

Constitutionalism of Transition

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Abstract

Existing legal and constitutional principles face great challenge during transition. As the revolution seek to leave behind the former values that are repugnant to new transformation, and embrace new principles, there lies great difficulty in reconciling new values with the deep rooted and relatively universally recognized principles. Which may also result into a possible conflict in principle, between generally recognized values of constitutionalism and constitutionalism in context of transition (transitional constitutional). During transition constitutional lawyers' chief job is to find way for the reconciliation of revolution with constitutionalism, transitional justice in particular pose great difficulty in this task. So during transition constitutionalism may take somewhat unconventional form and may connote unconventional meaning in the form of transitional constitutionalism. However, his unconventionality of the transitional constitutionalism is required for the transformation sought during popular revolution because it creates necessary foundations of transformation.

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INTRODUCTION: CONSTITUTIONALISM AND TRANSITION

Constitution of a nation apart from being fundamental law of land also carries high degree of socio-political recognition that forms the basis of its implementation, interpretation and crucially more than just legalistic assertion of legitimacy, such recognition permeates the constitution with high degree of moral authority as well. Indeed constitution is more than a mere text. It transcends beyond its letters and words a “broad philosophical value”¹ that gives both normative and factual relevance to the text of the constitution. In fact the secret of constitutional longevity and fidelity also lies in this very nature of the constitution, which demands constitution be understood in its proper social, economic, political, legal context² and not in any mechanical way that might neglect the ‘organic’³ nature of the constitution. And this very nature of the constitution is enveloped by the philosophy of constitutionalism.

Constitutionalism reflects wide normative ideas of a democratic constitution, like ‘Parliamentary Supremacy, Rule of Law, Human Rights, Responsible Government’⁴, Judicial Review, Independence of Judiciary,

¹ See for detail, BARNETT, HILAIRE, CONSTITUTIONAL AND ADMINISTRATIVE LAW, pg 3-4, Cavendish Publishing Limited 1997, where the author defines this “broad philosophical values” as constitutionalism that tends to permeate the Constitutional texts.

² One example of such understanding lies on the evolving concept of constitutional interpretation that emphasize on different existing normative standards (constitutional values, contemporary sense of justice, morality, rule of law virtues, social norms, efficiency, practical efficacy of constitution and constitutional provisions to the present context) apart from more obvious way that takes into account existing principles of interpretation. See for detail, LARRY ALEXANDER IN “PRACTICAL REASON AND STATUTORY INTERPRETATION, COLLECTED ESSAYS IN LAW, LEGAL RULES AND LEGAL REASONING” pg 319-322 Dartmouth Publishing Company Limited 2000, Khatiwada, Apurba, Constructing Constitution Beyond Original Intent, 2007 Dworkin Ronald, ‘In Praise of Theory’ 29 Arizona St. L. J. 353 (1997)

³ The notion of “Living Constitution” advocated by American constitutional experts, meant that the constitution would find new relevance within the same text as it passes through the history and reiterated by Justice Holmes in *Missouri v Holland* (1920) “When we are dealing with the constitution, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken years and has cost their successors much sweat and blood to prove that they created a nation.” See for detail, Rehnquist, William H. “The Notion of a Living Constitution” 54 Tex. L. Rev. 693 (1976)

⁴ See for detail, A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, pg 107-22 Eighth Edition (1915)

and so forth. Probably the list can go forever, important thing is that being the value and the principle that it is, “organic”, constitutionalism could and normally does adapt to the aspirations and expectations of the people whose lives are to be ordered and secured by it.

However, major political change after a popular revolution can prove very daunting time for constitutionalism to retain its original understanding. If constitutionalism permeates entire fabric of constitution and that it is the normative element of constitution able to reshape itself with time and demands. Transition is the unprecedented test for its relevance during the political change when the words of the constitution are gradually shedding their relevance and loosing their fidelity.

Transition implies the period of “transformation from one system to another,”⁵ it implies to the period where people have given up the old values and trying to hold on to the new one⁶. Moreover as Justice Langa stated “All societies in transition should have a transformative [values] rather than one that is merely transitional.”⁷ Transition thus, also means transformation, it is not only the end of old values but also the beginning of the new one, which proceeds forward by filling up the political cleavages as well as defeating old atrocities and injustices.

However, with such positives that a transition can lead at the end of the day, transition *in medias res* is very complex and challenging for the normalcy in law, constitution, politics, economy and so forth. And much of these complexities owe to the value clash between the former order and the new ‘sought after’ order during transition, apart from the volatility of the nature of transition itself.

In this regard, during transition a state faces few difficult questions, first what shall be the objective of transformation. Second, how to justify or give moral and constitutional meaning to the preceding act of change or revolution. And finally, how to manage the transition. And effective answers to these questions are indeed the keys for successful transformation. Otherwise, in the name of meaningful and successful

⁵ Thapa, Kamal Raj, Challenges facing a new Nepal, The Himalayan Times, 30th March 2007, pg 6

⁶ By transition to new values the article deals with the transition of a society to better values, like Democracy, Justice and so forth, that is democratic transition.

⁷ Roux, Theunis, Constitutionalism after Transition, Conference conclusions, International Association of Constitutional Law 2006

transformation, a constitution may speak to the actually existing political cleavages in a country. And yet, in so doing, it may risk enforcing or legitimating those cleavages, such that they continue to structure a country's politics in perhaps unhealthy ways.⁸

And as discussed earlier existing notion of constitutionalism probably bears quite an effect on it, it is also true that the notion of constitutionalism is most capable of giving unyielding of answers to the questions posed by the states in transition. However there may be few primary concerns, that is, whether constitutionalism is foundational/settled or dynamic, forward looking or backward looking?⁹ That is, whether constitutionalism in transition is borrowed from the old values or it is constructed again according to the normative demands of transitional period and the practical efficacy of transformation.

DIALECTICS OF TRANSITIONAL CONSTITUTIONALISM

Transition and Constitutionalism at the first look may seem very odd combination. In fact the whole notion of transitional constitutionalism for many, may seem like a notion in war with itself. Indeed general understanding of the principle of constitutionalism in its pure form would readily show such elements of constitutionalism, which probably has very little space during transition. For instance one of the aims of transitional constitution, after coming through a revolution may be to, “placate former enemies [and] to create the capacity to absorb the social and political consequences of democratization.”¹⁰

In fact professor Ghain also observes “many countries in the transition to democracy in this century have built in a deliberate ‘democracy deficit.’”¹¹

⁸ Id.

⁹ See for Details Teitel, Ruti, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 *Yale L.J.* 2009 (1997)

¹⁰ GHAIN, YASH, *DEMOCRATISATION, GOVERNANCE AND CONDITIONALITIES*, IN *LAW AND JUSTICE: AN ANTHOLOGY*, pg 365 (Soli J. Sorabjee ed. Universal Law Publishing Co. Pvt. Ltd. 2003)

¹¹ Id, Indeed professor Ghain's ‘democracy deficit’ can well be found in Nepalese transitional order. The Interim Constitution of Nepal 2007 Second Amendment Article 65(c)(1) and consequently Constituent Assembly Election Act 2007, Section 19 (f) restricted some former members of Royal government before 2062/63 revolution on the basis of their ‘alleged’ involvement in suppressing the revolution. Similarly another instance of such qualified electoral practice could be the Algerian elections in early 1992, where the second round election was cancelled following a huge lead taken by the

And taking into account this very ground, constitutionalism of transition may not be able to cope with the standards set by the constitutional lawyers for their notion of constitutionalism. Indeed, Adherence to the basic premise of Constitutionalism during periods of political uncertainty caused by transition creates, as discussed earlier, a tension between Constitutionalism as backward-looking and forward-looking, as settled versus dynamic.

Moreover, just after a successful revolution every member of the society and citizens feel that they deserve their goals for which they fought. However when all those goals are sought simultaneously, not only it would be daunting task to satisfy all of them but also may well lead to a conflict between those goals.¹² Whereby a democratic decision during transition would not necessarily mean complete satisfaction of all demands, however legitimate those expectations were. Which again raises a very intricate question, that is, how far in the name of transition and efficacy can the transitional order stray from the prevailing sense of right (constitutionalism). And how proper is it to redefine some elements of constitutionalism against the revolutionary backdrop and to a certain extent compromise the existing values within the perceived sense of constitutionalism.

Probably response to such complexities, in the form of separate school of thought as ‘transitional constitutionalism,’ possessing its own moral, political and legal authority capable of governing transitions as well as democratic transformation and able to determine its own normative contents and able to carry them through is best effective. Furthermore it is only proper that the extraordinary condition invited by transition can be governed by the order which is not only flexible to fend off all the challenges posed by transition but also carry enough moral and constitutional authority to transform.

Significantly other schools of thoughts advocated so far that contradicts greatly to this notion, have failed to effectively carry out the objectives of transitional society. For example, ‘Constitutional orderliness’ advocated by many constitutional experts including Bruce Ackerman, stresses, “even

radical FIS party in the first round of election, when FIS leaders expressed open hostility toward multiparty democracy, issued contradictory statements as to whether their plans included holding future elections and intended to convert Algeria into an Islamic state. See for detail, Fox, Gregory H. & Nolte, Georg, ‘Intolerant Democracies’ 36 Harv. Int’l L.J. 1 (1992)

¹² See for detail, GHAIN supra note 10 at 364-366

when engaged in transformative constitutional development, the [United States] nonetheless adheres [d] to deep constitutional norms”¹³ of normal politics, failed to take into account the very nature of transition which implies disorder and legal instability to the extreme of the extent. And also failed to consider transition after a movement that questioned the legitimacy of existing constitutional order, that is, probably transition after peoples’ movement that challenged the existing order and sought, as Joseph Raz advocated society do, “test of general efficacy of the [existing] legal system.” And thus determine transition as the occasion for “the test of exclusion”¹⁴ of existing constitutional order the doctrine of ‘constitutional orderliness’ during transition does not succeed.

Hence, transitional jurisprudence should not box constitutional order during transition to some constitutional cliché. Indeed transitional jurisprudence itself is fluid in form¹⁵, so as professor Teitel writes, constitutionalism during transition as ultimately contingent in the sense that rather than grounding itself to some Constitutional order, it serves to mediate the normative shift in justice and other socio-political as well as economic values that characterizes these extraordinary periods.¹⁶ Many prized value of ‘normal constitutionalism’ like rule of law, “does not follow idealist conceptions: Instead, the rule of law is constructed in relation to past conceptions of injustice, and an extraordinary form of the rule of law emerges.”¹⁷ Thus for the successful management of transition and to transform the society, transitional constitutionalism having its own normative standards is not only proper but also inevitable.

Moreover, transitional constitutionalism and the shift in its principal contents from normal constitutionalism further helps to transcend the moment of political transformation into the common understanding of law and constitution. Thus giving very unpredictable and volatile political movement, legal and constitutional face. Whereby it not only helps to provide stability but also give refuge to political movement/revolution

¹³ Levinson, Sanford ‘Transitions’ 108 Yale L. J. 2215, 2223 (1998-1999)

¹⁴ See for detail, RAZ, JOSEPH, THE CONCEPT OF A LEGAL SYSTEM, AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM, pg 203-208 Clarendon Press, Second Edition 1980,

¹⁵ Teitel supra note 9 at 2078

¹⁶ See for Teitel supra note 9

¹⁷ Id. at 2077

(which is all the time against the existing system) under the constitutional and legal 'rule.'¹⁸

FOUNDATIONS OF TRANSITIONAL CONSTITUTIONALISM

By foundation of transitional constitutionalism, it is meant the sources and to an extent contents of constitutionalism during transition. And given that the functions of constitutionalism of transition are to manage and transform transition and give moral and constitutional meaning to the revolution immediately preceding transition. Foundations of transitional constitutionalism seek to define wide array of probable principal ingredients prevailing in the political, social, legal and constitutional discourses that can contribute to the contents of constitutionalism of transition. Apart from that it also helps to ensure the right transformation of the society. Because, in absence of such foundations a society may be able to kill the first evil but may not know where to head off then. And such indecisiveness may run the risk of reinstitutionalizing of the old and already repugnant system¹⁹.

In this milieu, legitimate revolution for democratic transformation²⁰ itself creates strong moral authority and ultimately shapes the contents of

¹⁸ In fact, 'The Rule of Recognition' as the Secondary rule in H.L.A. Hart's thesis speaks to this very instance. Professor Hart states that when there arise uncertainties in the legal system (for example after a revolution against existing system) remedy lies in the Rule of Recognition, which serves to determine what actually counts as law in new order as well as helps to identify primary rules (new constitutional values) of the new order. See for Detail, HART, H.L.A THE CONCEPT OF LAW, pg 92-94 Oxford India Paper books, Second Edition 2002, See also DIAS, JURISPRUDENCE, pg 351-353, Butterworth & Co (Publishers) Ltd. Fifth Edition 1985, MORRISON, WAYNE, JURISPRUDENCE: FROM THE GREEKS TO POST- MODERNISM, pg 370, Lawman (India) Pvt. Ltd. 1997, pg 370

¹⁹ See, Roux supra note 7 Take for instance; lack of clarity in such foundations in 1951 even though saw back of Ranis but had to bear with the authoritarianism of Monarchy, that is, in post Rana era Nepalese society was sure that it wanted Ranis to be out from the ruling junta but failed to identify the foundations of the next political and constitutional resort that should have institutionalized democracy and peoples right.

²⁰ Probably the legitimacy of a revolution depends on the comparative judgment of existing values of the society, which is being contented and fought against and the transformation sought by such revolution. Which in turn suggests revolution to be retroactively justified by the success and acceptance of revolution and the developed constitutional values there after. However, it is still very difficult to search a common formula that can determine the legitimacy of revolution, which generally differs according to the individual context. Anyways, in the literature present to date professor Rawls comes close in determining justified grounds of, if not revolution, civil disobedience, which according to him are peaceful and made within the constitutional system. According to John Rawls Civil disobedience is justified if (a) There is violation

transitional constitutionalism. However, for many revolutionaries trying to search the legitimacy of revolution is not that much amusing. Indeed for many trying to search the basis of revolution is restricting the supra 'politico-legal' status of revolution and boxing it in a premeditated and obsolete principles. Nevertheless, as eminent constitutional expert Bruce Ackerman correctly observes it is crucial not only for the proper foundations of transitional constitutionalism but also for the practical reasons, that legitimacy be found and then pinned against some revolution and not against all;

Revolution is a game any number can play. Just as you challenged established authority, so can the next fellow. He too can proclaim his superior virtue and your subversion of the public good before irregular conventions who speak in the people's name. Vigilance, and the effective use of force, is a part of the successful revolutionary's answer to such rival pretensions. But there is another part too—an explanation of why it is wrong for others to usurp the usurper's crown.²¹

Thus, foundation of transitional constitutionalism is crucial for the moral and political authority of the revolution. And as it is, also for the most part constituent of the objectives of revolution, foundation of transitional constitutionalism serves the prospective function of defining the course and nature of transformation sought. Indeed in this regard people's movement in April 2006 was not only authoritative because then existed strong moral and political desire to end royal government in Nepal but also had great constitutional conviction to restore parliament, to go for constituent assembly election²², and to further assure wide array of individual and

of two principles of Justice, that is equality of freedom and fair equality of opportunity, (b) There is absence of legal means of effective redress and (c) Through analogy between the similar conditions of two groups in which the first group is justified under former two elements and the second group is justified because it shares the suffering of the same degree of injustice and normal political appeals have likewise been to no avail. See for Detail, RAWLS JOHN, A THEORY OF JUSTICE, pg 363-377, Universal Law publishing Co. Pvt. Ltd. First Indian Reprint 2000,

²¹ Ackerman, Bruce A. The Storrs Lectures: Discovering the Constitution, 93 Yale L. J. 1013, 1019-1020 (1983-84)

²² Ironically no such provision that could restore parliament or that provided for Constituent Assembly could be pinned in the then Constitution of the Kingdom of Nepal 1990. And indeed, not any provision of the Constitution was invoked by the King in restoring the Parliament neither the then constitution provided any right (in fact it prevented under Article 116) to parliament in making any determination to form whole new constitution by holding Constituent Assembly election. See for detail, Royal

collective rights of peoples, as the right form of transformation. And those convictions translated into the letters of law now govern the nation along with finding privileged place in the Interim Constitution.

That is, aspirations transcended during the revolution have become the foundations of transitional constitutionalism, and also the ultimate test of legitimacy of revolution²³ and democratic transformation. Indeed these days all political parties, civil societies irrespective of their participation in the revolution feel a compulsion to justify any policy they make or any decision they take on the basis of ‘the aspiration of peoples movement’. In fact the interim constitution speaks to this very subjective notion of ‘the aspiration of peoples movement’, by making all the three organs of state function according to ‘the aspiration of peoples movement.’²⁴ However, it is yet to be precisely defined what actually the constitution means by ‘the aspiration of peoples movement.’ Anyways development of this phrase into a cliché of Nepalese politics and recent constitutional commentary does suggest that the transition in Nepal even though in the most subjective of way, is being governed by the ‘aspirations’ people had while they revolted against the royal government. Which again explains the foundations of transitional constitutionalism as resting on such notion that was asserted by the revolutionaries during their revolution. Yet as subjective a notion ‘peoples’ aspiration’ is, it inevitably invites heated debate on its interpretation. In fact recent political deadlock on the question of electoral system and monarchy, seem to be the result of diverse interpretation of ‘peoples’ aspiration’ by Maoist and rest of the other political parties.

Indeed for a democratic transformation peoples voice is the most proper foundation, however apart from the peoples’ aspiration, probably, the foundations of transitional constitutionalism could also be prospectively discovered, by the necessity created by the demands of transition²⁵.

Proclamation of April 24th 2006 restoring the parliament and dissolving the then Council of Minister.

²³ See for detail Richards, David A. J. *Revolution and Constitutionalism in America*, 14 *Cardozo L. Rev.* 577 (1993) where the author opined that the success of American constitutionalism is literally the test of the legitimacy of the revolution for the American independence.

²⁴ See Interim Constitution of Nepal 2007, Articles 43 (1), 46 (c), 100 (2)

²⁵ For instance the House of Representative Declaration that slashed most of the rights of the King as a head of State including the status as commander in chief, and furthermore the declaration directly dissolved Raj Parisad a constitutional organ, National Anthem, and so forth, so that the transition and consequently the Constituent Assembly Election could in no way be jeopardized by the palace.

Furthermore as transitional constitutionalism also has transformative values, foundations of transitional constitutionalism could also be identified with the constitutional pre-commitments that are valued so much not only in the literature but also in the recent democratic transitions of numerous nations across the globe²⁶. In fact, Russel Hardin argues that many recent democratic transitions have failed because either they lacked constitutional pre-commitments or the parties to such commitments did not respect such pre-commitments²⁷. In any case constitutional pre-commitments during democratic transition are crucial, they help to bring together needs and demands of all stakeholders from all part of life. And then when the parties and the crafters of new constitutional order agree upon such needs and demands it not only acts as a moral, political and even constitutional²⁸ authority but also the guiding principle of transition, as it will act as the foundation of transitional constitutionalism.

More theoretical foundation of transitional constitutionalism can also be found through a simple analogy, with what David A. J. Richards called “six ingredients of American revolutionary constitutionalism;”²⁹

- a. Political principles of revolution
- b. Constitutional Principles of pre-revolutionary era
- c. Analysis of political pathologies³⁰
- d. Use of comparative political science
- e. Political experiences of the past political, legal, constitutional structures
- f. Self-conscious work of political reason.

²⁶ See for detail, DOORENSPLEET, RENSKE, DEMOCRATIC TRANSITIONS EXPLORING THE STRUCTURAL SOURCES OF THE FOURTH WAVE, Viva Books Pvt. Ltd. First Indian Edition 2006, HARDIN, RUSSEL, LIBERALISM, CONSTITUTIONALISM AND DEMOCRACY, Oxford University Press 1999

²⁷ “Constitutionalism can be exceedingly difficult, it works at all only if there is relatively wide agreement on core issues” HARDIN supra note 26 at 84

²⁸ The Comprehensive Peace Accord signed between the CPN Maoist and the Government of Nepal in 2006 is basically the constitutional pre-commitment for the democratic transition with restructuring of the state. However the Peace Accord is not just a set of agreed points between Maoist and Government that provides certain rights or duties to the signatories but is a constitutional document (as it now forms a part of the Interim Constitution, Annex IV) that endows people with certain rights and assurance of socio-economic transformation and the restructuring of the state as a whole.

²⁹ Richards supra note 23 at 577-634

³⁰ By the analysis of political pathologies it is referred to the errors made by and during the previous order and the conclusion drawn from the experiments of that era.

Undeniably, above six 'ingredients' of revolutionary constitutionalism or in the context of this article, transitional constitutionalism, are important foundations. Indeed, constitutional principles, use of comparative political science, of pre-revolutionary era do serve the purpose well. In fact, acknowledgement of some pre-revolutionary ideals and values are not only necessary for the relative order amidst disturbances brought by transition but also not all pre-revolutionary ideals can be uncomplimentary to the transformation sought. Individual human rights for instance can be an example that requires the transformation to build new constitutional order giving continuity to the former development rather than beginning from the very start. Moreover, among the six 'ingredients,' past experience and political pathologies often play more of a direct role in shaping the contents as well as sources of transitional constitutionalism.

Past experiences and political pathologies are inevitably the actual reason why people choose to fight against the existing system so it is only proper to acknowledge them in formulating new order. Even in case when most of the people are politically unaware or unwilling to participate in the political process, including the victorious revolution, still past experiences and analysis of political pathologies by experts and politicians could help to pin down the contents required for the new order³¹. And from that analysis, probably the 'peoples' aspiration' can be inferred. In Nepalese context the new vigor in making every organ and sector of the state equally inclusive, federal system of governance are few answers for restructuring the nation, is the result of analysis of political pathologies in which we previously experimented with such laws and policy that excluded many groups of people from the mainstream of national, political, economic, social life of the nation.

³¹ People in 2006 took to the streets against the royal government, now political leaders say that people took to the street because they wanted, 'Constituent Assembly', 'Federalism,' 'Republic State,' 'Restructurings of State,' 'inclusion,' 'proportional electoral system' and so forth. But it is ironical that study carried out in December-January 2006/7 regarding the awareness of people about these elements and even about 2006 revolution found only very negligible people (25 % about the revolution, 41 % about Constituent Assembly) were aware of these subjects, they were supposed to have revolted for. See for Detail, Khatiwada, Apurba et. al. 'Study on Thami, Hayu and Kamar (Jogi) Community with especial reference to the participation of the community in the political and legal life of the state' 2007

Concurrently with the former two foundations, the self-conscious work of political reason by the leaders and craftsmen³² thus becomes significant not only in ascertaining foundation of transitional constitutionalism but also can provide leadership and formal institutionalization of those foundations in the law of the land. Hence, the “type of craftsmen involved, the alliances and coalitions formed in the transition”³³ greatly shape the transitional order and values that governs the transition. This in turn is largely characterized by the raw politics of moderation, compromise, consensus, and dissent among the craftsmen having different principle and doctrinal background, who generally have few common interests only because they were on the same rhythm during the revolution. Thus, it is likely to bring them together on some issues but not on all. But it is necessary for democratic transformation that some principal issues are affirmed by all, which professor John Rawls terms ‘political conception of justice’³⁴ founded on the ‘overlapping consensus’³⁵ of “opposing religious, philosophical and moral doctrines”. Which functions more than the constitutional pre-commitments by serving to reconcile and integrate diverse and sometime antagonistic doctrines, thus bringing sense of predictability and order during transition and on the same time filling the normative contents of transitional constitutionalism.

In short, foundations of transitional constitutionalism accumulates a wide array of constitutional principles of transformation, that not only helps to manage the transition but also act as the resource from where the craftsmen of new order can borrow ideas of change and means and methods of addressing past and building future.

³² See for Detail for the debate on Democratic Transition as Actor Oriented or Structural Oriented, DOORENSPLEET *supra* note 27

³³ Di PALMA G., TO CRAFT DEMOCRACIES: AN ESSAY ON DEMOCRATIC TRANSITIONS, pg 8-9, Berkeley: University of California Press 1990, cited in *id.* at pg 3.

³⁴ See For Detail, Rawls, John, The Idea of An Overlapping Consensus, 7 *Oxford J. Legal Stud.* 1 (1987) where political conception of justice has been described as providing “a shared public basis for the justification of political [and] social institutions and ensure stability from one generation to the next.”

³⁵ See For Detail, *id.* and Rawls, John, The Domain of the Political and Overlapping Consensus 64 *N. Y. U. L. Rev.* 233 (1989)

TRANSITIONAL CONSTITUTION

After a popular revolution that openly challenged the worth of the then prevailing order including laws and constitution governing the state, most profound work during the transition is the formulation of new laws and constitution. Transitional constitution either made altogether or revision of existing constitution plays an important role in this regard by the formal recognition of the demands of revolution and transformation. Besides, transitional constitution after popular revolution also ensures the end of past order and injustice along with embracing political modernization of the state, making it widely acceptable and inclusive of all. Especially when the state is heading for complete makeover of the power sharing and nature of governance, formation of transitional constitution is necessary stage of revolution.

“A revolutionary ‘constitutional moment’ of rupture from the ancient regime and the founding of a new political order”³⁶ transitional constitution for nations coming out of war or autocratic regime is common these days.³⁷ Due to its ‘flexible’ and predominantly ‘political’ nature transitional constitution greatly enhance reconciliation and subdue much questioned issue of legitimacy of transformation. In fact, the transitional constitution helps to prepare the base for the more permanent post transitional constitutional order. Sometimes with bringing slow and steady change in the power equation and state structure, especially when transition is the result of compromise between the former regime and revolutionaries, it prevents unnecessary confrontation and ensures gradual adaptation to such major changes. Thus as the interim constitution of South Africa put it, interim constitution provides “a historic bridge between the past of a deeply divided society... and a future founded on the recognition of human rights.”³⁸

Transitional Constitution brokers the political shifts,³⁹ it not only fills much needed legal and constitutional vacuum created by the revolution, but also initiates constitutional mission of change. With transitional constitution, political change and constitutionalism start to complement each other so that

³⁶ Teitel supra note 9 at 2055

³⁷ Some recent examples can be, South Africa 1993, Brazilian Provisional Constitution 1988, Chilean Constitution 1991, Interim Constitution of Nepal 2007

³⁸ The Interim Constitution of South Africa 1993, Chapter 15, National Unity and Reconciliation

³⁹ Teitel supra note 9 at 2058

further political change sought would no more has to be in confrontation with the constitution rather constitution itself bestows recognition and legitimacy to such change. Furthermore, transitional constitution acts as the catalyst for further political change⁴⁰, especially crucial when the transitional constitution is prepared to give effect to the formal process of making permanent constitution inclusive of all transformative ideals of the revolution. But in so doing concern of normative limits on the transitional constitution, which unlike normal situation did not follow particular method of drafting or promulgation and was a product of political negotiation between the victors, is natural.

Formal as the process of constitution-making is, transitional constitution may lack such degree of formality. The drafting of Interim Constitution of Nepal, a quintessential transitional constitution, exemplified that constitution-making during transition begins with the basic agreement among the revolutionaries⁴¹, followed by provisional constitution predicated upon the understanding of subsequent, more permanent constitution. That is as Professor Teitel stated in periods of political upheavals constitutions are not created all at once, but in fits and starts contrary to the prevailing model of constitutions as monolithic and enduring. Where transitional constitution demands some features of transitional constitution as provisional, which only become entrenched after certain special process of recognition by the society, probably like the process of Constituent Assembly. Thus the constitution which itself is provisional and for the formal recognition of its principles, elaborated process of legitimization is required how far and wide can the transitional constitution go in determining the social, political, legal order of the transitional society, is a genuine question.

Modern view on this issue “emphasizes normative limits”⁴² to the transitional constitution. That is, according to the modern view transitional constitution follows revolution that establishes some common values of transformation however along with that, like Carl Schmitt’s “unalterable

⁴⁰ “Transitional constitutions are not simply revolution-stoppers, but they also play a role in constructing the transition. Early in the process, constitutions can jump-start and instigate political change. Insofar as such constitutions destabilize rather than stabilize a political order, the transitional constitution's "disentrenching" role is analogous to the ordinary codifying constitution's "entrenching" role in this respect.” Id. at 2059

⁴¹ In Nepalese Context 12 points Agreement between Seven political parties and CPN Maoist, 6 Points Understanding between Seven Political Parties and CPN Maoist, Comprehensive Peace Accord between The Government of Nepal and CPN Maoist.

⁴² Teitel supra note 9 at 2054

core” and Hans Kelsen’s “Grundnorm” certain universally recognized values of constitution continue to exert some limits on the transitional constitution giving legal character to the constitution. Hence preventing political manipulation even by the victors in the name of political necessity. Furthermore foundations of transitional constitutionalism discussed earlier also carry out the same work of giving transitional constitution more authoritative scope in managing transition.

Anyways, transitional constitution thus prepared is crucial not only because it performs the most obvious function of managing the transition, but also it has significant role in the transformation of the society, which takes two important jobs of transitional constitution, first, as already stressed, transitional constitution acts as an agreement between the parties giving it the nature of constitutional pre-commitment of transformation. And second, it lays down the process of formalizing the transformation through final process of constitution making. That is, it defines means and methods of making permanent constitution.

Transitional constitution as constitutional pre-commitment is exemplary in cases of Nepal and South Africa. Where both the nations resorted for transitional constitution covering almost all issues that are/were realized as the foundations of transitional constitutionalism or elements of transformation⁴³. In fact, in Nepal apart from the issue of Monarchy all other issues such as inclusion of all downtrodden, provision of socio-economic rights along with civil and political rights, federal system of governance, proportional electoral system are already agreed by the political parties and civil societies and endorsed by the Interim Constitution, leaving the Constituent Assembly to decide on the modality and formalize in the Constitution so made. Whereby the very principles of Interim Constitution are entrenched later on by the Constituent Assembly. But there is more to the Interim Constitution than functioning as the pre-commitment of transformation. Implicitly transitional constitution by first initiating the process of disentrenching former values makes realization of drastic changes conceived during revolution less dramatic and orderly. This is especially important when nations are coming out of authoritative regime and even after overthrowing the rulers remnants of the past regime pose

⁴³ For South African perspective see JUSTICE ARTHUR CHASKALSON, CONSTITUTIONS ARE SHAPED BY HISTORY: AN ACCOUNT OF THE MAKING OF SOUTH AFRICA’S NEW CONSTITUTION (Soli J. Sorabjee ed. Universal Law Publishing Co. Pvt. Ltd. 2003)

threat to the transformation, or the nations are emerging of the divisive past filled with bloodshed and intolerance that has resulted sense of rage and vengeance among the population.

Final stage of transformation after popular revolution is the formation of the final constitution that justly addresses demands of revolutionaries and again brings back order and surety in the constitutional process unlike during transition. Formation of such 'final' constitution is well and truly important in minimizing the cost of transition and inevitable for nations, which cannot run for long without a permanent law of the land. Thus constitution making becomes very important and transitional constitution serves in legitimizing and governing it. Actually, in periods of political upheavals for a constitution to satisfactorily assert its legitimacy (in relation to peoples' representation, degree of transformation or conformity with former constitution) can be very tricky. And to maintain its legitimacy only on the subjective notion of "peoples' aspiration during revolution" may serve for a short period of time, but then may run the risk of being questioned by the future generations. Thus after the transitional constitution has prepared a constitutional pre-commitment for the final constitution and has disentranced the former values it provides for the process of institutionalization of those pre-commitments into the final constitution. And that process irrespective of dialectics of transitional constitutionalism owes accountability to the universally recognized constitutional principles⁴⁴. Constituent Assembly elected to prepare the final constitution is one of that 'process' that can create firm basis of legitimacy of the final constitution, midst purely political state of constitutional order.

TRANSITIONAL JUSTICE

Revolution in most part is about the transformation of a society and overriding of obsolete values and socio-political structures with new values. However a central question facing this process in most transitional regimes is the stance to be taken toward the miscreants of the now happily

⁴⁴ However, Bruce Ackerman argues that unconventional amendments made in the Constitution in the name of '*we the people enterprise*' have the same legal status as amendments made through formal provision of amendment in the Constitution. See for detail, Ackerman *supra* note 21, Ackerman, Bruce A, 'Constitutional Politics/Constitutional Law' 99 Yale L.J. 453 (1989), Griffin, Stephen M. 'Constitutional Theory Transformed' 108 Yale L. J. 2115, 2142-2147 (1998-1999), Rakove, Jack N. 'The Super-Legality of the Constitution, or a Federalist Critique of Bruce Ackerman's Neo Federalism' 108 Yale L. J. 1931 (1998-1999)

discredited political order⁴⁵. And the dilemma lies on the question whether the transitional constitutionalism should cloth transitional justice to settle scores for the past injustices of former regimes or attempt to integrate the losers by a tactful silence of reconciliation about what has happened. Transitional justice in this regard portrays a diffused meaning of two entirely opposing ideas, that of vengeance and forgiveness. Vengeance however being the one which is readily identified with the transitional justice marked normally by successor's trial, retrospective laws, criminal sanctions.

Indeed in it's most naked form transitional justice has been associated with the trials of perpetrators of grave human rights abusers of 20th century, in Germany, Former Yugoslavia, Rwanda and so forth. However transitional justice is more than just about criminal trials and retribution. Transitional justice rather connotes "a field of activity and inquiry"⁴⁶ designed to address past and build better, democratic and peaceful future. And in that objective according to the context, apart from criminal sanctions, reconciliation, acceptance, and forgiveness equally play their parts.

Transitional justice, in the form of criminal trials of the perpetrators of former regimes, assists transformation process of disentrenching former rule and brings out public condemnation of the past along with the symbolic legitimization of the new rule. Transitional justice in such process indirectly serves politically to link up with the promotion of political transition, advancing political transformation through "normative regime change"⁴⁷ by demarcating the successor's regime and newfound transformation⁴⁸. Nevertheless, it is not without controversies, in fact transitional justice as successor's trial especially on the basis of retroactive laws is both legally and politically highly contested⁴⁹.

⁴⁵ Levinson *supra* note 13 at 2216

⁴⁶ Bickford, Louis Transitional Justice, *The Encyclopedia of Genocide and Crimes Against Humanity* vol. 3, pp. 1045-1047.

⁴⁷ Ruti Teitel, 'The Law and Politics of Contemporary Transitional Justice' 38 *Cornell Int'l L.J.* 837, 846 2005

⁴⁸ See for detail, USAMI, MAKOTO, *RETROACTIVE JUSTICE: TRIALS FOR HUMAN RIGHTS VIOLATIONS UNDER A PRIOR REGIME, IN HUMAN RIGHTS IN PHILOSOPHY AND PRACTICE* pg. 426-427 (edt. Buton M. Leiser and Tom D. Campbell, Ashgate Publishing Company 2001)

⁴⁹ See for detail Hart Fuller debate, where two great jurists of modern time argue for and against the criminal prosecution of a woman in post Nazi Germany, for her 'legal' betrayal of husband to the Nazi police. *Infra* note 51, 55

Even the citation of transition as extraordinary period and for the successful, safer, peaceful and democratic transformation, retroactive laws are necessary against miscreants of massive human rights violation may not be enough. Truly, transition implies disorder and that transitional constitutionalism shows those traits that are uncommon to normal constitutionalism discourses and rightly, transitional constitutionalism may well be backward looking, but to resort for retroactive laws to address past perpetrators highly intellectual minds have to take refuge under morals⁵⁰ and ‘objective necessity’⁵¹ rather than under purely ‘legal’ principles. Deficiencies of the concept do not end in this fear of giving birth to new generations of victims of transition, but even the intricacy of the concept and corollaries of transitional justice pose greater challenges.

Challenges of transitional justice in the form of criminal trials, would also account to the risk of further destabilizing the transition, when the remnants of the past regimes are still active or when there is already a peace agreement thus their would be obvious threat to such agreements or when the perpetrators of the past regimes now enjoy important place in transition, like security officials who continue to serve even after the change who could otherwise stage power confrontation probably in the form of *coup d’etat*. Furthermore, transitional justice may also face a huge dilemma on whether to account past perpetrators on the basis of politically based responsibility against top leaderships or offence based responsibility, which demand entirely different approach to whole process and would be impossible to accumulate both forms together, inviting confusions and obscurities in the process. And if separated and only former is chosen, at the local level people feel betrayed by the change and impunity remains as it is. On the other side if later is chosen, then it is practically nearly impossible to prosecute, as due to its sheer number⁵², intricacy of finding evidence that can link up the perpetrators to the crimes and so forth can prove

⁵⁰ Fuller, Lon L. ‘Positivism and Fidelity to Law-A Reply to professor Hart’ 71 Harv. L. Rev. 630 (1957)

⁵¹ USAMI supra note 48, where the author also refers enforcer’s (enforcer of retroactive laws) hand as “dirty hand”, even though the author is of the opinion that transitional justice in the form of retroactive law is objective necessity.

⁵² It is important to note in Rwanda after the genocide in 1994, over 130,000 people were detained in prisons, eight years later 125,000 were still in detention. There were over 10,000 courts established and 250,000 judges to deal with the crimes committed during the genocide. Mobekk, Eirin, Transitional Justice in Post-Conflict Societies Approaches to Reconciliation http://www.bmlv.gv.at/pdf_pool/publikationen/10_wg12_psm_100.pdf, accessed on 22 September 2007

overwhelming and terribly slow and lengthy, thus losing its more important objective of demonstrating the swift transformation.

Apart from the above-mentioned deficiencies of the process there is another probability of politically lot adverse result of the trials. That is such trials based on retroactive laws may help former rulers to earn sympathy of the public. Saddam Hussein, who was despised all over the world for his inhuman acts in Iraq during his reign, strangely enough was sympathized and people even came out to the streets against his trial and eventual death penalty. So did Slobodan Milosevic's trial at ICTY, where the trial backfired arousing nationalist backlash in Serbia, where Milosevic became even popular and his opponents who handed him to ICTY not only had to loose elections but also life⁵³.

Notwithstanding deficiencies in the concept and probable effects, nations continue to embrace it. And intelligentsias of the world are ever more justifying it. With strict positivist, who are by far the strongest opponents of transitional justice,⁵⁴ finding 'inclusive or soft positivism'⁵⁵ as the new development in positivist school of legal thoughts, where morality to a certain extent find its way into Law, makes way to argue that even most stout of opponents have left a room for exception. In fact, HLA Hart suggested retroactive law for punishing perpetrators of Nazi era could have been least objectionable solution⁵⁶. And to add to such positivist's notion observation of Lon L. Fuller, 'We would say it is normal for a law to operate prospectively, and that it may be arguable that it ought never operate otherwise, but there would be a certain occult unpersuasiveness in any assertion that retroactivity violates the very nature of law itself'⁵⁷ makes it jurisprudentially not wrong to resort retroactive law as means of transitional justice.

Moreover, it would be very difficult for only one value of justice to transform a society that does not speaks to the extraordinary nature of the

⁵³ See for detail, USAMI supra note 48

⁵⁴ See for detail, Hart, H. L. A, 'Positivism and The Separation of Laws and Morals' 71 Harv. L. Rev. 593 (1957)

⁵⁵ See for detail, JULES COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY, pg 67-73, Oxford university Press 2001, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, pg 14-45, Universal Law Publishing Co. Pvt. Ltd. 3rd Indian Reprint 2005, (The Model of Rules I)

⁵⁶ Hart supra note 54 at 619-620

⁵⁷ Fuller supra note 50 at 650

transition. And it is even more difficult to bring about fundamental changes the new order desires while, “at the same time, remaining impeccably faithful to one’s favorite notions of procedural regularity”⁵⁸. In fact the conflict between the change and such notion of procedural regularity was seen in post Nazi Germany and is still there to be seen in more recent transitions like in Nepal;

After the collapse of the Nazi regime the German courts were faced with a truly frightful predicament. It was impossible for them to declare the whole dictatorship illegal or to treat as void every decision and legal enactment that had emanated from Hitler’s government. Intolerable dislocations would have resulted from any such wholesale outlawing of all that occurred over a span of twelve years. On the other hand, it was equally impossible to carry forward into the new government the effects of every Nazi perversion that had been committed in the name of law; any such course would have tainted an indefinite future with the poisons of Nazism.⁵⁹

Thus, to strike the perfect balance between the past perversion and democratic future, transitional justice in the form of criminal trials are important.

However, criminal trial and sanction is only one aspect of transitional justice, as laid down earlier, along with criminal trial, reconciliation also forms the corpus of transitional justice⁶⁰. When for political ends of democracy and peace, people as a whole are ready to forgive the past wrongs; reconciliation serves as relatively less controversial and unproblematic transformation⁶¹. Reconciliation encompasses normally four concepts, truth, mercy, peace and justice⁶² and where reconciliation is made in individual and national level, in the form of pardon or amnesty for past wrongdoers. Even though reconciliation unlike criminal trial, forgive the perpetrators, reconciliation and criminal sanction actually complement each other in proving the point that past was wrong thus they are partners of

⁵⁸ Teitel supra note 9 at 2222

⁵⁹ Fuller supra note 50 at 648

⁶⁰ Abraham Lincoln’s ‘reconstruction’ under which he proclaimed amnesty to southerners after American Civil War, South Africa’s Truth and Reconciliation Commission which gave blanket amnesty to the members of former regimes are couple of example of reconciliation as a form of transitional justice.

⁶¹ See for detail, Daly, Erin, ‘Transformative Justice: Charting A Path to Reconciliation’ 12 Int’l Legal Persp. 73

⁶² Mobekk supra note 52

transformation⁶³. And reconciliation and criminal sanction both depend upon the particular nature of the past and transformation sought, it is for the individual society to choose what option is better for it. If past wrongs were not very grave and that people are ready to forgive and accept there can be no place for criminal sanction, just like South African people choose to do. But where the past atrocities were so grave that people cannot forgive or national reconciliation in such case between political leaderships is likely to revictimize individual people, criminal trail is the answer.

CONCLUSION

Constitutionalism of transition stands in a very close conformity with prevailing political order and yet shows such agility to be able to modify and generate new values for transformed order. In this way, “transitional constitutionalism not only is constituted by the prevailing political order, but is also constitutive of the perception of political change”⁶⁴ thus it is both backward looking as well as forward looking. Transitional constitutionalism comes forward in a variety of different processes, and plays multiple roles, serving conventional constitution’s aspirational purposes as well as transformative purpose. In short, Transitional constitutionalism bridges radical political change by reconciling law, politics and constitution.

As political change greatly shapes the constitutional values during transition, due to its extraordinary nature transitional constitutionalism also generates new process and ideas that facilitate actual change. Due to its jurisgenerative nature, political change and constitutionalism starts to complement each other. Entirely new nature of justice in the form of transitional justice is one example of transitional constitutionalism facilitating change. Transitional constitutionalism however plays more important role than just demonstrating the beginning of change. It also creates foundations for the transformation, sometimes acting as the conditions or pre-commitments of change and sometimes by defining legitimate process and methods of change. Indeed, when the very source of state power and authority is challenged, transitional constitutionalism serves to build the source of legitimacy, through transitional constitution and new discovered foundations.

⁶³ See for detail, Daly supra note 61, where the author explains at length, objectives of transformative (transitional) justice as both reconciliation and deterrence.

⁶⁴ Teitel supra note 9 at 2052

Surely, transitional constitutionalism marks a distinct variation from constitutionalism of normal times and dialectics of transition and constitutionalism may be profound. Transitional constitutionalism is a product of normative consideration of political change and the expectation of new order, than the specific and relatively more factual understanding of constitutionalism during regular times, which is reflected in among various elements the foundations of the philosophy, in the constitution-making and the sense of and debates on Justice. Furthermore, it is also the time for new beginning so is the time for generation of new values to govern the not so transitional period. That is transitional constitutionalism works as an integral part of John Rawl's 'political constructivism'⁶⁵ of new socio, political and legal system by finding out the common and core values of new governance and society.



⁶⁵ "Rawls use the term political constructivism to describe the gradual emergence of constitutional consensus as a result of a step by step decision making process which narrows the area of parties' political differences" cited at Teitel supra note 9 at footnote 176