

CITIZENSHIP, IDENTITY AND NEPAL'S CONTESTED 2015 CONSTITUTION

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ABSTRACT

This Constitution has divided “Nepal into 7 provinces and established a proportional electoral system to elect federal and state officials. It is also regarded as a progressive as well as the people-oriented constitution, with this we can also see numerous challenges for its proper implementation.” In one way it has got a lot of appreciation for its provisions for the protection of lesbian, gay, bisexual and transgender rights and on the other hand, also had to go through a lot of criticisms and chaos about other aspects of the constitution. It has somehow failed to fulfill the needs of Madheshis and Tharu in the constitution-making process even though they have a 70 percent population of the country. Bijay Kumar Gachhadar who is the leader of the Madheshis was also initially involved in the constitution-making process but later on, he also didn't have any option but to quit the alliance as nobody wanted to hear his point. Nepal's first constitution which was going to be delivered by the elected people changed the entire country to instability and violence. Madheshis and Tharu community called for the strike in the Terai region and around 46 people lost their lives during the protest. Almost the Terai region turned into a war zone.

INTRODUCTION

In September 2015 the Constituent Assembly of Nepal brought a new constitution after a long time. This is the “*seventh written document in the constitutional history of Nepal*” and was the first Constitution to be drafted by popularly elected members who are part of making Nepal a secular federal republic. “New constitutions were introduced in Nepal in 1948, 1951, 1959, 1962, 1990, 2007 and 2015. Each edition indicated a change in the political outlook of Nepalese and a demand for change of the status quo to varying degrees.”¹ The new Constitution had a provision for 165 Member of Parliament but it has been divided in such a way that the people of Hilly and Mountainous regions are getting 100 seats in the parliament though they have only 50 percent of contribution in Nepal's total population. And on the

¹ Charles Haviland, Why is Nepal's new constitution controversial, BBC News, 19th Sept 2015.

other hand, the Terai region which has the highest population among the three regions had been allocated only 65 seats.

“The issues that created chaos and huge debate in the drafting of the constitution was related to the federal boundaries, citizenship, representation in the upper house of federal parliament and official language.”²

“Under the Article 11 (5) and (7) of the present constitution, Nepali women cannot pass down citizenship rights to their children without declaring the citizenship status of the man who fathers the child.”³ Due to which even women protested for their rights which also created a whole lot of debate by the women in the parliament. They were completely sidelined in the constitution-making process. Even the people in the parliament were not ready to hear the views of the public. “The final months of the constitution drafting were marred by violent protests by ethnic Madheshis and Tharu against arbitrary federal demarcation and citizenship provisions in the southern part of the country.”⁴

I choose this topic because I have witnessed how the country was going through so much at this time and I have heard both sides of the stories but this gives me a lot of opportunities to do more research on this and find more on this. And right now we can see a lot of things going through because of CAA in India which has shaken the entire country so I thought it could be more relatable and see how the situation differs in two countries.

BACKGROUND

Until 1954, the Madheshis, as well as Tharu, constituted 94 percent of the total population of Terai. But later many hilly region migrants settled in Terai by clearing the thick forest land. The government allowed them to finish the land and settle there so this discrimination has been continuing for a long time. During this time a lot of people were also forced to migrate to India. But the people who stayed back used to work as slaves in the house of hilly migrants for their survival. “And in the time of both Ranas and Kings, a large sum of land in Terai were given away to the civil servants, army officers and family members of the ruling class through the infamous system of *Birta* and the kings had a policy of not employing the Madheshis in the civil services.”⁵ Even though Madhes has always been a part of the larger Mithila region and even the Indian ambassadors to Nepal belong to Bihar and a lot of them

² YubarajGhimire, Who are the Madheshis, why are they angry? The Indian Express, 25th Jan 2020.

³ Constitution of Nepal, Part 2, Article 11(5) and (7).

⁴ Anurag Acharya, Nepal: A Costly Constitution, Aljazeera, 8th Dec 2016.

⁵ HariBanshJha, Nepal's New Constitution: An Analysis from the Madhesi Perspective, Institute for Defence Studies and Analysis, 24th Sept 2015.

belong to Nepal's Terai. But from the early times, there seemed discrimination between the people of Terai i.e. Tharu or Madheshis and the rest of the people of the country. "This deficit of trust towards the Madheshis and Tharu was one of the major reasons why their presence in the civil services, judiciary and security agencies have remained minimal."⁶ Not only in the government sector but the private sectors also their role was far from satisfactory. Until the mid- 1950's people of Terai used to seek permission from the government authorities to enter the capital city i.e. Kathmandu. They were never given opportunities that were building up inside them and when the drafting of the Constitution started they fought for their rights. An upper caste like Bahun and Chhetris were given all the opportunities and all the higher positions in the government. For about one and a half Terai region was paralyzed.

On the other hand, that particular document brought a lot of unity in the hills and even we can see unity in the Terai people. The criteria seemed discriminatory against Madheshis and women and made them difficult to pass on citizenship to their children. "The fact that what was otherwise such a progressive and reformist constitution, which brought monumental changes in the country's legislature, governance and administration would retain outdated citizenship requirements was surprisingly conservative. Yet displeasure at the constitution was not just limited to inside the country, as India soon sought to justify a blockade of Nepal's borders in protest."⁷

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ISSUES OF DEBATE

PART 2 OF THE CONSTITUTION OF NEPAL

11. To be citizens of Nepal: (5) "a person who is born in Nepal from a woman who is a citizen of Nepal and has resided in Nepal and whose father is not traced shall be provided with the citizenship of Nepal by descent. Provided that his or her father is held to be a foreign citizen, the citizenship of such person shall be converted into naturalized citizenship as provided for in the Federal law."⁸

(7) "Notwithstanding anything contained elsewhere in this Article, in the case of a person born from a woman who is a citizen of Nepal and married to a foreign citizen, the person may acquire the naturalized citizenship of Nepal by the Federal law if he or she has permanently

⁶ *Ibid.*

⁷ David C, How the Mainstream Nepali Media Has Skewed Public Perception of the Madhesi Crisis, The Caravan, 27th Jan 2016.

⁸ Constitution of Nepal 2015, Part 2 Article 11(5).

resided in Nepal and has not acquired the citizenship of a foreign country. Provided that if such person's mother and father both are citizens of Nepal at the time of acquisition of citizenship, such person born in Nepal may acquire the citizenship of Nepal by descent.”⁹

RIGHTS OF THE PEOPLE OF THE TERA REGION

People of the Terai region like Tharu and Madheshis were scared because they had a feeling that the constitution will still work against them as it has been for a long time by established parties including Maoists, high caste and mostly male leaders. And another part is that in the parliament a very small number of people have been selected to represent them even in comparison with the past. They were not allowed to even speak and when there was even debate held in the parliament the voices of the representatives of these people were very less to be heard. So a lot of the representatives of the Madhesi and Tharu population boycotted during the promulgation of the Constitution.

ANALYSIS OF THE PARLIAMENTARY DEBATE

SUPPORT

Maoist's leader Pushpa Kamal Dahal said that this constitution brought a victory of dreams for the thousands of Martyrs and brave fighters of the country. The foreign minister MahendraBahadur Pandey also agreed and was happy with the constitution and said it has achieved what it dreamt of for decades. Sunil Pant who was a member of the first CA has praised articles that list “gender and sexual minorities” and help these people shine better. Prime Minister Koirala was also very happy and there was no such problem from his side regarding the Constitution. President Ram Baran Yadav also said that our country is full of diversity and this new document will help to protect the rights of all the Nepalese. “With that, he also signed five copies of the Constitution into law which was a very overwhelming moment and some of them even cried. So this is the perspective of one side of the parliament who agrees with the articles of the constitution and feels that no change is required. Neighbouring country China also appreciated the new Constitution and wished for stability and growth of the country. People in the hilly and mountain region felt a lot of unity and celebrated a day like Diwali with lights and crackers.

⁹ Constitution of Nepal 2015, Part 2 Article 11(7).

OPPOSITION

Like one side of the parliament agreed on some points some people didn't agree to what was happening which created a whole lot of debate and the situation inside was both happy as well as unsatisfied at the same time. At the time when the other people were celebrating the day as Diwali in the Terai region, people celebrated it as black day as their demands weren't fulfilled. They turned off their lights too and this is also one of the historic days in Nepal which will be remembered by the masses. C. K. Raut said that the Madhesi youth are coming up with the idea of establishing Madhes as a separate country because they don't trust the hilly region leaders. And there was a huge discussion on this which ended up with a question that why not give outsiders like Raut a chance? But the leaders are not ready to hear them as they are less in numbers. Even one of the Madhesi leader Shivaji Yadav has said that "*the big parties have tried to crush the minority groups*" and "*pushed the nation into chaos*".¹⁰ Leader of Madhesi Jana Adhikar Forum Upendara Yadav, says in the parliament that the Constitution amendments failed to address the issues of the Madheshis, ethnic indigenous and downtrodden people.

"It's a black day for us," said Rajendra Mahatoa, leader of the Unified Madhesi Democratic Front, an umbrella organization of Madhesi parties." Kanak Mani Dixit mentioned that they are burning the documents as it curtailed their rights. They felt cheated because all the decisions in the parliament were in favour of the people of the hilly region. He also called it a suboptimal Constitution but said we need to pick it up and move on.¹¹ Almost 2 weeks before the Constitution was being drafted 45 members representing the Terai region gave a memorandum in which they told Prime Minister Koirala to look after certain provisions which also includes part 2 of the Constitution which is about citizenship i.e. "in case if a woman from Nepal marries a man outside of the country then their children cannot become the citizens of Nepal until her husband becomes the citizen of Nepal but if a man of Nepal marries a girl of any country their children can have the citizenship without even looking at the citizenship of the mother."¹² "For this, a lot of women leader raised their voices in the parliament that this is very humiliating and discriminatory for women who feel to exercise

¹⁰ Saif Khalid, Nepal's ethnic Madheshis fight for dignity and equality, Aljazeera, 5th April 2016.

¹¹ Bhadra Sharma and Nida Najar, Amid Protests, Nepal Adopts Constitution, the New York Times, 20th Sept 2015.

¹² *Supra* note. 8.

their rights to be treated equally by the constitution.” And it also violates several provisions under international law including the “*Convention on the Elimination of all Forms of Discrimination against Women and the Universal Declaration of Human Rights.*” Some of the leaders also said that such Constitution is not and will never be our Constitution and they started a movement called “Not My Constitution”

Women responded to the Parliament by staying hungry for the entire day and that too for 2 weeks. “Additionally, women’s rights groups have protested on the basis that certain constitutional provisions discriminate against women. Scholars have also expressed concerns regarding the lack of public participation in the process of drafting and implementing the constitution.”¹³ Most importantly, “*India is worried about violence spilling across the Nepali border, which is surrounded by India on three sides, and typically quite open.*” “In an interview with The Wall Street Journal last year, Nepal’s ambassador to India, Krishna Prasad Dhakal, stressed the neighbouring countries’ extremely close ties: beyond the *tens of thousands* of Nepalese who live or work in India, and vice versa, 65 percent of the nation’s trade is with India, 46 percent of direct investment comes from India, and a quarter of the tourists in its booming travel industry are Indian.”¹⁴ So it was also against the Indian Government who was in support of the people of Terai. A lot of males don’t have the citizenship of Nepal and as per the constitution, it is said that the father must be a citizen of Nepal for the child to get the citizenship.

INDIAN GOVERNMENT INTERFERENCE

Nepal promulgated its Constitution by not listening to anything from the Modi Government which somewhere made the Indian Government disappointed. He constantly asked the Nepalese Government to be flexible from their side and doesn’t focus just on the majority but rather listen to the voices which have remained unheard. “*India recently urged Nepal to adopt seven amendments to its constitution in support of the Madhesi representative’s demands.*”

In response, Nepal has criticized India’s interference. The Constitution is supposed to be the personal matter of the country. India has been criticized by the aam Nepali for the fact that it

¹³ Prashant Jha, Nepal’s struggle for a constitution – A primer, Hindustan Times, 14th Jan 2015.

¹⁴ Shubhajit Roy, India and Nepal: A Constitutional Crisis? The Indian Express, 7th Oct 2016.

has been taking sides of the Madhesi leaders and creating blockade in the border which stopped the transportation of essential goods which Nepal imports with India. Already that year Nepali had to go through so much as an earthquake occurred in the same year, protests were happening in the entire country which was stressful in itself and now this blockade. Nepali people were suffering a lot due to this as there was a lack of so much stuff and they were helpless. The blockade continued for more than a month and the vehicles were stopped at the border and were not allowed to enter Nepal and here in Nepal, everything started to get expensive as very little stuff was left. “Over a quarter-century ago, a 15-month blockade by India led to a political change in Nepal and, subsequently, the advent of democracy. The current situation has followed India’s disapproving response to the new Constitution. The difference this time is that Indian opinion is divided more sharply — several former diplomats have criticized New Delhi’s policy, with some accusing it of attempting a Sri Lanka in Nepal: promoting an ethnic divide and taking sides, with potentially dangerous consequences.”¹⁵

*Nepalese political analyst Amit Dhakal stated that "Even a child can make out that it is a deliberate blockade."*¹⁶

PRESENT SCENARIO

The present scenario is comparatively fine and even the blockade has been removed. It is because in both the countries there are problems but the solution is only and only in the political arena. “Any hardline approach will affect people-to-people ties. Any support to Madheshis blockade would have tantamount to interfering in the matters of Nepal. Also, how can India demand states based on ethnicity when it does not have this provision. Nepal also understands that playing China card will not yield results because the cultural, historical and economic relations with India can't be supplanted by China.”¹⁷

CONCLUSION

Hence, with this completion of the blockade, the politicians in Nepal must understand that though the blockade may be removed the issues are still the same. Until and unless the issues are solved the things come on arising so the government should make sure that there remains

¹⁵ *Ibid.*

¹⁶ Bharat Bhushan, India’s Spectacular Policy Failure in Nepal, Catch News, 13th Feb 2017.

¹⁷ GirdhariDahal, Constitution of Nepal and Political Development: Adoption and Challenges of Implication, 6, Janapriya Journal of Interdisciplinary Studies, 150-55 (2017).

trust and faith of the people in the government. A lot of Ups and Downs have occurred in 2015 that have moved people. Even from the perspective of the Madhesi people, it's saddening for the fact that they have been struggling for so long and still they don't get their rights. Likewise even in the citizenship act women have been completely sidelined. In the Interim Constitution from both mother and father, the child could get citizenship but not with this constitution. This political upheaval took an interesting turn when the Indian government decided to seal the borders and halt the trade, as an expression of dissatisfaction with the Nepalese constitution. The nation, already weakened by the tremor of the 2015 earthquake, was up for an economic and food crisis, which wounded it severely. Madhes being the gateway to trade to India, was able to impose significant pressure on the government by halting the trade too. There was a blur on who led to the crisis, but the dominating ideology amongst the people was that the incident wouldn't have taken place without New Delhi's support.



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