



CONSTITUTION MAKING IN NEPAL

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ABSTRACT:

In the recent periods, most of the developing countries have adopted democratic political system by rejecting autocracy, dictatorships and authoritarian system of governance. The spread of democratic values and principles in the contemporary world is a clear indicator that it is a popular form of governance. But, the transition to democratic system with constitutional order is not an easy process. Almost all states follow democratic principles with a constitution to legitimize their rule in one way or the other. However, the real challenge has been the sustenance of democracy and the spirit of constitutionalism. Constitutionalism means rules for fair governance that is an important element of democratic system. Constitutionalism prohibits the tyranny of majority by keeping a check on power by providing legal safeguards to protect minority. Nepal is one country of South Asia where power politics has always got primacy over the reason of constitutionalism that ultimately created a fertile ground for political instability and eased the collapse of constitutions one after the another. In a way, the Constitution has always been used by political elites as a tool to justify their governance system, that created a trend of establishing a new constitution with every regime change.

KEYWORDS: Constitution, Democracy, Governance, Transition, Promulgation.

INTRODUCTION:

Nepal is one country which started its political struggle for a democratic political system with a democratic constitution in early 1950s. In a period of more than sixty years, Nepal experienced seven constitutions with the latest one promulgated in September 2015, but this long struggle of constitution making in Nepal was not an easy experience as constitutions were there but the spirit of constitutionalism was missing. During these sixty years and with all these constitutions, the Nepalese people struggled hard for institutionalizing a political system that would ensure good governance, development and secure peace and prosperity. Past constitutions in Nepal were successfully proclaimed but had a major flaw of democratic legitimacy. As a result, the democratic process of constitution making failed in Nepal until a formal democratic constitution was proclaimed in 2015 after a long political deadlock over certain issues. The roots of autocracy and feudal system were so strong and powerful in Nepal that in 1990, with the establishment of parliamentary democracy, sustenance of democracy with a democratic constitutional order remained a big challenge. Ultimately, the decade of 1990s proved to be much more exclusive in nature and as a consequence of non-performing democratic system, an era of extreme forces and violence started in the country with the establishment of Maoist Insurgency in 1996. This period of violence continued for ten years and it was only in 2006 that democratic order could be restored and the demand for a democratic constitution gained momentum. The scrapping of the institution of monarchy on May 28, 2008 marked a turning

point in the political and constitutional history of Nepal. This constitutional development recognized the people's aspirations and hopes for democracy. With the abolition of the monarchy, the process of making a new constitution for the Republic of Nepal started under the auspices and patronage of the Constituent Assembly of Nepal. Elections were held for the Constituent Assembly in 2008 where Maoists emerged as the largest political force in the country to deliver on the promises made to the people of the country. The Assembly was given the mandate to draft a new constitution for Nepal within two years of stipulated timeframe. However, the two year deadline failed in its task of drafting the constitution and ultimately assembly was dissolved in 2012. One of the most important issues that interrupted the smooth functioning of the Constituent Assembly was the political instability with the repeated change of Prime Ministers and the prolonged battles for the same. Between April 2008 and May 2012, Nepal had five Prime Ministers. Repeated elections for the formation of governments consumed the precious time that the constituent assembly could have otherwise devoted for the drafting of the constitution. Everytime there was a change in the leadership, the Constituent Assembly was interrupted to a great extent. The UCPN-Maoist, as a major political force in Nepal was responsible to a large extent for the failure of the Constituent Assembly. The intra-party fighting among the top leaders of the party kept them constantly focused upon setting their house in order. Secondly, when the Constituent Assembly was in the process of drafting the Constitution, UCPN-Maoist declared its so-called People's Constitution on 28 May, 2010. Instead of playing a constructive role in writing a democratic constitution by winning the confidence of other political parties, it proved detrimental and obstructive for the process of constitution making. Despite the obstacles and challenges, the Constituent Assembly was successful in forging consensus on an important issue, that was the integration of People's Liberation Army in Nepal Army. Finally, Constituent Assembly got dissolved without writing a constitution for the country and again the country was put into a political vacuum. The process of completion of the peace process with the drafting of constitution again gained momentum with the 2013 Constituent Assembly elections that was a show of vibrant participation, inclusiveness and enthusiasm. Despite having different priorities and political ideologies, the different political stakeholders agreed on key issues of federal state structure, type of government, judiciary, citizenship and ultimately got succeeded in promulgating a new constitution for the country in September 20, 2015. With the drafting of this new constitution, the peace process of Nepal, that started in 2006 came to a formal end. It was a huge achievement for the whole country, as it was the first constitution to be drafted by a popularly elected constituent assembly. With this constitution, ideals of procedural democracy have got a strong footing and the phase of establishing a substantive democracy is put into place with future substantive challenges.

Chronological order of Constitutions:

Nepal has a history of six constitutions: The Constitutions of 1948, 1951, 1962, 1990, the Interim Constitution of 2007 and the constitution of 2015.

Government of Nepal Act 1948

The Act of 1948 was promulgated by Padma Shamsheer to assimilate the Democratic principles. The Act was a step towards introducing the Parliamentary system with a bicameral legislature like structure but could not succeed due to the autocratic rule of Ranas.

Government of Nepal Act 1951

The Act came into existence after the fall of Rana rule to establish the democratic ideals multiparty system. This document had narrow role of electing the members of constituent assembly to write the new democratic constitution and hold elections for new legislature as per the new constitution. Instead of electing the constituent assembly, elections were held to elect a new parliament which changed the purpose of the constitution. Despite being a temporary arrangement without detailed analysis, it survived for eight years, until it got replaced by 1959 constitution.

Constitution of Nepal, 1959

The Constitution, 1959 was proclaimed by the King Mahendra. The scope for elected representatives to take part in constitution drafting process was again missing. This constitution was an attempt to introduce multi-party system and a parliamentary system of governance in the country but the enshrined constitutional principles were not in concurrence with the basic ideals of parliamentary democracy. The king kept the power of appointing half of the members of parliament and even the suspension of parliament with him under particular situations.

Constitution of Nepal, 1962

The democratic arrangement of 1959 had a short life as it got replaced by another constitution of 1962 in which the political parties were banned and a new party less panchayat came into existence for the next thirty years. In the new established system the panchayats played the role councils at grass root level to ensure participation of locals. Instead of decentralizing powers, the monarch established a much stronger centralized regime where he could change the constitution or adjourn it in emergency situations.

Constitution of 1990

King Birendra in 1990 proclaimed the constitution to reinstate democracy fulfilling the aspirations of the people. It established a constitutional monarchy and multi-party parliamentary system of governance. This constitution lifted the ban on the political parties and established a democratic representative system where the powers of the king were curtailed, and incorporated fundamental rights. But the overstepping of the constitution by the king, some critical defects in the constitution, and the incompetence of the elected governments, along with the Maoist insurgency, which began in 1996, and the royal coup led to the failure of the constitution and the 1990 Constitution got replaced by the Interim Constitution of 2007.

Interim Constitution, 2007

The constitution of 2007 had the provision for an elected Constituent Assembly to write a new constitution for the country. With this constitution, the demand for elections for constituent assembly was fulfilled in 2008. This constitution survived for eight years. Unfortunately, the assembly could not succeed in its objective to write a constitution within stipulated timeframe and got dissolved in 2012 after two extensions. Again elections were held for second Constituent Assembly with a mandate to write a constitution for Nepal in November 2013. After daunting political exercises and reconciling differences on certain critical issues, Nepal got a formal constitution on 20 September, 2015 that gave a logical end to the peace process started in 2006 in Nepal.

Nepal's New Constitution, 2015

Nepal adopted a Constitution on September 20, 2015 after almost ten years of political dialogues between different stakeholders. The Constitution provides for a federal system of governance as opposed to the previous centralized and unitary state system. Nepal is now a federation that is comprised of 7 states, each with a legislature and Chief Minister, to decentralize power at the local level. It is the first Constitution prepared by the representatives of the people. In the past, constitutions were either written by the monarch or by a committee selected by the king. With the drafting of the new constitution, Nepal's prolonged political transition has come to a formal end, logically ending the peace process started after a decade of vicious Maoist insurgency. This is Nepal's first complete political arrangement since the monarchy was scrapped in 2008. After five years of political deadlock over certain issues, fresh elections were held on November 19, 2013 for the Second Constituent Assembly to draft a new constitution within a year, that is by January 22, 2015. However, due to prolonged differences on vital issues including system of governance, judicial system and federation issues like number, name and areas of the states to be formed, constitution could not be prepared on time.

The Constitution of 2015, drafted after a long struggle between different political forces is the latest in the constitutional history of the world. The Second Constituent Assembly had a daunting task of preparing an inclusive legal constitutional document for a highly diverse society of Nepal and for such important task, the major political stakeholders tried to learn from the experienced and seasoned democracies like India. Nepal's new constitution has been based on the entitlement approach to rights. It guarantees fundamental rights as well as right to food, right to education and right to protection from environmental degradation. The constitution also gives right of protection from human trafficking. This constitution is progressive, and institutes several positive elements for the upliftment of women in the country. The foundations are set by two arrangements in particular. First, ensuring rights of women as a fundamental right through legislation from the very initial stage under Article 38 is far better than several other constitutions, including India. Second, the constitutional provision providing 33% representation to women in Nepal's all state machinery is a major breakthrough. Another progressive feature of the constitution is that Article 18 guarantees fundamental equality and non-discrimination irrespective of caste. Moreover, there has been a significant progress towards establishing a national legal framework dealing with caste based discrimination and practice of untouchability. However, it lacks provisions on indirect forms of discrimination and provisions regarding compensation for historical marginalization of Dalit Communities. National Dalit Commission has been elevated as a Constitutional body with detailed powers. Although autonomy and resources are still lacking. There is still much work that needs to be done. For one, while the new constitution marks the end of the peace process, some of the process's important issues have not been resolved. The Madhesi and indigenous people consider this constitution as discriminatory as they view that this constitution fails to address demands of marginalized communities and it supports status-quo of the ruling elites. The issue of demarcation of provinces as raised by the Tharus and Madhesh needs to be taken into consideration as the federal delineation of new states as proposed in the constitution could affect their political representation. The Truth and Reconciliation Commission has just begun its role to ensure justice to Nepal's war time victims, although only written complaints have been filed so far in the last four years and no trials have been done to complete the process.

CONCLUSION

Constitutionalism and democracy together are important factors for the political, economic and social success of a country. Such strong foundations of democratic order with constitutionalism can be achieved through popular sovereignty. Although democracy as a system of governance has been into practice in Nepal for a long time, but popular sovereignty remained conditioned either by autocratic or dictatorial powers that established undemocratic constitutions and defective democracy. Constitutions are not only juridical and lawful documents. They have tangible social and cultural manifestations. In that sense, the constitution drafted after such long political discussions for a highly diverse and conservative society deserves to be considered as a progressive document. In the past, all six constitutional agreements followed a top-down approach and were all exclusive in nature. None of these constitutions protected the participation of the diverse sections of people in Nepal. Moreover, they lacked popular legitimacy as they were either written by the king or the ruling elite. In a way, these constitutional documents were an attempt to ensure the centralisation of power in the hands of the ruling elites. The new constitution of the country has been drafted to address such issues to ensure a progressive, inclusive and egalitarian society. Revolutionary transformation, therefore will be difficult, given Nepal's history of 240 year long struggle with monarchy and Hindu Brahminical control over state power. Objections have been raised about the majoritarian tendency in the constitution. Secondly, serious objections have been raised over the constitution's lack of seriousness over the issue of reservation for the marginalized and alienated sections mostly found in the Terai region. Thirdly, Nepal's territorial rearrangements such as its delimitation of constituencies and its federal structure are not free of bias. For an egalitarian society, Nepal has to be socially inclusive, comprehensive and representative and such majoritarian bias can hurt the prospects of an inclusive society. The spirit of procedural democracy has been established in Nepal. But this has to be ensured with substantive

democratic principles. It may take generations to achieve the goal of constitutionalism with so many challenges as it is a never-ending and dynamic process for each country. Nepal is at a crucial juncture where there has been made huge promises in the constitution. It is now the responsibility of political elites to deliver on such promises to create an egalitarian and inclusive society where every marginalized section of society is taken into consideration to establish a true democratic system with constitutional order.

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