

Preface

Around the world, wherever I go, Nepal-loving people often ask me, “what is going on in Nepal?” I believe they ask me this question not because Nepal is making some groundbreaking social, cultural, political, and economic progress worthy of replication beyond its borders but because Nepal is grappling with finding simple and efficient solutions to its political problems. Recently, a group of talented Korean students came to my office and asked me, “why is Nepal not able to find solutions to its problems?” My responses to these questions are often reduced to clarifying three deficiencies persistent in Nepal: people don’t own constitutionalism, democracy has constantly been contested,¹ and the civic state is eroding. Above all other problems, these three deficiencies have pushed the country the most into a state of uncertainty, which I often call “diseconomies of politics.” Under a condition of diseconomy, an enterprise assumes scale production but suffers either from inefficiency or a higher cost than average. The politics in Nepal has become like a diseconomy, in that its political production is mired in inefficiency. The inefficiency is fashioned particularly by the self-imposed helplessness of political leaders, who have permitted foreign factors, especially India, to play out in major political decision-making processes of Nepal with a habit of deference to Delhi’s political indications

¹ Among many examples, recent two examples are more critical. First, 33 political parties including the CPN (Maoist) boycotted the second CA election held on November 19, 2013. Second, all national and international election observers including former US President Jimmy Carter hailed the second CA election for being free and fair. Immediately on the completion of the voting, all political parties competing in the election, including the UCPN (Maoist), hailed the election. However, when the vote counting process started, the UCPN (Maoist), formerly a dominating party in the parliament, started losing its domination. In response, the UCPN (Maoist) boycotted the vote counting process, denounced the election calling it the by-product of the national and international conspiracy, and also threatened to boycott the second CA and constitution-making process.

or guidance.² Consequently, the Constituent Assembly (CA) was driven toward an unfortunate failure by strategies in keeping it from proclaiming a constitution.

The political predator, alongside the diseconomy of politics, has aggravated uncertainties in the institutionalization of democracy and defied the salience of the nation-building process, resulting in the growing erosion of the civic state, and estranged the people from owning constitutionalism and the constitution. Indeed, the political ambivalence from the adoption of Westminster model to the search of a *sui generis* model of democracy, nation-building, and constitutionalism has further aggravated the diseconomy of politics. In this vein, the *sui generis* model of *panchayat* failed miserably to attain Democracy, a Civic State, and Constitutionalism (DCC).

The Westminster model adopted in the post-1990 era also could not achieve any satisfactory outcomes on any of these three fronts of the DCC. The post-2006 polity, along with the emergence of new political forces (the Maoist, regional parties, ethnic parties, and a strong ethnic civil society), is searching for a model of ethnic federalism under the rubric of the right to self-determination, aiming to address the multifaceted problems of Nepal, which is in fact neither a *sui generis* nor a fully accepted idea. This hybrid model has not yet been constitutionally adopted, but seems to be in the process of constitutional adoption, at least partially. Thus, it is not yet known whether this hybrid model will magically address the problems of Nepalese society or result in another chaotic political disorientation in disguise of a dogged political laboratory. Nonetheless, this model has garnered a level of intense and widespread discourse that needs to be systematically analyzed.

Generally, each nation-building process accompanies the trials of managing unique and ubiquitous dimensions. The Nepali nation-building has its own unique dimensions as well as ubiquitous impressions. The drive from a centralized to a fragmented governance, and from a civic state to an ethnic state, portrays the unique properties of Nepali nation-building. The movements from fragmentation to a centralized rational government and from governance to development and post-nation constitutionalism reflect the universal mode of nation-building. The manifest contradictions between the unique properties of nation-building in fashion in Nepal and permeating concepts of nation-building tested universally demand conceptually clear and deep public discourse with political wisdom in Nepal.

Undoubtedly, a liberal democracy is the best possible mode regarding the political organizations of social life. In this form of governance, democracy and constitutionalism are inseparable. Constitutionalism, as its distinctive mark, uniquely

²Sudhir Sharma has authored an interesting book, which candidly provides detail information with a penetrating analysis of the roles played by India since the beginning of the Maoist insurgency in Nepal, especially during the constitution-making process. Sudhir reveals the fact that even Dr. Ram Baran Yadav, President of Nepal, had to request the Indian Ambassador to Nepal in Kathmandu to assist in persuading political parties to solve the tough political row in the CA. Sudhir also discloses some unbelievable riddles that the people from Indian External Intelligence Agency, known as the RAW, beforehand know what decision the Cabinet of Nepal would take. See Sharma (2013, pp. 15–17).

separates democracy from autocracy or other forms of political organizations. But democracy is not a sacred cow. South African President Jacob Zuma says, “You cannot eat democracy.”³ Professor Giovanni powerfully remarks that the “wrong ideas about democracy make a democracy go wrong.”⁴ Indeed, the Nepalese experience shows that democracy can easily lose its distinctive marks under three conditions: first, when actors undermine constitutionalism and they are unchecked by institutional mechanism; second, when the formal or institutional structure of democracy and the normative individual praxis of daily life run counter to each other in enervating a civic state; and, third, when people do not own a constitution on the foundation of constitutionalism. Under all three conditions, a democracy might turn into a phony democracy or an illiberal democracy. A phony democracy directly breeds conflict, insurgency, social turmoil, and political uncertainties, which is the case of Nepal in the post-1990 era, especially marked by the post-2006 polity.

The concept of post-national constitutionalism as a source of nation-building signifies the harmonization of domestic laws, policies, and administrative mechanism compatible with international rules. This is especially true in the realm of international trade, business, human rights, international crime, protection of the environment, and international cooperation. The demands of an international legal system or global order are hard to ignore based on ideological anchorages or political divisions at the domestic level. The eminence of global order methodically rejects the elaboration of political ideologies in contradiction with post-national constitutionalism. The political picture of Nepal, is, however, deeply mired in counterproductive, outdated, and deceptive ideological anchorages, which has been widely felt as one of the major hindrances to unleashing national potential in the post-national constitutional era.

Among the DCC challenges in Nepal, passions are running high, especially regarding nation-building and constitutionalism. Political leaders are acting irresponsibly, becoming obsessively mired in power-centric petty political interests. The country is throbbing with pain, but some sections of the government are ludicrously amassing power, property, and prestige. Especially among political leaders, bureaucrats, high-level security officers, and a few civil society leaders, the classic tale of from rags to riches is being experienced while the people suffer. Conflict, political instability, and systematic erosion have become sources of windfall for these few. “When certain individuals can project themselves as being virtually above the law, why should they be faithful to the rule of law and work hard for building a system?,” one Nepali octogenarian woman asked me last year. I was spellbound by such a perceptive analysis from a senior citizen. Though my response was modest, I replied that “they should do it for you, for me, and for every person living in the country.” I felt that this concise response needed to be expanded to explain what role a polity should assume to treat its people, how the role could be accomplished efficiently, and how the people could enjoy democracy in their social,

³Cited in Norris (2012), Kindle Location 238.

⁴See Sartori (1987). Part I, p. 3.

political, cultural, and economic endeavors. In short, this book is the outcome of the need for this response and its explanation.

Why this book? The failure of the Constituent Assembly in promulgating a constitution in Nepal raised vital social, legal, and political questions. Why couldn't the elected body accomplish its historical task of making a constitution? Why did it fail? What messages and lessons does this failure impart to the Nepalese people and also to the international community? Why has the issue of ethnic federalism emerged on a scale that could not be addressed by the democratic polity? These broad but intricate questions demand objective analysis and explanations for strengthening democracy in the Nepalese polity. This book does not only explain the problems but also investigates the causes and analyzes the possible solutions to the problems.

This book does not aim to offer populist and fashionable solutions to the complex Nepalese problems of misrule, abuses of state apparatus, inequality, discrimination, exploitation, corruption, poverty, insecurity, political criminalization, ideological fetish, politics of misconceptions, political diseconomies, disrespect to individual autonomy, denial of human rights, impertinence to personal freedom and liberty, and on top of them the deep-rooted social conundrum of caste, *dalits*, and ethnic identity. For the sake of analytical convenience, this book ascribes all these problems as the problems of justice or justice problems. The quest for justice leads to an inquiry into the meaning, connection, and functioning of democracy, equity, and the rule of law, which this book explains.

The Nepalese political experience indubitably demonstrates that the justice problem regrettably persists when constitutionalism is ignored and the people do not own the constitution. It also shows that both tyranny or absolute rule and misrule under illiberal democracy are hardly distinguishable, when justice is denied. Whether it was during the *panchayati* regime from 1960 to 1990 or in the post-1990 democratic period where democracy was formally institutionalized despite the continued practices of the undemocratic functional style inherited from the *panchayati* regime, the justice problem thus remained unattended. This book analyzes why the justice problem could not be addressed even in the post-1990 democratic period. It also suggests how the problem of justice could be addressed in the Nepalese society in the post-2006 polity.

During the *panchayati* regime, the kings were above the constitution, free and competitive political participation of the people was denied, state apparatuses were managed to serve and please the kings, liberty and freedom were suppressed, hierarchical power structure was more important than the rule of law, and powerful people were practically vested with a license for corruption, discrimination, domination, exploitation, and misrule. Thus, understandably justice problems constituted the intrinsic character of the *panchayati* system. But why the same and also more justice problems such as an ordinary person could not have any standing in society without joining a political party for the protection and getting opportunities in society is difficult to understand in the post-1990 period. During the 2008–2012 constitution-making period, the same justice problems victimized the Constituent

Assembly, which failed to deliver a constitution. This book unravels the systemic justice problems, analyzes them, and offers some solutions to fix the problems and find a new way forward.

The quest for democracy, a civic state, and constitutionalism in the post-CA political realm of Nepal has become particularly relevant due to the unfortunate failure of the CA of Nepal on May 27, 2012. Nepal has been pushed into a serious void of constitutionalism and political legitimacy. Basic issues like the structure of a state, modality of a government, a sense of unity as a nation, and the nature of democracy itself have been put into questions, which many countries in the world have settled much earlier. Ironically, these questions have mired the Nepalese polity into two contradictory traverses: an intolerable ideological fetish and the epistemological aberration of ethnic identity into illiberalism.

Instead of suggesting a fanciful squandering of resources in finding a *sui generis* political model, this book unpretentiously suggests and explains a liberal democracy, constitutionalism, and a civic state as the minimum standards of the political model to address the problems encountered by the present-day Nepalese polity. It is divided into eight chapters. The first chapter analyzes the past constitution-making processes and draws lessons from past mistakes. The second chapter discusses the nature of the conflict between the kings and the people and examines the reasons for the abolition of monarchy in Nepal. The third chapter inquires into the reasons why the Constituent Assembly of Nepal failed in making a democratic republican constitution. The fourth chapter discusses the epistemology of ethnic federalism in the light of the different schools of thought that have emerged in Nepal. The fifth chapter examines the challenges of nation-building and post-nation constitutionalism. The sixth chapter inquires into the concept of right to self-determination and the complexities of its application at the domestic level. The seventh chapter offers some ways forward to address the problem of constitutionalism, ethnic federalism, and democracy. The last chapter concludes the book.

In the preparation of this book, I have immensely profited from conversations and interviews with many political leaders, dignitaries, parliamentarians, policy makers, academia, lawyers, professionals, journalists, civil society leaders, students, and people from different walks of life in Nepal. I owe thanks to all of them. I would like to avoid a long list of their names who I profited from, but I must not be oblivious to express my debt of gratitude to two dignitaries, both former Prime Ministers of Nepal—Mr. Jhala Nath Khanal and Mr. Madhav Kumar Nepal—for their time and interview. My talented and hardworking research assistant Ms. Nicole Cronin from Ritsumeikan University, Kyoto, deserves boundless appreciation for her untiring and engaging research support.

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