

Meaning, Implications and Scope of Constituent Assembly

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Abstract

Constitution of a given society is a sociological, political and moral document as much as it is a legal text. Thus for a dynamic society to reinvent its governance system necessarily involves social, political concerns and processes. Constituent Assembly in this regard reflects one of those processes of transformation of a society. However it is a human tendency that people in the brink of change tend to hanker behind the old habits and resist change. Fighting this habit thus becomes utterly necessary for the transformation sought by the people. And the success of Constituent Assembly also lies in being able to fight this tendency along with clear identification of what values to adhere to or respect in Constituent Assembly.

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INTRODUCTION

A progressive State, a dynamic society of free persons, reinvents governance values as the consistent and continuous progress. A society failing to have this quality cannot be a progressive society, and might face chaos and anarchy. The values of progressive governance, in a democratic society, are preserved as principles of constitutionalism evolved through constitutional practices and experiences of successes and failures. Optimism, pursuit of happiness and individual freedoms form such values in a democratic society.¹

Society is an ever-growing organism. It may encounter problems, chaos and anarchy. A dynamic society, however, goes on by discovering new ways. Of course, the systems of society are frequently broken, but the progressive society as a dynamic organism keeps reinventing new values, and moves out of the crisis by adapting to the given situation. The members of the society, due to their long nurtured habit of living in the customary paradigm marked by *status quo* often have a temptation to believe that the breakdown is permanent. In the physical world we can call this law of inertia: all bodies at rest remain resting.² This law, however, does not apply to the social phenomena. Nevertheless, the society as living organism gets changed to adapt to the given course of change. Yet, the society, while fulfilling this mission, has to go through a series of terrible paradigms of transition. An American politician, Donna Zajonc, has rightly said, “Every beneficial change is preceded by a period of discomfort and awkwardness”.³

Presently, the Nepalese society is passing through the uncomfortable and awkward situation. Viewing the given situation of Nepal at present, one can see obviously that the politics of Nepal is seemingly passing through an ever-felt painful and troubled condition. In the given scenario, people of Nepal see their future dark and uncertain. They feel their society is broken permanently. They have no faith on their leaders. They have long waited for a leader with all charisma and ability to fix everything in the right way. When they don't find the same, they feel despair. Given the size and complexity of the crisis, they feel scared and see a mountain of vulnerability. But what the history throughout the world has taught us that 'the crisis often brings opportunity to jump ahead progressively'. People in many countries have addressed such crises by their collective efforts. The collective forums like Constituent Assembly have been smartly used by

¹ See ZAJONC, 2004, p.10

² Id. at p.11

³ Id

people to rescue their nationals and themselves from unwanted future. Nepalese people, too, have rightly chosen CA as a platform with abundance of opportunities. This platform can, if properly and genuinely used,⁴ can prove to be a historic opportunity for reinventing many new values or desired breakthroughs.

MEANING AND IMPLICATIONS OF CONSTITUENT ASSEMBLY

In common parlance, a Constituent Assembly (CA) is a process of reinventing the values of governance, rule of law, democracy and national integrity. It is a popular process because it engages the entire population of a given society to evolve consensus for such values. It is why the Constituent Assembly is regarded as the most democratic process of making the constitution. A CA is, however, not a machine to produce an ever-lasting constitution. Both as a process and instrument, it helps the given society make new breakthroughs by reinventing fundamental values popularly and systematically.

The characters of democracy essentially mark a free society, and, the democratic society is, constitutionally, marked by a set of freedoms inherent in human beings by virtue of their birth as human beings. Viewed from this humanized perspective of polity, a CA is an instrument used by democratic societies to frame the constitution in accordance with the popular desire or will of the citizens. Obviously, it is also an instrument that makes the

⁴ Nepal is facing a critical division of interests among political parties and civil society. Political parties have neither interest nor activism to engender 'common national interests' to rescue the nation from trouble or crisis. Self-centered wills and motivations are phenomenally affecting the rescue process. Every interest group or class is engaged to secure something important for it, disregard of need of protecting the nation. Inclusion and participation is demanded for not from the perspective of need to strengthen democracy, rule of law and national integrity. There is phenomenal failure on the part of the political parties, interest groups and classes making demands before the government. To mention a few examples: many ethnic groups are demanding for federalist restructuring of the state system, but they are not interested to ponder as to how the national integrity can be strengthened simultaneously; women are demanding for 50% stake in the decision or law making bodies, but they are not interested to think as to what types of policies and laws we need to promote good governance and democracy; and political parties have their own agenda, but they are entirely apathetic to think about how consensus on political system, foreign policy, economic model, etc., can be developed. Segregation has been a syndrome of the Nepalese population. What is unavoidably established fact is that 'no interest of any group or class can be materialized without securing the national integrity and soundly grounded democracy'. A popular constitution is thus the precondition, and the Constituent Assembly is a prerequisite to have a popular constitution. It means that the Nepalese society needs to unite first to reinvent its core values of good governance and democracy.

citizens masters of their society, and exclusively authorizes them to determine the destiny of their society.

The importance of Constituent Assembly as a political process of empowering the people is even upheld even by the communist ideology. The communist revolutionaries had openly appreciated Constituent Assembly as a progressive instrument of transferring power of the State from the elites and minority to the working class people. For communist ideology, as it is quite evident from the history of communist revolution in the Soviet Union, CA is a progressive instrument of reforming the bourgeois society to the advantage of the common people, even though it does not, as they viewed, form a tool of socialist transformation of the society. What we can infer from this is that CA might be, under circumstances, an instrument for preparing for the grounds of revolution that gives complete powers of the state to the proletariats. Thus, they believed that it was correct for the proletariat to utilize CA to fight for bourgeois-democratic slogans. It is with this philosophy that the Bolsheviks in Russia agreed to take part in the CA election. To quote Lenin:

“The demand for the convocation of a Constituent Assembly was a perfectly legitimate part of the program of revolutionary Social-Democracy, because in a bourgeois republic the Constituent Assembly represents the highest form of democracy”.⁵

Obviously, the Bolsheviks did not want to utilize the CA election as a peaceful alternative to the revolution. According to Lenin, the CA election was merely an instrument of transforming the power to the proletariat. The following statements of Lenin make the assertion further clear:⁶

"While demanding the convocation of a Constituent Assembly, revolutionary Social-Democracy has ever since the beginning of the Revolution of 1917 repeatedly emphasized that a republic of Soviets is a higher form of democracy than the usual bourgeois republic with a Constituent Assembly.

For the transition from the bourgeois to the socialist system, for the dictatorship of the proletariat, the Republic of Soviets (of Workers', Soldiers' and Peasants' Deputies) is not only a higher type of democratic institution (as compared with the usual bourgeois republic crowned by a Constituent Assembly), but is the only form capable of securing the most painless transition to socialism.

⁵ VLADIMIR, 1917, p. 379-383

⁶ Id

Every direct or indirect attempt to consider the question of the Constituent Assembly from a formal, legal point of view, within the framework of ordinary bourgeois democracy and disregarding the class struggle and civil war, would be a betrayal of the proletariat's cause, and the adoption of the bourgeois standpoint. The revolutionary Social-Democrats are duty bound to warn all and sundry against this error, into which a few Bolshevik leaders, who have been unable to appreciate the significance of the October uprising and the tasks of the dictatorship of the proletariat, have strayed."

Implicit in Lenin's opinion is that the participation in the CA election could be a lasting solution only if all conditions of power transformation to proletariat were addressed by it. But it was not, as Lenin believed, possible. Hence, he warned, it would be a counter-revolutionary act to accept CA within the bourgeois democratic framework'.

From this discussion one can draw a conclusion that CA is acceptable for the revolutionary communist only as an instrument of transforming the state's powers to proletariats, as a process of generating larger support of people to the decisive revolution in future.

This notion about Constituent Assembly provides a perplex situation in the present scenario of Nepal, where all democratic political forces, rightists, centrist and leftist alike, have entered into an agreement for holding the CA election as a desired way out of the decade long conflict. CPN (Maoist) too has accepted the CA election as an alternative to the violent armed insurgency. However, it has so far not made its opinion clear as to whether the CA has been accepted in a form in departure from Lenin's thesis. His thesis has plainly projected CA as nothing but a revolutionary strategy for peacefully gaining the powers of the State as a prelude for complete revolution, i.e. establishment of the communist party's rule.

The agreement between the Seven Party Alliance (SPA) and CPN (Maoist) might fall in catastrophe, if the latter has not advertently accepted to depart from classical communist ideological stand on CA as Lenin set forth in 1917. If it has not, then the perplexity of the situation will further increase. As we all know, the people collectively invoked the agenda of CA in Nepal during April 2006 popular movement. The general people had put forward two demands to be addressed by the CA. They were (a) the establishment of the republican democracy and (b) the recognition and guarantee to pluralism of political ideologies with multi-party system. Perceivably, the general people did not support the system of 'one party' rule in Nepal.

The definition of CA in this typical context of Nepal is thus fully confounded with ambiguities and perplexities. For the democratic parties and general people, it is simply a process of making a new constitution with effect to eliminate the monarchy, and to work out a sound model of the inclusive democracy. If the same is the understanding of the CPN Maoist, making a new constitution successfully may not be a big challenge. And it will definitely provide an opportunity for transforming the conflict. However, if the objective of the Constituent Assembly goes beyond for establishing a proletariat state in Nepal, as CPN (Maoist) strategized originally, the making of a new constitution might end up in a devastating consequence. Discussion on this question is overlooked by all political parties and the civil society.

OBSERVATION ON CONSTITUENT ASSEMBLY FROM MARXIST INTERPRETATION OF SOCIETY

While it is no longer a fashion to introduce a discussion on political matters with a citation of Marx, and, occasionally, to do so might create a misconception, in the minds of capitalist intelligentsia in particular, that the person contributing to such a discussion is a communist. Anyway, let me quote a perception of Marx, a social scientist, about change and history. He once said:

“Men make their own history, they do not make it as they please; they make it under self-selected circumstances existing already, given and transmitted from the history. The tradition of all dead generations weighs like an alp on the brains of the living”. Of course, the history is unforgettable, and it largely helps to shape the future course of evolution.⁷

Marx is certainly, sociologically correct. No one can disagree that the process of social change is decisively influenced and shaped by its own historical developments. The future cannot be detached from the past. Marx’s statement contains a tremendous wisdom in context of societies that have been experiencing the traumatic process of change from an authoritarian regime to a democratic polity. Marx, in his introduction to the Eighteenth Brumaire Napoleon Bonaparte, cautions us of the emergence of the radical and innovative approaches to the reorganization of social life while the old system is both decaying and being transcended.⁸ He has also cautioned that just as societies are on the brink of transforming themselves,

⁷ Quoted from OGOT, 2001

⁸ Id

they may have tempting to hanker after old habits and resuscitate older traditional values. This tendency severely obstructs the process of true decisive change. In other words, history may repeat for society's failure to look forward and jump into progressive behaviors and attempts to create new values.

If we make attempt to look into the essence of CA from this education of Marx, the founder of communist political ideology, it clearly seems to be an instrument positively helping to the desired process of evolution of a constitution guaranteeing the positive transformation of the older values towards benefit of human beings. This way, it can be defined as a progressive instrument by help of which the society, looking for change, can transcend from old habits. A revolution without expressions of its newly emerged values may end up hankering after the old habits. A constitution following the revolution will be a document expressing the new values evolved by the revolution. To view this perspective, the opinion of Lenin does not find a scientific ground to believe on. As Marx pointed out, CA can be regarded as an instrumental process for eliminating the monopoly of elites on state's power. As such, it can be endorsed as an instrument of enabling people to be the masters of their destiny.

April 2006 movement was a revolution, without much bloodshed. The movement had clear messages for the future of Nepal. The CA election and the making of a new constitution by it should, therefore, be taken as a process of 'consolidating the new values emerged from the said popular movement'. No political party thus can go out of this mandate.

However, the course of change is not always directed to desired or positive direction. The danger of the process of change being deluded by its hankering after old habits always exists. The present situation of Nepal largely reflects this tendency. While the people of Nepal have made a bold choice to depart from the authoritarian past to the democratic future, the danger of the political parties and elitist civil society being engaged in blocking the process of change is serious. The delay in holding the CA election in many pretexts is an instance of the danger looming large.⁹

⁹ While the Maoist's agenda of immediate declaration of the republic and proportional election system seem progressive and praiseworthy, but they have been raised with a view to delay the CA election. CPN Maoist freely consented to the "Parallel Electoral System"- formation of the CA by 50 percent of representatives by first the past-post system and 50 percent by proportional system. The Parallel system is one of the terms and references of the Peace Accord signed between the Government and the CPN (Maoist), which was jubilantly celebrated by the latter as a victory of the 10 years long people's war. The proposal of CPN (UML) on proportional election was rejected by the

The people of Nepal plainly demonstrated a group impulse that they want to see their society get transcended to a democratic system of State, which remains controlled by the sovereign people. The attitudes of the political parties and some section of the civil society is, however, not congenial for this longing of the people. Their attitudes of remaining clung to the history are indications of falling off from the spirit of the popular movement. Implicitly, this attitude is an indication of the process of change being ended with a power-sharing agreement among the political elites.

Political parties made similar mistake in 1990, due to similar attitude. They made the mistake of agreeing to compromise with history, the legacy of the monarchy and feudalism. Consequently, they brought the popular movement to an end with a vague compromise with the monarchy, by which it was still able to maintain its high position and dominant power. Hence, the royal absolutism was gradually able to raise its poisonous head, and in 2004 decisively and overtly. The people were again compelled to sacrifice their freedoms and democracy. In 2006, people again revolted against the authoritarian historical legacy and since have been able to regain their sovereign supremacy. Unfortunately, the political leadership is weak, parochial and visionless to guide the process of change towards positive and a secured future of the Nepal's democracy and it's peoples' well being. Hence, the Constituent Assembly, which is to make a new constitution, must be regarded as an opportunity for ensuring the transformation of the dark feudal past into a bright democratic future.

RELEVANCE OF THE CONSTITUENT ASSEMBLY FOR TRANSFORMATION OF CRISIS

The last 50 years of Nepalese History clearly demonstrates that the people of Nepal at numerous occasions sought to transform their society, but their political leaders persistently hankered after old habits and customs to maintain feudal *status quo*. It is worth mentioning here a story of Krishna Prasad Bhattarai, one of our Prime Ministers and an honored democrat. On 13th April 2006, he said, after he came back from a meeting with the King

CPN (Maoist). In the Interim Parliament, the issue of proportional election was again raised by the CPN (UML), which CPN (Maoist) together with the Nepali Congress refused to accept. The CPN (Maoist) representatives, together with representatives of the other parties, enacted the CA Election Act, and subsequently with meeting of the Eight Parties, including CPN (Maoist), the date for the CA election was announced. Shortly after this development, it raised to agenda as pre-conditions to the CA election, which brought the CA election to stand nowhere. This tendency is an example of political party, how revolutionary it looks, to hanker after the powers and old habits. Source of Information: Interim Parliament Archives.

Gyanendra in a crucial time of people's movement, that he was a royalist and so it was just natural for him to oppose any idea of CA.

Sadly, one of the striking problems of our society is that our polity has consistently been failing to build on the confidence upon people. Hence, the aspirations of the people are often discarded or tormented. Our political leaders have always been unable to educate the king that his crown and position exists not because of his predecessors' contribution and the feudal inhuman prerogatives he has been able to benefit from, but because of Nepal as a nation inhabited by millions, with a great pride of their being independent population throughout the history. They have been unable to educate the Monarchy that the nation exists not because of it; rather it is the nation that is giving the crown, which it wears on. Hence, it is not necessary for a citizen to be a royalist, but the king must unequivocally be a loyalist to the nation and people. He is not a master, but a public servant like an elected president or a prime minister. It is entirely the people's choice if they want to keep this institution intact or not. In 1990, the people of Nepal wanted to have a constitution fully stripping the king of his absolute powers. To the contrary, political leaders choose to keep people subordinated to the king. Their mistake rendered the repetition of history with high cost; the monarchy one more time kicked back democracy.

We have made a series of constitutions in the past but all of them failed to focus on the people; rather we have always made the monarchy the center point. The proposed CA in this given reality is the expression of the desire of the people to exercise their sovereign powers in making a new constitution, which will clearly address a number of issues that is pending over the decades. The restructuring of the state system is one of the crucial issues, which necessarily encompasses future of the monarchy. To oppose the idea CA is, therefore, certainly a regressive polity.

Practically, making of a constitution through CA does not merely mean the process of drafting and declaring a so-called law of the land. Indeed, it means far more than that. In India, for instance, it meant a process of realizing the cherished goal of a long struggle for Freedom. Hence, in India, the demand for the Constituent Assembly was an event intrinsically linked up with the Indian people's larger goal of freedom from the imperialist regime. The resolution of the Indian Congress assembly for total independence (*Purna Swaraj*) in 1929 had aroused a great nationalist fervor and had galvanized the people to take part with renewed vigor in the Freedom Movement. The clear and unambiguous articulation of the deep-rooted longing of the people of India to be in control of their own destiny contained within itself the idea of a democratic Constitution which would

provide a framework for the governance of independent India by the Indian people.¹⁰ The Constituent Assembly was then thought to be the best platform to let the people work out a framework of their future on their own.

From these deep notions of love and sacrifice to freedom and independence, it was believed that such a constitution could only be drawn up by the elected representatives of the people, and thus it was from this unassailable logic that the demand for the CA was articulated by Jawaharlal Nehru. The proposal was accepted by the Indian National Congress in 1934, and Mahatma Gandhi, too, fully endorsed the proposal. On 25th November, 1939, he said:

"Pandit Jawaharlal Nehru has compelled me to study, among other things, the implications of a Constituent Assembly. When he first introduced it in the Congress resolutions, I reconciled myself to it because of my belief in his superior knowledge of the technicalities of democracy. But I was not free from skepticism. Hard facts have, however, made me a convert and, for that reason perhaps, more enthusiastic than Jawaharlal himself."¹¹

India's historical anecdotes about of the Constituent Assembly helps us to educate ourselves on issues that the process of making a constitution through a CA would be instrumental for giving expression to the people's deep faiths on freedom and willingness to participate in the system of governance. In India, when leaders engaged to take discussion about the issue of making the constitution through the CA, one of the ideas agreed by them without dispute was a conviction that the citizens would thus own the constitution and ultimately the nation itself.

In this sense, the process of making the constitution through CA is accepted, essentially as an important commitment for transforming the state into a glorious nation state. A constitution made through the imposition is bound to fail because the people won't own it. This was the fate of the 1990 Constitution of Nepal. As opposed to many people's superficial assertions, it never proved to be a model Constitution. The main reason behind it was the failure to discover the core values of the Nepalese society in the changed context.¹² The Constitution Drafting Committee introduced a 'British West

¹⁰ Quoted from the Speech, delivered by former President of Republic India, Dr. Shanker Dayal Sharma. The speech was delivered on the occasion of the 50th anniversary of the first sitting of the Constituent Assembly. Parliament House, New Delhi. Monday, December 9, 1996 18. URL <http://parliamentofindia.nic.in/Is/debates/ca.htm>

¹¹ Quoted from Id

¹² See for detail discussion in SANGROULA, 2004

Ministerial Model of Parliament', along with the western liberal majoritarianism concept of democracy. But the Nepalese society is, unlike England, predominantly controlled by a smaller elitist caste groups, and there are many different groups most of whom are marginalized. In that situation, the majoritarianism would only be a boon for the elite groups for monopolizing the state's powers with dire exclusion of larger number of other communities. The Maoist insurgency was built on the failure of this constitution to provide an inclusive basis to democracy. Most importantly, the constitution was disowned by the larger part of the population. The idea of CA in this perspective can be utilized effectively as a political process of transferring the ownership of the law of land over to people.

Nepal and South Africa were two important examples to usher to democracy in the early 1990s. South Africa successfully transformed to a democracy whereas Nepal miserably failed. Very few people in Nepal have attempted to diagnose the cause for this failure from the perspective of Constitutional framework. Deeper analysis of the past constitutional frameworks suggests that the Nepalese politicians have a tendency of tempting to overlook the necessity of developing a system to follow. Hence, in the past they have failed to realize that the constitution is much more than a legal document. They persistently demonstrated an attitude that the constitution is nothing but a statute, different only in the form that it is superior to an ordinary parliamentary statute. The constitution of any society, however, provides for the *grundnorm*- the fundamental norm- of the governance system as well as the relationships between individuals and groups in that society. As the *grundnorm*, the Constitution is seldom a product of the politicians in the parliament. It is rather a product of values, necessities and aspirations of the people. Hence, the constitution of a given society is legal as well as sociological, political and moral document. The success of South Africa was largely due to its politicians' understanding of this fact.

Sociologically, it is a process of identifying the core value of the society. Currently, in Nepal, the struggle of minority and indigenous people is getting momentum for the recognition of their culture, language, religious faiths recognized as the core value of the Nepalese society. The demand of the Nepalese people has spurred out of innate desire for greater liberty, equality, justice, respect for human dignity and democracy. The desire of people for such ideals

Right after the African National Congress pragmatic realization that the violent conflict was a waste of talent and energy of South Africa, it helped to abandon a wrongly perceived or grounded argument that in divided

societies the 'winner takes all'. This realization helped both the native blacks and power- holder whites to develop a theory of co-existence and form a consensual mode of government from which minorities (whites) would not feel permanently excluded.¹³ Another theory developed was the existence of 'bi-communalism' or recognition of a group rights and group representation. According to this theory, South African politics comprised "two power blocks": one based on the ethno-nationalism of the Africans, and the other on the significant population of white community.¹⁴ While it was a difficult task to complete, the political maturity of the ANC leaders achieved it after all. The Constituent Assembly was finally used to 'formalize the bi-communalism or existence of competing groups with recognition of group rights'. The significance of the Constituent Assembly in South Africa was thus very limited, as most of the issues of contention were pre-determined by political dialogue based on necessity of co-existence of one time warring groups. The interim constitution was in fact a true face of the conciliation between the competing forces. Unfortunately, the Nepalese political spectrum suffered terribly at this point. The Nepalese politics indeed failed to develop a co-existence based conciliation policy,¹⁵

Recognition of pluralism is another significant attribute of the Constituent Assembly. This is the reason behind why an autocratic society is reluctant to use it. In this sense, the process of Constituent Assembly represents a democratic mission of the people of creating a society where the values of pluralism and secularism are preserved. This doctrine is based on a conviction that the constitution is not merely a political document providing the framework and institutions for democratic governance, but also a

¹³ The theory of the CPN (Maoist) that the Constituent Assembly is a strategic maneuver to capture the State is what makes the 'difference between Nepal and South Africa'. The Maoist's theory does not recognize the political necessity of 'co-existence of all ideologies'. It is pretending to be a winner, and thus wants to take all as the winner. This strategy makes other political entities afraid of collaboration with Maoist. While there is vast difference between the poll for Constituent Assembly and Parliament, the current competition among the political parties for majority seats in the Constituent Assembly is an indication of the desire for making the constitution to suit the vested political interests. In Constituent Assembly, the opinions count, not the large number. South African leadership was able to understand this fact. Nepalese political leadership has so far failed to understand it.

¹⁴ *Supra* note 7

¹⁵ The conciliation prospect was largely frustrated by the YCL's activities of running parallel administration and administration of justice. The psychology behind the YCL's activism is that they have to prevail over other political entities. The declaration of withdrawal from the election at the last moment is an indication of the anti-conciliation approach.

framework for the economic and social emancipation of the society, in particular, the emancipation of the poor, the underprivileged and the downtrodden communities. In context of Nepal, the aspirations of people from the Constituent Assembly are thus not limited to its political dimension of stripping the king of his feudal prerogatives alone. In addition, the Nepalese people want to make their nation function in the future with the commitment to social and economic justice as the conscience or fundamental constitutionalism of the Constitution.

Hence, the idea of constitution making by the Constituent Assembly is driven by the concrete identification of objectives behind it. It would thus be difficult, if not impossible, to make a universally applicable modality of Constituent Assembly. Why one society wants to use it is the determining factor for both the definition and scope of the Constituent Assembly. No society can use the Constituent Assembly without clarity of thoughts and minds. To summarize, the following objectives make it an extremely dynamic process;

Popularization of the ownership of the form of the government: In the given society where the process of making of the constitution through informal mechanisms has failed, the Constituent Assembly has often been proved to be a successful venture to sustain a democratic form of government. This form of Constituent Assembly had been successfully used by India and South Africa, among others.

Internalization of the sense of nationhood and national pride: Newly independent countries have used Constituent Assembly to internalize the victory of their independent movements and acquisition of freedom. India is the best example. Indian leaders used this instrument to educate the whole nation that the constitution was brought in shape after a long and sorrowful struggle for freedom. In fact, in the given degree of acclaim and respect given to Gandhi, the Indian society probably would have accepted the constitution even if he solely made it.

Demarcation of rights and guarantee of existence: In some countries, the Constituent Assembly has been successfully used to demarcate the rights and guarantee for unchallenged existence of groups with their distinct identities. South Africa is a befitting example. Here the Constituent Assembly had been used to formalize the political understanding and necessity of recognizing the groups' rights.

Democratization of State: In some countries, the Constituent Assembly has been resorted to, to eliminate the loopholes of authoritarian regression. Malawi is an example for this case.

Demonstration of strength: *In* some countries, it has been used to depose autocratic regimes by manifesting the solidarity of constituent population. France is the example. The Constituent Assembly was convened to pressurize the monarch to abdicate. In Russia, the Bolshevik used the same objective. However, they failed to win the majority.

Utilization of opportunity to mass building: There is an instance where the Constituent Assembly had been used to build a support of the mass for revolution. In Russia, the Bolshevik used Constituent Assembly for building the mass support to capture of the State's power by the proletariat. Strategically, this is what Maoists in Nepal seem to engage in Constituent Assembly for.

The latter acts so, as the Constituent Assembly promotes a democratic practice of forming the government structure, but its objective might be derailed and can deform the democracy ending up at the autocratic regime. As a matter of fact, Constituent Assembly is not always an instrument that is totally free of risk from endangering the democratic will of people.

VALUES THE CONSTITUENT ASSEMBLY MAY PRESERVE AND PROTECT

The society cannot hanker on old habits. For its smooth and progressive transformation towards better service of human beings, a change cannot afford resuscitating old values set forth by dead generations. To obsessively cling on to old values would block the way for the new generation to come up with new values. A new generation cannot afford being chained by the outdated and dilapidated customs and conventions. Then why must the Constitution be serious in preserving some values? The reason is because some values are so fundamental that the entire foundation of the civilization or existence of the given society is based on them. The successful constitution is capable of identifying those fundamental values and giving up others. The Constituent Assembly is the most refined and progressive process to identify the fundamental or core values and give up the others.

For instance, in Nepal, all constitution-making processes in the past were glued to a so-called value that 'monarchy constituted the symbol of national unity'. They virtually exaggerated and mystified the role of monarchy in

Nepal. They failed to understand that it was not a universal institution. Nor was it a self-sustainable institution. Like many other institutions, it needed a nation for existence. Its existence could also be extinguished naturally. Had the present royalty been totally eliminated during the gruesome royal massacre, it would not have been there as a symbol of national unity. Thus, logically, a monarchy cannot be a symbol of unity of people. Only the people's institution can be a symbol of national unity. Metaphorically, the source of constitutional legitimacy is only symbol of national unity. In Nepal, the recognition of the pluralism or diversity of cultural, linguistic and geographical ethos is the basis of national unity. Obviously, an institution representing the diversity of such ethos is truly the symbol of national unity. The Constituent Assembly is the most progressive constitution making process in this sense as it, by interaction of the population, can identify and lay down the symbol of national unity.

Fundamental values are those values that are also binding on the people and other organs of the State. Such values are responsible to generate loyalty of people to the nation. The loyalty means respect to the nation with concrete legal obligation. For instance, no citizen of Nepal individually or in groups can denounce national sovereignty of Nepal. Thus, in a constitution making process through Constituent Assembly, it is not unusual to specify constitutional values that must be safeguarded henceforth. Since constitutions are, as rightly pointed out by Yash Ghai, negotiated documents, it is rarely that people embark on a making of it without some understanding of what its purpose is about.¹⁶

Such values are often negotiated by all key stake- holders. The agreement between SPA and CPN Maoist is one of such values in the case of Nepal. Specifically, the agreement for elimination of autocratic monarchy is one of such values. No political party or institution can now argue in favor of monarchy with any kind of power. Even the king cannot address the people to support him for power to rule. What he can appeal to the people is for the 'ceremonial status', and it is the choice of the people to determine if he can have that position or not.¹⁷ As pointed out by Yash Ghai, to a considerable extent such fundamental values reflect what were considered to be the weaknesses of the present constitution, broadly speaking the political framework of the system of government. In the context of Nepal, the following values need to be treated as inevitably fundamental ones:

¹⁶ GHAI, 2002

¹⁷ Id. See for additional theoretical discourse

National unity and diversity: Importance of this value is paramount for enabling the people to work collectively in unity in crisis, and make them able to resolve issues of contention with deeply rooted culture of conciliation. This value underpins a principle of co-existence. The Constituent Assembly in this sense is a platform to evolve culture of conciliation. Obviously, the sociological significance attached to the Constituent Assembly is remarkable. Secondly, the Constituent Assembly, in the given situation, is considered inevitable to promote inclusive democracy, which is a milestone for the transformation of conflict plaguing the Nepalese society for years. With this attribute, the Constituent Assembly has to focus on constitutionalization of a type of government in which all the communities of Nepal have access to participate, and consequently the ownership. To interpret, this value demands for breakdown or destruction of 'elite power centered politics' in order to give way for new breakthroughs.

Local self-governance or autonomy: The right to self-governance or determination is not a concept or instrument meant to destroy the national unity and integrity of the nation. Instead the concept of self-governance or local autonomy is the devolution of the governance power to the people. It is possible for such a core value to emerge only through a Constituent Assembly, as there is prospect for national discourse and compromise when constitution is being shaped.

Emergence of this value is necessary in the given context when the Nepalese society has long practiced a hierarchical societal structure, which obviously is founded on the feudal notion of the interpersonal relations. While the Nepali society in itself is composed of over five dozen minority or indigenous nationalities, the State's power is virtually seized by a handful of people, led by the monarchy. The military and civil bureaucracy is fully utilized to maintain and reinforce this exclusive control of the monarchy. Traditionally, there has been complete absence of respect of cultural diversity. The 1990 constitution too failed to realize the need to provide a strong mechanism to respect the cultural identity of various nationalities. The experiences in many countries have shown that the protection and respect to cultures of minority groups and indigenous population has enabled their members to exercise the autonomy and freedom, which the groups in powers take for granted. Practical experience has shown that the recognition of cultures of minority groups and indigenous population fosters a sense of belongingness and a strong sense of civic bond, whereas the

failure leads to conflict.¹⁸ The blatant example is Sri-Lanka and the North-east India.

Other important values needing institutionalization through the Constituent Assembly can be outlined as follows:

a. Pluralism, Democracy, Good Governance and the Rule of Law:

The resolution of the April 2006 people's movement has urged the CPN Maoist to give up arms as the demand for republic was made a popular issue without arms, and as such, the armed struggle for people's power became a redundant theory. The CPN Maoist thus has no excuse or right to use Constituent Assembly as it was advocated by Lenin in 1917. The 12 points agreements between CPN Maoist and seven political parties now form the political core value of the nation. It means that pluralism has been a mainstream concept of the Nepalese politics. Hence, the forthcoming constitution must not blur the multi-party democracy which allows all political forces to contest for power based on their respective ideology. The government system must be transparent and accountable to the people, not to the political organization. The power of the State must be divided, with unequivocal guarantee for judiciary to function independently. The electoral system must be reformed, so that every ideology or group may be proportionally represented in the legislative body. These demands of the Nepalese people can be met and legitimized only by the Constituent Assembly.

b. People's Participation in Government:

The constitutionalism behind the concept of people's participation in government has several implications or connotations. Firstly, it requires a system of free and fair election for handing over responsibilities to people of the public offices. The appointed bureaucrats cannot take over this role. Secondly, the elected representatives must assume the position with high principles of accountability and transparency. They must always be concerned with the mission of pursuit of people's happiness and protection of freedoms. Hence, the constitution must work out a concrete framework of governance. Thirdly, the central government should not be allowed to interfere in the local public affairs. The Constituent Assembly must

¹⁸ Supra note 7

therefore devise a system of vertical power sharing with a concrete scheme. This means a concrete plan of actions for devolution of powers.

The devolution of powers means the transfer of political authority of state to local level enabling the local representatives of the people to make decisions in some sphere of public policy. The concept of devolution of powers essentially differs to that of decentralization. Decentralization implies that the center delegates certain tasks or duties to the outlying bits or subsidiary units of the state. But the center remains in overall control of such powers. Hence, the powers to carry out these tasks and duties are not owned by the local governments. Under the decentralization concept, the local bodies work only for the sake of the central authority. The devolution of powers is thus a process of making sure of self-rule of people. In certain sense, this is what is called autonomy in general terms.

c. Guarantee and Protection of Basic Needs of People

The 1990 constitution failed to protect the right to life against hunger, diseases and deprivation of opportunity. The right to life is meaningless without guarantee to basic needs such as right to food, work, shelter and development. The right to education and capacity building must therefore be recognized as basic rights. The capitalist framework of the government system does emphasize only the civil and political rights, and thus creates conflict between the political democracy and economic and social democracy. But the political democracy without adequate economic and social empowerment is meaningless. The Constituent Assembly is thus expected to make people's basic needs as their fundamental rights, not the discretions of the government.

d. Protection of Human Rights:

Human rights are universal, inalienable and inviolable. They are inherent in all persons. Gender, cast and ethnic equality is necessary for ensuring justice. The accessibility to basic needs becomes meaningless without the guarantee of equality. The assumption behind the move of Constitutionalization of human rights is that the constitution is the supreme law of the land and therefore any law or conduct inconsistent with it is void. Constitutionalization of basic rights is necessary not only for giving a primacy for these rights but also to flag the primary purpose for the existence of the state, namely, the promotion and protection of human dignity, equality for all and human rights. The constitutionalization of basic

rights makes the state subject to the authority of law to provide service to the people. It virtually ends the concept of dominance of officials of the State over people.

e. Justiciability of the Economic, Social and Development Rights:

A number of arguments have been advanced as to why economic, social and development rights have not been Constitutionalized or are not made justiciable. One argument is: “no state can afford to actualize such rights because of the economic implications thereof”. This argument is faulty on several grounds. The issue of making such rights justiciable is not related with the economy of the nation, but with the sovereignty of the people. It is tempting to believe that the poor nations cannot afford providing free foods and medicines to people. In fact, what is demanded is not the free food and free medicines, but a system of supply or service delivery that provides unrestricted access for people towards necessary service. These rights call for obligations on the part of the government to satisfy minimum standards of service to people. For instance, in context of Nepal a minimum standard of health service, meaning adequate health facility in villages is essential. Simply speaking, without having such basic needs fulfilled, it would be virtually meaningless to Constitutionalize the civil and political rights.

The 1990 Constitution utterly failed to recognize the inevitability of economic and social rights as basic rights. Some conceptions that found place in the constitution were limited in the form of State’s directive principles, and as such not justiciable. Failure to recognize the economic and social rights as basic rights is instrumental to push the marginalized community further into deplorable conditions of backwardness. Monopoly of elites on economic resources generally results in the failure to recognize the economic and social justice. Economic and social rights are directly related to the basic needs of people, and thus their denial means the denial of the rights to food, health care, water, social security, housing, education, employment, and standard living. While vast populations of the country (38% below the poverty line) were subjected to deplorable conditions of life, state’s services were monopolized by people who had access to them. All benefits granted by the State had been pocketed by rich and middle class.¹⁹ The economic and social rights thus need to be incorporated by the new constitution as basic value.

¹⁹ See for detail analysis on SANGROULA 2006

These values need to be considered and encapsulated by the forth coming constitution, with due consideration. The Constituent Assembly must be able to address the challenges created by phenomenal corruption in all departments of the government, ill distribution of public services, absence of civic education, hierarchical social structure, and dominance of certain people over all kinds of resources and opportunities. Poverty has been a stumbling block for majority of the people to participate actively and meaningfully in the political process and governance. The wake of a gruesome conflict in the past 12 years has urged the Nepalese society to review the existing values of its constitution and political norms that have not only failed to serve the country as a nation state but have also intensified the conflict among cultural groups and seriously hindered the sense of national belongingness. The Constituent Assembly should therefore be utilized to ensure that the new constitutional framework would guarantee freedom and democracy, and respect to cultural identities in tune with modern realities and needs. The people of Nepal have aspired that the new constitution must secure the following:

1. Guarantee of peace, national unity and integrity of Nepal as a sovereign nation of people, in order to safeguard the well being of the people of Nepal.
2. Elimination, of all feudal and conventional institutions, which exploit national exchequers for their personal benefits and often pose a threat to democracy and freedom of people.
3. Establishment of a free and democratic system of Governance that enshrines good governance, constitutionalism, the rule of law, human rights and gender and ethnic equality as basic principles of governance.
4. Full and exclusive accountability of the Government to the people with all powers in the hands of the people to preserve or punish the Government.
5. Recognition and demarcation of the division of responsibility among State organs- the executive, the legislature, and the judiciary- so as to create checks and balances between them and to ensure accountability of the Government and its officers to the people of Nepal.

6. Devolution of state's powers to the local level so that people can rule themselves without interference of the central government²⁰.
7. Promotion of people's participation in the governance of the country through democratic free and fair elections²¹.
8. Respect to ethnic and regional diversity as a core value of the Nepali nation and group rights of communities to organize and participate in cultural and linguistic activities, and the expression of their identities.
9. Guarantee of basic needs of all Nepalese people through the establishment of an equitable access to national resources
10. Promotion and facilitation of regional and international cooperation to ensure economic development, peace and stability, and to support democracy and human rights.
11. To practically materialize these expectations into reality, the new constitution must also be able to provide a workable system for the democratic functioning of the government, and powers to people to censor the government failing to pursue the values set forth by the Constitution. For this purpose, the following mechanisms should be made fully operative by the constitution:
12. A system of accountability of the Government to people: for this a channel or process should be set forth by the constitution through which people can bring the issues of malfunctioning of the government to the public enquiry²²

²⁰ A group of researchers, including the author, from Kathmandu School of Law have suggested two models of devolution of powers. The most preferred by people is the division of Nepal into 9 autonomous councils with civil, police and financial powers. The alternative form suggested by people is the constituency government. See on Id

²¹ One of the failures of the 1990 Constitution is its electoral system, which, for no reason and detriment to the participation of indigenous and minority groups, has adopted a first past the post system of elections, in which the minority group rules the majority. The proportional electoral system or the block vote systems are two options thought to be realistic in the context of Nepal. See in Id.

²² Modern constitutions of the world have introduced the judicial review and legislative censuring of the Government as two major mechanisms. In South Africa, the Constitution has provided for a very powerful Constitutional Court, which independently and efficiently investigates the constitutionality of the Government's act. The government of South Africa, for instance, failed to guarantee an opportunity for free medicine for HIV/AIDS. The decision of the Government to refrain from providing free medicine to HIV/AIDS affected persons was declared against the constitutional value of right to life, and censuring the government resulted in the instruction to make provision to access to free medicine. In some countries, the USA, for instance, people can bring the issue at the Senate for investigation. The Abugarib prison case is the example.

13. A procedure to activate the system mentioned above
14. A system of intra-party democracy for fair competition among the actors and to ensure inclusion of people from various walks of life. A system of accommodating the diversity, including socio-economic status, race, ethnicity, gender, age, occupation and persons with disabilities in the political process and government
15. A system and procedure to grant supremacy to human rights.

ISSUE OF PEOPLE'S SOVEREIGN POWERS AND CONSTITUTION

In a country like Nepal that has a history of deeply rooted feudal elitism and monopoly in the powers of State, the issue of sovereignty attracts a serious debate. The 1990 constitution, for the first time in history, provided that the 'sovereign right of Nepal resides on people'. The *panchayat* Constitution expressly provided that the 'king was the source of all powers'. The country, prior to 1990, was thus treated like private property of the king. The Constituent Assembly is important to secure placement of the sovereignty on the people. It is thus going to be a historical event for the nationhood of Nepal.

Sovereignty in simple terms may be defined as the exclusive right of the state to govern the affairs of its inhabitants and to be free from external control. The State however cannot be an absolutist institution. A very common principle is that the 'State exists for people, but not the people for State'. This principle is the core expression of a democratic nation. The functionaries of a State exercise the sovereign powers to govern public affairs, yet the source of legitimacy of such governance is entirely located in the people. It is believed that the constitution is an instrument that grants such powers to people.

The issue of people's sovereignty often comes into debate, and the main reason is that individual citizen him/herself does not exercise the sovereign power. Therefore, the constitutional debates have often posed the question whether the constitution is supreme as against the people. The popular position is that the people are the ultimate authority from which the constitution and all governments and all organs of the State derive their authority. The people are therefore the makers of the constitution and *ipso*

facto must retain the ultimate authority to repeal it and replace it with a new one if they so wish.²³

A very basic principle of constitutionalism is that the ‘the constitution itself obtains legitimacy from the people’s sovereign power’. The people express their legitimacy by enshrining into the constitution the basic rights of citizens that are popularly known as fundamental rights (this is not the only expression of the people, considered). As such, while the constitution is supreme over the three organs of the State and the individuals acting in their individual capacities, the people are, on the other hand, supreme over the constitution, and consequently over the other organs of the State. As a matter of fact, the citizenry can legitimately abrogate, annul, revise or rescind the constitution or call for and hold a Constituent Assembly or national convention.

The normative and sociological approach also justifies this argument. To ensure political stability by annulling all loopholes of misuse of power by the monarchy or any other authoritarian regime is the concern of people at the present. Nepal, as a nation, is in the brink of collapse due to division of political opinions and failure to respect the diversity. The nationalism is thus a profound concern of the people, as they do not wish to lose the identity of being a Nepali. However, the survival of nationalism is not feasible without social progress. As Prof. Henry Mwanzi has rightly pointed out, “Social progress nourishes nationalism, until nationalism appears as an indispensable condition for social progress- the two constitute national identity, and reinforce each other”. A nation comes into a crisis when the integration of these two comes to a crisis or conflict. In a developing society, where there is a lack of strong and unified progressive political elite, this integration is often hindered by the feudal elite. The Constituent Assembly is a quest to end the dominance in politics, and thus prepare a way for integration of the nationalism with diversity and social progress. The technical legal legitimacy is thus rejected by the need for change.

The making of a constitution through a Constituent Assembly in such a society has two elements: it is normative as well as structural. The normative element has to do with the value system that should be attached to and contained in the constitution. It constitutes the sociological element of the constitution. It gives it life. The structural element deals with politics, and is concerned with the power arrangements and distribution of offices.

²³ LULUMBA, 2001

The durability of the constitution depends on its capability of enshrining the basic values that are necessary to integrate the nationalism with social progress. In developing societies like Nepal, there has been a trend of ignoring the values and promoting the structural element. The 1990 constitution, for instance, introduced a structure of democracy, and division of authority and offices. It, however, entirely failed to ‘incorporate values’, i.e. the recognition of cultural diversity, and the rights of all people to participate in the government. This defect arose from the failure to give equal weight to normative and structural aspects of society.

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