



**REPORT ON
INTERACTION PROGRAMME
On**

**ROLE OF PROVINCES IN THE FUNCTIONING OF FEDERAL
STRUCTURE OF NEPAL WITH REFERENCE TO AMERICAN
FEDERAL SYSTEM**

18 DECEMBER 2018



**ORGANIZER
OFFICE OF THE CHIEF ATTORNEY
GANDAKI PROVINCE
POKHARA, NEPAL**

INTRODUCTION

This programme is organized by Office of the Chief Attorney, Gandaki Province, Pokhara Nepal to address and discuss the issues related to functioning of Federal Structure in Nepal. Under the newly introduced Constitution power is divided between Central, Provinces and local authorities. Sometimes there may be challenges and problems with regard to the formulation of laws and functioning of authorities. So what should be the role of province in the functioning of federal structure in Nepal is the key point of discussion of this interaction programme.

AN OVERVIEW OF INTERACTION PROGRAMME

- Programme was organized by office of the Chief Attorney, Gandaki Province.
- Prof. Dr. Upendra Dev Acharya and Dr. Ram Krishna Timalsena were invited as distinguished guests who presented papers on the above mentioned topic.
- Other guests were Mr. Sushil Pyakural, Human right adviser to the President of Nepal, Hon'ble Hari Bahadur Chunam, Law and Internal affairs Minister, Hon'ble Kumar Chudal, Chief Justice of High Court of Pokhara, Hon'ble Babu Ram Kunwar, Governor of the Gandaki province were expressed their opinions and gave valuable suggestions on the topic. Total participants were 70 including legal practitioners, law professors, secretaries and staffs of province government, law students and people having good knowledge in the field of law.
- The programme was started at 3.15 pm and concluded at 6 pm.

WELCOME SPEECH

The Chief Attorney of Gandaki Province Dr. Rajendra Ghimire addressed the programme and felicitated respectable guests present in the meeting. The Chief Attorney explained the topic and the purpose of interaction programme and introduced distinguished guest speakers and guests in the programme.



speech by Dr. Rajendra Ghimire, Chief Attorney of Gandaki Province

PRESENTATION OF GUEST SPEAKERS

Dr. Ram Krishna Timalsena

Dr. Timalsena said that Nepal Constitution is a newly introduced federalism and 28th Constitution in Asia.

He focused on the point that Constitution should be interpreted and understood in its true spirit. If it is not implemented in its real sense than the act which is not in corroboration of its true spirit would be termed as unconstitutional. He mentioned the federal character of Indian Constitution and said Indian Constitution is also not pure federal in its nature. Indian Constitution is quasi-federal in nature. He made a comparison and said Nepal Constitution is not quasi-federal in nature rather in his opinion he termed it as quarter-federal. He mentioned the lists incorporated within the Constitution and said that those subjects which do not fall under the provinces or states to make laws the central government can take initiative to formulate laws on those subjects.



speech by Dr. Ram Krishna Timalaena

According to him balancing of interest between Central and provinces is no doubt a challenging task. He emphasized on these three main principles for the smooth functioning of Nepal Government i.e., Co-existence, Co-ordination and Co-operation.

He explained principle of separation of power and said there are two kinds of separation of power vertical and horizontal. Explaining the situation of Nepal he said no doubt the federal structure of Nepal will play an important role in the smooth functioning of government. He said that under the Art. 235 (1) law is not made by the legislature. Unless and until the law is passed under Art.235(1) the federal structure cannot work and it will lose its existence and he expressed his disappointment saying till date no initiatives have been taken by Nepal government in this direction.

He mentioned the important role of judiciary in federal form of government and said judiciary plays a very important role. He mentioned Art. 133 &144 in this context he talked about the principle of judicial review. He also stated that no doubt we are under the Constitution but the Constitution is what the Judges say. Dr. Timalsena expressed his opinion on the subjects which are included under the concurrent lists for which sometimes conflict may arise between federal government and state governments.

He explained the theory of pith and substance and stated Indian judiciary apply this theory while interpreting the Constitutional provisions on federal issues. He emphasized that our Constitution should be interpreted by applying the same principles. This theory will help to determine the area of functioning of both central and state government. Otherwise it would be difficult for Nepal federalism to work out. He focused on the role of judiciary and said judiciary should be conscious enough to incorporate and apply this principle.

He expressed his opinion on Art.60 (6) and said it is not yet fixed. He threw light on other issues like police, education and voting etc. He said it is mandatory to maintain the security, financial and political balance for the better result.

In his concluding remarks he said that provinces should be given its right so that it can work efficiently within its sphere, along with that the local government should also be made strong.

Prof. Dr. Upendra Dev Acharya

Prof. Dr. Acharya said the Constitution of Nepal came into force in the year 2015. He said Nepal's Constitution is progressive in the South East Asia. He said it is still in paper and only in written form. It has not been implemented in real sense. He said the federal structure in Nepal has its three layers Central, Province and Local government.



speech by Prof. Dr. Upendra Dev Acharya

The main question is what should be the criteria of each body to make laws in this federal structure. He explained how the federal systems of America work out. He states that Federal Congress is vested with enumerated powers under the American Constitution. Federal Congress can make laws in 17 areas where as the item 18 conferred it with vast power. It can make any law to perform its enumerated functions.

He explained that commerce clause plays a very important role in functioning of American federal structure. Congress has often used the commerce clause to justify in exercising legislative powers over the activities of states and their citizens thus it helps to maintain a balance between federal government and the states. He said that the conflict with regard to the exercise of power is always there in federal and states governments. He explained a case law in which federal government issued directions with regard to the growing of wheat and it's selling in the market. Federal government fixed the quantity and said neither a farmer can grow more than the prescribed limit nor he can sell it in the market. A farmer grew more than the prescribed limit and sold it in the market in this case he violated the directions issued by federal government. Farmer was penalized by federal government. Later on the state government took initiative to fight for farmer and proceed accordingly against the order of federal government. The Court emphasized on the aggregate effect theory and said farmer's act against the directions issued by the federal government would impact the economy of the country and upheld the decision taken by the federal government.

He talked on principle of separation of power and agreed with the views expressed by Dr. Ram Krishna Timalsona.

In the context of Nepal he said that the people with honesty and integrity should come forward and should be chosen for accountable and responsible posts. Our

newly introduced Constitution should be implemented in a fair manner. He condemned the practice of corruption among the people who are in highly responsible posts. He said people having leadership quality should come forward as political leader. So that with their leadership system will grow and lead into right direction.

He again mentioned the role of judiciary and said it is an inevitable part of federal structure. He said judges should act fairly to interpret the Constitution in its true spirit. Our Constitution is only in paper we must act in honest way to make it a successful and mature Constitution. Apart from it he also emphasized that yes it is the duty of the government to look after the remunerations and facilities of the judges so that judges can perform their duties fairly and honestly.

He explained one case law of America Madison vs. Marbury in which justice Marshall established the principle of Judicial Review quoted that "it is emphatically judiciary who will decide what the law is". He again reiterated that role of judges is very important to maintain the balance in federal structure. It is the duty of judges to understand society and law should be applied to the facts. Judges must be aware of social political and economic situations of society to make their decisions more rational.

He said that he is agreed with the views expressed by Dr. Ram Krishna Timalena and incorporation of these principles help to smooth functioning in federal structure i.e., co-operation, coordination and co-existence.

In question and answer session participants raised questions and expressed their suggestions on following topics.

1. On principle of Separation of Power by Dr. Baral (Ph.D. on Political Science)

2. Supremacy of Judiciary by Mr. Bhoj Raj Sharma (Associate Professor P.N. Campus).
3. On Constitution implementation by Mr. Rohit Raj Bastola
4. Brain drain from Nepal by one lady participant.



Interactions by participants

Some other questions on same aspects were raised by some other participants as well.

In response to the questions Prof. Dr. Upendra Dev Acharya reiterated the points he already mentioned in his speech. He said Constitutional supremacy is there in our system and it is in a growing stage. He compared our Constitution with a small kid who needs better care and protection along with good quality food. It is the duty of all of us to take proper care to bring

it into maturity. He said there is much more to explore and know about it and added that law is a tip of ice-berg.

Dr. Ram Krishna Timalsena added a few points in this session.

For working of healthy federal structure constructive opposition should be there, protection of political social and economic right of people and accountability of judicial, legislature and executive organs of government. He again emphasised that role of judiciary is inevitable to protect both the rights of people as well as the structure of the Constitution. He mentioned about a book Democracy is Dying in this context.

Mr. Sushil Pyakurel

Mr. Sushil Pyakurel said that in Nepal politics there is no dearth of intellectuals. Constitution of Nepal is a document of aspirations. And after a deep thought and discussions we have written our Constitution. He said our Constitution is a unique piece. He referred the statement made by Chief Justice P.N. Bhagwati and Justice Krishna Iyer "Constitution of Nepal is a unique model Constitution". He disagreed with Dr. Upendra Dev Acharya in some points. He emphasised that we have everything within our Constitution this government is working very hard to implement it in right direction. The only thing we require is proper implementation of it in right direction.

Hon'ble Hari Bahadur Chunam

Hon'ble Hari Bahadur Chunam, minister for the internal affairs and law of Gandaki Province, said that experiences from other countries as well as the knowledge gathered from different places always help us to know and compare the system. It will always help us to find out our own lacunas with the help of such discussion we can eradicate our own defects. He said we are

committed towards our Constitution. The words "we the people in the Constitution" itself shows that people of this country are committed towards the federalism or federal structure.

Hon'ble Kumar Chudal

Hon'ble Kumar Chudal, Chief Judge, High Court Pokhara said that our Constitution is a unique. Any problem arise in the working of the Constitution that can be addressed by two ways 1) bird eyes view and 2) worm eyes view.

He said that judiciary played a very important role and it has developed a jurisprudence and in case of Constitutional interpretation also judiciary always showed its good faith, process and interest. He talked on three principles in his speech;

Reet: Laws and policy should be formulated in a proper way.

Heet: Laws and policy should be for the benefit of all.

Meet: Laws and policy should be implemented in such a manner so that it can develop friendliness and brotherhood among the people.

Hon'ble Babu Ram Kunwar

Hon'ble Babu Ram Kunwar Governor of Gandaki province said that our Constitution is of federal nature. He explained why the people of Nepal adopted this form of Constitution and said that for the establishment of a progressive and egalitarian society federal structure was required. He said this system can establish a society free from exploitation and can establish principle of rule of law among the masses where people have full faith on their justice system. He also focused on Art. 48 of Constitution. He said that citizen must know about their duties and abide by it. He expressed that

honesty and ability both are required for a successful political system. If honesty is there without ability that cannot work. So ability is equally important for a successful functioning. According to him federalism has no certain definition. He said federalism can be of two types Co-operative Federalism and Competitive Federalism. He said ours is the Co-operative federalism where co-existence, co-operation and co-ordination all are fused. He also talked about Inter State Assembly. He said that I agree with view expressed by Dr. Upendra Dev Acharya and stated that our Nepali people who are outside Nepal are our representative.



speech by Hon'ble Babu Ram Kunwar

He talked about law and politics and law and culture. He said law in a generic society and society in a changed law. He also focused on the point

that we should develop our own Constitution in which patriotic feelings, feeling of nationalism would be imbibed. He said we should act in such a way which will bring rule of law i.e., good governance. He talked about Art. 161 and recalled his own experiences how he acted to incorporate this provision.

At last he thanked distinguished guest, all the honorable people and participant present in the interaction Programme with his concluding speech the programme came to an end.

CONCLUSION

Role of Provinces is inevitable in the smooth functioning of the federal system as well as to give effect the principles under the Constitution of Nepal. To establish an egalitarian society it is necessary to look after the problems in the grass root level. So the provinces and local bodies should be made strong to give them enough power as well as the monetary and financial supports. Legislature should give effect to Art. 235(1) as soon as possible apart from that Art. 60 should be considered keeping in view the present needs of the locality. Judiciary is considered as third pillar of democracy. Judiciary is considered as watch dog for the protection of fundamental rights as well as to preserve the sanctity of Constitution of Nepal. So this programme was really a need of hour to understand the role of provinces in the smooth functioning of federal government.