

Legitimate bases of the Constitution of Nepal and the Challenges pertaining to its implementation

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Introduction

A Constitution means a document having special legal sanctity which sets but the frame-work and the principal functions of the organs of the government of a state and declares the principles governing the operation of those organs.¹ All constitutions are the heirs of the past as well as the testators of the future². 'Constitution of a country lays down the basic structure of the political system under which its people are to be governed. It establishes the main organs of the state—the legislature, the executive and the judiciary, defines their power, demarcates their responsibilities and regulates their relationships with each other and with the people.'

Every constitution represents the vision and values of its founding fathers and is based on the social, political and economic ethos and faith and aspirations of the people. Constitution is a living organism of functioning institutions. It keeps on evolving and growing. Every constitution gets meaning and content only from the manner in which and the people by whom it is operated, the effects it acquires from how it is interpreted by courts of the land and the conventions and practices that grow around it in the actual process of its working.³

'A constitution is the supreme legal document on which all the laws, acts, delegated legislations and regulations of a country are based. Therefore, constitution making is an important part of the process of ensuring justice, peace,

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¹ WADE & PHILIPS, CONSTITUTIONAL LAW, Longman Group Ltd., London, 1, (1971).

² Ibid, .4

³ SUBHAS C, KASHYAP, OUR CONSTITUTION, National Book Trust, New Delhi, 1-2, (2009).

security and good-governance. Constitution making is also an exercise in democratic empowerment and can contribute significantly to nation-building. In order to ensure and incorporate the marginal voices, majority articulations and minority aspirations, a large number of key stakeholders at all levels must be involved in the making of a constitution. There should be reconciliation between mainstream and conflicting forces, and consensus among all the political forces on the constitution making process. Without this the constitution thus formed will have little legitimacy.⁴

Legitimate bases of the Constitution

In a democracy, sovereignty vests in the people and ideally the people govern themselves. In the modern representative democracies, people exercise their inalienable right to decide how and by whom they should be governed. The very first and foremost application of their sovereignty by the people is in giving themselves a constitution which outlines the ground rules under which certain powers are transferred to different organs of the government which are to be exercised by them. The constitution of a country may also be described as its foundational law which ordains the fundamentals of its polity and on the altar of which all other laws and executive acts of the state are to be tested for their validity and legitimacy.

There can be no state without a constitution, sometimes the constitution of a state is definitely formulated in a document or documents; sometimes it is found in established body of rules, maxims, traditions and practices in accordance with which its government is organized and its powers are exercised⁵. James Bryce defines a constitution as 'a frame of political society, organized through and by law, that is to say one in which law has established permanent institutions which recognize functions and definite rights.' Again, a constitution may be said to be a collection of principles according to which the power of the government, the rights of the governed and the relations between the two are adjusted. A true constitution will have the following facts about it very clearly marked; first, how the various agencies are organized; secondly, what power is entrusted to those agencies; and thirdly, in what manner such powers are to be exercised. The objects of a constitution, in short, are to limit the arbitrary action of the government, to guarantee the rights of the governed, and to define the operation of the sovereign power.⁶

⁴ HAN P BHATTARAI, DEMOCRATIC CONSTITUTION MAKING, Nepal South Asia Center(NESAC), Kathmandu, 1, (2007).

⁵ A.C.KAPUR, PRINCIPLES OF POLITICAL SCIENCE, S. Chand & Company Ltd., New Delhi, 485, (1997).

⁶ C.F. STRONG, A HISTORY OF MODERN POLITICAL CONSTITUTION, Surjeet Publication, Delhi, 11-12

Constitutions have, of course, been granted or adopted for many different reasons. New constitutions have marked stages in a progression towards self-government (as in most British colonies before independence); they have established a system of government in a newly independent state (as with the United State of America in 1787), or in a reconstituted state (such as Malaysia in 1963 or Tanzania in 1964); they have marked a major change in the system of government (as in Spain in 1978); they have been adopted in order to rebuild the machinery of government following defeat in war (as with the Federal Republic of Germany in 1949); as they have declared a new beginning after a revolution, or after the collapse of a regime (as in France in 1791 and in 1958)⁷. In the vast majority of developed states the constitution is the supreme law: it designates the principal organs of government, and gives them their authority. It is normally also a kind of higher law: all, or some, of the rules set out in the constitution are hierarchically superior to other law and are only alterable by a specially prescribed procedure⁸.

If we investigate the origins of modern constitutions, we find that, practically without exception, they were drawn up and adopted because people wished to mark a fresh start, so far as the statement of their system of their government was concerned. The circumstances in which a break with the past and the need for a fresh start comes about vary from country to country, but in almost every case in modern times, countries have a cobidnstitution for the very simple and elementary reason that they wanted, for some reason, to begin again and so they put down in writing the main outlines of their proposed system of government. This has been the practice since 1787, when the American constitution was drafted, and as the year passed, imitation and the force of example have led all countries to think about the necessity to have a constitution⁹.

Constitution is very important for every modern state. It is needed to determine the role of political institutions and elected officials, and save the state from anarchy. In addition to laying down the provisions of main organs of the government, it provides for mutual relations between them. The provision of fundamental rights in the Constitution plays an important role in providing security to individuals and citizens of the state. The government of the country derives its power from the Constitution. The emphasis of the Constitution is in forming a limited government. In the words of K.C.Wheare “Constitution is used to describe the whole system

⁷ RODNEY BRAZIED, *CONSTITUTIONAL REFORM*, Clarendon Press Oxford., Great Britain (1991)

⁸ *Ibid.*, 1,3

⁹ K.C. WHEARE, *MODERN CONSTITUTION*, Oxford University Press, Bombay, 6-7, (1984)

of government of a country, the collection of rules which establish and regulate, or govern the government. These rules are partly legal, in the sense that courts of law will recognize and apply them, and partly non legal or extra-legal, taking them from usages, understandings, customs, or conventions which courts do not recognize as a law but which are not less effective in regulating the government than the rules of law strictly so called.”¹⁰

Apart from making provisions of different organs of the government and providing for their formation, powers and working procedures, the Constitution mentions about the rules and principles that regulate and maintain relations between these organs and citizens of the state. Since that Constitution is a document which regulates governance system, it institutionalizes democracy through the medium of major constitutional provisions such as the preamble of the document; the provisions of fundamental rights; directive principles, policies and obligations of the state; provisions of executive, legislative and judiciary branches of the government; provisions regarding political parties, election system and the governance system.

Constitution is imperative for institutionalization of democracy and establishment of a legitimate state. The norms of modern democracy emphasizes on limited government. Moreover, it stresses on the protection and promotion of basic rights of the people. “In modern times, the formation of government and the source of its power are only as provided for in the Constitution. No government could be formed without a constitutional basis. A constitutional government should not have unlimited power: it should be controlled and have only limited power. Only a democratic constitution and the laws enacted therein could be the basis of a constitutional government.”¹¹

In this age it would be very unnatural to make a constitution without the involvement of people. It is widely believed that the constitution making process is as important as its inherent provisions. A participatory and inclusive constitution making process will create an atmosphere for national consensus which helps to make it democratic and sustainable. Nepal imbibed these principles and made a constitution through a Constituent Assembly.

Challenges Pertaining to Implementation of Constitution

In Nepal’s context, there could be numerous arguments for and against the constitution making process adopted by the Constituent Assembly. People’s

¹⁰ Ibid, 1

¹¹ BIDUR KOIRALA, LOKTANTIRIC SAMBIDHANKA AADHRHARU (in Nepali version), M Sarathi Adhyayan tatha Anusandhan Kendra, Kathmandu, 9, (2065 B,S).

participation in the constitution writing process cannot be regarded as wrong if it is compared with the abstract principles of constitution making. The election of a Constituent Assembly should be regarded as the right approach to make a constitution if the fundamental law of the land could be made a legitimate basis for the creation of an inclusive society, and if it is made through a participatory process to lay a strong foundation to strengthen the institutionalization of an inclusive democracy.

The aspirations and efforts of Nepali people to write a constitution through a Constituent Assembly since 2007 B.S has been realized by the promulgation of the Constitution of Nepal. With a protracted effort that lasted for nearly eight years, about 90 percent of the Assembly members approved and promulgated the new Constitution of Nepal on 20 September 2015 (3 Asoj 2072). It was signed by 537 members out of 598 existing members of the Constituent Assembly.

For the first time in the constitutional history of Nepal, Nepali people have been able to write a constitution for themselves, which is a testimony to the fact that they are sovereign. Despite the fact that the new constitution is Nepal's seventh constitution, it is the first constitution written and promulgated by the sovereign people of the country. Written and imbued with the spirit of a federal democratic republic, the Constitution of Nepal includes a preamble, 35 Parts, 308 articles and nine schedules.

Whatever the methods and procedures used in constitution building, only the processes that adopt constitutionalism and the basic principles of rule of law can create a base to strengthen the institutionalization of democracy. Since that the Constitution of Nepal has fully adopted constitutionalism and the basic principles of rule of law such as the concept of limited governance, or that the government should be limited, or that it should not be arbitrary; the constitutional guarantee that the people will be able to exercise their basic rights freely; a governance system run with the consent and participation of the people; the governance system based on laws legislated by elected representatives of people through adult franchise held periodically in a free and impartial manner, and that all people are equal before law and equal protection of people by law.

It is said a constitution should be judged on the basis of three things. First, how is the constitution made? Second, what provisions have been made in it? And thirdly, how has it been implemented? A constitution will be successful only when these aspects of constitution making and implementation are assimilated.

In this sense, the Constitution of Nepal has been made with the support and participation of elected representatives of people.

The concept imbibed and the provisions made by this constitution are based on democratic norms and values. Its effective implementation can guide the country towards constitutional stability, which in turn, can lead the country effectively towards prosperity. If the new constitution is to be evaluated with these norms and values in mind, it will be necessary to recall the sayings of then honorable chairperson of the Constituent Assembly Subash Nembang.

According to him “The major political parties represented in the Constituent Assembly—Nepali Congress, Nepali Communist Party UML, Nepal Communist Party (Maoist Center) and *Rastriya Prajatanrik Party* promulgated the new constitution through consensus by putting aside several of their standpoints. With an untiring effort that lasted for five years and eight months, the Constituent Assembly promulgated the new constitution with the approval of 90 percent members of the Assembly. International experience shows that it is not possible to have a hundred percent approval on all issues relating to constitution making anywhere in the world. Sixty-five percent of the Assembly members had passed the constitution of neighboring India. Likewise, fifty-two percent members of the Assembly had approved and promulgated the constitution of the United States of America.”¹²

Mr Nembang’s views clarify the matured approach adopted and democratic basis of the new constitution. It needs no further elaboration. In short, it is a democratic constitution if it is evaluated on the basis of the norms and values it has imbibed and the major provisions made in it. It is based on the principles of constitutionalism and has imbibed norms and values of rule of law. In other words, the constitutional provisions are aimed towards institutionalization of the norms of a limited government.

Constitutional provisions have been made in way not to make the state arbitrary, and enable the people to exercise their rights freely. The constitution is based on norms and values of rule of law and that all citizens are equal before law, and that law will provide equal protection to all citizens. It has imbibed the principle and process that the state will be run with the consent and participation of the people. It constitutionally guarantees people’s basic rights. Furthermore, it aims

¹² Subash Nembang., *Yo Sambidhanko Prakriya Bhatkiyo Bhane Sabai Dubchhau.*, NAGARIK, (Poush 3, 2073 B.S)

to create a situation to guarantee that the people will be able to exercise their basic rights without any encroachment.

Likewise, the constitution emphasizes on a limited and accountable government. It aims to enable the access of ordinary people to different organs of the government on the basis of the principle of proportional inclusion. Moreover, it stresses on a system which will give justice to the weaker class, community and regions of the country on the basis of the policy of positive discrimination. In order not to make any organ of the government arbitrary, the constitution is based on the norms and values of modern constitution such as the principles of separation of powers and checks and balances. The constitution has made a provision of running the country by people's representatives elected through periodic elections. Plurality is the norms of democracy and the constitution has made necessary constitutional provisions to institutionalize its norms and values.

The new constitution has imbibed the concept and provisions needed to institutionalize republicanism and federalism brought about by the political change of 2062/063 B.S. There is no reason to doubt that the fundamental law of the land is based on these and other democratic norms and values. The constitution making process and the democratic bases on which it is founded need not be questioned. International experiences show that a good constitution and a good constitution making proves may vary according to the context of the country concerned. Despite democratic processes and procedures and the adoption of democratic norms and values while making a constitution, it may not last long if the implementation aspect is ineffective.

The Weimar constitution was good but it could not last long because of lack of commitment to its implementation. The MacArthur constitution is still effective and acceptable because of the sincerity involved and its effective implementation despite the lapses in its making. The American Constitution commenced in 1789, with limited amendments, is still going strong because of its effective implementation and the loyalty of the American people. In this sense, effective implementation of a democratic constitutional is as important as the constitution making process and the basic provisions it has made. However good a constitution may be, there is a strong possibility of its failure if the implementation aspect is weak and if the political forces and the state mechanism responsible for its implementation lack accountability.

Despite the fact that it took eight years to pass the constitution with the approval of ninety percent of the members of the Constituent Assembly, the first

amendment proposal was tabled in the House only three days after its promulgation. Likewise, the second and third amendments have been registered in the House within a span of fifteen months of the commencement of the constitution. It is unfortunate that the amendment was made for a small political party represented in the House with equally smaller popular base. The second and third amendment proposals have been registered for the same party.

The amendment proposal has been registered in the House to please the said political parties and such other forces that are making a tough stand on certain issues which are aimed at institutionalizing external influences through controlled instability and politicization of the new constitution. Consensus and unity between major political forces is imperative for the implementation of the new constitution promulgated on the basis of consensus reached between them. There is a possibility of creating a congenial political atmosphere for the implementation of the constitution if the dissenting groups join hands to institutionalize the achievements made thus far, while also giving continuance to their efforts to have their issues addressed and moving forward by critically imbibing the spirit of the constitution. Unfortunately, the implementation of the constitution is in crisis because of the disagreements among major political parties; the tendency to politicize the constitution, and the weaknesses of some internal political forces which are likely to be used by strategic external politics for controlled instability in Nepal.

Conclusion

A constitution needs not necessarily be excellent and acceptable to all just because it has followed a democratic process. The first important stage of constitution implementation will be completed only after the fundamental law of the land based on democratic norms and values and written with democratic process and procedures are made more acceptable, and the election at the local level held on the stipulated date i.e 21 January 2018 (7 Magh 2074)) as specified in the constitution.

There are two sides with regard to ensuring effective implementation of the constitution. If one side regards unconditional election at the federal, provincial and local levels to be the ground for constitution implementation, the other side wants to ensure the acceptability of the constitution. In such a situation, there is no alternative for rebuilding consensus among the political forces that made the constitution, and building political will in the dissenting political parties to critically accept the new constitution and moving forward.

In spite of the lengthy constitution making process, Nepal has promulgated its own constitution. The new constitution could be made to suit people's aspirations by following the norms of constitutional development and democratic practices. For that, this constitution has already created legitimate bases for its timely progression according to the aspirations of people by making constitutional provisions of periodic elections; an independent judiciary with the Supreme Court as the interpreter of the constitution; a political system which is to be endorsed by people; a governance system which is accountable to people; constitutional provision of constitution amendment; a proportionally inclusive state system; widely guaranteed fundamental rights, and an independent and able legislature to legislate laws. There should not be any reason to express discontent to it. Effective implementation of the constitution can address present dissatisfactions through healthy and legitimate ways.

Lastly, the views expressed by the chairperson of Constitution Advisory Commission for the Constitution of the Kingdom of Nepal, 2047, and former chief Justice of the Supreme Court of Nepal late Bishwanath Upadhyaya, on the challenges to be encountered in the process of constitution making and its implementation, is still relevant today. According to him, "The task of constitution making and its implementation is in itself very challenging. Apart from the need for a wider political consensus for such a challenging task, there will also be a need for a good and accountable political culture based on democratic norms and ideal. The implementation of new constitution of Nepal is certain to be difficult and complicated in the absence of national unity and an accountable political culture founded on democratic norms and ideal and a widened polarized nation."¹³

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¹³ Gyanmani Nepal. *Ganatantra Dekhi Loktantrik Ganatantra Samma. KATHMANDU MAKALU PRAKASHAN GRIHA*, (2066 B.S)..