

Salient Features of the Constitution of Nepal, 2015

Bipin Adhikari

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(The person holding the flag, Laxmi Narayan Shilpakar, made it his mission to promote the recognition and significance of the national flag shortly after the promulgation of the Constitution of Nepal, 2015.)

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Dedicated to

**Late Ganesh Raj Sharma
Senior Advocate**

**A renowned Nepalese lawyer,
constitutional expert, and political analyst**

Foreword

Nepal celebrated the first anniversary of the promulgation of its seventh constitution, the Constitution of Nepal, 2015, on September 20, 2016. Compared to the country's previous constitutions enacted during an approximate 68-year period, the new Constitution is unique in many respects.

The first Constituent Assembly, beginning on May 28, 2008, was unable to frame a new constitution, even in four years. Despite its attempts, the government at the time was unable to gear the efforts to promulgate the new constitution or to mobilize support within the Constituent Assembly to create an alternative arrangement by amending the existing Constitution. Amidst a series of constitutional crises, a new Constituent Assembly was elected on November 19, 2013 in order to pursue a second try at constitution-building. This is how the Constitution of Nepal, 2015 was finally adopted, thus replacing the Interim Constitution of Nepal, 2007.

The new Constitution is unique in the sense that it is the creation of an elected constituent assembly for the first time in Nepal's history. It is distinctive also because it is based on republican values, a three-tier federal system, and many new economic, social, and cultural rights guaranteed to the people. As a Constitution that aims to create an inclusive democracy in the country, it also intends to protect the rights of indigenous peoples and minorities as well as others facing structural disadvantages. The new Constitution distinguishingly introduces a parliamentary form of government, an integrated judiciary in a newly federalized country, and a devolution of power to the local level. Compared to Nepal's previous constitutions, this Constitution is certainly a cut above, and, if implemented with the right spirit and dedication, will empower the people of Nepal, help build an inclusive political order, and serve as a springboard for the country's socioeconomic and political development.

Salient Features of the Constitution of Nepal, 2015 by Dr. Bipin Adhikari, a leading constitutional law expert, describes the contents of the new Constitution from the perspective of the scholar. The Constitution of the Nepal, 2015 is a document of compromise between many political parties. Had this compromise failed amidst fluid politics and international

interferences, the second Constituent Assembly would inevitably have dissolved once again without producing a constitution. This would have been disastrous for the country and the people. The parties that compromised represented different masses, including the extreme right and the extreme left. Some were centrist with leftist or rightist orientations. However, not only was the new Constitution shaped by ideology, but it also had influences of class, caste, religion, ethnicity, and regional considerations. Obviously, the Constitution has attempted to accommodate every constituency, at least in the opinion of the Constituent Assembly's two-thirds majority, without unduly learning on any one side. Countries that never resort to constitution-building by way of a constituent assembly in the modern age may never know this kind of equilibrium and compromise. Dr. Adhikari's commentary thus explores Nepal's context that gave rise to the Constitution and shaped its provisions and their nuances.

Dr. Adhikari has been following Nepal's constitutional development ever since the Constitution of Nepal, 1990 was promulgated. He has been a part of the institution-building and democratization process as well. This book is yet another addition to Dr. Adhikari's list of constitutional scholarship. Without going into a detailed analysis, the book highlights, in a clear and lucid manner, the essence of the new Constitution and the changes it has brought about and its basic features, keeping the constitutional history of Nepal in hindsight. This book not only fills the vacuum of an initial offering of its kind of the 2015 Constitution, but also helps readers understand the immediate challenges in its implementation. Despite its simple tone and concise writing, this book is comprehensive in its coverage and clear to analyze what has come out of the Constituent Assembly process.

The Government of Nepal is engaged in creating the necessary conditions to implement the Constitution and institutionalize the changes it has introduced. This requires lawmaking by the existing Parliament and fresh elections to the different tiers of government. The major responsibility of the present Parliament is to facilitate this process. Article 296 of the Constitution provides continuity to the Constituent Assembly in its capacity as the parliament for this important purpose as well. It clearly states that the Constituent Assembly existing at the time of the Constitution's commencement shall ipso facto be converted into the Legislature-Parliament, whose term shall exist until January 21, 2018.

However, if elections to the House of Representatives are held as set forth in this Constitution prior to the expiration of that term, the Legislature-Parliament shall continue to exist until the day before the day specified for the filing of candidates' nominations for that election. While the task ahead is enormous, time is limited. For now, the Government must be able to mobilize the present Parliament to meet all the requirements of transition, including creating laws to hold the first round of all elections, which are due by January 21, 2018.

As I noted above, the task of constitution-building was not easy. The first Constituent Assembly failed to produce a constitution despite the enthusiasm and support of the people. The second Constituent Assembly faced the same plight and challenges before it finally succeeded. Similarly, the promulgation of the 2015 Constitution, like every document of compromise, has left some political parties unsatisfied with the net outcome. Some even boycotted the final adoption process, while others, though wishing for a new constitution, did not take part in the election to the second Constituent Assembly and remained outside the discourse. Now, the great challenge before the new Nepalese state is to bring all political forces and stakeholders under the newly-adopted constitutional regime, while resisting geopolitical elements and other free-riders. Dr. Adhikari has explained this challenge well.

Efforts to move beyond the limits of partisan politics in consideration of the nation's best interests, strengths, and possibilities must continue. Moral vision is required in the Constitution's implementation. Practical wisdom and common sense are as important as ingenuity. Therefore, I believe constitutional experts of the country have a significant role to play in this process. I am sure this book is going to be a window on the new Constitution of Nepal. The author deserves special thanks for this timely initiative.

Kalyan Shrestha

Chief Justice (retired)

December 2016

Preface

Nepal has been in an unstable state ever since the 1950–51 transition that heralded democracy in the country. Although the end of the Rana regime was a momentous event in the history of Nepal and brought many changes in the country, these changes did not significantly contribute to the consolidation of national interests, the institutionalization of democracy, or the people's empowerment. Even though the country began its constitutional journey in 1948, it has yet to reach its destination.

In an environment of political instability, where the people have failed to prevail, Nepal has produced seven constitutions in a span of more than 67 years. The people's representatives, who were assigned the responsibility of framing the seventh constitution, proved to be the weakest representatives in the history of constitution-making in Nepal. They navigated through a turbulent political scenario before they eventually created a document of compromise. Even now, it is doubtful whether the document they have created will restore peace and stability in the country. What is clear, however, is that Nepal's uncertainty remains unresolved.

There are objective reasons behind this suspicion. Nepal continues to face the challenges of geopolitics and national divides along ethnic, religious, cultural, and regional lines. These challenges were continuously reflected in the seven years it took to complete the constitution-drafting process, which eventually led to the adoption of the Constitution of Nepal, 2015. The first effort, which began in 2008 with the election of the Constituent Assembly, unsuccessfully ended in 2012. The second effort, beginning in 2013, attempted to build on the first and was eventually successful.

The final document that has been produced reflects a very uneasy political compromise between different political parties and diverse stakeholders. The role of external elements in shaping the constitutional outcome has been crucial. The document also marks a paradigm shift in the constitutional history of Nepal, making the new Constitution very enchanting in terms of certain norms, values, institutions, and procedures. Its new features will provide the State with a new orientation. As a document of compromise, however, the Constitution certainly has some shortcomings and challenges for every constituency of stakeholders. Whether or not it can adapt to domestic and external

geopolitical challenges through an evolutionary process is open to debate; only time can tell how these challenges will be tackled. Much depends on Nepal's political leadership and its capacity, commitment, and resilience to build upon what has already been achieved.

This book is an effort to introduce Nepal's new Constitution concisely. The earliest version of this book was presented as a paper in an orientation given to a group of expats in Kathmandu at the local office of the United Kingdom's Department for International Development (DFID). That paper gradually evolved, as I presented it to different national and international institutions in Kathmandu. As its name suggests, the book aims not to analyse the Constitution in detail or to delve into a comprehensive commentary of the constitutional principles and practices or political theories. Instead, it aims to briefly describe the context of the new Constitution, explain its salient features in a clear, concise, and complete manner, and discuss the potential challenges its interpretation and implementation may face. Moreover, the book will not explore the Supreme Court's decision of actual cases over the years or its contribution to the development of well-known doctrines.

The book has been divided into six chapters. Chapter I is an introductory chapter that briefly deals with Nepal's constitutional journey since 1948. Chapter I introduces how the first Constituent Assembly worked towards the development of fundamental constitutional concepts and preliminary thematic drafts and struggled to deal with contentious issues. The Chapter then explains the effort of second Constituent Assembly to further manage contentious Issues, compromise solutions, and the adoption of the Constitution of Nepal in 2015. Chapter II analyses the Constitution's preambulatory pledges and its anatomy. Against the fundamentals of the preambulatory pledges, the salient features of the 2015 Constitution has been explained in Chapter III. Following this, Chapter IV deals with the constitutional reforms introduced by the new Constitution, focusing on the enrichment of fundamental rights, identity, inclusion, and participation in state structures as well as the restructuring of the state and federalization, executive power and political stability, and the institutionalization of limited government. Chapter V provides a review of the critical aspects of the Constitution and interpretive challenges. Finally, a vital need for implementation of the new Constitution has been emphasized in Chapter VI, the concluding chapter of this book.

The draft of this work received input from several critics, including lawyers and experts in the legal and constitutional areas. German senior lawyer and professor Mr. Walter Maier of the University of Applied Sciences, Ludwigsburg, who is a visiting professor of law at the Kathmandu University School of Law, was very kind to provide written input during this book's writing. His comments have been very helpful. Ms. Bidushi Adhikari deserves special thanks for research assistance and editorial support. I would also like to thank Professor Thomas Hartwig, Ms. Rebecca Ordis, Mr. Namit Wagley, Ms. Prakritee Yonjan, and Mr. Umesh Gautam, for their input and comments.

I would also like to thank former Chief Justice Kalyan Shrestha for writing a foreword to the book. He remains one of the most cherished names in the constitutional jurisprudence of Nepal. He has been immensely helpful in establishing the School of Law at Kathmandu University in my efforts as its senior faculty and founding dean. I believe his foreword emphasizes what I, as the author, have implored. A constitution is of lesser significance on its own. The life of a successful constitution, no matter how democratic and human rights-oriented it is, depends on its consistent and effective interpretation and implementation and, where necessary, on timely reforms based on the new developments in the country. After all, the timeliness of this book is very intentional, given the constitution-building process and the long route to achieving the Constitution's purpose.

Finally, as noted, I dedicate this book to Late Ganesh Raj Sharma, a renowned Nepalese lawyer, constitutional expert, and political analyst. He was a remarkable inspiration to me when I was a young professional as well as throughout my career. Many young legal professionals before and after my generation will state the same. Sharma pleaded throughout his life that a constitution that has the opportunity to evolve becomes enduring, and I believe this bespeaks the truth in the context of Nepal's constitutional journey as well. I wish the new Constitution will have that opportunity finally.

All views and opinions as well as any possible errors and omissions are entirely my own and do not represent the views and opinions of the institutions with which I am associated. I welcome readers' comments and suggestions, which may be e-mailed at lawyers_inc_nepal@yahoo.com.

Bipin Adhikari

December 2016

TABLE OF CONTENTS

Chapter I: Towards a Constitution with a Commitment for Change and Transformation 1–41

- | | | |
|------|---|----|
| I. | Nepal’s Constitutional Journey: A Brief Overview | 4 |
| II. | Constituent Assembly I: Development of Fundamental Constitutional Concepts, Preliminary Thematic Drafts, and Contentious Issues | 17 |
| III. | Constituent Assembly II: Management of Contentious Issues, Compromise Solutions, and Adoption of the Constitution of Nepal | 31 |
| IV. | A Document of Compromise | 38 |

Chapter II: Preambulatory Pledges and the Anatomy of the Constitution 42–64

- | | | |
|------|--|----|
| I. | Contents and Significance of the Preamble | 42 |
| II. | Explanation of the Preambulatory Pledges | 47 |
| III. | Anatomy of the 2015 Constitution | 53 |
| IV. | Product: A Moderately Lengthy Constitution | 62 |

Chapter III: Salient Features of the 2015 Constitution 65–124

- | | | |
|-------|--|----|
| I. | Constitution as Fundamental Law | 67 |
| II. | Recognition of Diversity and Inclusivity in the New State | 67 |
| III. | Sovereignty and State Authority Vested in the People | 68 |
| IV. | A Single Citizenship for the Entire Country | 69 |
| V. | Fundamental Rights and Duties | 71 |
| VI. | Directive Principles of the State | 77 |
| VII. | Parameters of Constitutional Economics | 78 |
| VIII. | The Rule of Law | 80 |
| IX. | Constitutional Presidency Replaces Constitutional Monarchy | 81 |

X.	Parliamentary System of Government	83
XI.	Separation of Powers	85
XII.	Federalism: Vertical Separation of Powers	92
XIII.	Independent Supreme Court and the Judiciary under Its Leadership	99
XIV.	Fourth Branch of Government: Independent Constitutional Bodies	103
XV.	Mechanism for Key Constitutional Appointments	109
XVI.	Power of the Government of Nepal to Make Treaties	112
XVII.	Inclusive Mixed Electoral System	112
XVIII.	Provisions Relating to Political Parties	116
XIX.	Emergency Powers	118
XX.	Constitutional Amendment	119
XXI.	Implementing Legislation	120
XXII.	Overview of the Salient Features	123

Chapter IV: Overview of Significant Constitutional Consolidation and Reforms **125–205**

I.	Enrichment of Fundamental Rights	126
II.	Identity, Inclusion, and Participation in State Structures	155
III.	Restructuring of the State and Federalisation	171
IV.	Executive Power and Political Stability	182
V.	Institutionalisation of Limited Government	196
VI.	Additional Remarks on Constitutional Reforms	202

Chapter V: Building on the Structure of the Constitution and Interpretive Challenges **206–246**

I.	Some Crucial Constitutional Political Issues	208
II.	Consolidation of the Fundamental Rights Regime	214
III.	Federalism and Strengthening of Devolution of Power	224