

CONSTITUTIONALISM IN SOUTH ASIA: DEMOCRACY AND HUMAN RIGHTS INTERFACE

*Yubaraj Sangroula, Ph.D.*¹

¹. Professor of Jurisprudence and International Law at Kathmandu School of Law. Email: sangroula195@gmail.com

PERSPECTIVES

South Asia is a home of 22 percent of the world population. Ironically, unfathomable despite richness in natural resources, cultures, traditions or civilizations of deeply rooted humanity, and scenic beauty, arts and prospect of great transformation of lives, South Asia is also a home of 43 percent poor people of the world.² Over last some decades, as described by reports from national governments and world organizations like Asian Development Bank and World Banks, South Asia is said to have well established on a high economic growth path, with strong and improving macroeconomic fundamentals. In statistics, the over description may be true. The life of people in actuality is, however, different; South Asia remains the most impoverished region in the world in terms of income as well as human development indicators, such as health and education".³ Even today, the region inhabits 47 percent of the world's illiterate population aged 15 years and above (up to 59 years).⁴ Over 71 percent of the South Asians live in rural areas with abundance of young population.⁵ The aging population is increasing rapidly, due to constant rise on the average life expectancy, but without social changes such as improved living conditions, better nutrition, gains in wealth and access to health services. Obviously, the problem of unhealthy aging is well manifested. Demographic, Economic, and Health Profiles of South Asia has experienced average annual 6 percent GDP growth in the last 20 years, despite prolonged conflicts and political instability. Though the economic growth rate is supposedly inclining, the region is known to have the largest absolute number of poor in the world'. An estimated 437 million people live below 1.25 US dollar a day. It is disheartening to say that 237 million people in South Asia live at risk of dying before the age of 40 years. Furthermore, it is a fact that 867 million people in the region do not have access to basic sanitation and more than 300 million people are living undernourished. The significance of the recent economic growth for vast poor rural people is thus widely suspected looking from the perspective of massive inhuman conditions crippling the huge of population of human being in the region.⁶

Statistically, though the good performance in macro-economic paradigm has pushed down the poverty rates in all countries of the region; the said growth has, however, failed to manifest equal inclusion of all, or, to say categorically, to reduce the number of poor. The natural calamities, the conflicts, the looming political instability and the myriads of socio-economic problems along with the poor yielding governance system are in the region are stealing the prospect of transformation of the live of the vast poor population. The weak governance is particularly a serious impediment to the equitable distribution of of resources and opportunities, the delivery of public or security

2. South Asia holds the largest concentration of poor people in the world, with over one billion—some two-thirds—leaving on less than USD\$ 2 a day. More than two-fifths of the population live in extreme poverty, on less than USD\$ 1.25 a day.

3. Human Development Report in South Asia, 2006, Poverty in South Asia- Challenges and Responses", Mahbub ul Haq Human Development Center, Pakistan.

4. The absolute number of illiterate people has stayed close to 900 million throughout the 1990s, with the majority found in South Asia, and East Asia and Pacific regions. The number of illiterate in South Asia has increased by nearly 40 million despite a decrease in the rate of illiteracy. Source, UNESCO, UNICEF Report, 2001.

5. Source, UNESCO, UNICEF Report, 2001.

6. See, Human Development Report in South Asia, 2006: "Poverty in South Asia- Challenges and Responses", mahbub ul Haq Human development Center, Pakistan.

services, such as education and health care system, and to the overall enhancement of the standard of the life of people.⁷

Moreover, looking beyond consumption and poverty, the region has been able to record encouraging success in some major areas of human security and social transformation: for instance, infant mortality rates have dropped from about 120 in 1980 to 58 in 2008. Challenges, however, remain in key areas such as child malnutrition, maternal mortality, and gender balance in education and health outcomes. Total expenditure levels on health as a share of GDP or per capita remain the lowest among lower- and middle-income regions. Close to three-fourths of this spending is from private sources (mostly out of pocket) suggesting financial vulnerability among the poor. Broadly speaking, South Asia is far backward in all spheres of development, with the following traits as general characters of the society: (1) the distribution of resource stands on an acute imbalance looking from the perspectives of gender parity, caste inclusion, geographical areas of inhabitation, and age groups; (2) the disparity in resource and opportunity distribution between the rural and urban sector is staggeringly wider; (3) the pattern of expenditure of the revenue is manifestly erroneous as 'the governmental expenditure exceeds' 10 percent of the GDP whereas the health care sector receives only is less than 2.5 percent; (4) the access to opportunity to development is less inclusive as the vast majority of the population lives on only with meager (below 5 percent) of GDP; (5) the social injustice, such the problem of untouchability, sex discrimination, and practice of degrading customary rituals and relics mostly against children women and downtrodden people, is phenomenal ; and (6) the corruption in all sectors of life is deeply rooted. These factors largely account for defilement of the values and institution of democracy in South Asia. Undoubtedly, the study of constitutionalism in south Asia cannot close eyes to such issues. The terms democracy and human rights are not merely rhetoric' of abstract debate. The concepts of democracy and human rights are inseparably linked up with the 'ground realities' of the lives of majority, thus it is near impossible to 'understand' constitutionalism in absence of a discourse on democracy and human rights that are isolated from the 'prevailing ground realities' of human conditions of life. Formalist interpretation of the 'provisions of constitution' is not what the concept of 'constitutionalism' is meant in the context of South Asia. The concept of 'constitutionalism' is relevant both the 'making of contextual constitutional frameworks and constructions thereof in light of the need of improving the condition of life of vast majority of unprivileged sections of population through operation of principles such as equitable distribution of resources, unrestricted access to justice, inclusive participation in governance, gender parity in access to resources and opportunities, priorities in development opportunities to vulnerable sections of population and rule of law'.

Country Profiles of Democracy in South Asia

Happily enough, all member of SAARC, have constitutionally endorsed the 'liberal democracy' as a political mainstream; liberal democracy is 'an established political trait' of the region today. While the course of each nation to enter the society of democratic nations varies, and also demonstrates a difference in pattern of historical unfolding and approaches to institutionalize the 'democratic system', it would not be an exaggeration to claim that 'the quest for sustainability of democratic values and institutions' is unceasing in South Asia'. The people's jubilation and faith on democracy across South Asia is in no way less 'significant'. All the members have 'written constitutions generally based on 'the constitutionalism of separation of powers'. Regards among general general people to ' the principle of independent of judiciary' and it s 'activist role to ensure implementation of pro-people and pro-democratic polices' is manifestly higher. Consequently, the highest judiciaries in the region have played crucial roles in 'shaping the state's pro-people policies and implementation thereof'. Increased awareness of nations in SAARC towards their

7. World Bank 2010. "South Asia Regional Strategy".

responsibilities to the 'enforcement of economic, social and cultural rights' as the fundamental rights is visibly established. The recognition of the 'justiciability' of the economic, social and cultural rights in India, Nepal and Bangladesh is spectacular. The protection of 'societies' from vices of population and preservation of the natural climate, bio-diversity and ambient environment are equally important sector of 'judicial interventions' in the region. Not the least, the consciousness of the civil society and the judiciary towards 'eradication of corruption' by enhancing the rules and mechanisms of 'good governance' is tremendously grounded reality of the region. These positive traits about 'efforts for consolidation of democratic values and institutions' rule out the 'gloomy prospect' of socio-economic and political development in the region.

To look back over the last two decades, it is well manifested that the 'third wave of democracy' has swept through South Asia, which is characterized by five forms of regime change.⁸ Three of these characteristics have been witnessed in South Asia; they include (a) cyclical-alteration between democracy and authoritarianism, (b) second try-pattern—being weak structurally as well as constitutionally gave way to authoritarianism and eventually got replaced by stronger democratic structure, (c) interrupted democracy—the democratic system was interrupted temporarily and was restored after a popular movement of the people. Without exception, all nations of South Asia have manifested one of the above patterns during their political evolution.⁹ Today, all members of SAARC have been ruled by written constitutions under a multi-party structure of democracy'. The adult franchise has been enshrined into by all constitutions of SAARC as the 'form of electing the legislative body and the executive government'. With Bhutan continuing as a constitutional monarchy, rest all member of region are 'republic, the Nepal being the young member of the 'society of the republican nations'.¹⁰ Nepal, after coming out of a decade long Maoist insurgency and election of the Constituent Assembly, is heading towards setting a system of democracy through a 'popularly enacted constitution'.¹¹ The Interim Constitution of Nepal was adopted by the 'Interim Legislative-Parliament'¹²

Country Specific Trajectory of Democracy

As mentioned earlier, nations in South Asia has their own distinctive history of democracy. Some have a history of over a half-century long practice of democracy and others comparatively recent. The history of democracy in the region hence presents a 'continuous evolutionary process'. Often, this evolutionary process has encountered 'setbacks', the authoritarianism in some countries making an unfortunate return at regular intervals. However, the political reforms during last one decade show encouraging signs of greater democratization among South Asian nations. The evolutionary process of democracy in South Asia manifest two important characters (a)

⁸ . Madhivi, 2009. "South Asia and the Fourth Wave of Democracy". See online, <http://thetrajectory.com/blogs/index.php/2009/03>

⁹ . Madhivi, 2009. "South Asia and the Fourth Wave of Democracy". See online, <http://thetrajectory.com/blogs/index.php/2009/03>

¹⁰ . On the Day of 28th May, 2008, the first assembly of the Constituent Assembly endorsed the proposal of Interim Government of Nepal to amend the 'Constitution' implementing the Declaration of Nepal a 'Federal Democratic Republic'. Out of 564 members of the Constituent Assembly, 560 voted in favor of the proposal and thus adopted the 'proposal of the amendment to the Interim Constitution of Nepal, 2007, with an effect to declare Nepal henceforth a 'republic nation'. Following the said constitution amendment proposal, the Constituent Assembly urged the king Gyanendra to vacate the Narayanhithi Royal Palace within 15 days'. The adopted proposal, inter alia, states, "The king will lose all perks and privileges except his rights as common citizen". See on www.nepalnews.com

¹¹ . The Election of the Constituent Assembly was held on 10th April, 2008. The CA comprises of total 601 members, 335 and 240 elected respectively by proportional and first-the-post-past electoral systems. 26 members were chosen by the Council of Ministers from amongst intellectuals, the groups of population unelected, and those serving the nation in different walks of life. For detail see on www.election.gov.np

¹² . The Interim Constitution was adopted on 15th January, 2007. It is Interim because it is intended to exist until new Constitution is made by the Constituent Assembly.

uniqueness of the 'attempts at democracy', as a rare lesson in the consistent desire for democracy, despite recurring failure, (b) the trial and error are engendering variants of structures and values quite distinct to that 'evolved by the Western liberal democracy'. The second character is mainly inspired by the failure to duplicate the popular tenets of Western democracies. The variants reflect on the contextual needs of South Asian societies—the recognition of ethnic identity of groups; the proper balance of State guidance and individual freedom, the process, which, while maintaining the distinctiveness of various ethnic, religious and cultural diversities, undertakes the nation building endeavor. The South Asian constitutionalism is thus built on 'specific needs-based context of the the region and endeavors to address these unique needs by evolving a variant of Western liberal democracy'. The following description of the country-specific events will amply reflect on 'genus' of the South Asian Constitutionalism.

1.1.1. Bhutan, the youngest democracy in the region, embarked to adopt a new Constitution in 2008. The transition from hereditary monarchy to a 'constitutional one' under a parliamentary system has been a landmark development in history of Bhutan. The spectacular development subsequent to the adoption of the Constitution is that 'the sovereign authority of the nation is vested in the elected representatives of people', although the monarch continuous to reign. A unique deviation of Bhutanese democracy from the Western liberal democracy is that, the former 'adopts' a principle of 'cultural governance' along with individual freedom.¹³ The cultural governance here implies a notion that 'the practice of democratic principles and institutions' should not defile the 'cultural identity' of the people which is generally so dear to the people. It further implies that 'the State instead of relinquishing, must assume the stewardship of nurturing the cultural identities of people. Bhutan has exquisitely followed this approach, thus clearly marking departure from dogmas (indifference to cultural values of people) of the Western liberal democracy. Hence, the Bhutanese Constitution intends to institutionalize the:

- a. Democratic nation building by exploring the cultural connectivity among the people, which interjects some disciplines of human life as 'symbols of civility'.¹⁴
- b. The blurring of a distinct identity as a pre-condition of successful democracy is rejected. The notion is that a 'nation can keep its cultural identity along with democratic institutions and sovereignty of people lying with the elected representatives'.
- c. Governance efforts for empowerment of people, which can be realized while asserting their traditional moorings.
- d. Enjoyment of democratic rights or freedoms under conditions of cultural supervision.

Obviously, the Bhutanese democracy, to consider from accepted norms of Western liberal democracy, can easily be brushed aside as 'fake democracy'. But Bhutan has its own reasons for adopting democracy in its current manifestation. The 'concept of democracy as a melting pot' does not necessarily translate into better democratic governance, as it has been widely experienced in the South Asian.

¹³ . Western democracies place utmost premium on the efforts to create a single identity out of multifarious sub-national identities in the country. The newly emerging democratic nations in South Asia, such as Bhutan and Nepal, are moving towards a 'system where the political freedoms are guaranteed along with a notion of cultural governance', i.e. the recognition of role in governance based on cultural and linguistic identities. With these developments, the traditional theories of 'constitutionalism' need, in the emerging contexts South Asia, rethinking. The utter division of 'politics and culture or ethnicity' is found unsustainable in South Asia.

¹⁴ . For instance, the smoking is banned in the country; eligibility criteria for candidates to contest the Parliamentary election is possession of university degree; attempts at creating regional and sectarian discord through political campaign in the election are prohibited by the Election Commission; the cultural identity in public post is discouraged but cultural practices are allowed to dominate the public life.

- 1.1.2. Afghanistan's current phase of democratic transition opened with Bonn Conference of 2001, where the representatives of Afghan people met to create a 'transitional framework for governance'. The Constitution Commission, appointed to make new Constitution, was established by the Bonn Agreement, using the 1964 Constitution as the basis. A new draft Constitution prepared by the Commission was accepted by the "*Loya Jirga*" (Grand Council) in 2004. Under the Constitution, Afghanistan emerged as an Islamic State under a presidential system of governance. The democracy Afghanistan also rejected the 'principle of blurring the cultural and religious identity of democracy'. The blend of human rights guaranteed by the international human rights conventions and the Islamic tradition is a unique feature of the 'Afghan democracy'. The nation's sovereignty is exercised by the 'elected representatives' of the nation that comprises of ethnic groups: Pashtun, Tajik, Hazara, Uzbek, Turkman, Baluch, Pashai, Nuristani, Aymaq, Arab, Qirghiz, Qizilbash, Gujur, Brahwui and others.
- 1.1.3. Nepal has a story of over two millennia as an independent nation, even during the British colonialism in South Asia. Nepal, however, was ruled by series of autocratic regimes, the 104 years of Rana oligarchy that ended in 1951, being the most ruthless one. Nepal had its first democratic entry in 1951 by ousting the Rana regime, which hardly lasted for a decade; in 1961 the monarchy through a *coup d'etat* overthrew the multiparty system and plunged the nation into a 'party-less system'- called panchayti democracy. The political parties were banned and 'the king was declared as the source of national sovereignty'. A very popular movement of people in 1990 restored the 'multi-party system' under Constitutional monarchy. The Constitution, however, under the accepted democratic norms of Western liberal democracy, could not address the aspiration of 'cultural or ethnic diversity' of the nation. The 'notion of democracy as a melting pot' could thrive 'the participatory democracy', and hence proved to be a reason for 'outburst' of conflict; the failure to address the long-standing structural violence eventually led the 1990 Constitution to 'dissolution'.

The West minister model of 'governance system' generated an abominable test to the Western liberal democracy. The frequency of change of government, the unholy alliance of political parties to form and break the governments and the resultant political corruption, the further marginalization of the marginalized groups, and the unregulated and unrestricted privatization resulted plight of vulnerable groups made people to stand against the West ministerial model of democracy. This failure gave standings to two ultra-forces, i.e. the ultra-leftist communist movement of CPN Maoist and anti-democracy reactionary monarchy led by King Gyanendra. The King Gyanendra, taking advantage of the increasing unpopularity of political parties, dissolved the elected 'House of Representatives, and plunged the nation into an anarchy of emergency rule, whereas the Maoists, taking advantage of the collapse of democratic system, intensified the 'bloody insurgency' in order to set up a 'proletariat State'. With these political upheavals, Nepal went through the most unexpected and cruel transformation of politics. It was painful from aspects such as the hardship of life suffered by the people, the backlash of democratic institutions, the stagnation of economic development and the social turmoil caused by violence and anarchy. In 2006, the people took the street against the 'reactionary royal regime'. The fight against the 'royal autocracy' brought the Maoist insurgent to an 'open political dialogue'. The Maoist participation in the 2006 popular movement eventually resulted the 'victory of people for democracy' and demise of the 250 years old institution of monarchy. The Interim Constitution of Nepal, 2007, is a 'social contract of the Nepalese people' which guarantees a system of democracy that will respect the 'participation of divergent competing ideologies' and 'devolution of powers' to the local people. The democratic exercise is in its apex. The constitution is being drafted by a 'huge body of representatives' which includes every segment of the society. The ongoing democratic experiment, if successful, will set a new example of democratic evolution by involving the potential separatist forces. Is so happens, Nepal's contribution to the democratic

revolution will add a new page of history with 'marked recognition that a break from traditional political system and proper involvement of dissents sections within the political mainstream can enhance quality of governance'. Nepal's ongoing political phenomena suggest that 'democratic transformation cannot always be accomplished through constitutional amendments; constitutional evolution can also imply a new constitutional framework to respond to unexpected political developments'. The democratic transformation process of Nepal thus will categorically imply that:

- a. End of bloody revolution can be made by accepting a 'norm within a democratic set up' to let its propagators engage, without forcing it to compromise its ideological beliefs, in political competition to form the government and run the nation.
- b. The modus operandi of people for participation in democratic system of governance is defined by its own constituents, i.e. the people. It implies that democracy is not a 'set of principles and doctrines' propounded by theorists, it is rather a operational system of governance put in place by people themselves in order to 'secure their freedoms and social security'.
- c. Constitutional continuity does not singularly imply the 'notion of political stability', hence the 'events' that break from the traditional political system' in order to give space for all in the system should be defined as 'political development' but not the political instability.

Bangladesh has, like many other nations across the world, long been a victim of disfunctionality of the 'Western liberal democracy. In a history of over half dozen Parliamentary elections, Bangladesh has witnessed a 'rule of two parties' intermittently. After end of the tenure of Bangladesh Nationalist Party (BNP) in 2006, Bangladesh fell in rule by a 'Caretaker Government' backed by the Military. In the past, the interference of the military in political affairs, in making and unmaking of the government, is spectacular in the Bangladeshi political history. Since 2007, for some years, Bangladesh underwent through a declared state of emergency. The frustrations and gossips overwhelmed the political scenario. The caretaker government emerged heavily against political leaders in its mission of anti-corruption 'crackdown'. The Election Commission was entrusted with the task of election reforms, which largely non-partisan but allegedly under influence of military, made some crucial headways to reform electoral process to stop 'criminals, corrupted people, and undesirable elements capture the State's power for their private gains. The Representation of the People Ordinance 2008 made some interesting rules:¹⁵

- a. Bar on officials on contesting polls within three years retirement,
- b. Mandatory election fund accounts and determination of individuals election expenditure
- c. Anti-hoarding policies to check price rise, and
- d. Onslaught on the Jama'atul Mujahaideen Bangladesh militants.

The Caretaker Government looked 'authoritarian' its approach. The onslaught on political leaders was heavier, at some point it created a 'psyche of terror'. As a matter of fact, the reforms process of Caretaker Government received skepticism and criticism from many quarters. Nevertheless, the tendency of the political parties coming to the power time and again was hardly less 'authoritarian'. Most importantly, the motive of political parties' authoritarianism was to gain additional power and privileges directly affecting the 'system of democracy'. The Caretaker Government's motive, however, was to achieve reforms in the electoral process and system of governance. The system of democracy subsequently was punt in much more credible rails.

India is pioneer for designing and enforcing a 'constitution' popularly made, i.e. through the Constitute Assembly. The current decade in India started with a non-Congress Coalition

¹⁵. Madhivi, 2009. "South Asia and the Fourth Wave of Democracy". See online, <http://thetrajectory.com/blogs/index.php/2009/03>

Government in power, the first such combination to complete a full tenure of office. The year of 2004, however, witnessed a change as the Congress emerged as victorious in the general elections securing the largest number of Parliamentary seats. The United Progressive Alliance, the communists being one of the constituents of the alliance, assumed the power, with communist parties as partner of coalition. The Congress continued to wield power after 2009 elections, though the alliance with leftist parties ceased to exist. India despite diversity of ethnic, linguistic, religious and cultural groups is able to 'engage people in political process' and successfully utilize the democratic institutions of Western liberal democracy. The transition to from the one-party dominance to coalition politics and culture has been a 'trait of Indian democracy' in recent era with comfortable resilience and stability. As it is quite visible, the democracy of India has been evolved able to manage multiple challenges like the socio-regional diversities, illiteracy, problem distribution of resources, the increasing disparity between rich and poor and terrorism.

The desire for framing the constitution of India by a 'popular body', the Constituent Assembly, was necessitated by the 'quest of Swaraj'. It was one of reasons for S. Srinivasa Iyenger, the then President of Nation Congress, in 1927, to boycott the Simon Commission. He publicly emphasized the need for constituting a Constituent Assembly to frame the future Constitution of India.¹⁶ In May 1928, the All Parties Conference, appointed a committee under chairmanship of Motilal Nehru. The task of this committee was to 'determine the principles of the Constitution of India'. The committee submitted its report on 10th August, 1928. The report, however, stopped short of demanding full freedom for India and based its recommendations only on 'Dominion Status'.¹⁷

Father of Indian nation, Mahatma Gandhi, in his article in the *Harijan*, dated 19th November 1939, wrote: "*Look at the question from any standpoint you like, it will be found that the way to democratic Swaraj lies only through a properly constituted Assembly, call it by whatever name you like. All resources must, therefore, be exhausted to reach the Constituent Assembly before direct action is thought of. The stage may be reached when direct action may become the necessary prelude to the Constituent Assembly. The stage is not yet.*"¹⁸

What implies in the statement is that 'the democracy can survive and sustain only by help of a Constitution which is 'framed by the minds of constituents' themselves. The Indian 'Constituent Assembly' indeed is a prelude in South South Asia for 'constitutionalization' of freedoms of people. The 'constitution', from the light of the history of Indian Constitution making process, struggle and efforts put into it, is an evidence of 'national independence as well as the guarantee of freedoms of people'. This doctrine is unique in South Asia as most countries after their liberation from colonial rule or autocracy made 'all hard efforts to ensure a "Constitution' with guarantee of freedoms of citizens' as the precious 'yield' of the revolution or political change. The 'most fundamental embryo' of the South Asian constitutionalism lies on this fact.

The Constituent Assembly of India formally met on 9th December, 1946, when India was not yet free, though the Interim Government had begun to function. On 13th December 1946, Jawaharlal Nehru, India's first Prime Minister, moved a resolution: "Aims and Objects of the Constituent Assembly", which later became the Preamble of the Constitution. This resolution is 'one of the most historical sources of South Asian Constitutionalism' today. Some important principles underlying the resolution are as follows:

- a. Autonomy of unit of territory that is associated to constitute the 'Union of India'. The autonomy here implies 'ability to exercise all powers and functions of Government and

¹⁶ . B. Shiva Rao, *The Framing of India's Constitution*, Vol.1, Part 11 (1996), at p. 41.

¹⁷ . H.V. Hande, *Ambedkar: the Making of the Indian Constitution*, 2009, MacMillain Publishers India Limited, at p.2

¹⁸ . B. Shiva Rao, *The Framing of India's Constitution*, Vol.1, Part 11 (1996), at p. 108

- administration' save and except such powers and functions are vested in or assigned to the Union.¹⁹
- b. All power and authority of the Government of India and its parts and organs derived from people.²⁰ It in a straightforward meaning implies that 'the government is controlled by the people', but not the people by the government. In understanding lies the 'bedrock' of democracy in India, which can equally be replicated in systems of other countries of the region to foster true meaning of democracy.
 - c. A democratic system must guarantee and secure to all the people social, economic and political justice; equality, before the law, of status and opportunity; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality.²¹ As it implies, equality, before the law, is an essence of democracy as no exercise freedom would be possible without 'equality' of status and opportunity.
 - d. Adequate safeguards for minorities, backward and tribal areas.²² This implies that 'the priority in opportunities and resource distribution' must constitute a 'system of governance'.

These fundamental sources of 'Indian constitutionalism' were later developed elaborately by operating parts of the Constitution such as 'fundamental rights', election of representatives, jurisdictions of the Supreme Court and other subordinate courts, and directive principles and policies. The structure of the 'Constitution' devised by the Constituent Assembly is 'more or less a model for all other South Asian' countries.

Sri-Lanka is credited with running a successful political system through the current century characterized by regular elections and smooth transfer of power. Historically, existence of a strong political opposition and viable party system has been described as the strength of the Sri-Lankan democracy.²³ Rule by majority has been a 'characteristic feature of democracy advocated' by dogmas of Western liberal democracy. This dogma has made Sri-Lanka to pay a high cost; the sidelining of the minority Tamil community eventually resulted with an 'unprecedented surge of conflicts' tolling deaths of over one hundred people. The rule by Sinhala majority with indulgence of minority Tamil in violent conflict followed by 'stringent suppression' has largely defiled the 'historical credit of successful political system'.

Pakistan has been most time in its history is ruled by military. It has spent seven years of military rule even in the recent past decade. The election February 2008, and Pervez Musharaff's resignation, has one more time offered opportunity for political parties of Pakistan to 'restore civilian control of the Government'. However, the challenges of Pakistan in institutionalizing the 'democracy amidst the crises of lacking national consensus on vital national issues among political parties, the task of balancing the national concerns with international pressure and mushrooming terrorist outfits with the country are daunting. The strong personality with weaker system is making Pakistan's democracy a 'fragile system'.

¹⁹ . Section 3 of the Resolution. See, H.V. Hande, *Ambedkar: the Making of the Indian Constitution*, 2009, MacMillain Publishers India Limited, at p.10

²⁰ . Section 4 of the Resolution. See. H. V. Hande, *Ambedkar: the Making of the Indian Constitution*, 2009, MacMillain Publishers India Limited, at p.10

²¹ . Section 5 of the Resolution, See, H.V. Hande, *Ambedkar: the Making of the Indian Constitution*, 2009, MacMillain Publishers India Limited, at p.10

²² . Section 6 of the Resolution. See, H.V. Hande, *Ambedkar: the Making of the Indian Constitution*, 2009, MacMillain Publishers India Limited, at p.10

²³ . Madhivi, 2009. "South Asia and the Fourth Wave of Democracy". See online, <http://thetrajectory.com/blogs/index.php/2009/03>

Maldives following the removal of president Gayoom's from power after thirty years got an opportunity to write a new Constitution for the country. Under the new Constitution, 2008, the multi-party system has been introduced, and first presidential elections were held on October, 2008. Most other democratic reforms are however are still a matter of concerns. The procedural democracy is still far away in Maldives.

Basic Traits of Democracy and Constitutionalism of South Asia- An Analytical Discourse:

- (1) To look into political history of South Asia, it is undisputedly established that 'the democracies' are fruits of people's popular movement against colonial powers or autocracies. Most democracies in South Asia were constitutionalized flowing success of long and hugely sacrificed 'liberation movement'. Obviously, the Constitutions of South Asia 'reflect on aspiration of people for freedoms and self-governance'. The legitimacy of the South Asian Constitutions is thus derived from 'popular movements of people against colonial or authoritarian subjugation or tyranny'. Conventions have had played less role to play in legitimacy of 'constitutions'. Take for instance, the Indian Constitution was drafted by a Constituent Assembly after a tedious struggle for it. The Simon Commission, appointed by the British Government in UK, was rejected by National Congress and other parties in India. The hidden cause for that was 'that Indian people wanted to establish their own sovereignty'.²⁴ "Revitalization of Sovereignty" is therefore one very important principle of 'constitutionalism of South Asia'. Constitutions in South Asia thus not only a 'body of fundamental rules for governance', they are also a 'source or means of restoration of people sovereignty'. No constitution of South Asian nation can thus be 'interpreted or construed in oblivion of its unique political history of liberation'.
- (2) Equally important feature of constitutionalism can be discerned from political history. Since constitution was considered as a 'final outcome of political movement in each country', the primacy given to 'its adoption by people representatives themselves' was invariably emphasized. Indian National Congress and other parties, therefore, adamantly propagated the 'idea of making the constitution by Constituent Assembly'. Nepal was supposed to 'make the constitution by a popularly elected Constituent Assembly', in the aftermath of 1951 revolution against the Rana regime, though the promise was later flouted by the monarchy. Presently, Nepal is making a constitution by an inclusive Constituent Assembly. Afghanistan's Constitution is finally adopted by representatives of people in January 2004, after 2003 *loya jirga*. The agreement of making a Constitution by a commission was reached in Bonn Conference, 2001.²⁵ The Bonn Agreement was a 'process of making a social contract' of Afghan people. The Bangladesh Constitution is unequivocally an outcome of Bangladeshi people's independence war against Pakistan. The independence movement envisaged to set up 'a self-rule' as an independent nation. Upon success of the movement, the Constituent Assembly was established to frame a constitution for the independent Bangladesh.²⁶ Even Bhutan's newly made Constitution

²⁴ . See on B. Shiva Rao, *The Framing of Indian Constitution*, Vol.1, Part II

²⁵ . Bonn Agreement, 2001, was initial series of agreements intended to re-create the State of Afghanistan. This agreement made a way for formation of a nationally-agreed-upon government, and for making such a government at least 'one *loya jirga*' was required to be convened. Hence, in December 2001, a number of prominent Afghan representatives met in Bonn under UN auspicious. This conference appointed a Commission to make a new Constitution'. For more information, see UN/Security Council Resolution 1386 (2001)

²⁶ . The Preamble of Bangladesh's Constitution is self-evident of the 'constitutionalism'. Excerpts: We, the people of Bangladesh, having proclaimed our Independence on the 26th day of March, 1971 and through a historic war for national independence, established the independent, sovereign People's Republic of Bangladesh; Pledging that the

was adopted by the representatives of the people. This discussion can be summed to 'enunciate the following principles of South Asian Constitutionalism: (a) the Constitutions of South Asia inherently imbibe the aspirations of people for liberation and self-rule, (b) hence, the Constitutions of South Asia do not merely mean a 'body of fundamental rules of governance, but also represent the collective will of the people for national independence and freedom of people,²⁷ (c) the basic structures of the constitutions of South Asia are thus not amendable,²⁸ (d) the legitimacy of South Asian Constitutions are directly founded on 'sovereignty' of people, but not on conventions of governance, and (e) the South Asian constitutions not only project mechanism of Statecraft but also a road map of the socio-economic transformation of the society.

- (3) Doctrine of Necessity is widely practiced 'tool' of legitimizing the 'constitution' making process. Most South Asian countries emerged independent out of colonial regimes, or colonial backed autocratic regimes. None of South Asian countries preferred to stick with 'fundamental laws' set forth by colonial or autocratic regimes. They choose to frame new constitutions by representatives of the 'people'. It was one of the reasons, why Indian people declined to accept the proposal of drafting of Constitution by a commission (Simon Commission was rejected). In India, the Constituent Assembly acted on resolutions of submitted by the Prime Minister. In Nepal, Comprehensive Peace Accord has been a source of legitimacy for Interim Constitution. In Bangladesh, the Declaration of the Independence was a basis for legitimacy for 'establishment of the Constituent Assembly'. In Afghanistan, the *loya jirga* was the foundation of the Constitution. It is thus believed that 'sovereign people have powers to generate constitutions for their prospective system of governance'.
- (4) Judiciary has thus been accepted as the 'custodian' of the basic structure of the Constitutions. The legislative body does have inherent powers to 'adopt amendments of to the Constitutional provisions'. Nevertheless, abundance of judgments of the Apex courts in India, Bangladesh and Nepal have established that 'the legislative body cannot' alter the 'basic structures of the constitution'. Out of this doctrine have sprouted out a number of innovative principles, such (a) justiciability of economic and social rights of people, (b) judicial review of the statutes enacted by the parliament, (c) special directives to the State in order to preserve ambience of environment, protect people from hazards of pollution, and

high ideals of absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in the war for national independence, shall be fundamental principles of the Constitution; Further pledging that it shall be a fundamental aim of the State to realize through the democratic process to socialist society, free from exploitation-a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens; Affirming that it is our sacred duty to safeguard, protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh so that we may prosper in freedom and may make our full contribution towards international peace and co-operation in keeping with the progressive aspirations of mankind; In our Constituent Assembly, this eighteenth day of *Kartick*, 1379 B.S corresponding to the fourth day of November, 1972 A.D., do hereby adopt, enact and give to ourselves this Constitution.

²⁷ . The 'collective will' principle implies that 'no institution of State can flout the 'spirit' of constitution. Supreme Court Bangladesh judgment in the *Moone Cinema Verdict* has specifically this principle. It held: Can a *de facto* regime be given *de jure* status through any constitutional engineering? There exist no provisions in the Constitution whereby the army can neither take over the power nor can such taking over be validated in any form. And so one hoped that there will be occasion to steadfastly say that the remains of fourth, fifth and seventh amendments were no part of the constitutional doctrine. They were violative of the fundamental structure of our Constitution. This was done at last in the *Bangladesh Italian Marble Works Ltd v. Government of Bangladesh and Others* 2006 (Spl) BLT (HCD) 1.

²⁸ . *Kesavananda Bharti Sripadagharu v. State of Kerala* (1973 (SUP) SCR 0002 SC) in India and *Bharat Jungam v. Council of Ministers and others* (2011- judgment yet to be published) have elaborately established the doctrine of 'basic structure'. The basic structures are 'taken as direct evidences of the aspirations of people reflected in the revolution or liberation movement'.

preserve archives or archeological objects from harms of any kind, (d) adopt special measures to protect vulnerable.

Conclusions

To be precise, the South Asian Constitutionalism does not fully transplant the 'Anglo-American' doctrines of constitutionalism. The South Asian Constitutionalism is largely structured by 'innate contextualism'- i.e. the political history of revolution against colonials and autocrats. The innate source of South Asian constitutionalism lies on 'aspirations of people' to institutionalize national independence and freedoms of people.

Constitution in these perspectives is not merely a 'body of fundamental rules of governance' but also a 'road map of the economic, social and political development' of the people and judiciary has *locus standi* to gauge the accepted standards, and oblige the executive to perform accordingly.