

Challenges of Constitution Making: a case study of Nepal

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Abstract

The process of constitution making and its smooth functioning is very crucial in providing peaceful political transitions and future harmony, and development of a state. Making their own constitution is a big challenge for newly created democratic states with plural and multi ethnic civil societies. Beginning with a short discussion of the importance and role of the constitution, this paper tries to examine the constitution making process in Nepal as a measure of pacifying conflicts and divisions. It also analyses the recent practices of constitution making in the country and the challenges in its way ahead. It concludes with a consideration on lessons learned from the past and stresses on the future supportive steps to be taken for a successful attainment of the goal of constitution making.

KEYWORDS; Constitution, democracy, development, peace, ethnicity.

Introduction

Constitution is the basic foundation for a civil society based on freedom and equality. It's not only the greatest law of the land but provides necessary surroundings for the rule of law and a system of check and balance on the absolute powers of state¹. The process of constitution making and its development is very crucial in providing peaceful political transitions and future harmony, constancy and development of a state. Modern era is an era of democracy and constitutionalism. Making their own constitution is a big challenge for newly created democratic states with plural and multi ethnic civil societies. Here not only the process but the substance of the constitution matters, which is a prerequisite for validity of a new constitution. It also requires transparency, accountability, people's participation, a strong civil society and communication channels.

An understanding of the constitution making process is important to realize the critical role of a constitution which aims not only to design the supreme law of the land but to produce the atmosphere where the civic involvement and awareness could be indorsed. A good constitution and the prospects of successful implementation of it requires social inclusion², personal security and freedom of speech, a strong civil society and civic education.

Beginning with a short discussion of the importance and role of the constitution, this paper tries to examine the constitution making process in Nepal as a measure of pacifying conflicts and divisions. It also analyses the recent practices of constitution making in the country and the challenges in its way ahead. It concludes with a consideration on lessons learned from the past and stresses on the future supportive steps to be taken for a successful attainment of the goal of constitution making.

Experience with constitution

Nepal had been a country, with monarchy from the very beginning; it was dominated by Rana rulers for more than 104 years, wherein Kings were just a nominal head. This

situation changed a bit in 1948, with the enactment of the Government of Nepal Act, which introduced partial democracy to the system, but it could not flourish, due to misgiving of Rana rulers, who were not ready to give away their powers. The people of Nepal struggled against Rana dynasty and it ended in 1951, and a new interim constitution was promulgated which introduced multiparty system³ with more significant role of Monarchy in the political system of Nepal. After a decade of enactment of multiparty system, it was replaced with party-less Panchayat System by the then King Mahendra in 1960 and political parties were prohibited. In a major development, in 1980, to silent the growing opposition of Party-less Panchayat system, the King held a referendum between improved Panchayat system and Multi-Party System. Unfortunately, the result was declared in favor of Panchayat System and the political parties were again seized to exist. The decade of 90's brought a new era to political scenario in Nepal, when the people of Nepal started a "Jan-Aandolan" to restore the multiparty democracy in the country. The changing political environment and global pressure forced the Monarchy to accept the demands of the people and establishment of a new constitution of 1990 and in a historic move the multiparty system was again back for the second time in political system of Nepal⁴. Although this development was seen as a victory of democratic forces and as a great opportunity for recreation of the country yet it was realized that the constitution did not properly stand for all sections of multi-cultural society of Nepal.

The era of political instability and emergence of People's War

The victory of "Janaandolan" (1990) throw new challenges to the political system of Nepal, it aroused very high expectations of common Nepali people from the newly created democracy. Unfortunately, the political leadership of the country could not realize the need and demand of social and economic reconstruction of the country to pacify the growing expectations of poor people in the remote and rural areas. On the other hand, they were busy in power and party politics, which not only disappointed the people but created an environment of dismay. The instable political environment also worsened the situation. In the year of 1994, after defeat of Girija Prasad Koirala government in no-confidence motion, new elections were held and communist party of Nepal formed a new government but it could not survive for long and communist government was dissolved in 1995.

Very soon, this situation was utilised by CPN-M by forwarding their ideology of "Socialism" in terms of social and economic equality. In 1996, a 40 point agenda was presented by CPN-M to Prime Minister Sher Bahadur Deuba of Nepali Congress⁵. This multifaceted agenda basically demanded redistribution of Basic resources to reconstruct unfair, semi-feudal Nepali society, but it could not seek much attention of ruling party. As a result of refusal to their proposal, now, they decided to launch the direct People's War against the feudal and bourgeoisie political, social and economic system. It started an era of bloodshed in the history of Nepal which continued for a decade (from 1996-2006) and more than 12,000 Nepalese have lost their lives and many people are reported still missing. During the period of civil war, CPN-M openly demanded the end of Monarchy and establishment of republic, while the other major political parties had supported monarchism and multiparty parliamentary democracy⁶. On the other hand the unsteadiness continued to increase in the politics of Nepal, in the year 2000, when G.P. Koirala returned as prime minister, he was heading the ninth government in the past 10 years.

The politics of Nepal saw another unfortunate event on the night of 1st June 2001, when king Birendra was massacred with his family members and king Gyanendra became the new king. His reluctance towards democratic process became obvious very soon, when king Gyanendra imposed emergency and dissolved the elected government of Sher Bahadur Deuba on 4th Oct 2002 on the grounds of incompetency to prevent the Maoist civil war and established a puppet government of his own choice⁷. This move of king was not liked by the people and due to heavy opposition and pressure king Gyanendra reappointed Sher Bahadur deuba as prime minister in June 2004. Reestablishment of democracy was welcomed by the people but it could not continue for long period, as the king again tried to capture power by arresting Prime Minister with his ministry in the midnight of 1st Feb 2005, and established his own government in the name of democracy and welfare of the country. In April 2005, amid international pressure the king lift the state of emergency and agreed for negotiation with Maoists and main opposition parties for reestablishment of democracy. In April 2006, Maoist declared a three- month long ceasefire and the King Gyanendra agreed to reinstate parliament.

End of Monarchy

In May 2006, in a historic move, all the political parties voted in favour of curtailment of political power of King in the parliament while in November 2006, as a very successful result of peace talks between government and Maoists, the “Comprehensive Peace Accord” was signed and both of them formally declared the end of 10 year-long insurgency. To facilitate the growing demand of constitutionalism and replacement of the Constitution of the Kingdom of Nepal (1990), the Interim Constitution was drafted and adopted on the date of 15th January 2007. It was a major step towards managing the transformation phase of Nepali politics. The Interim Constitution provided for a Constituent Assembly, which was given the responsibility, to create a constitution within the timeframe of May 28, 2010. In January 2007, Maoist leaders joined parliamentary politics under the terms of a temporary constitution. Leaving their political exile’, Maoist entered in mainstream politics by joining the interim government in April 2007, but very soon they quit the interim government to make pressure on government for their demand of abolishment of Monarchy, which was a main part of the Peace Deal. This step of Maoist put in danger the proposed November elections of Constituent Assembly and the entire peace process. Amid great internal and external pressure, in a historic move, in December 2007, the Parliament of Nepal declared the end of Monarchy and establishment of Democratic Republic of Nepal⁸.

Formation of the Constituent Assembly

A new phase of Nepali politics started in April 2008, when elections held for the new Constitutional Assembly. No single political party could win the majority, although the former Maoist rebels emerged as the single largest party in the new Constituent Assembly. In August 2008, Maoist leader Prachand formed a coalition government. A row erupted in May 2009, when Maoist party tried to combine former rebel fighters in to national Army, President Ram Baran Yadav including other political parties strongly opposed this proposal. Prime Minister Prachand resigned on the issue and veteran communist leader Madhav Kumar Nepal named as new Prime Minister.

Unfortunately, the Constituent Assembly could not complete its task under the deadline as it has to face many points of disagreement among the different political sects. As it has

no option, it extended the deadline of 28th May, 2010 by a year. This process was again repeated after 29th May 2011, as it could not be succeeded to agree on a new blueprint for the nation by their deadline and kept on extending the deadline by a few months at a time. The democratic process of country faced a major jolt on 28 May 2012, when it was dissolved⁹ by the then Prime Minister Baburam Bhattraï on the grounds that it could not complete its tenure in the limited timeframe, this step not only leaved the country in a legal vacuum but also ruined the efforts of four years of constitution drafting.

November 2013, bring a new hope to the democratic development of the country, when elections to a second constituent Assembly were held to draft a new constitution within a year. These elections were organized in a tough environment, with the shadow of violence and protests from the parties who had boycotted the elections and threatened to disrupt the polls. Despite, these challenges, elections were held on time and 78.34% voting was recorded, which showed the faith of the people in the constitutional process and the determination to reinforce the political process in Nepal. This time also no party could win the majority and Nepali Congress emerged as the single largest party and his leader Sushil Kumar Koirala¹⁰ took the oath as Prime Minister in Feb 2014.

Major challenges and Issues

Despite 60 years of constitutional history Nepal has been a country, deprived of a constitutional and democratic government. The ineffective effort of constitution making process clearly show gigantic challenges faced by it. The basic reason of this disappointment lies in the fractured mandate of constitutional Assembly, lack of consensus in common minimum program, and disagreement of major political parties. If we look at the experiences of constitution making process of other countries, it is quite evident that the internal formation of the house is a decisive factor towards making of a constitution. Majority of a single party in House and specially two third majorities play a crucial role in deciding the controversial issues. This is a fact that the divided structure of the house has been a main stumbling block in the constitution making, and unfortunately, the democratic republic of Nepal has been a victim of this drawback. In the last constituent assembly, no party could win the simple majority¹³, although the UCPN(M), was the largest party, but it was not in decisive positions, thus the constitution making process could not go in the right direction. On the other hand, the major political parties of Nepal are not only bitterly divided on ideological grounds but they have serious differences on the major constitutional provisions. The UCPN(M) in last constitutional assembly and Congress in current constitutional assembly have never shown the zeal and commitment to acquire consensus of opposition on the controversial issues.

The issue of federalism has been another key stumbling block in the development of constitution in Nepal. The ethnic diversity of the nation and the desire for development in remote areas are the main reasons for it. The political scenario of Nepal seems divided in to multi polar groups on the issue of federalism, while some groups are in the favor of large geographic provinces, the others supporting smaller linguistic divisions, some are in favor of single-identity provinces and, some are opposing federalism. Determining the base of federalism has been a very complex issue for the constituent assembly, deciding the number of the provinces, their boundaries and even their name is not an easy task. The long standing demand for separate ethnic units is the result of different identity movements in the country to recognize their ethnicity. These identity movements have

been very tactfully articulated in the demand of single identity ethnic provinces by political parties¹⁴. If, we look at the geographic and demographic situation in the country, it is quite obvious, that the federal system is not much amenable and the proposed provinces on ethnic and linguistic grounds will only complex the situation.

The question of political preferential rights is also a controversial issue related with the demand of federalism, which demands that there should be special executive rights to every dominant ethnic group in each province whether it creates majority in that province or not? But, the basic problem is that, the different ethnic groups are badly scattered in the different parts of the country and they don't form the majority in any single province. It is also worth mentioning here that if the single identity units are created, they will be an economic burden on the nation due to their too small sizes.

The right of self-determinism under federalism is also a controversial issue, two major political parties Maoist U and UCPN- (M) supports ethnic group as nation and right to self-determination with the right of separation, while the other political parties including UML and NC opposes racism and right to self-determinism, although they support the federal system. During this contentious situation, an important agreement took place between U Maoist, UML and NC on 15th May 2012, when they agreed to construct the units on multi-racial grounds but the ethnic organizations did not supported this proposal and continued their demand of single identity base unit and racial privileges. The Madheshbadi, various NGOs, and INGOs, who were supporting the racial ground of federalism and other Maoist groups came openly in support of the movement against May 15 agreement. In these circumstances, the U Maoist separated itself from the agreement and finally it resulted in the failure of agreement and dissolvent of the constituent assembly.

Another, significant issue is the forms of government. The UCPN (M) supports the Presidential form of government, where the president will be real head of the government¹⁵. In the thematic subject committee of the last constituent assembly, this proposal was supported by 18 votes while the draft of parliamentary form of government secured 16 votes. The Nepali Congress favors the parliamentary form of government, as it believes that this system is more suitable for multi-ethnic and plural society of Nepal.

Like the form of government the procedure of electoral system is also an arguable issue. The UCPN (M) supports proportional representative electoral system which should be multiple members. It wants the geographical, population, economical and other criteria to include in the process of representation while the Nepal Congress wants a combined representative system, in which the proportional and direct election method, both should be included.

Other significant area where divergence is obvious is related with supremacy and autonomy of judiciary. According the suggestions of judicial committee the appointment of chief Justice was to be made by the "Head of state" and the Head of state was supposed to follow the recommendations of the "Federal Legislative Special Judicial Committee" in this regard¹⁶. The power of interpretation of constitution was also given to

the same committee, which violates the separation of power theory, thus the procedure of appointment of judges is also a contentious matter.

Another debatable issue among others is related with the provisions of fundamental rights. Approximately 30 reasonable rights with the right of employment, social security etc. had been recommended by the “committee for fundamental rights and directive principals” of last constituent assembly. This is a fact that honest implementation of these rights may be a milestone in the direction of a justifiable society but the main hurdle in implementing these rights is the monetary restrictions of the country¹⁷. The right to private property and land ownership is also a contentious subject which reflects totally different views of political parties. Thus it’s quite evident that to make consensus on these contentious issues is the first required step towards making of a new constitution.

The 16 Point Agreement and Recent Developments

In an important development, the prime minister of Nepal had announced that the four major political parties had agreed on the first draft of much awaited new constitution, which indicated a positive signal towards removing the constitutional deadlock. The major political parties of Nepal signed the 16 point program on 8th June 2015, which provided for 7 federal provinces on the basis of identity and feasibility. Consequently the names of the provinces would be decided by the federal parliament while the task of delineation has to be done by a federal commission yet to be formed¹⁸. The 16-point agreement had brought a great hope among the people that there was finally some progress on the contentious issues. Despite, this optimistic development some unfortunate events and a new controversy with interim order¹⁹ of Supreme Court of Nepal on the 16-point agreement had eroded those aspirations to some extent. The major issue of controversy in the new format is related with the provisions of citizenship, the proposed provisions provides that the original citizenship would be limited to those only, whose both of parents belongs to Nepalese origin by birth only, and the others will be entitled to the provisional citizenship only and they can not be entitled to any constitutional post, neither they can contest for elections, nor eligible for government positions. Even the provisional citizenship will be awarded only after 15 years of continuous stay to those foreigner men married with Nepalese women. These kind of provisions will convert a large number of population in to second class citizens in their own country. The distribution of resources is another matter of concern, the Tarai areas which contribute to 80% in national GDP, gets only 10% share. The current draft clearly shows the ignorance of Madheshi community and parties in the constituent assembly, who don’t have sufficient representation in the house this time, as they have secured only 49 seats in comparison to 80 seats of last constituent assembly, when they were in better situation of negotiations. The Madheshi parties were not united this time and not made serious efforts for pre poll alliances due to their internal clashes and self-centeredness, which benefited the other political parties.

The much awaited draft was weighed down with extreme reactions by some members of constituent assembly, who not only tore its copies but walked out of C. A. also. The political parties like Federal Socialist Forum Nepal, Tarai Madhes Democratic Party and Sadbhawna Party strongly opposed it on the grounds that it don’t take care of the rights of marginalized communities like Madhesi, Dalit, Janjaties and women, and it is regressive. The RPP Nepal, also objected on its secular status and demanded referendum on the issue.

In a historic development, on 20th September, 2015, Nepal formally adopted a much anticipated and long delayed constitution that took more than seven years to complete following a decade of political wrangling, it replaced the interim constitution, that governed the nation since 2007. The key part of the constitution that was passed on 16 September 2015, sets the country up as a secular federation of seven states, each with a legislature and chief minister. However, violent protests and bickering against the newly created constitution, over the past several weeks, that has left at least 45 people dead, indicates that all is not well. Major ethnic and religious groups like Madhesi and Tharhuts etc. complains that their interests and concerns have been ignored by law makers, they demand for more states, including ethnically based ones, bigger²⁰ territories for larger ethnic groups and more seats for ethnic minorities in parliament and government. There are more than 100 ethnic groups in Nepal, and some say the new constitution still limits their representation. Although the proportional representation system is there for parliament, yet the numbers of seats are insufficient, as they claim.

Nepal, which is already facing the greatest calamity of its history, needs a stable political system so that the country could focus on post-earthquake restoration to overcome this hazards situation. The devastating earthquake of April 25, 2015, that claimed around 9000 lives worked as a tragic wake up call for constitution makers to abandon their differences. The promulgation of new constitution on 20th September 2015 is a mile stone in ending of a stretched and tortuous political transition process, but the voices of dissent can not be ignored. While there is happiness on the one side, dismay and restlessness looms on the other side. Certain provisions of the new constitution clearly show that the kind of broadmindedness and elasticity required was not taken care of. Despite the strong objections and violent protest of Tharus and Madhesis of Tarai region, their voice seems unheard. The Indian origin Madhesis forms almost half of the Nepal's population, but their less representation in parliament, will convert them in minority. India has registered its despondency and reacted sharply towards the promulgation of the new constitution in the same format. In the build up to the final draft of the constitution, when it became clear that Nepal remained an unequal society, India had cautioned the leadership of the dangers, in fact, it send a special envoy to Kathmandu to remind them for the goal of an inclusive constitution, which will provide equal representation of every section of society, but the Nepalese leadership went ahead anyway. In a way this constitution shows the less importance of India for Nepal, the prominent traditional upper caste hill region Nepali elite are understood to be more close to China.

However, it's obvious now, that the new constitution of Nepal will create an unequal society and perpetuate²¹ the hold of upper class on the power, leaving chunk of its people, unhappy and unrepresented. Amid strong violent protests and major human rights violations in Tarai region, the situation has worsened and it has been more critical, no doubt, the functioning of new constitution will not be an easy task.

Conclusion

Nepal, a multi ethnic country, is confronting with the task of framing a constitution and this assignment however proved to be highly complex and threatened to be a major national problem. Certain geographic and demographic features and high aspirations of the people had not only derailed the constitution making process earlier, but it has endangered the national unity also. The constituent assembly established in 2010, grappled with the problems for the last two and half years and formulated a number of

proposals, although it was unsuccessful, its deliberations during the constitution making process throw remarkable light on the problems to be faced in framing a constitution for Nepal. The people of Nepal are still waiting for a stable political system, based on democracy and constitutionalism. The second constituent assembly understood the seriousness of the situation and no doubt it worked hard to create consensus on the controversial issues yet a lot of efforts are required. As the first required step is the seriousness and sincerity of political actors towards their goal of promulgation of a new conclusive constitution. Resolution of every obstacle is possible if the shareholders show the faith in constitutional values and respect the guidelines and procedure established by interim constitution. The next step might be to awaken the people that they must think in broader way and they should give priority to the nation upon their class, caste and regional interest. The policy of social and economic inclusion might be beneficial in achieving the goal of political inclusion with protection of pluralism. The people have to keep it in mind that to bring constitution making process to its logical end, some compromises are essential and these sacrifices are prerequisite for the process of nation building also.

Not only promulgation of a constitution but its comprehensive nature which correspond to every section of society, is a necessary step towards establishment of a legitimate state and related with destiny of the entire nation. International assistance and positive support from those countries, who are keen to make their contributions towards easing the constitutional process, can help in creating consensus among different groups, even experience of those countries may provide a learning lesson for the constitution makers of Nepal and inspire them to adopt a practical and down to earth approach to take the process to a rational conclusion.

Experiences show that the device of public participation in constitution-making process may assist nation building in deeply divided society like Nepal which is post-requirement for smooth functioning of a constitution. The process of state building and nation building are linked with the process of political culture and initiating modifications to the political culture of a society is one of the most challenging phases of any post-conflict progression. The process of participatory constitution making needs enduring plan to include all sections of the society. It impacts not only the future course of a state but it can offer an opportunity for the negotiation on disputed matters.

Firm commitment and confidence building among different sects of the country is the need of hour. The people of Nepal should initiate themselves for the process of remedial and resolution through collective conversation and create a novel harmony for the future of the country.

References

1. Curtis Micheal, Comparative Government and Politics, II edition, Harper & Row Publishers, New York, 1978, Page No.95.
2. Acharya, Dr. Bhimarjuna. Constitution Making Process & Contentious Issues. Retrieved on 20-1-15 from http://www.nepallaw.org/index.php?option=com_k2&view=item&id=23:constitution-making-process-contentious-issues&lang=en.
3. Nepal Profile- Timeline, 13 March 2015, South Asia section, retrieved on 20-1-15 from <http://www.bbc.com/news/world-south-asia-12499391>.

4. *ibid* no.3.
5. Hutt, Michael, Himalayan People's war; Nepal Maoist Rebellion, 2004, Hurst and Company, London, Page No.285-87.
6. *Ibid* no. 5.
7. Bhattraï Kesab Prasad, Local dynamics of conflict and the political development in Nepal: A "New Model" for conflict transformation. Page No.3 Retrieved on 25-3-15 from http://www.nepalresearch.com/publications/bhattarai_2006_1109.pdf.
8. Nepalese celebrate opening of new era and end of monarchy, published 28May,2008 retrieved on 12-4-15 from http://www.nytimes.com/2008/05/28/world/asia/28iht-nepal.4.13283900.html?_r=0
9. FINAL REPORT, Nepal 2013 Constituent Assembly Elections Asian Network for Free Elections (ANFREL Foundation) retrieved on 4-5-15 from <http://aceproject.org/ero-en/regions/asia/NP/nepal-final-report-constituent-assembly-election-4>
10. Ganesh Datta Bhatt, Core Questions Confronted in Constitution Making, New Spotlight news magazine, issue name; Vol;04 No.14 Jan.7 -2011(poush 23, 2067) <http://www.spotlightnepal.com/News/Article/-Core-Questions-Confronted-in-Constitution-Making>
11. Sagar Parsai, federalism, <http://asiafoundation.org/in-asia/2012/05/30/nepals-constitutional-transition-and-uncertain-political-future> May30 , 2012.
12. *ibid* 2
13. Menaka Guruswami, Making of the Constitution in Nepal, retrieved on 4-5-15 from [HTTP://WWW.THEHINDU.COM/OPINION/LEAD/MAKING-OF-THE-CONSTITUTION-IN-NEPAL/ARTICLE481030.ECE](http://WWW.THEHINDU.COM/OPINION/LEAD/MAKING-OF-THE-CONSTITUTION-IN-NEPAL/ARTICLE481030.ECE)
14. *Ibid* No.2.
15. *Ibid* No.13.
16. *Ibid* No.10.
17. Mohan Bikram Singh, Problems and complexities of the present political situation of Nepal. Retrieved on 12-6-15 from <http://www.nepalitimes.com/blogs/thebrief/2015/06/30/constitution-draft-tabled/>
18. Dahal Binita, Interim Order and interim constitution <http://nepalitimes.com/regular-columns/Legalese/supreme-court-verdict-on-16-point-deal-blurs-separation-of-powers,509>
19. Rai Om Astha, Constitution deal inked, Monday, June 8th 2015 <http://www.nepalitimes.com/blogs/thebrief/2015/06/08/constitution-deal-inked/>
20. Nepal adopts constitution amid stepped up security, The Times of India. Page no.1, 21September,2015.
21. Bagchi Indrani, Nepal messed up its constitution, India messed up its handling of Nepal, page No.12, September, 2015.