
Right to remedy is important for the meaningful realization of fundamental rights. Right to remedy should be understood to have reparation (compensation, relief and so on) in case of violation of such rights. Further, in order to deal with impunity, each violation of the fundamental rights must be investigated and the suspect must be trialed by the court. Therefore, it is advisable to have a sub-article in the right to remedy article stating that victims of violation of fundamental rights shall have the right to reparation and state shall have the obligation to investigate each violation of fundamental rights. Further, the level of effectiveness of the fundamental rights depends the availability of remedy to the lowest courts near the violation of such rights. Therefore, it should be considered to provide all writ jurisdictions to the District Courts so that people can approach immediately with much easier access. Therefore, a sub-article can be inserted in the right to remedy article to confer the jurisdiction to the lowest level of the court system.

Citizenship Directive Principles Provisions

The citizenship provisions are much improved in comparison to the provisions mentioned in the

Interim Constitution. However, some provisions still need consideration from the gender equality perspective. Article 6 provides right to a woman to grant the citizenship with her decent to her child, but article 3 takes away of it by granting such power jointly to the father and mother. Therefore, it may be considered to make the provision of article (3) as father or mother. Further, article 3(2) provides the right of a child with unidentified father or mother to receive the citizenship on the basis of descent, but a child of a Nepali woman whose father is not identified will have to receive the citizenship on the basis of adoption. This discriminates Nepali mothers and fails to recognize them as equal to Nepali fathers. Article 4(1) has a provision to fix the time of fifteen years to acquire Nepali citizenship to any person who has married to a Nepali person. This provision looks gender neutral, but will have adverse effect to a foreign woman who will marry to a Nepali man as she must wait for Nepali citizenship to fifteen years. Therefore, it is advisable that such time duration must be liberalized.

The chapter on Directive Principles and State Policies repeats some of the fundamental rights provisions such as education, environment, health, housing, food, social security, gender quality and social justice related rights. Such policies are subject to progressive realization, but do not allow to be justiciable. Having such repetition of rights in the chapter of directive principles and state policies may undermine the justiciable independent fundamental rights. Therefore, it is advisable to delete the rights which are recognized as fundamental rights from chapter of the directive principles and state policies.



» Rabindra Bhattarai «

Responsive Criminal Justice System and Constitution

Though the political climate at present for the adoption and enforcement of new constitution by Constituent Assembly is in limbo, we are hopeful for a people-responsive constitutional setup. The constituent assembly Committee on Fundamental Entitlements and Directive Principles of State has submitted its draft version for consideration in the full House. From criminal justice perspective, some of the provisions that are proposed in the draft version are only the continuity of the previous constitutions however; this draft version has incorporated some of the new concepts and safeguards in the chapter of fundamental entitlements. This brief write-up would try to discuss some of the possibilities of new adjustments in the draft version of the constitution and probabilities of their implications in the future.

The drafters have put provisions in various articles that are related to right to criminal justice whereas proposed Article 5 seems to be exclusive provision for right to justice. As usual, prospective legislation for prescribing capital punishment is

barred and rendering justice is ensured under rule of law. Article 5 has covered all the provisions, including right to defend a case through legal counsel, those are existed in Interim Constitution, however, proviso managed under clause 2 of the Article has jeopardized the right to counsel for non-Nepalese people. The provision in the draft states: *"Provided that, this Clause shall not be applicable to the non-Nepalese citizens under preventive detention or to the citizen of an enemy country."* This has limited the right to justice in unlawful preventive detention of non-Nepali persons subjected to jurisdiction and it doesn't seek judicial remedy for unlawful arrest and detention. Therefore, it seems that such provisions in the draft have been proposed with the intention to make system more restrictive than before. Similar restriction is imposed in production of accused to the court.

The draft has pushed traditional type of protection against non-applicability of retroactive criminal law and punishment. It has failed to give recognition of possibility of retroactive prosecution of gross

human rights violators and war criminals. This failure has shown that the draft hasn't adhered to the jurisprudence of criminal law cherished at international level. The draft has recognized the importance of presumption of innocence until proven guilty and has placed it as a component of fundamental entitlement to justice, however, it has failed to ensure justice to the person, through compensation, in the cases of illegal detention in course of criminal investigation and proceedings and in the cases of miscarriage of justice. Consequently, presumption of innocence gets meaningless if someone is detained and tried but freed after sometime.

Another important provision in the draft as carried on by Interim Constitution is that a person will be tried and heard by a competent independent judicial authority. Unless the state is restructured this entitlement would also be in the demonstrative showcase.

The definition of torture is limited as tradition in its prohibition constitutionally. Civil Society had proposed a broader definition of torture for making prohibition of tor-

ture more effective; however the drafters have just copied the text of the previous constitution and have given continuity.

A remarkable point made in the draft from the criminal justice perspective is a separate provision on victim justice. The provision reads as:

Rights of the Victims of the Crime

1. The victims of the crime shall have right to information about the investigation, probe and action taken in the case in which he/she is victimized.
2. The victims of the crime shall have the right to social rehabilitation and compensation in accordance to law.

This clause has assured right

friendly justice", there is small hope that the notion of juvenile justice would be developed and implemented in the future. Child-friendly justice does not necessarily mean a justice delivery system to children in conflict with law in restorative justice approach. There were recommendations from civil society and human rights organizations to give a clear recognition to restorative justice approach for rendering justice to children, however, the drafter failed to incorporate that in that way.

Though these provisions are positive to some extent, the drafters have failed to have provisions in directive principles corresponding to the provisions of fundamental entitlements. The drafters are found to be

would allocate necessary source and would manage scientific crime investigation system; a proper operation of judicial system and effective correctional services. However, the drafters have not been able to pay attention in this regard.

Finally, if we view the draft of the fundamental entitlements and directive principles committee, what we can observe is that the provisions are assembled rather than incorporated or drafted. The language of the draft is not very compatible and convenient to the language of legal document. Even though the drafters have done important job, things could go even better had they worked properly and prudently. Therefore, it is required to reconsider the text and

This clause has assured right to information, social rehabilitation and compensation to the victim of crime. However, according to restorative justice victim has right to information, participation and representation, relief, restitution, compensation, satisfaction and guarantee of non-repetition as well as full rehabilitation.

to information, social rehabilitation and compensation to the victim of crime. However, according to restorative justice victim has right to information, participation and representation, relief, restitution, compensation, satisfaction and guarantee of non-repetition as well as full rehabilitation. Therefore, these other rights have not been recognized by the recent draft and there is partial inclusion of the theoretical aspect of restorative justice.

Under the entitlements of child, the draft has for the first time incorporated notion of juvenile justice. As it is said in the draft "Every child shall have the right to child-

incorporating duties of the citizens. From criminal justice perspective, there is no necessity to decorate the provisions by duty as right holds rights and duty both inseparably. But, there was need of provisions in directive principles corresponding to each of the fundamental entitlements. For example, if a right of the defender is protected, at least there is pre-requisite of effective criminal investigation and proceeding system inclusive of effective forensic laboratory, trained and educated human resources. To ensure that the state would fulfill these requirements, a provision of state policy or directive principle was necessary stating that the government

language of the draft from the criminal justice perspective. The potential changes of the areas are:

- ▶ Recognition of complete notion of Victim Justice
- ▶ Recognition of restorative justice approach at least for justice to children
- ▶ Incorporation of public defender system instead of legal aid
- ▶ Incorporation of provision of correction and rehabilitation of offenders and
- ▶ Compensation for wrongful administration or miscarriage of justice.

Suggestions Given by the People had Naturally Heartened us in Increasing the Number of Fundamental Rights

Binda Pandey is The Chairperson of the Constituent Assembly Committee on Fundamental Rights and Directive Principles. The committee chaired by her has submitted its report to the Constituent Assembly with some differing views of the political parties on different aspects of fundamental rights and directive principles. INFORMAL had talked with her on the provisions included in the draft report.



INFORMAL: The draft report submitted by your committee has provisioned so many fundamental rights. Are there particular reasons behind the inclusion of so many rights in the draft report?

Pandey: Historically viewing fundamental rights have been increasing. The constitution of Nepal 1990 had provisioned 12 fundamental rights and the Interim Constitution 2007 has 23 and with the additional 10 fundamental rights, 33 fundamental rights have been provisioned in the draft report. Such increase in the number of fundamental rights has nexus with the question whether or not to make the matters of people's concerns the constitutional rights. Internationally, human rights are viewed as the rights of first, second and third generations. Initially it was thought that only the first generation rights were fundamental rights. Now, the first generation through the fourth generation of rights can be included in the constitution as the fundamental rights. So, opposed to the initial views that only the individ-

ual rights are the fundamental rights, we have reached to the phase where rights of the community have also been considered as the fundamental rights. Such shift in understanding is also responsible for the numerical rise of the fundamental rights in the draft report.

Another reason is that in the earlier days, only the civil and political rights were thought as essentially the foremost rights and necessity of an individual and we were not able to recognize the right to food, shelter, education and to live a healthy life as the foremost rights of an individual. As per the suggestions from the people that basic needs of an individual has to be the fundamental rights, following the discussion in the committee over such issue and considering the necessary elements for an individual to live securely, we included the rights in the draft which were not provisioned in the Interim Constitution. So, it is not unnatural that fundamental rights have been increased.

INFORMAL: Did the suggestions collected from people have any roles for the increase?

Pandey: We took the suggestions collected from the people as the base of determining fundamental rights. So, the suggestions from the people were also responsible for the increase. We determined the fundamental rights on the basis of constitutional practices of Nepal, international practice and our commitments, continuous movements of Nepali people especially the Janaanadolan II and the issues established by them and on the basis of the suggestions collected from people. Naturally, the suggestions of the people helped determine fundamental rights. The suggestions brought to the committee by all the 40 suggestions-collecting-groups of the committee showed that people have demanded food, shelter, clothing, education, health, security and their participation. Of the demands suggested by the people, many of them were not provisioned even in the Interim Constitution. So, the suggestions given by the people

had naturally heartened us in increasing the number of fundamental rights.

INFORMAL: Rights to employment, and shelter, to take some examples, have been included as the fundamental rights. Are not these the developmental aspects to be gradually fulfilled by the state as per the economic capacity of the state?

Pandey: Thinking that rights keep on increasing over time, we can't wait for another 5 years to include right to shelter by including right to employment in our constitution as the fundamental right this year. We included such rights in the fundamental rights with the view that the suggestions given by people and the issues established by the latest Loktantrik movement and the concerns of basic needs must be included in the fundamental rights. These rights are not to be provisioned bit by bit. However, implementation will take place as per our capacity. So far as employment is concerned, it has been made the fundamental rights and it has also been written there that employment and condition of it will be as defined by the law. By the time one seeks rights; state will have made law and have defined employment and its conditions. This debars me from seeking employment as per my capacity and qualification right now.

Similarly, government might define child-caring, domestic work as well as working in the field and geriatric care as the employment and if the government states that only domestic work is available for one, either s/he has to accept the work or s/he can't claim unemployment allowance. This should be the provision for the initial phase; however, as the state increases its capacity, it has to provide with employment opportunities to its people as per their capacity. The notion that one has to be employed as per their expertise and graduation will be possible only

step by step. Now we have to take such provision as the basic step. We have stated that education up to grade 8 will be free but compulsory. However, education for free doesn't mean that the state can manage right now. "Free- of-cost" too has to be relatively defined as per the capacity of the state. State is not equipped for the purpose right now. State has to establish infrastructure. Parents have responsibility to send their children to school and shouldn't pay fee for sending children to school. This is what we call free and compulsory education following the promulgation of constitution. Provided that state increases its capacity we can come up with other policies, we can distribute text books gratis up to grade 8 when the capacity of the state keeps on getting better. As the capacity of the state gets further better, each students will get everything needed to attend school for free. Things will be implemented gradually.

INFORMAL: Do you think the state keeps capacity to fulfill all the rights included in the draft report?

Pandey: State has to be able to. State has to be able to fulfill the minimum rights. We are incapable not because we don't have means and resources but because we haven't been able to manage them properly. Another important thing is that government alone doesn't have sole responsibility to translate the provisions of the constitution into implementation. Each citizen has responsibility in implementing the provisions written in the constitution. Citizens have to acknowledge they too have duty on their part and they should be able to respect it. They should be aware that only by respecting constitution they will be respected. Only on this condition that we will be able to implement the basic issues mentioned by us and the state will have access and capacity.

INFORMAL: Earlier too there were the provisions of fundamental rights. Given the situation that people couldn't fully utilize those rights, how to be assured that people will be able to utilize them following the promulgation of constitution?

Pandey: Proper management and mobilization of resources and promotion of awareness among the people that they too have responsibility in such activities will make it viable. If we are unable to make people acknowledge their accountability, it won't be possible. Many fundamental rights were provisioned in the constitution of 1990; however, implementation was a failure due to absence of political will power. Social engineers only taught about the rights but they couldn't abide by those rights in their own practical lives. We had formulated law against untouchability, questions arise did we implement them? Are we all responsible for non- implementation or not? State can't reach to individual household to teach them against untouchability.

Constitution of Nepal 1990 and 2007 provisioned sex based non-discrimination, however, women and girls in every household are still facing discriminations. State is not responsible in such discriminations. Our children are not equally treated. This is due to people's insouciance and negligence. If I can't treat my sons and daughters equally state alone can't avoid such discriminations by enshrining rights in the constitution. Written provisions and implementation should go side by side. At least the rights campaigners like we have to practically implement those rights. The forthcoming constitution will be with fundamental duties of the people together with fundamental rights. I feel that attempts of rights campaigners to take rights and duties side by side will make it sure that that fundamental rights provisioned in the draft reports will be implemented.

INFORMAL: For the purpose of implementing some of the rights it has been stated that law will be formulated within two years. On what ground can we be assured that law will be made within two years?

Pandey: Will-power is the base. Provided that we are committed we can formulate law within two years. In the absence of political will power nothing will be possible, even constitution may not be written. Of the fundamental rights included in the draft report, law has to be made in the cases of 12-15 articles in number. These laws will be made by different ministries. If the concerned ministries work with commitment and political will power, things can be accomplished on time. Formulation of laws is solely connected with will power. Endorsed unanimously, the issue of formulating law is on the move, so, ministries don't have to be waiting for the promulgation of constitution. Corresponding ministries can start their works from now on taking the draft report as the base. Will power is the prime matter, showing will power will make it possible that laws will be made within the stipulated time.

INFORMAL: What sorts of views had to be churned in the committee? Why couldn't the committee pass its issues unanimously?

Pandey: The committee comprises of the members from diverse political backgrounds so it was natural that there were diverse views. Constitution assembly has 25 political parties and in the fundamental rights and directive principle committee there are the members representing 11 political parties so it is again natural that they are with differing views. Amidst differences it is impossible that things will be passed unanimously. The positive aspect was that this committee faced very few differing views. In many cases differing views were related with selection

of words. It was normal aspect. There are differing views on some of the issues like whether or not to provide with compensation at the time of land reforms, whether or not to accept multiparty system and pluralism, whether or not to formulate retroactive law.

INFORMAL: On the basis of their rights how will the Nepali people be empowered following the formulation of constitution as per the draft report submitted by your committee?

Pandey: Compared to the fundamental rights included in the previous constitution, rights have been provisioned in the draft report more progressively. Fundamental rights are linked with every individual. So, a lot of dissatisfactions were also there. Of the 11 thematic committees in the Constituent Assembly ours was the committee to see the most number of dissatisfactions. Fundamental rights are not related with politics. These rights are related with the people of all level and strata so we feel there were numbers of dissatisfactions. Many people showed their concerns and reactions. More than 92 thousands people had sent their suggestions to the committee individually. Including rights in the constitution is not the end in itself as regards empowering people with their rights. If the written aspects are translated into practice, I am sure that we have drafted more progressive fundamental rights. As regards this each citizen has to think what has been written about them in the constitution. People should be equally wary about their role in course of implementation of the rights. Politicians have duty to create environment whereby each individual will have access to the rights. Provided that these things are fulfilled, we can guarantee the rights of the citizens.

INFORMAL: What's your view regarding the remedial aspect of the fundamental rights? What will be the remedial mechanism?

Pandey: It is difficult to write specifying the place. This is not the issue to be mentioned by our committee. So far, we have to understand that in the cases of violation of fundamental rights one has the Supreme Court to go. It is because of lack of access that one hasn't been able to seek his rights. A poor person of Jumla district can't be expected to go to Supreme Court for his rights. People have been given rights now but in the cases of violation of those rights they don't have easy remedial access. There will be the Supreme Court following the promulgation of new constitution too; however, whether or not the district courts can be entrusted with power to look into the cases of violation of fundamental rights of the people is still a matter of discussion. State court will have this right. Under rights to justice we have mentioned that state will provide with free of cost legal support to the poor family. There has to be the provision that state will help the destitute family providing with access to justice. The constitutions in the past were made by some few persons so people didn't have concern towards them. Constitution this time is being written by the representatives of the people where people do have their concerns and interests. Earlier, it was provisioned that only the perpetrators were taken action but this time apart from punishing the perpetrators we have provisioned that the victims will also be compensated. Rather than getting pessimistic in retrospection, we are many steps ahead now learning lessons from the past. If the provisions in the draft are included in the constitution and implemented honestly Nepali people will be fully empowered in terms of their rights

Expounding the Constitution: Essays in Constitutional Theory

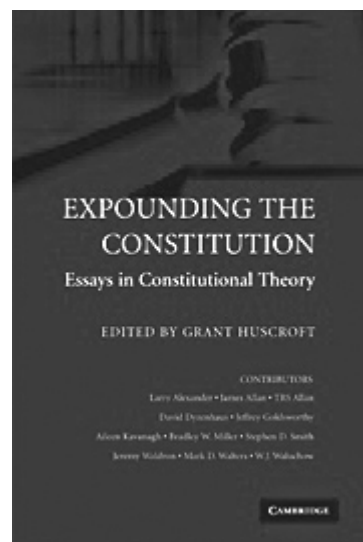
The editor Grant Huscroft in *Expounding the Constitution: Essays in Constitutional Theory* has included articles of some of the world's leading constitutional law theorists. Although the essays concentrate primarily on constitutional law issues in the US, Canada, the UK, New Zealand and Australia, the theorists have presented a vivid picture of the impacts of bill of rights provisioned and the place of unwritten constitutional rights in the constitutional order in an idealistic manner. Steven D Smith, Jeremy Waldron, W.J. Waluchow, Bradley W. Miller, Larry Alexander, David James Allan, T.R.S Allan, Aileen Kavanagh Dyzenhaus, , Mark D Walters and Jarefy Goldsworthy are the contributors as the leading constitutional theorists. As the editor says, this book has arisen out of a colloquium held at the University of Western Ontario in October 2006 with the aim to bring the leading constitutional theorists and legal philosophers to discuss constitutional and judicial review.

This book is divided into 3 parts. The views of Smith Waldron, Waluchow and Miller deal with aspects of constitutional interpretation, moral aspect of the judges while interpreting, constitutional morality and limiting provisioned rights by creating other clauses and its relevance respectively. In the second part of the book Alexander, Dyzenhaus, Allan and Kavanagh deal with the constitutional review, justification and legitimacy. In the third part of the book T. R.S Allan, Walters and Goldsworthy deal with written and

unwritten constitutional principles. The essays that make up this volume, contributed by some of the most accomplished legal philosophers and constitutional law scholars in the common law world, are concerned with interpretative aspects of the constitution. The articles included in the book reflect the jurisdictional roots of their authors still with wide application. This book, being brought into existence out of the colloquium, is full of exchanges of debates.

Larry Alexander's article- "Constitutions, Judicial Review, Moral Rights and Democracy: Disentangling the Issues" in the book has advocated the idealistic aspect of the constitution- assuming and revering the real moral rights carried by a good constitution whereas those moral rights may not be entrenched in the constitution in letters and words. His theoretical analysis underscores that moral intent carried by the provisions in the constitution are with paramount importance while interpreting constitution. For him legislatures don't face any constraints of precedent and statutes as the courts do.

Waldron's observation that legislative decisions should enjoy judicial deference has been questionable and debatable at the same time. He has seen the legislatures to be more competent for the adjudication of certain rights especially the rights related with abortion, affirmative actions and the rights related with criminal aspects. However, Waluchow assumes that ascertaining the community's true moral commitments is not significantly different from



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what judges normally do in common law cases.

This book has been designed to be useful to wide readership, legal professionals and the constitution drafters especially those entrusted with the responsibility to draft provisions of fundamental rights in the constitution are likely to be benefited. So, it is equally useful to the Nepali constitution drafters. Though the book doesn't indoctrinate explicitly on how to provision rights in the constitution, the discussions of the experts in the book can guide the concerned with farsightedness so that the provisions included in the constitution can be free from interpretative ambiguities. This book is worth reading, at least for the persons involved in writing constitution, primarily because they can involve in good constitution writing identifying the post-implementation complexities a constitution faces.

The philosophically balanced views of constitutional theory in the book, despite their incomprehensiveness, are worth reading.

Dipendra Pd. Pant

Interaction Program on 'Report of the Fundamental Rights and Directive Principles Committee': A Report

(Being guided by the particular purpose of this edition of INFORMAL and also due to page limitation some texts spoken by the participants, especially those irrelevant to the purpose of this edition, haven't been included. However, there has been utmost attempt as to keeping the original intent of the speakers intact)

Background

Informal Sector Service Center (INSEC) and Constitutional Lawyers' Forum (CLAF) jointly organized an interaction program on "Report of the Fundamental Rights and Directive Principles Committee" on 26 November. The

program was attended by the Chairperson and members of Fundamental Rights Committee of the Constituent Assembly (CA), CA members, law professionals, representatives of the civil society and journalists. In the program chief guest honorable Chief Justice Min

Bahadur Rayamajhi and guests Nilambar Acharya- Chairperson of the Constitutional Committee of the CA and the Chairperson of the CA Fundamental Rights and Directive Principles Committee Binda Pandey had their views. Law professionals Chandrakant Gyawali and Dr.



Chairperson of INSEC Subodh Raj Pyakurel (Fourth from the left) Speaking in the program

Bhimarjun Acharya had presented their papers on the report submitted by the Fundamental Rights Committee. Amidst the situation that many concerned and professionals are demanding revision and amendment of the report, the committee has submitted its report to the CA.

As the program was interactive, the participants had their views openly. Speaking as the Chairperson of the program INSEC Chairperson Subodh Raj Pyakurel had his view that the draft report of committee needed further discussions. The program was facilitated by Devendra Raj Adhikari of INSEC and the participants were welcomed by Tikaram Bhattarai, INSEC Board Member cum Chairperson of CLAF.

Objectives

The Key objectives of the interaction program were to-

- ▶ publicize the provisions in the draft through discussion.
- ▶ seek solution of the differing issues, provisions in the draft
- ▶ involve the members of the Fundamental Rights Committee, justices, law professionals and civil society members in the discussion.
- ▶ facilitate for the required amendment of the draft report.
- ▶ help in drafting Federal Democratic Republican constitution
- ▶ facilitate overall constitution writing process.

Views of the Participants

Subodh Raj Pyakurel,
Chairperson, INSEC

INSEC generally works in the field of human rights. So, spectrum of issues is encompassed under our working area. Primarily, we work

against the violation of human rights for the safety of the citizens. Our desire is to make human rights-friendly environment. Our works have been seriously perceived by people. Our intervention on the quality of the food distributed by World Food Program is one example. The phrase 'Civilian supremacy'

The fundamental rights included and the directive principles provisioned in the draft should be so clear that even the common people will be able to decide how future political process develops. Whatever issues have been raised and put forth by this draft report are only the preliminary ones, however, in the mean time, these issues are too serious as well.

has made the country captive now. Rule of law needs to be clarified properly for the civilian supremacy. Being in a state of transition, it is time for Nepal to prepare a brief knowledge document that is free of ambiguities. The fundamental rights included and the directive principles

provisioned in the draft should be so clear that even the common people will be able to decide how future political process develops. Whatever issues have been raised and put forth by this draft report are only the preliminary ones, however, in the mean time, these issues are too serious as well.

Tikaram Bhattarai,
Chairperson, CLAF

Citizenship and fundamental rights are the crucial parts of any constitution. If students of law, law professionals and honorable justices don't pay attention and think in time, in spite of the fact that our 601 CA members have expertise and historical contribution, posterity and international communities will question the expertise of Nepali justices, lawyers and constitution experts. CA members are political figures and they might have expertise as well, but, legal experts will have to be able to show the correct paths for correcting the flaws in the draft. This program is meant to for the purpose.

Dr. Bhimarjun Acharya,
Paper Presenter

Probably no constitution gets legitimacy in the absence of bill of rights. In 1791 Americans had 10 amendments in the constitution in a single day to include bill of rights. Since then there has prevailed trend of including fundamental rights in constitution. Compared to the constitutional history of Nepal this draft has broader concept of bill of rights, this has to be applauded. It seems that such provisions have been included in the draft as an attempt to cope with heightened expectation of Nepali people. Respecting the efforts of the CA members I would like to discuss on the draft provisions point-

wise.

Right to Live with Dignity provisioned in the draft is a new dimension in our constitutional history. Though the Supreme Court had explained about the rights to dignified life, such provision had not come to practice earlier. To the drafters, it seems, to live with dignity means to maintain ones' material body and entire organs, identity and self respect. Right to live with dignity is not so narrow; rather, to live a dignified life dozens of other factors like health, education, foods etc have to be there. Some comments have been floated regarding the prohibitory provisions in the constitution. Prohibitory provisions in the constitution might be there, however, there are varied opinions regarding the length of the list of limiting provisions. Internationally, article 90 of ICCPR has talked about two provisions. The latest documents of the UN have defined nationality, sovereignty. We can also get help from them so as to avoid possible ambiguities.

In the history of bill of rights in constitutions new thing has been added. The right to equality before

law and right to equal protection of and benefits from the laws are equally praiseworthy. Such provisions will be beneficial in empowering the marginalized and minority groups. However, there have been used some words and phrases like 'sexual orientation' which may not have clear meaning in bill of rights. What such phrases have tried to give priority to is not clear. It seems that such provisions have been included being influenced by some persons. Article 3(2, 3) mean the same thing because in both the cases given in the article state is responsible for the discrimination. The provision in 4(4) states that except in accordance with law, no press, electronic transmission, and telephone and other means of communication shall be obstructed. The word 'telephone' shouldn't be written because means of communication might be changed in the future. It seems that such diction choice is affected by incident in the past but; the diction choice in the bill of rights should be as guided by theory not by any particular incident.

This draft has tried to accept only the torture inside custody as the

torture as the Constitution of 1990 and the Interim Constitution 2007 did. Such provision is not acceptable. Nepal is one of the state parties to CAT so torture has to be understood as defined by article 1 under CAT. The differing view under Rights Regarding Property states that property can be requisitioned, acquired encumbered by the state from a person without compensating. Please don't have such provision because fundamental duty of a modern state is to safeguard the freedom of life and property of its citizens.

Under Right to Privacy it should be written that privacy in relation with property should also be inviolable. While provisioning rights regarding employment it should be understood that once some rights are provisioned under fundamental rights they become claim rights so it is too essential to think of the capacity of the state. Similarly, under right to health it has been stated that every person shall have right to informed health services. Once health becomes a fundamental right of citizens it is very essential to define "basic health" as well.

Food security and food sov-



Participants in the program

ereignty are different issues. People can't enjoy right to food sovereignty, this is the right of a state. Things have to be corrected here. In the mean time "appropriate accommodation" hasn't been defined well, this will create confusion in the future.

Provisioning Rights to Social Justice is very important part of this draft but the provision that "the state will make appropriate provision for the implementation" will give it double meaning. Such rights provisioned in the constitution don't go effective until new laws are made. To stop the possible emergence of dictators and possible genocide we have to make retroactive law.

**Chandrakanta Gywali,
Paper Presenter**

Article 1 under Part One states there will be the provision of Single Federal Citizenship with Regional Identity. I feel that while federalizing the state we have to depend on resources and North-South geographical bases so as to mainstreaming the marginalized groups. Many federal countries in the world have federal citizenship system. So far as regional identity is concerned; I think there should be local identity instead of regional. Local government can identify and be familiar with its citizens. The second article in the report states that citizenship will be identified in two ways- an individual that has obtained Nepalese citizenship while the constitution came into effect and an individual that has obtained Nepalese citizenship after the commencement of this constitution. Once these two ways of identifying citizenship are there it is not necessary to have article 2(c) referring to article 3.

Article 3 states that an individual whose father and mother were Nepalese citizens during his/her birth will get Nepalese citizenship. Instead of writing father and mother we should write father or mother. As regards the naturalized citizenship a clause 'in accordance with existing law' is written. Following the implementation of this constitution laws will be made maintaining consistency

Article 3 states that an individual whose father and mother were Nepalese citizens during his/her birth will get Nepalese citizenship. Instead of writing father and mother we should write father or mother. As regards the naturalized citizenship a clause 'in accordance with existing law' is written.

cy to the constitution, so, writing 'in accordance with law' is redundant. Under naturalized citizenship it has been mentioned that if a foreign lady wants to get citizenship of Nepal she has to denounce the citizenship of the foreign country. As per the earlier constitutions of Nepal she could get Nepali citizenship once she started the process to denounce her citizenship. Such provisions might make

a person stateless because once an individual denounces the citizenship of one particular country it is not sure that s/he will obtain citizenship of another country.

Whatever clauses are included under article 5 as regards obtaining naturalized citizenship of Nepal are quite sensible. These provisions were adopted by the two constitutions earlier than the present constitution. Language, birth, ability to write and the professions are the part of contribution to Nepal. Five years' time for the re-obtaining the Nepali citizenship is too long so it should be two years. The draft report also states that the federal government can confer honorary citizenship upon internationally reputable individuals. Not only the international repute the reputable persons should have contributed to Nepal as well.

Non-residential Nepali shouldn't be given non-residential Nepali identity card.

**Min Bahadur Rayamajhi,
Chief Justice, Chief Guest**

Fundamental rights and citizenship being interconnected each other and being important issues, the constitution drafters need serious thought, farsightedness and balanced coordination. It is believed that to live as human being and for the development some rights are essential. In this context, Nepal has also been state party to Universal Declaration of Human Rights - 1948, International Covenant on Civil and Political Rights -1966 and International Covenant on Economic, Social and Cultural Rights. Certainly, we are guided by these international declarations and instruments. It doesn't mean that we have to depend on these instruments only. Provided that there are suffi-

cient resources more other rights can be included. Whatever rights are enshrined in the constitution they become fundamental rights and they must come into effect. State has to respect those rights.

Interim Constitution of Nepal 2007 has provisioned the rights regarding employment, social security, women, elderly persons, food sovereignty and social justice but those have remained just as the show pieces because paper hasn't been translated into practice due to inability of the state to formulate law. Provisioning the rights that can't be put into effect is not any good. Those aspects that can't be included by the state as the fundamental rights have to come within directive principles of the state.

It is true that citizenship issue in Nepal is problematic. State shouldn't deny citizenship to its citizens and non-citizens shouldn't be granted citizenship. The constitution drafters have to be wary that if they adopt policy regarding citizenship without considering resources, open border and relation with the neighbors, country might face crisis within shorter period of time.

Nilambar Acharya
Chairperson, CA Constitutional Committee, Guest

While working in different thematic committees under Constitutional Committee I have realized that things have been somewhat imbalanced. Constitution is both legal as well as political document. It expects contribution from the experts. While dealing with the issues like preface, state of emergency, transitional period and political parties I felt that constitution is only a political document, so, my worry is whether I will be able to

deal the issues or not. It is very essential that the experts have to contribute for maintaining balance. We are in need of such constitution that will be able to solve the possible problems that arise in the future.

Binda Pandey,
Chairperson, CA Fundamental Rights and Directive Principle Committee, Guest

This report is a document of consensus that has been prepared and brought amidst high political

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pressure, contradictions and expectations of the people. It is appropriate to perceive this way. This report is also a document that has come into being from among suspicions and disbeliefs. So, I think that if these fundamental rights are to be given to the people, rights of the courts should also be guaranteed. Rights regarding employment, accommodation and health are essential to the people, however, these have posed question whether or not the state will be able to cope with these rights.

So, within right to constitutional remedy it should be guaranteed that there will be right to test the constitutionality of the laws as well. Earlier constitutions had also guaranteed that people had rights to take the issues of public welfare to the court. This part hasn't been included in the draft so it is necessary to include. Fundamental rights are the rights against state; we can't claim them against any persons. There are contradictions regarding family, children and consumers related rights. These have to be adjusted and corrected.

Dinmani Pokhrel,
Advocate

If we had attempted to prepare this draft referring to the constitutions guided by democratic liberalism, this draft could have been perfect. Now we are trying to write constitution depending on and guided by 'narrow norms and values' not by value and ideal. The constitutions made earlier were perfect having been guided by liberal norms and values. So, we even had claimed the constitution as the best constitution in the world. However, we have already denounced it thinking that the constitution couldn't encompass the ground reality of Nepal. Viewing from the parameter of 'liberal constitution' it seems that contradiction will be seen in the Constituent Assembly on freedom, equality, and security. Although the draft is not revised it has tried to reflect the image of modern state by balancing these values.

Tika Ghimire,
Student

Employment has been provisioned as fundamental right in the draft report. Following the implementation of the constitution if the

Supreme Court directs the government to provide with job and if the government couldn't provide what will be the situation? Similarly, right to information is also there. We have the example that Supreme Court's order regarding right to information to the Tribhuvan University was not implemented. Once the right to employment becomes the claim right and the government fails to fulfill this, agitation will be the alternative.

Jyoti Baniya,
Advocate

Initially there were many differing views in the committee. Despite the presence of such differing views this committee has brought a good report. We had been lobbying for the consumers' rights to be included in the constitution and we had not expected that the committee would prepare such a good draft report. Many countries have provisioned consumers' rights as the fundamental right. We have been suffering from the tendency that fundamental rights are increasing and courts' rights are decreasing. I

feel that there was insufficient process of jurisprudence while preparing this report. The challenge now is how to present the rights regarding employment and consumers as per jurisprudence.

Shiva Rijal,
Advocate

Constitution doesn't contain the terms like "appropriate", 'as mentioned' and 'as required'. CA members have to pay attention in this regard. Please don't provision those rights in the constitution that can be managed by laws. For instant, the rights related with women, children and family can be managed by law so it is not necessary to include in the constitution. It seems that while provisioning the rights regarding labor only the labors' perspective is taken into consideration. Perspective of the employers and industrialists has been ignored. Industrialists will have to enjoy rights to run industry unimpeded and they also will have to have rights to close industry in the cases of disturbance from the labors' side. Or else, even the employers will start strike and agitation.

Shekhar Paudel,
District Judge, Kathmandu

It seems that this report has been prepared being guided by the assumption that large numbers of rights have to be included in the constitution. In fact this is wrong. Fundamental rights are limited. This report has numbers of fundamental rights. However, I feel that right against natural calamities, though it is related with environment, has to be included in the draft.

Shantidevi Khanal,
Advocate

Even the constitutions in the past had right to social justice. Those constitutions stated that elderly persons and disabled persons would get rights as provisioned in the law. However, law couldn't be made even after many years. The forthcoming constitution should guarantee their rights. Elderly persons should be cared by the state, so, a separate article should be provisioned regarding their rights. As many things are being included in the constitution, I think, the forthcoming constitution will be voluminous. There needs



Participants in the program

provision against dowry in the forthcoming constitution.

Vincent Calderhead
International Commission of Jurist, Country Director, Nepal

Article 31 is a matter of discussion because due to ambiguity it might influence the rights related with economic, social and cultural rights at the time of implementation. Rights regarding accommodation, health and food are indispensable for us whereas Article 21 in the report hasn't been able to encompass these rights. Dalit, women and janajati rights activists will feel these rights are more important. These have to be included in the forthcoming constitution.

Meghraj Pokhrel,
Student

Non-Residential Nepalis have to be given opportunity to invest in Nepal. We are in need of resources and seeking them. They shouldn't be unjustly dealt.

Kanakmani Dixit,
Journalist and Rights Activist

We have to write the forthcoming constitution being guided by the good provisions of the constitutions in the past regarding fundamental rights. To have proper sketch about federal and republican structure of the country and to have positive action and discrimination will make the constitution better. We are going to forget the good practices of the past, this shouldn't happen. While writing constitution class should be taken as the prime issue but due to politicization many issues have been allowed entry into this draft. This will make the constitution complex. Constitution should

be precise, liberal, explainable and amendable. My opinion is that new constitution should be made based on the concept of class.

Ushakala Rai,
Member, CA Fundamental Rights and Directive Principles

Whether equality can be a base and principle of constitution writing or not has been a matter of debate. Equality and nationality can't be ignored. Going contrary to its provisions the constitution of Nepal 2007 has also discriminated

While writing constitution class should be taken as the prime issue but due to politicization many issues have been allowed entry into this draft. This will make the constitution complex.

women in the case of citizenship. Citizenship showing descent and gender identity is necessary, it must be retained in the forthcoming constitution. Constitution itself should speak that missing issues will be included later.

Anandamohan Bahattarai,
Justice, Appeal Court, Patan

Primarily, these provisions included in the draft have to be revised. The Interim Constitution made many rights as the claim rights and it was a significant achievement. One the one hand, rights are being

explained and, on the other hand, role of the courts as regards implementation are being shrunk. How can we maintain balance between these two issues? Theoretically, to include the issues that can be addressed through law in the constitution might be reasonable but it will create problem in the future at the time of implementation. Under right to freedom it is stated in the draft that there is freedom to open political parties in Nepal, however, the prohibitory clauses in the draft are dangerous. Such prohibitory clauses are frequently used whereas only limited use of such clauses is entertained in constitutions. Political parties shouldn't be restricted in the future due to explanation of any clause in the draft.

Victims have right not only to be informed, they have right to be involved in legal proceedings also. If we are guaranteeing rights representation judicial process, victims' participatory rights should also be guaranteed. Many cases are being revoked due political pressure and without any particular bases that has nurtured impunity in the country, so, constitution should have provision of retroactive law under right to justice to stop this.

Dr Gopal Krishna Siwakoti,
Human Rights Defender

Those issues that can't be instantly implemented have been made fundamental rights so it is difficult to accept. This has posed questions- Is the state capable to implement these rights within two years? And, what happens if the state laws are not made within two years? Non-residential Nepali shouldn't be given NRN identity card.

Harihar Dahal,
Senior Advocate

The words used in the draft show that political parties are being restricted and political pluralism is being denied. No provision should be there in the constitution that restricts freedom of political parties to express and exercise their opinions. There needs demarcation between the issues to be included in the constitution and to be addressed through laws. This draft has to be revised for this purpose as well. The words and phrases used in the draft like- "people's movement", "people's war", "Madhesh movement", "disappeared family", "injured in the movement" etc are not appropriate to use in constitution. Constitution should be practical; many issues encompassed by the draft can be addressed through formulation of laws.

Mohan Prasad Situala,
Justice, Supreme Court

I agree with the issues raised by Ananda Mohan Bhattarai, Harihar Dahal, Bhimarjun Acharya and Chandra Kanta Gyawali. Comments on the draft are insufficient. It seems that constitution has attempted at including interests and demands of all. This can't be done. Constitution should be written being guided by features of UDHR and its articles 30 and 31 are more important to take into account while drafting constitution. Intellectuality of the citizen of a country is measured through the type of constitution they have in their country. Constitution making is not a matter of moving in emotion.

Badri Bahadur Karki,
Senior Advocate

In term of materials, many issues have been included in the

draft. The drafters have to see the things through the minimum legal parameters. Half of the issues in the draft can be minimized. Things can be revised but it matters whether or not CA members accept it. We are commenting and helping for the revision, this is our perspective, but we should be able to convince the CA members that their issues and concerns are guaranteed in the constitution. This draft reflects that debate is between the experts and politicians. CA has many differing views as regards enshrining the fundamental rights in the constitution. 44 members in the committee have shown their so many differences, what will be the differences while discussing the draft in the full house of 601? What will be the values and weight of these fundamental rights at that time? This draft has to be revised. This draft is likely to create problem in the future. Some words used in the draft are too controversial. Linguistic euphemism is required. The term 'Disabled' has to be replaced with 'differently able'. Under social justice it is not clear whether farmers' rights or duties are being dealt. It lacks clarity regarding right to property. It is necessary to adopt article 12 of the Constitution of India. Fundamental right is a basic guarantee. Central bank has to be one of the parts of central power. This draft hasn't maintained balance between right of individuals and groups.

Sherbahadur KC,
Advocate

Following the guarantee of fundamental rights it should also be guaranteed that there will be independent judicial system. Constitution drafters will have to pay attention in this regards. If Supreme Court is not valued, inde-

pendent judiciary can't exist. Particular party's philosophy shouldn't be imposed in the constitution. Perceive that Nepali people are the representative of all; this will safeguard the fundamental rights. Many words in the draft have tried to curb political parties, omit these words and adjectives. Omit 'basic' and only keep there that there will be the guarantee of education, health, employment and accommodation. Also mention that these rights will be guaranteed phase-wise. Such things can't be accomplished at once. First be determined which system of citizenship to adopt-whether in term of place of birth, in terms of parents or naturalization. We can't have double system. Nowhere in the world is such practice in use. Nowhere in the world double nationality is allowed. It has been heard here. Non-residential Nepalis' issues shouldn't be dealt in the constitution; rather, those have to be solved through laws. Laws should provide them privileges. If they want to come to Nepal they will get their citizenship after 12-15 years.

Baburam Dahal,
Advocate

Prohibitory clauses can be there but such clauses should not be used to obstruct the things. It should be clearly written in the constitution when the prohibitions apply. 'Will be as per the law' can't be written. We are trying to write constitution based on past incidents. Indian constitution has given power to the President still power is not misused there. We have been cynical as to abuse of power.

Dr. Ramdayal Rakesh,
Rights Activists

The draft report talks about

the rights of Dalits. However, there is a community in Tarai which is known as 'backward class'. It is known as 'backward', 'Other Backward class' in short - OBC. They live from East to West in Nepal. They cover 22% of total population. It has its own identity. This word is there in the draft but it has to be written at the forefront of the list. I have a suggestion regarding citizenship. It is not good that we have to wait for 15 years. Indian constitution has written how one becomes a citizen. You probably know this. We talk about America and Switzerland and are committing mistakes by not keeping our ground reality in mind. Rest of the things has to be given to the law and parliament to categorize what type of citizen one is.

**Rakhsya Basyal,
Advocate**

Citizenship is a sensitive matter. We should write 'denounced' rather than 'in the process of denouncing' in the case of foreigners trying to be Nepali citizen. So, I am against the idea of Chandrakant Gyawali.

**Haribansa Tripathi,
Law Expert**

Regarding the right to property the draft report has stated that compensation will be given as per the law. Chandrakant Gyawali's paper on page no 3 talks about appropriate compensation in the case of illegal detention. Similarly, under rights of the consumers it has also been stated that persons affected by substandard goods and services will be given compensation. Of the three rights regarding compensation, in two instances the word 'appropriate' is used. Not only the matter of compensation, it should also be made clear in the constitution for

what purpose the state will take the properties of people. The fifth point in right to equality states that without gender discrimination there will be equal right on the ancestral property. It is not clear whether it applies in the case of the daughters married away as well or not. If it applies in the case of married away daughters as well, we are creating another contradiction.

Conclusion

Most of the speakers in the program viewed that the rights that are beyond the capacity of means and resources of the country shouldn't be provisioned as the fundamental rights in constitution. Most of the speakers' view was that together with the increased number of fundamental rights state should also enhance its capacity. It was also viewed in the program that, citizenship being one of the sensitive issues of a state, citizen of the country shouldn't be deprived of citizenship and non-citizen shouldn't enjoy Nepali citizenship. The participants showed their solidarity on the matter that state should write constitution being guided by UDHR, ICCPR, ICESCR and other international human rights instruments taking the capacity of the state into account.

Referring to the failure of the state to implement the rights regarding employment, food sovereignty and social justice provisioned in the Interim Constitution 2007 in the absence of laws, the law professionals in the program underscored the need of formation of law for the guaranteed implementation of the rights included in the draft. It was opined that constitution should be written based on geographical location, social situation, neighboring countries' situation and practicality. Similarly, constitution being a polit-

ical and legal document, it was agreed that experts do have crucial role in writing constitution. Participants focused that constitutionalism and the mechanism to curb the power of the government were needed for a constitution to be a good constitution.

The participants commented that fundamental rights are increased and power of the courts is curtailed. The participants disapproved the provision of banning political parties. They focused on the need that constitution writing should be based on international human rights instruments like UDHR, ICCPR and ICESCR.

Suggestions

- ▶ Hold further discussions on all the fundamental rights provisioned in the draft report.
- ▶ Those rights that can be addressed through the formulation of laws shouldn't be provisioned in constitution.
- ▶ Universal Declaration of Human Rights should be the base of writing constitution.
- ▶ Interrelated issues that create confusion shouldn't be repeatedly written in constitution.
- ▶ Together with the increment in the number of fundamental rights state should also increase its capacity.
- ▶ Pay attention in choosing diction; avoid ambiguities and maintain political correctness.
- ▶ Constitution shouldn't be written being affected only by the pressure of the people and political interests.
- ▶ Include the rights of the victims of crime.
- ▶ Prohibitory clause regarding political parties should be omitted

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