

The progressive and regressive issues of Nepali Constitution: A study in the light of Constitution of India

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Guest Column by Dr Vijay Srivastava and Jivesh Jha

A painful decade of bloody Maoist insurgency and then years of failed attempts later, Nepal on September 20, 2015 got a new Constitutional document, a development that led to celebrations in Hills but 135 days long protests in southern plains that claimed more than 40 lives. There was celebration in Kathmandu and the Hill regions by lighting lamps and firing crackers. But, the Madheshis and Tharus of Nepal, the half of the national population, observed a Black Day to mourn the deaths of their community members who had been gunned down by security forces while protesting against certain discriminatory provisions of the Constitution.

The drafting process (2008 to 2015) kicked off in 2008 with the formation of Constituent Assembly (CA)-I, the unicameral body of 601-member, after its election. In fact, the demand for a new Constitution was raised by Maoist rebels, who waged a decade long civil war which ended with 2006 comprehensive peace accord. Two new political forces emerged—the Maoist with 229 seats in the CA and the Madheshi parties with 80 seats. The Maoists became the largest party in CA, leading to the abolition of 240-year old monarchy. But because of wrangles, the Assembly failed to give birth to new Constitution.

The political parties came in the CA with a two-year mandate to draw up a new statute for Federal Democratic Republic of Nepal. After 2010, the CA extended its life four times till, finally, the top court intervened while deciding a writ petition and the CA dissolved on May 28, 2012 without producing any outcome. The differences within the CA led to political deadlock.

The fresh CA-II was constituted for a four-year term following its poll held a year later on November 19, 2013. The Maoists were down to 81

seats in parliament and the Madheshi forces to 40; the older political parties, the Nepali Congress (NC) and the Communist Party of Nepal- Unified Marxist Leninist (UML), emerged stronger with 201 and 175 seats, respectively. The Assembly gave a deadline to promulgate the Constitution by January 2015 but it again failed to meet the deadline. After much back and forth, Nepal got its new Constitution on September 20, 2015 by approval of over 85 per cent of the 601 members of the CA, but without the stamp of approval of at least 60 Madheshi and Indigenous representatives.

“The Constitution was crafted completely by a handful of leaders of the big three parties—the Nepali Congress, the CPN-UML and the CPN-MC behind closed doors in collusion with some political elites and technocrats and was presented in the CA for a ritual and forced endorsement,” writes Dipendra Jha, Advocate General of Province-2 of Federal Republic of Nepal in his book *Federal Nepal: Trials and Tribulations*.

Importantly, “The Interim Constitution of 2007 had introduced a wide range of provisions for progressive transformation, including federalism, citizenship, inclusion and secularism. The drafters of the Constitution watered down all of these provisions in 2015. As a result, the country stood psychologically divided on September 20, 2015, Nepal’s Constitution Promulgation Day,” further writes Jha.

However, apart from a few discriminatory provisions, there are provisions that have received much praise. This story seeks to undertake a study on some of the progressive and regressive provisions enshrined in the Constitution of Nepal.

Progressive provisions:

i. Language

Everybody loves mother tongue and wants to see the language given by the mother flourish. Once you know the language, it is easier for you to make good relationship with people, and establish contact through effective communication. In order to flourish the languages given by mother, its been provisioned that all the languages given by mother shall be national language (Article 6).

However, the position is different in India.

The Gujarat High Court, while hearing a PIL, had in 2010 observed that Hindi was not the country's national language. The PIL had sought direction of the Centre and the State to make it mandatory for print details of good to be in Hindi. But the court had observed, "Normally, in India, majority of the people have accepted Hindi as a national language and many people speak Hindi and write in Devanagari script but there is nothing on record to suggest that any provision has been made or order issued declaring Hindi as a national language of the country."

Importantly, clause 1 of Article 343 states that “The official language of the Union shall be Hindi in Devnagari script.” Not only this, “the

Articles 350A and 350B were inserted by the Constitution (7th Amendment) Act 1956 to ensure the protection of linguistic minorities,” argues the much-admired commentator of Constitutional Law MP Jain in his book *Indian Constitutional Law*. To secure these goals, the charter recognizes 22 languages in the Eighth Schedule that includes Nepali, Bengali, Maithili, and Hindi.

The Constitution of Nepal (under article 7) envisages that in addition to Nepali language, a province can select one or more national languages to be used in the state if that is spoken by a majority of the people there. More or less, similar arrangement has been envisaged under Article 345 of the Constitution of India.

ii. Right to privacy

Although right to privacy is yet to be expressly mentioned in Indian constitution, the same right has been enlisted under fundamental rights in Nepal. However, right to privacy is protected as an intrinsic part of ‘right to life and personal liberty’ clause in India.

iii. Progressive Fundamental Rights

The provisions relating to fundamental rights have been embodied under Part-III (Article 16-48) of the Constitution. There are ample provisions which are progressive in nature. For instance, right to information, right to communication, right to justice, rights of victim of crime, right against torture, right to free legal aid, right to privacy, right to property, right to clean environment, right to language and culture, rights of women, rights of Dalits, rights of senior citizens, right to social security, and among others are the provisions which appear progressive for a number of reasons.

iv. One-third representation of women in legislative spectrum

Having gone through the constitution, one can firmly and proudly say, Nepal’s new constitution is progressive, and institutes several positive elements for the upliftment of women in the country.

The cornerstones are set by two arrangements in particular. First, ensuring rights of women as a fundamental right (FR) through legislation from the very initial stage under Article 38; second, the constitutional provision setting aside 33% representation of women in Nepal’s legislature is a major breakthrough.

Nepal sets aside 33% of parliamentary seats for women through legislation as envisaged under Article 84(8). Similarly, A-86 (2) (a) ensures that three berths shall be given in 59-member national assembly, where eight members to be elected from each province.

Regressive provisions:

i. Citizenship

The persons who have solemnized marital bonding with a non-Nepali national remained deeply offended after sensing that their husband or wife or their issues would be beneath their civil and political status.

The Article 11 (3) provides that in order to acquire citizenship by descent, it must be proved that both 'father and mother' are Nepali citizens. However, on non-fulfillment of this clause, meaning where a child whose 'father or mother' is a Nepali, a person is entitled to get citizenship by naturalization.

Moreover, if his/her father is found to be a foreigner, the citizenship to such a person shall be converted to naturalized citizenship, Article 11(5). Similarly, if a foreign woman married to a Nepali citizen so wishes, she may acquire naturalized citizenship of Nepal, says Article 11(6).

Interestingly, Article 11 (7) of the Constitution allows a child born to a Nepali woman, whose father is a foreigner, to acquire naturalized citizenship. However, the authority to issue such citizenship lies with the District Administration Office under Ministry of Home Affairs which has not issued even a single citizenship certificate of that type till date.

Ironically, if a brother marries a foreigner, the children born from them would get citizenship without any hassles while the same treatment is not there with a sister marrying a foreigner. Isn't the provision generating gender bigotry?

Despite this, Article 289 bars a naturalized citizen to hold any vital government post. In this way, Constitution itself makes clear that the naturalized citizens are inferior to descent citizens. Unfortunately, this type of derogatory provision was not embodied in Interim Constitution-2007, and other five repealed Constitutions.

ii. Electoral Constituency

The parameters for delineation of electoral constituency became the other most disputed provision.

Nepali parliament made provision of taking 'geography and population' both into account while delineating the electoral constituencies. Conversely, 'population' is only the basis for constituency delimitation in India.

In this context, it bears relevance to acknowledge the reading of former Indian envoy to Nepal Rakesh Sood who observes: "The 2015 Constitution reduces the weightage given to proportional representation. Terai (Madhesh) constitutes 51 per cent of the population but according to calculations, it would currently get only 62 out of a total of 165 seats under the first past the post system, instead of 83, as per its population. The notion of fixing electoral constituencies after taking into account 'population and geography' was intended to ensure that

the sparsely populated trans-Himalayan districts are not left out of the democratic process.” His views appeared in an article published *The Hindu*.

iii. Judiciary

Independent and impartial judiciary is one of the hallmarks of the democratic government. To give the executive, cabinet or legislature an unfettered discretion in deciding the philosophy of judges is to make judiciary obedient to government.

It has been provisioned that judicial appointment shall be made on the recommendation of Judicial Council (JC), where the Law Minister shares a berth. The constitution of JC has been provided under Article 153. It envisages that the Chief Justice of Nepal will be ex-officio Chairman of the Council, whereas the Federal Law Minister, senior-most judge of the SC, a legal expert nominated by the President on the recommendation of the Prime Minister, and a senior advocate appointed by the President on the recommendation of Nepal Bar Council will be acting as members.

In India, the appointment, removal and transfer of judges of higher courts and subordinate courts have been placed entirely in the hand of judiciary, leaving no room for the influence of executive and legislature.

iv. Preamble

The second paragraph of preamble accepted the glorification of various movements in past such as people’s war and the armed conflicts. Surprisingly, it fails to acknowledge the Madhesh movements that led to the inclusion of federalism. “The Constitution has undermined three big Madhesh movements that took place in the country since 2007.... Had the Madhesh movement been recognized in the Constitution, it could have increased the acceptance of the Constitution in Madhesh.”

Concluding remark:

It may be noted that 2015 charter is the seventh Constitution before the Nepali people. The Government of Nepal Act, 1948 was the first Constitutional document in Nepal. Since 1950, the Himalayan state has experimented with various constitutions. It has had two Interim Constitutions (1951 and 2007) and three formal Constitutions (1959, 1962 and 1990).

Many thoughtful Nepalis believed that the new Constitution would succeed to end all discriminations lying in the country. But the charter, at the time of its promulgation, failed to strike a balance between dominant views (i.e., the agendas of major parties) and minority views (i.e., agendas of Madheshi parties). As a result, agitating Madheshi parties refused to give their stamp of approval to the new document, arguing that the “statute is not a broad-based document” and it would “politically marginalize the Madheshi people.”

The constitution failed to address the concerns of the Madheshi population in terms of federalism, electoral representation and citizenship, forcing the community to hold a five-month long blockade along the Indo-Nepal frontier. More than 40 people lost their lives while protesting against new statute. This Constitution has been under trouble from its inception as there was a sense of triumphalism in Hills but dissidence in Madhesh.

A just Constitution cannot be discriminatory. So, there is dire need of an amendment in it, not only for incorporating the aspirations of Madhesh, half sky of Nepal, but also for ensuring its wider ownership and everlasting progress.

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