

Comparative Study of the 1990, 2007, and the Forthcoming Constitution

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The third constitution is being drafted in Nepal in the duration of twenty years. The Constitution of 1990 was promulgated on November 9, 1990 after the People's Movement (*Jana Andolan*) of the same year. Similarly, after the 2006 *Jana Andolan* (II), the Interim Constitution was promulgated on January 15, 2007. The new constitution is being written following the mandate of the *Jana Andolan* II and the voices represented in the Constituent Assembly. Various political scenarios have played roles in developing platforms for the drafting of these three constitutions. During this period, a lot of changes are seen in the economic, social, and educational level of Nepal. Likewise, the needs, expectations, and aspirations of the Nepalis have increased.

Background and Differential Styles

The People's Movement 1990 (*Jana Andolan* I) was against the 30-year autocratic Panchayat System. The revolution was started in the leadership of the Nepali Congress and United Left Front on February 19, 1990 and reached its climax on April 8, 1990. Because he could not suppress the movement initiated by the political parties, King Birendra was forced to remove the word 'party-less' from the constitution. After the multiparty system was restored, an interim government, headed by Krishna Prasad Bhattarai, was formed. The drafting of a new constitution and holding a general election to direct the nation in a political system were the chief responsibility of this government. Bearing in mind the national responsibility and the-then power balance, a commission for drafting the constitution was formed that had the representatives of the King, Nepali Congress and the United Left Front. Though the Nepali Congress and the United Left Front represented the mandate of the *Jana Andolan* in the Commission, they were elected by the people. However, after a series of discussions, debates and hard work, the commission formulated a draft constitution after six months. After the Council of Ministers made some minor changes, the Constitution of 1990 was promulgated by King Birendra.

Whereas, a totally different political scenario has played a role in enacting the Interim Constitution 2007. Chiefly, as the Nepali Congress and the CPN (UML) could not work as per the spirit and mandate of the constitution, the rule of law could not be established in the country. The King was using the constitution as a tool for ending the parliamentary system. The CPN (M) had launched a war against the democratic system of governance ensured by the constitution.

Towards the climax of the conflict, the distance between the Maoists and the political parties like the Nepali Congress and CPN (UML), which supported the King and the parliamentary system, decreased. Believing that they needed the support of each other to bring political change, the Maoists and the Nepali Congress and CPN (UML) reached a consensus to fight against the King's dictatorial regime. As a result of this, a twelve-point agreement was reached on November 22,

2005. Keeping *Loktantra* (democracy) as the central focus, the political parties started the decisive revolution from April 6, 2006, and the Maoists supported them. After a flood of people came to the streets for *Loktantra* and peace, the King was forced to restore the dismissed parliament on April 24, 2006 and called the assembly of the parliament.

After the success of the *Jana Andolan*, a government headed by the Nepali Congress leader Girija Prasad Koirala was formed. The parliamentary meeting called on May 18, 2006 withdrew the special rights of the King. Then, the Maoists joined open politics on June 16, 2006 following the eight-point agreement that was signed between the government and the Maoists. An agreement, after talks and discussions between the government formed by the political parties that carried out the revolution and the Maoists who had left the revolutionary politics and entered into peaceful politics, was reached to devise a new constitution after holding the Constituent Assembly elections. Likewise, an interim constitution draft committee was formed involving representatives of both sides during the then transitional political situation. The Interim Constitution devised by the committee was promulgated on January 15, 2007 by the parliament which already had Maoist members by then.

The primary goals of the Interim Constitution were to institutionalise the achievements of the *Jana Andolan*, to hold the Constituent Assembly elections, and to create an environment for the Constituent Assembly to draft a new constitution. The historic election of the constituent assembly was held in Nepal on April 10, 2008. To draft their constitution by themselves, the public extensively participated in the elections of the constituent assembly. The CPN (M) became the largest party in the Constituent Assembly after the elections and the Nepali Congress and CPN-UML respectively became the second and the third largest parties. Based on the first-past-the-poll system and the proportional representative system, 25 political parties got the opportunity to represent themselves in the Constituent Assembly. In a backdrop where the nation has been declared a democratic republic after duly ending the monarchical system through the Constituent Assembly, the people's representatives are busy drafting the new constitution. The new constitution that is being drafted by the people's representatives is to be promulgated from the parliament itself.

Differences in the Content

The 1990 Constitution of Nepal had the provisions of constitutional monarchy and parliamentary system of governance. The provisions about the King and the monarchy in the Constitution were set based on the notion that 'the King is not active and can do no wrong'. While the 1990 Constitution had the provision that the Prime Minister was the head of the government and the King was the head of the state, the 2007 Constitution ensures that the executive rights are limited only with the Council of Ministers. It has been clearly written in Article 37 of the Interim Constitution that 'the executive power of Nepal shall, pursuant to this Constitution and other laws, be vested in the Council of Ministers'. . Nepali Congress leader Girija Prasad Koirala was the prime minister in a situation where the monarchy was neither fully ended nor openly accepted. While promulgating the Interim Constitution, it was silent on the monarch, but this situation did not last long. Because of

the movements that were carried out in the Tarai and in the parliament itself, the first meeting of the Constitution Assembly had to declare the country a republic.

Stating that the Interim Constitution did not effectively address their demands, the Madhesi People's Rights Forum started a movement in the Tarai. When the agitating groups of the Madhes Uprising were not satisfied even after the Prime Minister addressed the country, the government and political parties like the Congress, UML and Maoists agreed to amend the Constitution. Consequently, they amended the Interim Constitution on April 13, 2007 and added the provision that Nepal would be a Federal Democratic Republican State. The amended part of the Interim Constitution that was passed by the parliament stated: 'Accepting the aspirations for autonomous states of the Madhesi people, along with the ethnic, indigenous and marginalised peoples, Nepal should become a Federal Democratic Republican State'.

Article 33 of the Interim Constitution 2007 stated that the elections of the Constituent Assembly would be held within mid-June 2007. But the environment for drafting the constitution by mid-June was not created as per the consensus reached by the parties about elections while drafting the constitution. In the situation where there was series of blaming and counter-blaming amongst the parties was escalating, and there were rumours that the palace and royalists were trying to sabotage the Constituent Assembly elections, the second amendment to the Interim Constitution was made on June 13, 2007 and such provision was made that the monarchy would be abolished if the elections to the Constituent Assembly was tried to be disrupted. The Maoist position on this provision did not last long. The Maoists soon started pressing for declaration of a republican from the parliament. Assuming that the presence of the King could become problematic to holding the Constituent Assembly elections, they wanted to dethrone the King. As their demand was rejected by political parties including the Nepali Congress and CPN-UML, the Maoists proposed for federal democratic republic.

After a long dispute, an election was held in the parliament itself. As the Maoists and the UML were for instantly starting the processes for implementing the federal democratic republicanism, the bill was passed by a majority in the parliament. Even the bill passed by the parliament could not be implemented due to the dispute amongst the parties. After a series of discussions and debates, a consensus was reached by the Nepali Congress, Maoists, and UML, and on December 27, 2007, the third amendment of the Interim Constitution was made mentioning that the first meeting of the Constituent Assembly would declare Nepal a republic. Similarly, constitutional provisions were made that no right of governance would be given to the King, and the Prime Minister would do all the work that the head of the state does until federalism and system of governance are not implemented. The first meeting of the Constituent Assembly on May 28, 2008 declared the implementation of the federal democratic republican and finally the state entered into an era of a republican. The fourth amendment of the Interim Constitution systematically ended the monarchy declaring Nepal a federal democratic republic state and established a system of electing the President and the Vice-President.

The 1990 Constitution recognised the people as the source of the state power. The sovereignty of Nepal rested on Nepalis. State power was not in their hands. It was mentioned in the Interim

Constitution that both sovereignty and state power rested on the people. These two provisions are going to be enshrined in the new constitution. The preliminary draft report of the new constitution prepared by the Constitutional Committee mentions: 'The sovereignty and state power lies in the Nepali people'.

The provision of state restructuring was not clear in the 1990 Constitution. Similarly, the class, ethnic, regional, and gender-based problems were not fully addressed. It is mentioned in the Preamble of the Interim Constitution 2007 that: there will be 'progressive restructure of the state in order to resolve the existing problems of the country based on class, caste, region and gender'. In the new constitution, a step is being taken further than that. The Preamble of the constitution as prepared by the Constitutional Committee mentions: 'Aspiring the construction of an equitable society based on proportional representation and participation, and ensuring economic equality, privilege and social justice by ending all forms of discrimination and untouchability based on sector, ethnicity, region, language, religion, gender and caste'.

In the 1990 Constitution, Nepal was declared a Hindu Kingdom. It was defined as a secular state in the Interim Constitution. Preparations are being done for writing Nepal as a secular state in the new constitution. While it was said in the Interim Constitution that Nepal was an independent, indivisible, sovereign, secular and inclusive state, the new constitution has taken a step further. In the proposed draft of the Constitutional Committee of the Constituent Assembly, initiatives have been taken to regard 'Nepal as an independent, indivisible, sovereign, secular, inclusive, state socialism-oriented, republic and multi-national state'.

There have been a lot of changes in the context of looking at and using the language. Mentioning that Nepali language is the national language of Nepal, the 1990 Constitution said: 'Nepali shall be the official language of Nepal. All the languages spoken as mother-tongues spoken in various parts of Nepal are the national languages of Nepal'. The provision in the Interim Constitution is more progressive than that of the 1990 Constitution. In the Interim Constitution, it is mentioned that all the mother-tongues are national languages. Similarly, while Nepali language that is written in the Devanagari script shall be used as the official language, there would be no restriction in using the mother-tongues in the local level and offices, and the language thus used shall be translated into the official language by the state and archived.

There have been efforts to further simplify the provisions related to language in the new constitution. Taking a step further than the Interim Constitution, the new constitution has taken initiatives to ensure that it shall be the duty of the state to give equal protection, preservation, and development of the national languages; every community with a mother-tongue shall be given rights to respectfully champion their linguistic identity and their relation to the language; and the visually-impaired and the speech-impaired shall be given rights to use the Braille-script and sign-language. Although the official language of the central government shall be Nepali language in Devanagari script, there have been efforts made to have a provision that any language could be given the recognition of the official language of the central government by the Language Commission based on the fulfilment of certain standards. The Committee for Determining the Base of Cultural and Social Solidarity, in its concept note and preliminary draft report, mentions in a

provision: 'The official language of the central government and one or more than one national language spoken within the federal government shall be the official language of the federal government as determined by the federal legislature'.

Similarly, press freedom was mentioned in Article 13 of the 1990 Constitution. While press freedom was ensured in the preamble of the Interim Constitution, the constitution that is in the making has also ensured press freedom in its preamble. The preamble prepared by the Constitutional Committee mentions: 'being committed to the democratic values of people, competitive, multiparty, democratic, proportional, and inclusive system of governance; civilian freedom; fundamental rights; adult franchise; periodic elections; press freedom; capable, neutral and independent judiciary; and the rule of law for creating the basis for socialism'.

The new constitution will contain more fundamental rights than the 1990 Constitution and 2007 Interim Constitution. There were 13 fundamental rights in the 1990 Constitution, namely: Right to Equality, Right to Freedom, Right to Press and Publication, Right to Criminal Justice, Right against Preventive Detention, Right to Information, Right to Property, Right to Culture and Education, Right to Religion, Right against Exploitation, Right against Exile, Right to Privacy, and Right to Constitutional Remedy. This list was increased to 21 in the Interim Constitution. In addition to the 1990 Constitution, Right against discrimination based on Untouchability and Race, Right to Environment and Health, Right to Employment and Social Security, Rights of Women, Right to Social Justice, Rights of the Children, Right to Justice, Right against Torture, and Right to Labour were incorporated in the Interim Constitution.

Initiatives are being taken to have provisions of 31 fundamental rights in the new constitution. In addition to what the Interim Constitution has, this constitution includes Right to Live with Respect, Right of the Crime Victims, Right to Food, Right to Residence, Right to Family, Right of the Consumers, Right of the Implementation of the Fundamental Rights and Constitutional Remedy being added. Clarifying this, the report of the Committee on Fundamental Rights and Directive Principles has written: 'Because it is believed that the state shall not do unfair intervention in exercising fundamental rights of civic and political nature, and the state shall play affirmative role in exercising fundamental rights of financial, social and cultural nature, the state shall devise appropriate law and other mechanisms for their implementation the fundamental rights under this section – right to education, health, employment, residence, food, social justice and social security'.

Though the provision of fundamental rights was there in the 1990 Constitution and the Interim Constitution, no provision of fundamental duties was there. However, there have been efforts to include fundamental duties in the constitution that is being drafted. The Committee on Fundamental Rights and Directive Principles of the Constituent Assembly has proposed including the following under the fundamental duties: to safeguard the nationality, sovereignty and indivisibility of Nepal being respectful to the country; to preserve national privacy; to follow the constitution and the laws; to compulsorily serve the nation whenever it needs; and to pay taxes as mentioned by the laws. Similarly, to preserve the public and national property; to exercise one's freedom and rights without hindering the state's, society's or anyone else's rights; and to preserve

and promote the environment and natural, historical and cultural heritages have also been proposed as fundamental duties.

There are also possibilities of having different provision regarding the executive rights compared to the preceding constitutions. The 1990 Constitution vested the executive rights on the King and the Council of Ministers. All the works of the King used to be done through the advice and agreement of the Council of Ministers until otherwise done by the King's own consciousness or the recommendation of any other institution or authority. The Interim Constitution of 2007 vested the executive rights on the Council of Ministers. There is no clarity on whom does the executive rights lie on in the new constitution. No majority was reached in the election within the Committee on whether the executive rights should be vested on the President or the Prime Minister. Because of this, the provision of executive rights in the new constitution is not clear.

In the 1990 Constitution, there was a provision of bicameral parliament, with the House of Representatives and the Upper House. As per this, there used to be 205 directly elected members in the Parliament and 60 members in the Upper House. After the King's usurpation of power of October 2, 2002, there was no parliamentary elections held in Nepal, and therefore, no House of Representatives. The existing Upper House was made ineffective.

In the Interim Constitution, provision was made for a unicameral legislature consisting 330 members. In this parliament, there were members from the former parliament, the members from the Upper House, and the representatives from the CPN (Maoists). This was a special kind of unicameral legislature where 83 representatives of the CPN (Maoists) who had come into the peace process were included. A bicameral legislature has been aspired for in the upcoming constitution. The Committee for Determining the Structure of the Legislative Body of the Constituent Assembly has proposed having the lower house as the House of Representatives and the upper house as the National Assembly. There shall be 151 members in the Lower House and 51 members in the Upper House.

As per the 1990 Constitution there were Commission for the Investigation of Abuse of Authority, Attorney General, Public Service Commission, and Election Commission as constitutional bodies. The National Human Rights Commission was added to the existing list of commissions through the Interim Constitution. It has been prepared in the upcoming constitution to increase the number of commissions. The Committee for Determining the Structure of Constitutional Bodies of the Constituent Assembly has proposed adding Women's Commission; Dalit Commission; Indigenous and Ethnic Peoples' Commission; Muslim Commission; Madhesi Commission; and Commission for the Welfare and Protection of Persons with Disabilities, the Minority and Marginalised Communities, and the Backward Class and Areas.

Although the 1990 Constitution was exercised for 15 years, no amendment was made in that. Even though the CPN-UML and Nepal Sadbhawana Party had carried out discussions for amendment, it could not be institutionalised. After the Nepali Congress leader Sher Bahadur Deuba publicly remarked that not even a "full stop" could be amended in the constitution, no attempt was taken for amending the constitution. The Article 116 (2) of the 1990 Constitution had a provision that any bill

shall be presented before the King for endorsing if it is passed by a two-third majority of present members who have to be two-third of the total number of the parliamentarians. The individuals holding power never took initiatives to go along with this provision.

The then Prime Minister Sher Bahadur Deuba dismissed the parliament on May 22, 2002. As it appeared unfeasible to hold the elections on pre-scheduled November 13, 2002, the political parties decided to postpone the elections by one year. To implement this, they granted the King the power to remove difficulties as per the Article 127 of the 1990 Constitution. Using that power, the King on October 4, 2002, ousted Deuba from the post of the Prime Minister and usurped all the executive rights in his hands. As a result of that, the King sometimes appointed the prime ministers on his own, while sometimes called for application for the post of the prime minister. When he started ruling the country by taking all the powers himself from February 2, 2003, the movement initiated by the political parties was able to restore the dismissed parliament.

The Interim Constitution drafted then has been amended seven times in the three years of operation. The Interim Constitution was devised to manage the transition period. It is perceived as a soft constitution by the political parties. Although the provision of making a two-third majority is not an easy one, the constitution has been amended at times to address the series of movements, and to find consensus in various political agendas and to restore the work of the parliament. When the Madhes Uprising took place in the Tarai, the government tried to address it by amending the constitution. The Maoists obstructed the parliament demanding the declaration of federal democratic republic and fully proportional electoral system. The constitution was amended following this.

Similarly, because the date of holding the Constituent Assembly elections included in the constitution itself and being not able to hold the elections in time, the amendment of the constitution was mandatory. The constitution was also amended to make it up-to-date. The best example for this is the fifth amendment of the constitution and implementation of constitution on March 8, 2008. The constitutional amendment was an attempt to solve the issues raised by movements and the debates raised in national politics. While the constitution was amended multiple times in a short duration by the government and political parties for finding way out of the problems faced rather than weighing the short-term and long-term consequences of amending the constitution, the agitating parties demanded constitutional amendments because they thought that agitation is the best option for making the government and other political parties yield to their demands.

Dates and Amendments

The first amendment was done on April 13, 2007, following the demands of the Madhesis, along with indigenous and ethnic groups, and marginalised people to make Nepal a federal democratic republic state.

The second amendment was done on June 13, 2007, including a provision to dethrone monarchy if it tried to disrupt the Constituent Assembly elections.

Third was done on December 28, 2007 where Nepal was declared a federal democratic republic, that the provision of establishing a republic through the Constituent Assembly was incorporated, and where it was finalised that the Constituent Assembly elections would take place within mid-April 2008 and the number of constituent assembly members be 601.

Fourth amendment was on May 28, 2008 when the monarchy was formally abolished and Nepal was declared a federal democratic republic and the Constituent Assembly would elect the country's President and Vice-President.

Fifth was on July 12, 2008 when the provision of choosing the prime minister by a simple majority and not by two-third majority was incorporated.

Sixth, on December 11, 2008, it was stated that any Nepali citizen over the age of 18 years would be allowed to cast vote in the by-elections.

Seventh, on January 28, 2010, for making the post of the Vice-President function, provision of allowing the President and Vice-President to take vow in his/her mother-tongue was added.

The Article 148 of the Interim Constitution maintains that for any article of the constitution to be amended or scrapped off, a bill could be presented in the parliament, and the bill thus presented gets passed if the two-third majority of the parliamentarians vote for it. Based on the same Article, the parliament following the demands of the Madhesis, along with indigenous and ethnic groups, and marginalised people agreed to make Nepal a federal democratic republic state.

Similarly, the provision of abolishing monarchy if it tried to disrupt the Constituent Assembly elections, of declaring Nepal a republic through the Constituent Assembly, of the abolishment of monarchy, and of electing the Prime Minister through a simple majority was done through amending the constitution. The Provision for Constitution Amendment as proposed by the Constituent Assembly Constitutional Committee mentions: 'Any amendment against the values and norms respecting people's sovereignty, republican system, rule of law, independent judiciary, fundamental rights, press freedom, pluralism, multiparty competition, adult franchise, and periodic elections cannot be made.'

Conclusion

Not only for political reason, but the 2007 Constitution is progressive compared to the 1990 Constitution in terms of state restructuring, inclusive nature, and the financial, social and cultural rights incorporated in it. This change was not brought about just by the duration of 16 years, but a big role of the people's movements and the aspirations expressed through them. Although devised to manage the transition period, the Interim Constitution has granted many rights to the people. The voices raised for one's welfare and rights are also addressed in this constitution. This has opened a series of avenues for change.

The new constitution being drafted in this prospect is likely to be better than the previous ones. Such stage is also set because of the drafts of the Constituent Assembly committees, people's

participation in drafting the constitution, and people's interests in the Constituent Assembly. It is not that the Nepali Congress, UML, and Maoists have not given voices to proceed with new ideas. But if the representation and power balance of the Constituent Assembly is seen, no political party could neither stop the change nor could usurp the democratic norms and values. If gone by simple majority to approve the proposals of the Constitutional Committees, there could be chances of them getting changed. Similarly, as there is no chance of the constitution getting drafted in any one particular political party's power, the major parties might have to give ground on their positions. However, there is no room for the political parties to give away important issues of progression, democracy, federalism, restructuring, inclusion, human rights, and press freedom.