

Question of legality

CONFLICT & RIGHTS



By BIPIN ADHIKARI

The Seven Party Alliance (SPA) government has dissolved the municipal bodies constituted after the February 2006 polls, decided to rescind all legislation, decrees, appointments and other moves made by the king-led government, declared ceasefire, dropped the terrorism-related charges against the Maoists, and asked Interpol to quash international arrest warrants for their leaders. It has also ordered a judicial inquiry on the abuse of power by the security forces during the mass movement last month. Additionally, the CPN (Maoist) has also been called to come forward to discuss with the government on how to get ahead with the contentious issues.

There seems to be a popular opinion in Kathmandu, often supported by the mainstream media, that since the reinstatement of the House is politically enforced, it is not necessary for the newly constituted government and the House of Representatives to conform to the existing constitutional process in their plan, programs and decision-making.

Even some established lawyers who took part in the mass movement are saying that the movement backs up the SPA government, and the legal and constitutional underpinnings do not matter much in the process. It is on this ground, for example, that the splinter Nepali Congress (Democratic) was given a party status in the House of Representatives, disregarding the law, which states otherwise.

As popular sovereignty does not mean the sovereignty of the politicians, or their executive or technical hands, the compliance with the rule of law

is as much necessary in the transitional business of the government as the need to make sure that the state functionaries including the House of Representatives act according to the rule of law, and refrain from minimizing the existing constitutional and fundamental rights standards. The sanctity of the rule of law must be preserved in the transitional process until a new rule of law is established and there is a dependable exit to a better constitutional regime.

The reinstatement of the House of Representatives, dissolved four years ago, was demanded by the SPA, because they thought a legitimate forum, based on certain constitutional parameters, to discuss the prime agendas of the nation could be immediately available, and which would not be compromised by anybody. But this objective seems to be dwindling, and the activities of the government are being done haphazardly.

The first and foremost requirement at present therefore is to legitimize the House reinstated by the king by amending the Constitution, and giving it powers, responsibilities and life, and a clear constitutional status befitting the transitional process (in all areas where it cannot give outlet to the current political agenda). This obviously necessitates the reinstatement of the National Assembly and implementation of the rules regarding parliamentary decision-making.

Such an amendment must also provide for interim arrangement as agreed with the Maoists. Until the constituent assembly completes its job, the role of the House in maintaining continued legality, performing essential legislative functions, and forming an interim government will remain crucial. This arrangement can also keep the Supreme Court functionally alive to check when the government is acting ultra vires the Constitution.

The most important among the contentious issues is the formation of a constituent assembly to draft a new constitution as called by the Maoists. From the French Constituent Assembly of 1789 to the Peru's Alberto Fujimori's Democratic Constitutional Congress of 1992, the world has seen dozens of constituent assemblies. There has been so far not a perfect example of a constituent assembly, or a perfect written constitution ever produced by it.

South Africa's Constitution of 1996 is considered comparatively better. It is because of the result of remarkably detailed and inclusive negotiations done by its constituent assembly with the support of a charismatic Nelson Mandela. In all, it took seven years, from 1989 to 1996, to complete the final document.

Almost five years elapsed between the first meeting between African National Congress and Prime Minister P W Botha in 1989 and agreement on an interim constitution and the first non-racial election in 1994. Through these years, outbreaks of violence threatened the process. But the leadership of Mandela and his pragmatic approach helped the process considerably.

The 'historical' enemies in South Africa succeeded in negotiating a peaceful transition from apartheid to democracy exactly because they were prepared to accept the inherent capacity for goodness in the other. Mandela wanted South Africans never to give up on the belief in goodness, and continue to cherish that faith in human beings as a cornerstone of their democracy. He was largely successful.

This does not always happen, especially when there is a communist or a totalitarian movement. Nepal is basically capitalizing on hatred against the king, and the revolutionary fervor is demobilizing many important values that Nepal needs to protect in its reformative moves. The SPA have

already shown that old habits die hard. Throughout the 19th century, Russian reformers demanded the setting up of a democratically elected Constituent Assembly. After King (Czar) Nicholas II abdicated on 1st March, 1917, the new provisional government announced it would introduce a Constituent Assembly. A total of 703 candidates were elected to the Constituent Assembly in November, 1917. This included socialist revolutionaries, Bolsheviks, Mensheviks, and Constitutional Democratic Party. The position of the Bolshevik was not better. They were bitterly disappointed with the result as they had hoped it would legitimize what they proclaimed as the October Revolution. Thus, when the constituent assembly rejected Vladimir Lenin's Bolshevik programmes, he announced its dissolution asserting that the October revolution stands higher than the formal rights of the constituent assembly, and its attempt to disregard the class struggle and civil war would be a betrayal of the proletariat's cause, and the adoption of the bourgeois standpoint. Soon afterwards all opposition political groups were banned in Russia. The October revolution was not the revolution of the Russian masses; it was the forceful takeover of the interim regime by the Bolsheviks.

Nepal is at present in that stage. What is going on, by itself, is not unfortunate. What is unfortunate is the failure to understand the scenario. The question of course is not simply the constituent assembly and the constitutional framework that will be ultimately adopted, but whether or not that framework is a viable instrument from which the country can emerge and persist as an independent, nationalist and democratic society. A strong commitment to the rule of law is necessary to overcome this challenge.

LAWYERS_INC_NEPAL
@yahoo.com)