

CHAPTER XI

SIGNIFICANT PARADIGM SHIFTS IN JURISPRUDENTIAL THOUGHTS IN THE SAARC COUNTRIES FROM 1950-2020

Every country requires a 'Constitution' because it is the document laying down the philosophy of a nation, nature of the polity and the procedure of governance. It is also the foundation head of all laws in a country. A country undergoes several changes before being transformed to the present state. The political, social and economic circumstances of a country is ever changing and the Constitution of that country must be flexible enough to cope up with this transformation. In this backdrop it is quite apt to say that the Constitution of a country should change according to social, political, economic and cultural demands of the nation.

It is significant that during the period 1950-2020 India has witnessed significant paradigm shifts, accommodating the demands of the time. Some shifts happened even before Britain could initiate them and in somewhere Britain led the way.

In the SAARC region Pakistan and Bangladesh are the two countries that were carved out of India. Two other land locked countries i.e. Nepal and Bhutan are contiguous to Indian sub-continent and have not remained unaffected by the social, politics, economic and cultural happenings in India. The present chapter looks into the paradigm shifts in these four countries during the stated period and see how far they have followed the changes in India.

PAKISTAN

Pakistan was born out of a demand by the All India Muslim League to create a nation of Muslims once British rulers relinquished the control of undivided India. Mohd. Ali Jinnah, leader of the Muslim League, asserted that Indian Muslims were not minority and hoped to negotiate for equitable share of power between Hindus and Muslims in the new Constitutional Arrangements. Nevertheless, a separate nation with Muslim majority was carved out of the Indian Union and came to be known as Pakistan. Prior to partition in 1947 both Pakistan and India were known as British India under the direct rule of the British Crown and was regulated by Acts enacted by the British Parliament. The Government of India Act, 1935 was the last Act to regulate both these nations as undivided India before being partitioned into India and Pakistan by virtue of Indian Independence Act, 1947. Thus, both India and Pakistan have adopted principles of their legal system from English legal system. Nevertheless, the course and the pace of development in the legal system of each country is different.

Immediately after independence in 1947 the first Constituent Assembly was set up to draft the Constitution of Pakistan. The Constituent Assembly, during the interim period besides drafting the Constitution, had to exercise and discharge responsibilities of Federal Legislature. Subject to the law making power of the Legislature the ordinance-making power of the Governor General and Provincial Governors were retained to meet the immediate necessity of law-making.¹ Soon after this arrangement the Public and Representative Officers (Disqualification) Act, 1949, was enacted by the first Constituent Assembly. In *Khuhro v. Federation*² the action of the Governor General under the Act of 1949 was challenged. It was contended that the Public and Representative Officers (Disqualification) Act, 1949 itself did not get any assent of the Governor General which was prerequisite for every bill to become an Act till the formal adoption of the Constitution of Pakistan. It was contended on behalf of the Government that the impugned Act was passed by the Constituent Assembly in exercise of its constituent powers and as such the Governor-General's assent was not necessary. Accepting this argument the Sind Chief Court upheld the validity of the

¹ The Governor General and Provincial Generals were vested with the law making power under the Government of India Act, 1935. This power was retained in Pakistan for interim period i.e. until the Constitution of Pakistan was drafted.

² *Khuhro v. Federation* P.L.D. 1950 Sind. 49.

Act stating that any Act enacted by the Constituent Assembly in exercise of its legislative power would be constitutionally valid. On the same ground in two different cases i.e. *Khan of Mamdot v. Crown*³ and *Akbar Khan v. Crown*⁴ Acts were challenged because of the absence of assent of the Governor General. However, the Federal Court of Pakistan declared that the Constituent Assembly enacted those Acts in exercise of their legislative power which was why those Acts were constitutionally valid despite the absence of the assent of the Governor General. In any Constitution one of the significant features is arrangement of power sharing between the legislature, executive and judiciary. Separation of power amongst these three organs of the government is important to uphold rule of law in the country. Till 1954 the course of development even if it was slow but was consistent. The Federal Court of Pakistan and other courts were able to establish their competence to protect and uphold the principles of Constitution which also defined the separation of power. However, soon the country plunged into its first major constitutional crisis. It was in late October, 1954 the then Governor General of Pakistan Sir Ghulam Muhammad dissolved the first Constituent Assembly by a proclamation.⁵ The incomplete work of the first Constituent assembly of Pakistan pushed the whole nation into a constitutional crisis and political uncertainty. In *Maulvi Tamizuddin Khan v. Federation of Pakistan*⁶ the petitioner, President of the Constituent Assembly Maulvi Tamizuddin Khan, challenged the dissolution of the Constituent Assembly by the Governor General. The petitioner challenged the action of the Governor General under Article 223A of the Government of India Act, 1935 seeking the Sind Chief Court to issue a writ of *mandamus* and *quo warranto* with a view to

- (i) restraining the Federation from giving effect to the proclamation and obstructing the petitioner in the exercise of his functions and duties as the President of the Assembly; and
- (ii) to determine the validity of appointment of the recently appointed Ministers who were not members of the legislature.

³ *Khan of Mamdot v. Crown* P.L.D. 1950 F.C. 15.

⁴ *Akbar Khan v. Crown* P.L.D. 1954 F.C. 84.

⁵ Z. I. Choudhury, *The Role of The Judiciary in the Constitutional Developments in Pakistan (1947-1971)*, 1 (1), *The Dhaka University Studies*, 1-24 (1989).

⁶ *Maulvi Tamizuddin Khan v. Federation of Pakistan* P.L.D. 1955 Sind 96.

The five judges Bench of the Sind Chief Court observed that the Governor General did not have the power to dissolve the Constituent Assembly as the same could not be dissolved unless it finished its work of drafting the Constitution. The respondent, the Government of Pakistan, filed an appeal before the Federal Court of the Pakistan where the case was heard by five judges Bench. In this case the majority view of four judges, with Justice Cornelius dissenting, observed that all Acts passed by the Constituent Assembly including the Acts providing for constitutional provisions required the assent of the Governor-General for their validity. Since section 223 A of the Government of India Act, 1935, by virtue of which the Chief Court of Sind had assumed jurisdiction to issue writs did not receive such assent it was not yet a law, and hence that Court had no jurisdiction to issue the writs.

In *Usif Patel v. Crown*⁷ again the issue of Governor General's assent was raised before the Federal Court. The court upheld the decision of *Maulvi Tamizuddin Khan v. Federation of Pakistan* and held that a law could not be validated by Ordinance if the same had not received the assent of the Governor General. Chief Justice Munir in this case observed that the power of the Governor General also included the power to dissolve the Constituent assembly and to set up a new one to draft the Constitution of the country. The only requirement for the new Constituent Assembly was that it had to be representative one.

Dissenting from the majority, Cornelius and Sharif, JJ, held that the Governor-General had no authority to validate the invalid laws, whether temporarily or permanently. On the application of the doctrine of 'state necessity', Sharif, J., pointed out that general application of this doctrine could lead to dangerous situation where the Head of the state might be tempted to tamper with the constitutional structure itself.

The constitutional crisis arising out of dissolution of the Constituent Assembly indeed raised important question regarding the power of the Governor General in Pakistan until the final draft of the Constitution. The Governor General, in this situation, sought advice from the Federal Court.⁸ In the Special Reference case, the Federal Court opined that the Governor-General's authority temporarily and retrospectively to

⁷ *Usif Patel v. Crown* P.L.D. 1955 F.C. 387.

⁸ Reference by H. E. the Governor-General P. L.D. 1955 F.C. 435. Known as Special Reference case.

validate the invalid laws was subsequently recognised by the Federal Court in this case. Munir, C.J., distinguished *Usif Patel* case where validation by the Governor-General was held to be beyond his power “because by the validating Ordinance, the Governor-General claimed for himself the power to validate, without any reference to, and in the absence of the legislature until the adoption of the Constitution.” The end result of these judgments was that *status quo* in the legal structure was to be maintained till the new Constituent Assembly decided on the issue.

Soon after the decision of Federal Court in *Special Reference* case the new Constituent Assembly was set up. Finally the Constitution of Pakistan was adopted on 17th February, 1956 and finally came into effect on 23rd March, 1956.

Hence, it can be seen that Pakistan, after its formation faced a question regarding the identification of where sovereign power was vested- whether in the titular head like the governor or in the legislature and the Courts had assumed an arbitral role.

The framing of the Constitution of Pakistan gave rise to worst form of political rivalry threatening the unity of the Country and creating widespread disappointment among people. The first initiative of drafting the Constitution was taken immediately after independence but in 1954 the Pakistani Constituent Assembly on the ground that it lost confidence of the people. The Constitution of 1956 was drafted by the second Constituent Assembly and was implemented in 1956. This Constitution was rigid but the same introduced democracy, parliamentary form of government, collective responsibility of Cabinet etc.

The Constitution of 1956, adopted by the second Constituent Assembly, was lengthy, detailed and rigid. It contained 234 Articles divided into 13 Parts and 6 Schedules. Following were the significant features of the Constitution of 1956⁹-

- a. Making a base of Islamic philosophy and Islamic character occupied a considerable part in this Constitution. But the conflict arose between Ulema (religious teachers) and intellectual Muslims regarding the interpretation of Islamic philosophy.
- b. It exhibited the characteristics of federation. Pakistan prior to 1971 comprised of West and East Pakistan (now separated from Pakistan and is known as

⁹ G.W. Choudhury, *The Constitution of Pakistan*, 29 (3), *Pacific Affairs*, 243-252 (1956).

Bangladesh). In West Pakistan four provinces i.e. Punjab, Sindh, Balochistan, Pakhtunkhwa had different aspirations and ideology. Thus, the object of the Pakistani government was to not govern the people only but to dictate the geographical area which was vast and scattered. However, there was dissension regarding the federal structure of the nation between the East and West Pakistan leaders.

- c. It had to devote a considerable space to explain the share of powers and duties amongst federations and Units. Special provisions have also been made for tribal areas and backward classes.
- d. Provision for public service was included in the Constitution,
- e. Provision for promulgation of emergency was also included in the Constitution.
- f. The framers of the Constitution intended to establish Parliamentary supremacy in Pakistan.

The religious character of the Constitution of Pakistan was manifested in its Preamble which started with 'In the name of Allah'. The Directive Principle of State also laid down that the State would take steps to enable Muslims, individually and collectively, in Pakistan to live in accordance with the teaching of holy Quran. The State would also protect organizations like *Wakf*, Mosque etc. Thus, in Pakistan Islam was established as the State religion while in the Constitution of India individual was guaranteed right to profess, practice and propagate any religion but the State did not promote any one of these. This was/ is a clear point of divergence between the two nations.

According to Article 198 of the Constitution of 1956 any law in contravention of the Constitution of Pakistan would be declared void. Article 13 of the Constitution of India states that laws in contravention of Part III of the Constitution, to the extent of such contravention, shall be void.

Nevertheless, the Constitution which born nine years after the independence following another turmoil and strife, had a very short life span. Within thirty nine months of its operation the President abrogated the Constitution in 1958, national and provincial legislatures were dissolved, central and provincial governments were dismissed, all political parties were abolished and martial law was declared through

out the country. The President then appointed General M. Ayub Khan, the then army chief, as the Chief Martial Law Administrator with the supreme command over the armed force in Pakistan. On 10 October, 1958, three days after the abrogation of the Constitution of 1956, the President issued the Laws (Continuance in Force) Order, 1958¹⁰ which turned out to be the principal constitutional document for the martial law period.

In 1958 General Mohd. Ayub Khan carried out a Military coup with confounding ease. Between 1958 to 1971 Mohd. Ayub Khan centralized the Pakistani government with unstable ministry. Thus, the first half of the independence of Pakistan is characterised as the autocratic rule of Mohd. Ayub Khan introducing Military rule in Pakistan. During the period of 1958 to 1971 last three years i.e. from 1969-1971 General Agha Muhammad Yahya Khan headed the second Military regime in Pakistan. General Yahya Khan held an election in 1970. In this election Pakistan People's Party headed by Zulfikar Ali Bhutto won in West Pakistan while the Awami League headed by Sheikh Mujibar Rahman won majority seats in East Pakistan. Nevertheless, Zulfikar Ali Bhutto of Pakistan People's Party was declared to be the elected Prime Minister of West and East Pakistan. However, in 1977 Zulfikar Ali Bhutto was deposed by army chief Zia-Ul-Haq because of an allegation of vote-rigging in 1977 Parliamentary Election. The second period of Military regime in Pakistan is also marked by the Bangladesh Liberation War following Bangladesh, the then East Pakistan, emerging as an independent nation in 1971.

Thus, the period between 1958 and 1971 marked a shift of sovereign power from civilian, elected institution to the Military power, whereas in India, though democracy was being strengthened under the able leadership of Mrs. Indira Gandhi, there were also signs that power was concentrating in her hand.

Pakistan which itself emerged as a consequence of partition was again divided on the basis of regionalism and formed a new nation Bangladesh. Moreover, Pakistan was under the Military rule for twenty five years.

The Laws (Continuance in Force) Order, 1958 was to take effect immediately after the proclamation by the President. The arrangement made post abrogation of the Constitution of 1956 was that any further proclamation or ordinance by the President

¹⁰ President's Order (Post-Proclamation) No. 1 of 1958.

or by the Chief Martial Law Administrator would operate as far as possible with the provisions of abrogated Constitution. The rights of civilians guaranteed under the abrogated Constitution were left untouched. The powers of civilian authorities were also kept as it was but those were made subject to order of the Chief Martial Law Administrator. The jurisdiction and power of the Supreme Court and the High Courts of Pakistan were also kept intact but it did not have power to question President's proclamation or order. In this exceptional circumstance the Supreme Court of Pakistan was called upon to determine the legality of the regime which abrogated the Constitution of 1956. The regime did not even hide the fact that the armed force of Pakistan was behind the coup. In *State v. Dosso*¹¹ the Supreme Court was to decide the legality of the Writ issued by the West Pakistan High Court under the provisions of the abrogated Constitution in connection with the Laws (Continuance in Force) Order. This case was heard by four judges Bench consisting of Hon'ble Chief Justice Muhammad Munir, Justice Muhammad Sahabuddin, Justice Alvin Robert Cornelius, Justice Amiruddin Ahmad. The majority view was delivered by three judges with Justice Cornelius dissenting. The majority judgment legalised martial law and the then arrangement of harmonious existence of abrogated Constitution and the Laws (Continuance in Force) Order was called as the new Constitution. Muhammad Munir, C.J., who delivered the majority judgment of the Court, in a detailed discussion of constitutional changes maintained that an abrupt political change, not contemplated by the existing constitution emerging as a 'victorious revolution' or a 'successful *coup d'etat*' was an internationally recognised method of changing a constitution. Chief Justice Munir also stated that no matter how transitory and imperfect the Laws (Continuance in Force) Order might be it had to be accepted that it was the new legal order. This decision of the Supreme Court of Pakistan is a reflection of Analytical Positive School of thought in the legal system of Pakistan.

Therefore, the Military Regime in Pakistan was legalised by the Pakistan Judiciary in the aforementioned cases. The military government led by General Mohd. Ayub Khan appointed a Constitution Commission in 1960 to draft a new Constitution for Pakistan. The new Constitution for Pakistan was drafted in 1962. The 1962 Constitution provided Federal State and introduced Presidential form of government with Unicameral legislature. However, the 1962 Constitution was abrogated in 1969

¹¹*State v. Dosso* P.L.D. 1958 S.C. 533.

as a result of imposition of military rule for the second time in Pakistan. On 7th December, 1970, pursuant to the Legal Framework Order (LFO), the then President General Agha Muhammad Yahya Khan issued a decree to conduct an Assembly election on the adult franchise and population basis. Mujibar Rahman's nationalist Awami League Party from the province of East Pakistan won the majority of three hundred seats in the National Assembly. Despite Mujibar Rahman's win the Pakistan People's Party, a political party of West Pakistan headed by Zulfikar Ali Bhutto, joined the force of military leadership to stop Mujibar Rahman from establishing the government. Already frustrated with the under-representation of East Pakistan in all sectors of the government, economic deprivation and the then suppression of the democratic process gave rise to the violent demonstration against the then Pakistan government. In this political turmoil language also emerged as a major issue. In 1971 the East Pakistan was seceded and the State of Bangladesh was created.¹² Interim Constitution was adopted on 17th April, 1972. The Interim Constitution of 1972 provided Presidential form of government.¹³ The present Constitution of Pakistan was drafted in 1973. However, the provisions of the present Constitution of 1973 differ from the original texts of the 1973 Constitution because Pakistan went through military regime of two more leaders since then. *Miss Asma Jilani v. The Government of Punjab*¹⁴ challenged the military rule in Pakistan. In this case the decision of *State v. Dosso* was overruled. The Hon'ble Chief Justice Hamoodur Rahman observed that the military takeover was illegal and unconstitutional. Thus, the decision of Dosso case could not be continued on the basis of *stare decisis*. Similarly in *Begum Nusrat Bhutto v. Chief of Army Staff and Others*¹⁵ the Supreme Court of Pakistan refused to validate military rule on the ground of effectiveness and termed it as 'abrupt political change'. Thus, the declaration of martial law for the second time in 1977 was termed as Constitutional deviation. Despite several attempts by the judiciary to correct its

¹² C. Christine Fair, *Pakistan's Future: Is Past Prologue*, (RAND Corporation, U.S.A.).

¹³ According to the National Assembly Website - [t]he Assembly also formed a Constitution Committee on 17th April 1972 to prepare the first draft for framing a Constitution. The report of the Committee was presented with a draft Constitution on 31st December 1972. It was unanimously passed by the Assembly in its session on 10th April 1973 and was authenticated by President on 12th April 1973. This Constitution, called the Constitution of the Islamic Republic of Pakistan 1973, was promulgated on 14th August 1973

¹⁴ *Miss Asma Jilani v. The Government of Punjab* PLD 1972 SC 139.

¹⁵ *Begum Nusrat Bhutto v. Chief of Army Staff and Others* PLD 1977 SC 657.

past decision the executive (the military leaders) interfered with the governance and the military rule continued for some more years.

It is interesting to note that Pakistan is a member of the Commonwealth countries but its legal system is not a common law system. It has a state religion and follows a state religion. Hence, customary practices and the voice of people take a back seat there. Yet it is significant to note that during the period 1975-1977, in India emergency was clamped and the fundamental rights of the people including right to life was suspended and in Pakistan the courts were making feeble attempts to revive democracy.

During the Military Regime under General Muhammad Zia-Ul-Haq in 1980 Pakistan underwent Islamization process including establishment of Shariat Court and a more enhanced role of the Council of Islamic Ideology, a Constitutional advisory body on Sharia law issues.¹⁶

Democratic process was still not adopted in the governance of Pakistan and Pakistan was still under the rule of Military government. Ironically, military leaders and their supporters espoused democratic government but they also believed that Pakistan was still not ready to embrace democracy owing to its lack of developments, pervasive illiteracy and dysfunctional political institutions. General Pervez Musharraf seized the power in 1999 and unlike his two predecessors Gen. Khan and Gen Haq, he insisted on being referred as President instead of General. The present civilian government after coming to power since 2008 has not even shown any interest in diminishing the power of the President.¹⁷

In 2008 democracy was restored in Pakistan following Gen. Pervez Musharraf's stepping down from the government. Despite restoration of democracy Pakistan is yet to incorporate significant principles of checks and balance in the Constitution of Pakistan. Moreover, the amendments, introduced by Gen. Zia-Ul-Haq, mandated that the Pakistani law must be in compliance with the Sharia law. The Constitution of 1973 mandated for parliamentary form of government and bicameral legislature in Pakistan. However, these were operative for a very short period of time i.e. for seven

¹⁶ Tariq Ahmad, *National Parliaments: Pakistan*, 2-3 (The Law Library of Congress, Global Legal Research Centre, 2017).

¹⁷ C. Christine Fair, *Pakistan's Future: Is Past Prologue*, (RAND Corporation, U.S.A.).

years only when in 1977 Gen. Haq took over the control of Pakistan through a military coup and eventually in 1980 initiated Islamization of laws and government of Pakistan.

CONSTITUTIONALISM IN PAKISTAN: Since Pakistan has Islam as State religion in compliance with Shariat law, divine law gets a precedence over man made law in this case of constitutionalism. Therefore, Pakistan is one of the examples of unstable constitutionalism. It can also be said that lack of interest was found amongst the military leaders in Pakistan to incorporate stable constitutionalism which led to recurring tensions in Pakistan. Article 5 (2) of the 1973 Constitution lays down that obedience to the Constitution and the Law is inviolable and every citizen in Pakistan must comply the same. Article 6 (1) of the Constitution of 1973 lays down that any conspiracy to abrogate, subvert or suspend the Constitutional provisions will be treated as treason. Despite these constitutional provisions ‘extra-constitutionalism’ i.e. sheer disdain or disrespect for constitutionalism has been reflected in the history of Pakistan. In this context some of the features of Constitutionalism will be discussed below to analyse whether these principles found its place in the Pakistani legal system.¹⁸

- a. **Popular Sovereignty**- sovereignty can be defined as possession of the supreme power over some domain. Initially sovereignty was attached to monarchs or the government. In that backdrop the question was whether the power of the monarch or the government could be subjected to any limitations by the Constitution. The question of sovereignty was trickier in Pakistan. Jinna visualized Pakistan as a democratic state with the sovereignty resting with the people where every one would have the right to citizenship irrespective of religion, caste or creed. However, the course of developments in the Pakistani legal system proved Jinna irrelevant where religion became significant and was manifested in every sphere of the system. Islamization of Pakistani legal system by the Gen. Zia-Ul-Haq is the example of inclusion of religion with State’s activity. To establish the sovereignty of the Allah the Preamble of the Constitution of 1973 starts with *whereas sovereignty over the entire Universe*

¹⁸ Hina Khan, Constitutionalism: Theory and Issues from Pakistan’s Perspective, 22 (1), *Pakistan Perspective* (2017) 111-133.

belongs to almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by him is a sacred trust. Post independence in 1947 the leaders claimed Pakistan to be a modern state but eventually it could not fulfil its claim as the concept of ‘political sovereignty’ of people was not approved in Pakistan.

- b. **Civil or Fundamental Rights-** the Constitution of 1973 guaranteed fundamental rights to its citizens which are inviolable. However, periodic intervention with the rights by the military dictators proved otherwise. Unfortunately, this intervention by military dictators led government officials change the spirit of the Constitution. This is the reason for several amendments in the Constitution of 1973. The present version of the Constitution of 1973 differs to a great extent from its original version drafted in 1973.
- c. **Rule of Law-** Since the abrogation of the Constitution in 1958 Pakistan did not witness Rule of Law. The usurpation of democratic government by the military coup and eventually supporting this usurpation in Maulavi Tamizuddin case (1955), Dosso case (1958) by the Pakistan judiciary reflected the absence of rule of law in Pakistani legal system. The military regime in Pakistan manifested authoritarian rule which reached its peak during General Zia-Ul-Haq. General Zia-Ul-Haq introduced several amendments in the Constitution of 1973 in the name of ‘checks and balance’ which instead made the government puppet of military leader Gen. Haq. The role of the judiciary in upholding the rule of law in a country has been realised in Pakistan. Thus, Iftikar Muhammad Chaudhary, the then Chief Justice of Pakistan, began to exercise Court’s *Suo moto* power to judicially review legislations since 2005.
- d. **Separation of power-** Pakistan, despite being the parliamentary form of government, has always been occupied by the executive. The perpetual tension between the civilian government and military rulers resulted in a debate for providing a strong position for the President of Pakistan. However, the accountability of the executive and the legislature and an independent judiciary was a dream for Pakistan until recently. This could only be fulfilled after President Musharraf’s, a military ruler, stepping down from power in 2008. The political party being loyalist to the military ruler defuncted the idea

of separation power. The idea of independent judiciary was also subjected to the approval of the executive. This situation changed only in 2007 with the unconstitutional suspension of the then Chief Justice of Pakistan which triggered country-wide protest of lawyers and civil society movement. The protestors claimed restoration of the then Chief Justice who was suspended for questioning unconstitutional activities of the then military ruler. The position of the judiciary of Pakistan was finally restored through a revolution in March, 2009.

- e. **Devolution of Power-** post independence Pakistan required a reconstruction and solidarity, hence Pakistan opted for federal system with a strong Centre. However, the journey of Pakistan in unifying its provinces was not easy. East Pakistan was separated in 1971 following its demand for autonomy. The demand for autonomy was also raised in provinces like Balochistan, but eventually the martial rule and Afgan war smothered this demand for a separate state and centralization became complete. Even though the Constitution of 1973 lays down that the government must encourage the local governments, but the devolution of power to the third tier i.e. local governments is yet to be done.

BANGLADESH

Bangladesh was previously a part of Pakistan and was known as East Pakistan. East Pakistan was separated from West Pakistan following the Liberation War of Bangladesh in 1971. The demand for a separate state by the people of East Pakistan arose due to the following reasons-

- a. Lesser representation of people of East Pakistan in the government offices,
- b. Pakistan Peoples Party (a political party in West Pakistan) joined the military leaders with an objective to stop Mujibar Rahman from forming the Government in Pakistan who won the 1970 Pakistan Assembly Election,
- c. People of East Pakistan was tired of forceful imposition of every order by the West Pakistan. The forceful imposition went to an extent where Urdu was declared as the official language of Pakistan while the language spoken by East Pakistan was Bengali,
- d. Before 1947 a separate country for Muslims was demanded to build a democratic State aiming to provide equal rights to all the Muslims. However, this object seemed far to be achieved, at least, till 1970 when Pakistan was under the Military regime.

Thus, the sense of resentment and disappointment led East Pakistan revolt against the autocratic rule of West Pakistan. Eventually, East Pakistan was seceded and a new State, Bangladesh, was formed in 1971. Thus, the legal developments in Bangladesh shall be studied from 1971.

After the separation from West Pakistan the first and significant work for Bangladesh was to provide a legal system for the newly established country. The aspiration of people of Bangladesh was to have Parliamentary government with the President as nominal head of the State. On 11th January, 1972 Sheikh Mujibar Rahman, as President, promulgated the Provisional Constitution where it was declared that there would be the Cabinet of Ministers with the Prime Minister as its head. Parliamentary form of government was introduced in Bangladesh by the Provisional Constitution. Eventually, Sheikh Mujibar Rahman resigned from the post of the President and took over the Prime Ministership of Bangladesh. Justice Abu Sayeed Choudhury, a former High Court Judge and Vice-Chancellor of Dacca University (one of the few intellectuals who had actively participated in the liberation movement and yet was not

aligned with any political party), became the new president of the Republic. The first positive step towards drafting of the Constitution of Bangladesh was taken on 23rd March, 1972 by promulgating the Bangladesh Constituent Assembly Order. The Constituent Assembly was set up for drafting the Constitution of Bangladesh. The last meeting of the Commission was held on 11th October, 1972. The draft was approved and conclusion was reached for majority of the provisions. However, the points of dissent were the provisions regarding right to property and provision authorising compulsory acquisition of property and nationalisation by the government.¹⁹

The Constitution of Bangladesh did not write anything about Basic Structure. The doctrine of basic structure was innovated by the Supreme Court of India in *Kesavananda Bharti* case (1973) which has been endorsed by the Supreme Court of Bangladesh. Innovation and subsequently its adoption in the Constitution of Bangladesh increased the power of the Judiciary which was never possible under the military rule in Pakistan. Article 102 of the Constitution of Bangladesh empowered the High Court of Bangladesh to give any direction in order to ensure enforcement of fundamental rights guaranteed in Part III of the Constitution. *Anwar Hussain Chowdhury v. Bangladesh*²⁰ commonly known as 8th Amendment case is a significant case where the Supreme Court of Bangladesh has recognised the basic structure doctrine. In this case the Supreme Court of Bangladesh overruled an amendment by the Parliament recognising the ‘unconstitutional constitutional amendments’. The court observed that the parliament lacks the authority to amend the Constitution to take away the basic structure from the Constitution. This case was heard by four judges Bench consisting of Justice BadrulHaider Chowdhury, Justice Sahabuddin Ahmed, Justice M.H. Rahman, Justice A.T.M. Afzal. The majority judgment was delivered by three judges with Justice A.T.M. Afzal dissenting.

Other significant features of the Constitution of Bangladesh are²¹-

- a. The Constitution of Bangladesh contains 153 Articles, 1 Preamble, and 4 Schedules establishing Bangladesh as a Sovereign, Unitary and Republic,

¹⁹ Md. Ayub Ali, Judicial Activism vis-à-vis Judicial Restraint Imperative for Delivering Justice: A Comparative Analysis, 1 (1), *Southeast University Journal of Arts and Social Sciences* (2014), 141-155.

²⁰ *Anwar Hussain Chowdhury v. Bangladesh* [1989] BLD (Spl) 1.

²¹ ShamimaBinte Habib, Understanding Constitutionalism: Bangladesh Perspective, 8(1), *ASA University Review* (2014), 225-240.

- b. It has provided for a representative government elected by the adult franchise. The Constitution provides for a Parliamentary form of government which the President as the Constitutional head of the Republic elected by the members of Parliament,
- c. The Sovereignty rests with the people of Bangladesh as per the Constitution of the Bangladesh,
- d. The Constitution provides separation of power amongst three organs of the State i.e. Executive, judiciary and legislature,
- e. The executive authority is vested with the Prime Minister who, along with the Cabinet, is responsible to Parliament, and through Parliament to the ultimate sovereign, the people of Bangladesh,
- f. The guardianship of the Constitution has been given to the Supreme Court of Bangladesh. Except under certain circumstances the Supreme Court of Bangladesh is vested with the power of judicial review.

CONSTITUTIONALISM IN BANGLADESH-

- i. **The period under Sheikh Mujibar Rahman (1973-1975)-**
 Bold and significant initiative taken by Sheikh Mujibar Rahman post liberation was to transform presidential form of government to parliamentary form of government. In reality, the power was concentrated in the hand of the Prime Minister i.e. Sheikh Mujibar Rahman. Contrary to the expectation of Bangladesh the parliamentary form of government was just a mere expression and a way to re-designate Sheikh Mujibar Rahman's position as the Prime Minister of Bangladesh. Legislature could not even enact laws for Bangladesh. Sheikh Mujibar Rahman had the absolute power despite the fact that Bangladesh had its titular head i.e. the President. In the initial days of Mujibar Rahman's political career he was the head of the government and also the President of the political party Awami League. This combination of dual power is contrary to the norms of constitutionalism. To retain a form of pressure on the ruling party the norm in parliamentary system is that the President of the political party and the head of the government will never be the same person. However, Sheikh Mujibar Rahman held both the position at the same time which

transgressed the policy of parliamentary form of government.²² The final blow came with the declaration of making Bangladesh one party State in January 1975 in a Constitutional coup. According to Sheikh Mujibar Rahman one party system would help promote the fundamental principles of state policy, namely nationalism, socialism, democracy and secularism. The new political party was to be known as KrishakSramikAwami League or Peasants', Laborers' and Peoples' League. In this new system there was no freedom of expression, thought and conscience. Freedom of press was not allowed and no permission to form any other political party. Thus, there was a complete negation of constitutionalism.

Prime Minister Sheikh Mujibar Rahman introduced the Constitution (Fourth Amendment) Bill in the House on 25th January, 1975. The Constitution (Fourth Amendment) Bill brought the following changes²³-

- In the original text of the Constitution Article 11 stipulated that Bangladesh as republic would ensure democratic values, freedom, dignity of human person and election at all state affairs. The fourth amendment removed election from its guideline,
- The Constitution of Bangladesh in Article 44 vested the power to enforce the fundamental rights upon the Supreme Court. It also laid down that if necessary the Parliament could set up tribunals to enforce the fundamental rights. The fourth amendment deserted the Supreme Court of this power and only tribunals were given the power to enforce fundamental rights. However, the Awami League did not set up any Constitutional court or Administrative tribunal to enforce the same.
- In part IV of the Constitution the framers incorporated Parliamentary form of government. The fourth amendment to the Constitution brought some changes in this part which destroyed the democratic character of the Constitution. The ruling party i.e. Awami League brought these changes on the pretext of failure of governance in Bangladesh.

²²ShamimaBinte Habib, Understanding Constitutionalism: Bangladesh Perspective, 8(1), *ASA University Review* (2014), 233-234.

²³Dr. Md. Morshedul Islam, The Politics behind the Passage of Fourth Amendment to the Constitution of the People's Republic of Bangladesh and Its Provisions: A Modest Analysis, 4(9), *IISTE* (2014), 55-67.

- The Chapter on President was renamed as President and Vice-President. The Constitution provided that the Members of Parliament shall elect the President. However, the fourth amendment laid down that the President would be elected through direct votes and he would be the head of the State. Impeachment of President was also introduced, but the procedure was made so complicated that it was quite impossible to impeach one. The executive power was vested upon the President by the fourth amendment. These changes brought about by the fourth amendment was completely against the parliamentary sovereignty,
- The Constitution provided that the Prime Minister shall act with the aid and advice of the Council of Ministers. The Cabinet shall be headed by the Prime Minister. The Cabinet shall be collectively responsible to the Parliament and to the whole nation for its actions. However, the fourth amendment laid down that the Prime Minister would be selected from Members of Parliament by the President. The Council of Ministers were to advise the President. The members of the Council of Ministers were to be appointed by the President and would hold office during the pleasure of the President.
- Fourth amendment to the Constitution abolished local governments in Bangladesh,
- The fourth amendment is also criticised for subjugating the independence of judiciary. The Chief Justice of Supreme Court of Bangladesh is to be appointed by the President while other justices would be appointed by the President in consultation with the Chief Justice of Supreme Court of Bangladesh. However, the fourth amendment vested absolute power on the President in appointing judges. The removal of a judge from his/her office was to be done in accordance with a procedure as per the Constitution. The fourth amendment provided that a judge could be removed from his/her office before attaining the age of 62 by the President on the ground of misbehaviour and/ or incapacity.

Besides abovementioned changes the fourth amendment brought several other changes to the Constitution of Bangladesh which changed the nature of polity of Bangladesh. In this backdrop Major General Ziaur Rahman arose in power and took over the control.

- ii. **Period under Ziaur Rahman (1975-1981)**-The autocratic government of Sheikh Mujibar Rahman was overthrown by a military coup led by Major General Ziaur Rahman. Martial law was declared ousting the civil government and military emerged as a new force in the polity of Bangladesh. An era of military rule was started in the state. On 7th November, 1975 Major General Ziaur Rahman consolidated his power in Bangladesh with the assassination of Sheikh Mujibar Rahman and his family (except his two daughters who were not present in Bangladesh at the time of assassination). Post military take-over in Bangladesh the military bureaucracy formed an alliance with the civil bureaucracy in order to consolidate power both at national and local level. The Sepoy Revolt in 1975 successfully transformed parliamentary form of government into presidential form of government and reinstated Major General Ziaur Rahman as the Chief of Staff of Bangladesh Army. Justice A.S.M. Sayem continued as President and Chief Martial Law Administrator of Bangladesh. On 30th November, 1976 Major General Zia (this is how Major General Ziaur Rahman was/is known) took over the presidency and retained the positions of Chief Martial Law Administrator, Commander-in-Chief of the Armed Forces for himself.²⁴ Eventually, Major General Zia started civilianize his regime and in 1979 brought the Constitution (Fifth Amendment) Bill. The fifth amendment removed martial law and declared the Constitution as the supreme law of the land but also legalize all the military activities. Despite recognising the Constitution as the supreme law the system was fundamentally retained as authoritarian as introduced by the fourth amendment to the Constitution. The fifth amendment vested more power upon the President. All extra-ordinary constitutional devices introduced by the fourth amendment, for example emergency, ordinance making power, preventive detention etc. were retained which possibly could make the President a dictator. Therefore, Zia's system was not democratic nor was hated autocracy as introduced by Sheikh Mujibar Rahman. The system introduced by Gen. Zia was multi party Presidential

²⁴ Syed Serajul Islam, *The State in Bangladesh Under Zia (1975-1981)*, 24(5), University of California Press (1984), 556-573.

system blended of democratic and autocratic feature. However, Gen. Zia's regime also failed to bring stability in the polity of Bangladesh.

- iii. **The period under H.M. Ershad-** The trend of civilianization by Zia was smashed by second time imposition of military rule in 1982 by H.M. Ershad. General Ershad also followed the path of Major Gen. Zia i.e. imposition of martial law and then subsequently withdraw it with the objective of civilianize the legal system. On 10th November, 1986 Gen. Ershad legalised all the military activities through the Constitution (Seventh Amendment) Bill. Gen. Ershad amended the Constitution as many as four times and each time he did it to fulfil his political ends.²⁵
- iv. **Period after the fall of General H.M. Ershad-** finally in 1990 the country was freed from the clutches of military rule with the resignation of General Ershad. In 1991 the parliamentary form of government and the democratic system were re-established in Bangladesh through the Constitution (Twelfth Amendment) Bill. However, post democratization of Bangladesh the country could not come out of hereditary or dynastic element in party leadership. Khaleda Zia, widow of deceased General Ziaur Rahman, was the head of the then ruling party Bangladesh Nationalist Party. Sheikh Haisna, daughter of Sheikh Mujibar Rahman, was leading Awami League. The existence of these two political parties and selection of its head on hereditary basis ruled out the possibility of the emergence of any other political party.

Thus, Constitutionalism in Bangladesh varied from one regime to another. Nevertheless, even amongst this turbulent political situation the role of the judiciary of Bangladesh requires a special mention. In Anwar Hossain Chowdhury case²⁶ the Supreme Court of Bangladesh embraced the concept of Basic Structure. This judgment is significant because it was delivered during the military regime of Major General Ziaur Rahman. Moreover, this judgment is preceded by infamous fourth amendment and fifth amendment which destroyed some of the significant features of the Constitution of Bangladesh. Judgment in Anwar Hossain

²⁵ShamimaBinte Habib, Understanding Constitutionalism: Bangladesh Perspective, 8(1), *ASA University Review* (2014), 233-234.

²⁶*Anwar Hussain Chowdhury v. Bangladesh* [1989] BLD (Spl) 1

Chowdhury was delivered when the whole country was rallied against the decade long dictatorial regime at the auspices of which the eighth amendment was adopted. The eighth amendment of the Constitution of Bangladesh declared Islam as the State religion and the judiciary was decentralised by setting up of six Benches of High Court Division outside Dhaka. In this case the Supreme Court of Bangladesh declared the eighth amendment unconstitutional.²⁷

In *Jamil Huq v. Bangladesh*, *Shahriar Rashid Khan v. Bangladesh*, *Syed Abdul Alim v. DC, Dhaka*²⁸ the Supreme Court of Bangladesh dealt with an issue where the Constitution ousted out the jurisdiction of the Supreme Court. While dealing with these cases the Supreme Court interpreted the provision in a liberal way and observed that the judicial review power of the Supreme Court is so wide that it can declare any action unlawful and malafide if found to be not in compliance with the law. The judiciary of Bangladesh has also widened the scope of judicial review of administrative actions through several cases post 1991.²⁹

²⁷ Md. Moin Uddin and RakibaNabi, Judicial Review of Constitutional Amendments in Light of the "Political Question" Doctrine: A Comparative Study of the Jurisprudence of Supreme Courts of Bangladesh, India And The United States, 58 (3), *JILI* (2014), 313- 336.

²⁸ *Jamil Huq v. Bangladesh* [1982] 34 DLR 125 (AD); *ShahriarRashid Khan v. Bangladesh* [1997] 49 DLR 133 (HCD); *Syed Abdul Alim v. DC, Dhaka*, [2006] 58 DLR 74.

²⁹ *Dr.Mohiuddin Farooquev Bangladesh*[1997] 49 DLR 1 (AD); *Professor Nurul Islam and others v.Bangladesh*[2000] 52 DLR 413 (HCD); *Bangladesh Sangbadpatra Parishad v.The Government of Bangladesh* [1991] 43 DLR 126 (AD).

NEPAL

Nepal has got its several Acts as Constitution before receiving its final Constitution in 2015. These are Acts which are specially Constitution, but in the history of Nepalese Constitution these Acts are registered as the Constitution of Nepal.

The first of such Constitution was promulgated by Maharaja Padma Shum Shere Jung Bahadur Rana in 1948. This Constitution was named as the Government of Nepal Act 2004 B.S.³⁰ This Act of 2004 B.S. guaranteed a very limited rights to its citizens and the part of the 'Fundamental Rights' was not even quite clear. This Constitution guarantees freedom of personal liberty, freedom of speech, freedom of press, freedom of assembly and organization, freedom of religion, complete equality before the law, affordable and speedy justice, universal free compulsory elementary education, universal and equal suffrage for all adults subjecting to public order and good practices. However, this Act was never implemented as Maharaja Padma Shum Shere was not willing to guarantee any right to its citizens.³¹

Due to the autocratic nature of Rana regime Nepalese carried out Revolution of 1951 to oust out Rana regime. The political history of Nepal is the history of revolution for establishing representative democracy, multi-party system and finally abolition of monarchy. The beginning of national movement in Nepal was with ousting of Ranas, long established Royal family in Nepal, through Revolution of 1951. The Revolution of 1951 resulted in immediate abolition of the system of hereditary Prime Ministership by the King and initiation of democracy in Nepal. After the collapse of the Rana regime an Interim Government Act, 1951 was promulgated in Nepal by King Tribhuvan. This Interim Government Act, 1951 was a first step towards introduction of democracy in Nepal. The Interim Government Act introduced the following-

³⁰Vikram Samvat (V.S. or B.S.) and also known as the Vikrami calendar, is the historical Hindu calendar in the Indian Subcontinent and is the official calendar of Nepal. In India it is used in several states, for example Gujarat. The calendar uses lunar months and solar sidereal years. For the easier understanding the researcher has used the English year instead of Vikram Samvat. Therefore, 1990 is 2047 Vikram Samvat. 2007 is 2063 in Vikram Samvat. 2011 is 2068 in Vikram Samvat. 2015 is 2072 in Vikram Samvat.

³¹Kapilamani Dahal, the Constitution of Nepal: On the Touchstone of Constitutionalism and Good Governance, Vol XVII, *Journal of Political Science*, 36-51.

- a. Directive Principles of State Policy (for the government while formulating any policy for Nepalese people),
- b. Fundamental principles of Law (for the government for better governance),
- c. Protection to weaker section of the society,
- d. Equality before the law,
- e. Equal protection by law,
- f. No discrimination on the basis of religion, race, caste and sex,
- g. Upholding rule of law,
- h. Guarantee of personal liberty,
- i. Prime Ministership was no longer vested with the Monarch, and
- j. Introduction of election for electing members of Parliament.

The first general election of Nepal took place in 1959 which was won by Nepali Congress with overwhelming majority. The Interim Government Act, 1951 already recognised Constitutional Monarchy. Following the death of King Tribhuvan in 1955 King Mahendra became the Monarch of Nepal. The Government formed post general election 1959 was Nepal's first popular government which introduced a Constitution in 1959. However, persistent controversy between Nepali Congress and King Mahendra led to dismissal of Congress Government in December, 1960. The Constitution of 1959 was eventually abolished in 1962 using the King's emergency power and the King reassumed all the power of government. King Mahendra promulgated a new Constitution in 1962. The Constitution of 1962 was controversial as the sovereignty was again vested with the King.

King Mahendra died in 1972 and his son King Birendra was crowned in 1975. The Constitution of 1962, promulgated by the King Mahendra, introduced partyless political system in Nepal. However, the same system was carried forward by the King Birendra. Nevertheless, the political and economic crisis in Nepal was evident and King Birendra realised the need for a change in the country. Therefore, King Birendra announced a national referendum to be held in May, 1979 to be held to decide whether Nepal required multi-party system. In that referendum the political group supporting the existing non-party system won but with a very narrow margin i.e. only 55%. This showed that the Country would soon require a change.

It was in this backdrop King Birendra decided to retain the Constitution of 1962 but liberalized the political system in Nepal by providing direct popular election for National Assembly. The Nepali Congress which was declared illegal during the regime of King Mahendra was allowed to operate in Nepal but with limitations. The election to the National Assembly was still held on the basis of 'partyless' system. This meant the candidates were to be elected on the basis of their popularity and reputation and not for his/her allegiance to any political party.

This system of Constitutional Monarchy in Nepal led Nepalese feel that they have been rigged and a demand for multi-party system began. In 1990 different political parties, coalition of leftist and communist, which were declared illegal started campaign against the King Birendra to achieve multi-party democracy in Nepal. This movement towards achieving multi-party democracy in Nepal is known as 'Jana Andolan I' (people's movement) was officially launched in February, 1990. The Jana Andolan I ended the autocratic 'panchayati system', however, the definitive struggle was yet to take place. The Jana Andolan I brought King Birendra on the negotiation with the political parties of Nepal. King Birendra agreed to form interim government under the leadership of Nepali Congress leader, Mr. Krishna Prasad Bhattarai, with a mandate to hold election to the Parliament. It was also agreed that post-election a new Constitution would be framed. King Birendra, on the recommendation and with the advice and the consent of his Council of Ministers, proposed the following guiding principles of the new Constitution of Nepal-

- Constitutional Monarchy
- Multiparty Democracy

The Constitutional Recommendation Committee (hereinafter referred as CRC) was formed on 1st June, 1990 and was authorised with the responsibility of drafting the Constitution. post drafting the Constitution the same was given to Mr. Krishna Prasad Bhattarai for reading in the Parliament and to finalize the same. Nevertheless, there are controversies that the Constitution handed over to the King Birendra by CRC and Mr. Krishna Prasad Bhattarai was different from the one read by the King Birendra while promulgation. Supposedly, the objection was regarding 'Constitutional Monarchy, in the democratic system. However, the Preamble of the Constitution of 1990 laid down that the Constitution was promulgated by the King Birendra Bir

Vikram Shah Deva. This in a way established the existence of Monarchy and the same was constitutionalized as well.³²

Undoubtedly the principles of the Constitution of 1990 was undermined by the King Birendra. Simultaneously the Communist Party of Nepal (Maoist) was agitated because the Country was led by Nepali Congress and they started insurgency against the Government of Nepal from 1996-2006. This insurgency is known as Nepalese Civil War or Maoist Conflict. The government of Nepal could not stop Maoist insurgency despite using force against them. However, on 1st June, 2001 the royal massacre of King Birendra and his entire family increased the intensity of political instability in Nepal. Following this unfortunate incident King Gyanendra became the King of Nepal and tried to bring back authoritarian rule as soon as he was ascended to throne. Taking over of kingship by King Gyanendra set in motion the process of dismantling the basic governing principles embedded in the Constitution of 1990. It brought the conflict between the king and the people at critical stage. Following this Deuba government (Nepali Congress led by Sher Bahadur Deuba) imposed state of emergency and suspended all the fundamental rights of citizens. After this King Gyanendra dismissed Deuba government and finally dissolved the House of Representatives. Rhetorically, Nepali Congress led by Sher Bahadur Deuba welcome this unconstitutional move of the King Gyanendra.

The King Gyanendra wanted to nominate any hard-core royalist in any position of the government of Nepal. This led the King nominate Lokendra Bahadur Chand and later on Sher Bahadur Deuba for the position of the Prime Minister. However, the object of the King was to remove anyone who could possibly went against the then King. Nevertheless, in 2005 the King again dismissed Deuba government through a coup and usurped all the state power. The King became the Chairperson of the Council of Ministers and Tulsi Giri was the Vice Chair of the King's Counsel. It was also publicly declared that the Nepalese must choose between Monarchy and Democracy for both these systems could not continue together.

The Nepal Bar Association led by Senior Advocate Mr. Shambhu Thapa along with Federation of Nepali Journalists launched protest against the autocratic movement of

³²Surendra Bhandari, *Self- Determination and Constitution Making in Nepal*, 33- 35 (Springer, Singapore, 2014).

the King. This protest was joined by seven political parties of Nepal along with the Communist Party. 12 points understanding (also known as Comprehensive Peace Process) was also agreed by these parties to continue this protest against usurpation of power by the King. Following the 12 points understanding protest broke out all over the country which finally led the King Gyanendra kneeling down in 2006. The King finally announced that the people of Nepal were the source of state power and sovereignty. The King reinstated the Parliament which was dissolved in 2002 and insurgent Maoists joined the mainstream politics. The government of Nepal and the Maoist party entered into an agreement to draft the Interim Constitution of Nepal. However, this Interim Constitution of Nepal is criticised for various reasons like there was no guiding principle for drafting the Interim Constitution. The Interim Constitution was also not drafted by the Constituent Assembly. Thus, the question of under-representation or non-representation remained in Constitution drafting remained.³³

The Interim Constitution, promulgated in 2007, provided that the fate of monarchy in Nepal would be decided by the first meeting of the Constituent Assembly. The election of the Constituent Assembly was held. The Maoist secured position of the largest party in the government. However, no party secured the majority. Following the election of the Constituent Assembly the Assembly held its meeting for the first time in 2008. In the first meeting the Constituent Assembly abolished Monarchy in Nepal. The Constituent Assembly was comprised of 601 members of whom 240 were elected through First Past the Post (FPTP) system while 335 were elected by the Proportional Representation and the remaining 26 members were nominated by the Council of Ministers. The Constituent Assembly was appointed for two years for the purpose of drafting the Constitution of Nepal. However, the time period was extended for two more years and later on a suit was filed regarding extension of time period of Constituent Assembly without having a proper drafting of the Constitution. The term of the Constituent Assembly-I was extended for another six months by the order of the Supreme Court and after amendment to the Interim Constitution but on the understanding that on failure to draft the Constitution the CA-I would be dissolved. The Constituent Assembly-II adopted electoral system of CA-I and started being

³³Surendra Bhandari, *Self- Determination and Constitution Making in Nepal*,13 (Springer, Singapore, 2014).

operative from 22nd January, 2014. Finally on 20th September, 2015, President Ram Baran Yadav promulgated the Constitution of Nepal.³⁴

CONSTITUTIONALISM IN NEPAL: Upendra Dev Acharya in ‘Constitutionalism and Democracy in Nepal: What Went Wrong’ mentioned that Constitutionalism in a less developed country like Nepal embraces following aspects³⁵-

- i. A development aspect- realisation of social and economic aspiration of its people,
- ii. Political aspect- acknowledgment of adult suffrage and representative system of government,
- iii. Liberty and Equality and a concept of justice to transform the ‘Rule of Law’ concept into living reality.

According to UpendraDev Acharya public participation while drafting the Constitution is a major force underlying an effective Constitution. This force recognizes that the sovereignty is vested with the people of the nation. Without public participation the Constitution becomes the exhibition of some affluent powers. In this backdrop it is apt to mention that Nepal has never been introduced to Democracy in that sense. ‘Democracy’ as a system of polity was laid in the Constitution of Nepal 1948. However, neither there was any public participation during constitution-making nor the public was acknowledged as the ultimate source of sovereign power. The Constitution was drafted by people either handpicked by the King or through unorganised selection system of political parties. In the Constitution of 1948 the power was transferred from Rana Regime to another King to Nepali Congress. However, none of them could function within the mandate of the Constitution and always looked for opportunities to grab the power. Civil liberty and democracy pronounced under this Constitution remained as a mere decoration.

The Constitution of 1960 was drafted by the Constitution Commission consisting of experts. However, this Commission received advice from British Constitutional Expert Sir Ivor Jennings. The process of drafting of this Constitution could also not be

³⁴Nepal’s Constitution Building Process: 2006-2015, 26-29, by the International IDEA, Stockholm.

³⁵UpendraDev Acharya in ‘*Constitutionalism and Democracy in Nepal: What Went Wrong*’, 177-192 published at *Constitutionalism and Democratic Transitions: Lessons from South Africa*, edited by Veronica Federico and Carlo Fusaro (Firenze University Press, 2006).

regarded as democratic as the Constitution was drafted by the Constitution Commission where the members were appointed by the King. The Constitution was approved by the Council of Ministers where the members were again hired by the King and lastly the Constitution was promulgated by the King. Thus, the model of Constitution of 1960 has been considered as One-Dimensional-Man model as propounded by Herbert Marcuse.³⁶

The Constitution of 1990 was a by-product of protest against the usurpation of power by the Monarchy. This Constitution came into being because of an uprising demanding multi-party system in Nepal following ban on the political parties by the King. Another most significant demand was that the new Constitution must be drafted by the Constituent Assembly. However, this demand was not fulfilled and the Constitution was drafted by the Constitution Reform Commission (CRC) consisting of major political parties of Nepal and the King. The three main principles basing upon which this Constitution was drafted were-

- i. Sovereignty will be divided between the King and the people,
- ii. Multi-party democracy would be established,
- iii. Parliamentary form of government would be followed.

Thus, the principle of the Constitution of Nepal was Constitutional-Monarchy. Therefore, in theory the sovereignty was vested with Nepalese but in reality the same was enjoyed by the King.

Nepalese were again deprived of from the process of drafting of the Constitution. The instance of establishing the CRC consisting of major political parties and the King forsaking the demand of Constituent Assembly is enough to prove that there was no public participation in the process of drafting the Constitution. Thus, the process of making of the Constitution of 1990 in Nepal was a process of accommodation of power between the major political parties of Nepal and the King.³⁷ Election of a Constituent Assembly would ensure Nepal's pre-commitment to democracy. Election

³⁶Herbert Marcuse (1898–1979) was one of the most prominent members of the Frankfurt School or The Institute for Social Research (Institute für Sozialforschung) in Frankfurt am Main. The Frankfurt School was formed in 1922 but went into exile in the United States in the early 1930s during the reign of the Third Reich.

³⁷Upendra Dev Acharya in '*Constitutionalism and Democracy in Nepal: What Went Wrong*', 188 published at *Constitutionalism and Democratic Transitions: Lessons from South Africa*, edited by Veronica Federico and Carlo Fusaro (Firenze University Press, 2006).

of representatives from all the strata of Nepali society i.e. including its minorities would also ensure recognition of diversity and several ethnicities in its Constitution which would establish its Constitutionalism. However, unfortunately the constitution-making in Nepal in 1990 has been dictated by the King and the political elites. The Constitution of 1990 could well be termed as Lancaster Model of Constitution as well³⁸.

Bruce Ackerman has propounded that a Constitution could be measured through its opportunities provided to its citizens and State for survival, growth and renewal of polity³⁹. In case of Nepal such growth and renewal of polity was possible only by way of establishing the Constituent Assembly. However, the Constitution of 1990 was drafted by Constitution Reform Commission (CRC) whereby the Sovereignty was divided between the King and the citizens. Nevertheless, in reality the sovereignty was still enjoyed by the King alone. The various structures of the government and arrangement of sharing of power between the government and the King were done through negotiation.

The fundamental rights guaranteed to Nepalese were protected by the Supreme Court of Nepal under Article 88 of the Constitution of Nepal, 1990. However, the confusion was regarding the position of the King. The position of the Monarch was absolute and Article 4 of the Constitution of Nepal, 1990 established Nepal as the Constitutional Monarchical state. Moreover, Article 31 of the Constitution of 1990 laid down that the action of the King could not be challenged/ questioned in the Court of Law of Nepal⁴⁰ (no matter how much the action was violative of the fundamental rights guaranteed under this Constitution). Therefore, the right conferred upon the Supreme

³⁸ The “Lancaster Model” of constitution-making reflects the idea that people believed that the former colonies were incapable of doing something like writing a constitution, and therefore needed help from the colonizing countries. Similarly, many countries that made their constitutions after World War II have been getting help from constitutional experts in writing their constitutions. The Lancaster Model takes its name from the Lancaster House in London where meetings to determine post-colonial constitutions were convened.

³⁹ Bruce Arnold Ackerman (born 1943) is an American constitutional law scholar. He is a Sterling Professor at Yale Law School. The author calls for national referendum on major constitutional or system transforming occasions and he argues that referendum can be important to legitimize devices for new structural constitutional arrangements of a significant nature.

⁴⁰ Article 31

Question not to be Raised in Courts

No question shall be raised in any court about any act performed by His Majesty: Provided that nothing in this Article shall be deemed to restrict any right under law to initiate proceedings against His Majesty's Government or any employee of His Majesty.

Court of Nepal to act as guardian of the fundamental rights guaranteed to Nepalese was limited to the extent that the same violation was not committed by the King.

The Constitution of 1990 was already challenged on various grounds which also in a way attack on the Monarchy in Nepal. Thus, in 2003 King Gyanendra attempted to clear out all the mounting unrest against his exceptional takeover of power by appointing Prime Minister. However, soon after this in 2005 the King dismissed the government through a Royal Coup and placed all the significant leaders under arrest, communications were severed and stringent restrictions were placed for travelling.

Following cumulative protest against the authoritarian rule of Monarch the Constitution of 1990 was repealed and the task of drafting the Interim Constitution was entrusted with the Interim Constitution Drafting Committee. There was protest against the Interim Constitution because the same was not drafted by the Constituent Assembly despite making several demands for the same. The demand for drafting the Constitution by the Constituent Assembly was to fill up the gap of proper representation of all ethnicity and region in Nepal. Due to protests against the Interim Constitution, 2007 by the Madhesis (people of Madhes, also known as Terai region in Nepal) the Interim Constitution, 2007 was amended twice in very short span of time. Finally the Constitution was drafted by the CA-II and was promulgated in 2015.

The journey of drafting of the Constitution of Nepal was all about representation and participation of Nepalese in the political activities of the country. However, the same was restricted till the abolition of Monarchy. The power of the Judiciary was also restricted to a great extent in the Monarchical regime. The role of the Apex Court of Nepal in drafting the Constitution of Nepal, 2015 is significant because it was for the first time the Judiciary interfered with the drafting of the Constitution of the country in Nepal. In *Bharatmani Jungam v. Office of the President &Ors.*⁴¹ the tenth amendment to the Interim Constitution extending the time period of Constituent Assembly-I was challenged. The CA-I was appointed initially for two years which was extended several times since the CA-I could not finish drafting the Constitution of Nepal. The Extension of CA-I was done through amendments in the Interim Constitution which was challenged in this case. For the first time the Supreme Court of Nepal was called in to decide the matter related to the Constitution of Nepal. This

⁴¹*Bharatmani Jungam v. Office of the President &Ors.* Writ No. 68-ws-0014.

case was presided over by the Special Bench of the Supreme Court of Nepal consisting of Khil Raj Regmi, Chief Justice, Damodar Prasad Sharma J., Ram Kumar Prasad Shah J., Kalyan Shrestha J., Prem Sharma J. The Supreme Court ordered in this case that the time for CA-I could not be extended more than six months. If the CA-I could not draft the Constitution within six months then the same must think of an exit strategy. Therefore, the tenth amendment to the Interim Constitution of Nepal extending the time period of CAI was declared void. The eleventh amendment to the Interim Constitution was introduced post this judgment to provide six months extension to the CA-I as per the judgment of the Supreme Court of Nepal. However, the CA-I could not draft the Constitution within six months and CA-II was operative from 2014 onwards which finally promulgated the Constitution of Nepal in 2015.

Nepal despite being a neighbouring country of India and influenced by the systems followed in India could implement those in its own country only in 2015. India adopted its Constitution in 1949 while Nepal was witnessing Monarchical system at that point. In 1948 the King of Nepal promulgated a Constitution of Nepal where nor the rights were properly defined neither the role of the judiciary was clear.

Post the abolition of monarchy in Nepal the role of the Judiciary in this country becomes significant in upholding the rule of law. The judiciary, by subjecting the government and the people alike to the law, has created an environment where the law takes the basic value that binds the power with duty and accountability. The role of the Supreme Court of Nepal could not be denied in limiting the power of the government by restricting its power of detention and freed many political leaders and student activists protesting against the autocracy. There are also instances of reprehension of the government by the Supreme Court of Nepal for restricting the Press by colourable exercise of power.⁴² However, in *Sanjeeb Parajuli on behalf Rajiv Parajuli v Royal Commission on Corruption Control and Others*⁴³ the Supreme Court of Nepal for the first time observed that the sovereignty was vested in the people of Nepal and the constitutionality of the King's action could be challenged before the court. After the royal massacre King Gyanendra ascended to the throne and started concentrating the power in his hand. The concentration of power started with

⁴² Ram Prasad Shrestha, Role of Nepali Judiciary in Strengthening the Rule of Law, *NJA Law Journal* 1-6 (2009).

⁴³ *Sanjeeb Parajuli on behalf Rajiv Parajuli v Royal Commission on Corruption Control and Others* Writ No- 118 of 2062 (B.S.).

dissolution of the Parliament in 2002 followed by declaration of emergency. King Gyanendra set up Royal Commission for the Control of Corruption (RCCC) despite the fact that Nepal was already having an independent authority to investigate abuse of power by authorities. The RCCC arrested the Prime Minister and other political leaders who resisted the concentration of power in the Monarch. The main issues before the Court were-

- a. Where does the sovereignty lie?
- b. Whether the action of the King could be challenged before the Court of Law?

The Constitution of Nepal, 1990 vested the sovereignty in the people of Nepal and made the King the guardian of the Constitution. However, the Constitution of Nepal, 1990 could not be continued for various reasons and the sovereignty was demanded to be with the Monarch in 2001 by King Gyanendra. The Supreme Court in this case not only reiterated that the sovereignty lied with the people but also observed that the Supreme Court of Nepal was empowered to question the constitutionality of King's action. This case was undoubtedly a step forward in upholding the rule of law in Nepal which was finally laid down in 2008 by the Constituent Assembly-I through abolition of monarchy.

Under article 88 of the Constitution of Nepal, 1990 the Supreme Court of Nepal was vested with the power of declaring any law void if found to be inconsistent with the Constitutional provisions.⁴⁴ Article 23 of this Constitution has laid down that the

⁴⁴ Article 88 of the Constitution of Nepal, 1990

Jurisdiction of the Supreme Court

(1) Any Nepali citizen may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by this Constitution or on any other ground, and extraordinary power shall rest with the Supreme Court to declare that law as void either ab initio or from the date of its decision if it appears that the law in question is inconsistent with the Constitution.

(2) The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution, for the enforcement of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective, or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders to enforce such rights or to settle the dispute. For these purposes the Supreme Court may, with a view to imparting full justice and providing the appropriate remedy, issue appropriate orders and writs including habeas corpus, mandamus, certiorari, Prohibition and quo warranto: - Provided that: (a) the Supreme Court shall not be

manner for enforcing the rights guaranteed in the Constitution of 1990 has been set forth in Article 88. Thus, the Article 23 of this Constitution indicated that Article 88 of the Constitution of 1990 had procedural utility. However, in *Dhan Kumari Gurung on behalf of Iman Singh Gurung v. Military Court*⁴⁵ the Supreme Court of Nepal has observed that Article 88 was not only a procedural provision, rather a substantive provision having the strength of fundamental right. Thus, each individual whose rights had been violated could seek remedy from the Supreme Court to enforce the same. Thus, judicial review has been made a significant principle to realise Rule of Law and socio-economic and political justice.

The Constitution of 1990 empowered the Supreme Court of Nepal to review the enactments in the light of Constitutional provisions. The same Constitution in Article 31 provided immunity to the King from being challenged and/or questioned before the Court of Law.⁴⁶ Therefore, the scope of judicial review of the Supreme Court was a significant question post adoption of the Constitution of 1990. In *Rabi Raj Bhandari v. Hon'ble Prime Minister Man Mohan Adhikari*⁴⁷ court determined the scope of judicial review. The Supreme Court observed that the action of the King could be questioned before the Court of Law which had not been performed exclusively at his

deemed to have power under this clause to interfere with the proceedings and decisions of the Military Court except on the ground of absence of jurisdiction or on the ground that a proceeding has been initiated against, or punishment given to, a non-military person for an act other than an offence relating to the Army. (b) except on the ground of absence of jurisdiction, the Supreme Court shall not interfere under this clause with the proceedings and decisions of Parliament concerning penalties imposed by virtue of its Privileges.

(3) The Supreme Court shall have original and appellate jurisdiction as defined by law.

(4) The Supreme Court may review its own judgment or final orders subject to the conditions and in the circumstances prescribed by law.

(5) If His Majesty wishes to have an opinion of the Supreme Court on any complicated legal question of interpretation of this Constitution or of any other law, the Court shall, upon consideration on the question, report to His Majesty its opinion thereon.

(6) Other powers and procedures of the Supreme Court shall be as prescribed by law.

⁴⁵*Dhan Kumari Gurung on behalf of Iman Singh Gurung v. Military Court* NKP 710 (2049).

⁴⁶ Article 31 of the Constitution, 1990

No question shall be raised in any court about any act performed by His Majesty: Provided that nothing in this Article shall be deemed to restrict any right under law to initiate proceedings against His Majesty's Government or any employee of His Majesty.

⁴⁷*Rabi Raj Bhandari v. Hon'ble Prime Minister Man Mohan Adhikari* NKP Golden Jubilee Edition 1 (2052).

discretion. Immediately after two years in *Krishna Prasad Siwakoti v. Cabinet Secretariat and Others*⁴⁸ reviewed the Succession of Throne Act, 2044 (BS) whereby it entertained a question regarding constitutionality of an act performed by the King. The Supreme Court declared the concerned provision of the impugned Act violative of the Constitution.

However, the Supreme Court of Nepal has sometimes created formidable ‘self-constraint’ in order to protect the basic spirit of the Constitution. In *Gyan Raj Rai v. Cabinet Secretariat and Others*⁴⁹ the petitioner challenged the tripartite treaty among Nepal, India and Great Britain Of 1947 on the ground that the treaty violated his right to equality. The Supreme Court dismissed the petition stating that treaty fell under the scope of diplomatic relation of the country with the contracting parties. Maintenance of such relation was the duty of executive. Therefore, any dispute arising out of such relations could not be reviewed by the Supreme Court. It further observed that the jurisdiction of the Supreme Court could not be invoked in the absence of any legal and constitutional question.

In *Babu Ram Poudel v. Cabinet Secretariat and Others*⁵⁰ interpreted the letters of Article 11 of the Constitution. Article 11 of the Constitution of 1990 guaranteed ‘Right to Equality’ to its citizens. In this case the Supreme Court observed that the provision of ‘equal before the law’ has embraced a negative concept within it which meant that the State would refrain itself from any discrimination while protecting the right of an individual. Therefore, ‘equal before law’ does not bestow any special privilege upon an individual and treated very individual equally. This interpretation of ‘right to equality’ by the Supreme Court of Nepal is similar to the interpretation of the ‘right to equality’ under Article 14 of the Constitution of India by the Supreme Court of India.

The Supreme Court of Nepal in *Sapana Pradhan Malla v. Ministry of Law, Justice and Parliamentary Affairs and others*⁵¹ made it clear that any classification in order to enact legislation for downtrodden would be just and valid. Such classification could

⁴⁸*Krishna Prasad Siwakoti v. Cabinet Secretariat and Others* NKP 295 (2054).

⁴⁹*Gyan Raj Rai v. Cabinet Secretariat and Others* Writ No 2651 of 2056.

⁵⁰*Babu Ram Poudel v. Cabinet Secretariat and Others* NKP 143 (2051).

⁵¹*Sapana Pradhan Malla v. Ministry of Law, Justice and Parliamentary Affairs and others* Writ No 56 of 2058.

not be challenged as violative of ‘right to equality’ guaranteed under the Constitution of Nepal, 1990.

The journey of the legal system in Nepal reflects that the Supreme Court of Nepal has adopted the constitutional interpretation by the Supreme Court of India. However, legal system of Nepal witnessed this development in 1990 through adoption of a new Constitution while in India this development ushered through a judicial pronouncement in 1978 (*Maneka Gandhi v. Union of India*).

BHUTAN

It is not long ago that Bhutan has been introduced to participatory democracy by its fourth King Jigme Syngye Wangchuk. It was in 2008 Bhutan received its first written Constitution as a consequence far reaching reforms commenced since 2001 by the fourth King. Unlike Nepal, the Constitution of Bhutan was not drafted at a difficult time. The reform has come to Bhutan very peacefully by the Monarch. The transition from indigenous system of rule to democratic system in Bhutan has been considered as one of the unique and astonishing transitions. The noteworthy aspect of the experiments of Bhutanese with the Constitution is that it does not have any colonial history nor it has been ruled under a system other than its indigenous one.⁵² Bhutan did not have modern and/ or written document as the Constitution and has always been ruled by the Monarch under indigenous system. The transition to democratic system from monarchical system was not due to any popular pressure or pressure from the elite class, but the change was introduced by the Monarch whose authority was unchallenged at that time. Therefore, the significant task for Constitution-making of Bhutan was to provide it's a modern and written Constitution and something *sui generis*.

Bhutan is a small country situated between China in north and India in South. Economic and political modernity of Bhutan could be attributed to Indo-Bhutan friendship which started with the visit of Jawaharlal Nehru to Bhutan in 1958. The origin of Bhutan, as a nation state, is resulted from a democratic process by electing the hereditary Monarch in 1907. This election of hereditary monarch in Bhutan back in 1907 corresponds to Social Contract Theory. According to Hobbes the origin of Social Contract Theory is the desire of a stable and secured polity. Therefore, introduction of a sovereign was inevitable. There was two types of pacts between individuals and that is *Pactum Unionis* and *Pactum Subjectionis*. By *Pactum Unionis* people sought to protect their lives and properties as a result of which society was formed and individuals learnt to respect each other and live in a harmony. By *Pactum Subjectionis* individuals agreed to subject themselves under the authority of superior who might be called the Sovereign. His Majesty Jigme Singye Wangchuk, the fourth King, has been instrumental in introducing the democratic Constitution. The drafting

⁵²Venkat Iyer, 'Constitution-Making in Bhutan: A Complex and Sui Generis Experience', 7 (2) *The Chinese Journal of Comparative Law*, 360 (2019).

of the Constitution of Bhutan was initiated in 2001 when the fourth King astonished Bhutan with his proclamation that Butan would embrace democracy. His Majesty Jigme Singye Wangchuk said *The destiny of the nation lies in the hands of the people. We can not leave the future of the country in the hands of one person.*

Tshering Wangchuk, Justice, Taachog Bench, Supreme Court of Bhutan, on Constitutionalism stated that *The institutions fashioned by the constitution – parliament, executive and the judiciary are intended to bring about a form of government that will guarantee that democracy and liberty are not empty promises.* The idea of Constitutionalism and rule of law are the foundation of any modern state. Rule of law is not only an arid legal doctrine but guarantees responsible government and an important contributor to fair and just society by offering best means of securing peace and co-operation. The fourth King His Majesty Jigme Singye Wangchuk, on the 105th National Day in 2008, stated that *the power handed over to the Monarch in 1907 was now returned to the people.* This shows that unlike other countries the political transition in Bhutan was not due to any strife, violence and conflict nor there was any sacrifice of life to bring such change in the country. At the 105th National Day Ceremony in 2008 His Majesty said that *“The highest achievement of 100 years of Monarchy has been the constant nurturing of Democracy...I hereby return to our People the powers that had been vested in our Kings by our forefathers 100 years ago. As King, henceforth, it is my sacred duty to ensure the success of our new democracy so that it fulfils the aspirations of our people always”*.⁵³

His Majesty the Third King’s liberalism led to introduction of National assembly in 1953. Simultaneously, Royal Advisory Council, High Court and Adult Franchise were also introduced by the King in 1960’s. Therefore, it can aptly be said that the true spirit of democracy recognising dignity and worth of individual was ingrained in the polity of Bhutan by the Monarchy. His Majesty the Fourth also prepared the citizens of Bhutan steadily to embrace democratic form of government by introducing various mechanisms and institutions in his governance. In 1981 The Dzongkhag Yargay Tshogdu (DYT) and in 1991 Gewog Yargay Tshogchung (GYT) were set up for administrative and political decentralization to enhance democratic powers, social

⁵³Tshering Wangchuk, Justice, Taachog Bench, Supreme Court of Bhutan on Constitutionalism, Rule of Law and Democracy.

responsibilities, transparent process and decision making at grass root level. The greatest and significant devolution of power took place in the 77th session of National Assembly in 1998 by dissolving the then Cabinet through Royal edict. The Council of Ministers of National Assembly were then elected by secret ballot and the executive power was fully vested with the Prime Minister. In 77th Session of National Assembly ‘no confidence motion’ against the Monarch was also introduced. This shows the extent of devolution of power by Monarch. In 2001 His Majesty the fourth King commanded drafting of a Constitution stating that *the political system of a nation must evolve to ensure continued peace and prosperity of Bhutanese people*. His Majesty further mentioned that *Monarchy is good as long as the Monarch is good* thereby emphasising the necessity of participation of Bhutanese people in governance.

His Majesty while addressing the Constitution Draft Committee said that *“the Constitution must create a political framework that will make democracy effective and vibrant in our country. It must embody the hopes and aspirations of the people, draw on the existing system and laws and on the lessons learnt from countries around the world. Bhutan is in a unique position today and time and opportunity are in our favour, to develop a system of governance that will be in the best interests of the Bhutanese people and the country. It is of utmost importance for us to utilize this opportunity to frame a Constitution that will create a dynamic system of governance, which will uphold the true principles of democracy. The Constitution must become the golden pillar that will support and enable the political system in Bhutan to safeguard the sovereignty of the country and the rights of the people”*.⁵⁴

Since the political transformation in Bhutan was not due to any conflict with the Monarchy the Constitution of Bhutan in 2008 is an example of harmonious construction of democracy and Constitutional Monarchy. This harmony was possible only because the benevolent King handed back the power to the Bhutanese people and portrayed Monarch as the representatives of its subjects. Article 1 (1) of the Constitution of Bhutan lays down that Bhutan is a Sovereign Kingdom and the Sovereign power belongs to the people of Bhutan. Article 1 (2) of the Constitution of Bhutan lays down that the government of Bhutan will be Democratic Constitutional

⁵⁴Tshering Wangchuk, Justice, Taachog Bench, Supreme Court of Bhutan on Constitutionalism, Rule of Law and Democracy.

Monarchy. Article 1 (9) of the Constitution of Bhutan declares the Constitution as the Supreme Law of the land. Article 1 (13) of the Constitution of Bhutan has guaranteed separation of the Executive, the Legislature and the Judiciary.

Bhutan has exhibited a striking example of path-dependency⁵⁵ as the fourth King His Majesty Jigme Singye Wangchuk has continuously followed his vision to transform Bhutan's polity. There are two features which have shaped the Constitutionalism in the Constitution of Bhutan. These two significant features are-

- i. Emergence and Consolidation of Monarchy under the First and Second Druk Gyalpo⁵⁶ from 1907-1952.
- ii. Introduction of Gross National Happiness under Article 9 (2) of the Constitution of Bhutan.⁵⁷

The circumstance under which the present hereditary Monarch of Bhutan came into existence has a striking similarity with the Social Contract theory of Thomas Hobbes. The decades preceding the establishment of the present Monarchy in Bhutan (Prior to 1907) was marked by violence and civil war. Hobbes perceived state of nature as full of violence and civil war. Therefore, the way of coming out of such state of nature is the social contract which would bring peace, tranquillity and certainty by establishing a civil society under the rule of a Leviathan. In Bhutan the social contract was entered into by the conflicting and rival parties, relieving themselves from the State of Nature, subjecting themselves under the legal authority of one man known as the Monarch. Therefore, the work of Thomas Hobbes in Chapter 17 of Leviathan has a striking relevance with the creation of Monarch in Bhutan. The Social Contract theory envisages that the power to rule is wilfully handed over to the ruler which was manifested by the fourth King His Majesty while giving back the power to Bhutanese people.⁵⁸ Monarchy in Bhutan is an example where the Monarch voluntarily reduced his powers in order to introduce democracy in Bhutan. Which is why it was possible to introduce Democratic Constitutional Monarchy in Bhutan.

⁵⁵Path dependence is the tendency of institutions or technologies to develop in certain ways because of their structure or their beliefs and values.

⁵⁶Druk Gyalpo means the King.

⁵⁷ Article 9 (2) of the Constitution of Bhutan- Principles of State Policy-

The State shall strive to promote those conditions that will enable the pursuit of Gross National Happiness.

⁵⁸ Marian Gallenkamp, *Democracy in Bhutan: An Analysis of Constitutional Change in Buddhist Monarchy*, 6, (Institute of Peace and Conflict Studies, New Delhi, 2010).

Article 9 (2) of the Constitution of Bhutan introduced Gross National Happiness (GNH) as one of the principles of State Policy. The clause connotes that the GNH is not complementing democracy, rather democracy is a part of the GNH as the Article 9 (2) mandates that the State shall strive to promote conditions which will enable the pursuit of GNH. Common features of Democracy are-

- a. Having a Constitution,
- b. Separation of power amongst the legislature, executive and the judiciary,
- c. Law debated and passed by the parliament,
- d. Decisions made by the government are based on laws,
- e. Members of Parliament and/ or legislative assembly are elected through adult franchise.

Thus, Democracy is the right of citizens to have a share in political system. In Democracy citizens vote and participate in politics. This Democracy in Bhutan was introduced by the Monarch who commanded drafting the Constitution.

Rule of Law protects citizens from arbitrary government. Rule of Law ensures that the law shall be complied with everyone collectively and individually including the State. The Constitution of Bhutan has also upheld the principle of Rule of Law. Article 20 (2) of the Constitution has subjected the Monarch to the Constitution of Bhutan. The Monarch can be abdicated for wilful violation of the Constitution of Bhutan.⁵⁹

⁵⁹ Article 2 of the Constitution of Bhutan

20. The Druk Gyalpo shall abdicate the Throne for wilful violations of this Constitution or for being subject to permanent mental disability, on a motion passed by a joint sitting of Parliament in accordance with the procedure as laid down in sections 21, 22, 23, 24 and 25 of this Article.

21. The motion for abdication shall be tabled for discussion at a joint sitting of Parliament if not less than two-thirds of the total number of the members of Parliament submits such a motion based on any of the grounds in section 20 of this Article.

22. The Druk Gyalpo may respond to the motion in writing or by addressing the joint sitting of Parliament in person or through a representative.

23. The Chief Justice of Bhutan shall preside over the joint sitting of Parliament mentioned in section 21 of this Article.

24. If, at such joint sitting of Parliament, not less than three-fourths of the total number of members of Parliament passes the motion for abdication, then such a resolution shall be placed before the people in a National Referendum to be approved or rejected.

25. On such a resolution being approved by a simple majority of the total number of votes cast and counted from all the Dzongkhags in the Kingdom, the Druk Gyalpo shall abdicate in favour of the heir apparent

In *Opposition Leader v. The Government*⁶⁰ the plaintiff moved the High Court of Bhutan seeking Court's intervention with Government's restructuring and broadening the then existing tax structure. This case was heard by Constitutional Bench of five judges comprising of Hon'ble Acting Chief Justice Sangay Khandu, Justice Lungten Dobgyur, Justice Norbu Tsering, Justice Tsering Namgyal, Justice Tashi Chhozom. Article 14 of the Constitution of Bhutan laid down that the structure of tax could not be altered and/or amended except by law. The then Finance Minister of Bhutan in the Annual Budget 2010-2011 in the 5th Session of the Parliament announced that broadening of sales tax would bring revenue. The then Finance Minister also proposed to rationalise the sales tax and customs duty rates. This was, as contended by the plaintiff, against the Article 14 (1) of the Constitution of Bhutan which laid down that alteration to tax structure had to be made according to the law.

The Bench dismissed the plea of the plaintiff to declare Article 14 (1) of the Constitution void. The *locus standi* of the plaintiff was challenged by the respondent. The Bench maintained that alteration of sales tax and customs duty rates concerned public at large, thus, the plaintiff had the *locus standi* to file the suit. Finally the Bench observed that no alteration to sales tax and customs duty rates could be made except according to the law. Thus, announcement of such alteration in Budget session was not in compliance with the law.

The Preamble of the Constitution of Bhutan reflects the historical school of law. Karl Von Savigny, one of the founders of the historical school, propounded that legal system was a part of the culture of people. From the very beginning of giving back the sovereignty to people by the Monarch reflects the significant feature of historical school i.e. law is not arbitrary manifestation of legislature. Law and legal system is developed as a response to interpersonal powers to be found in the spirit of people known as *vokgeist*. The basic constitutional values incorporated in the Preamble is *BLESSED by the Triple Gem, the protection of our guardian deities, the wisdom of our leaders, the everlasting fortunes of the Pelden Drukpa and the guidance of His Majesty the Druk Gyalpo Jigme Khesar Namgyel Wangchuck*. These triple gem mentioned in the Preamble are Buddha, Dharma and Sangha. DrukGyalpo in the Preamble meant benevolent monarchy with republicanism. The preamble endeavours

⁶⁰ Judgment was rendered on 18th November, 2010.

to secure blessings of liberty, ensure justice and tranquillity, enhance unity, happiness and well being of the people. The Preamble starts with 'We the People of Bhutan' and ends with 'Do hereby ordain and adopt this Constitution'.⁶¹

The abovementioned discussion on the Constitution of Bhutan shows that the philosophical basis for the Constitution of Bhutan was different from India. The preceding years of the drafting of Constitution of India is history of struggle for autonomy and violence. However, the history of Constitution drafting in Bhutan does not show any such struggle and violence. The address of the Monarch in the 105th National Day Ceremony reflects the spirit of people of the nation. Therefore, the Historical school is manifest in the philosophy of the Constitution of Bhutan and unlike India the sovereign of Analytical positive school of law has not been reflected in the Druk Gyalpo of Bhutan.

Therefore, developments in the legal systems of Pakistan, Bangladesh, Nepal and Bhutan have followed the trail of developments in Indian legal system. In India 1975 can be marked as the moment of political crisis as emergency was promulgated thwarting the political development of the country for almost two years. The same situation can be witnessed in Pakistan during 1975 when the country was under the military regime of General Zia-Ul-Haq. In 1975 Bangladesh also witnessed military regime under Major General Ziaur Rahman which was done transgressing the boundary of the Constitution of Bangladesh. Thus, both Pakistan and Bangladesh went through the autocratic rule exactly when India witnessed emergency. Thus it can safely be said that 1970s is a period of manifestation of Analytical Positive School of Law in India, Pakistan and Bangladesh and subsequent paradigm shift towards sociological-realist school of thought rooted in principles of natural law.

Till 1990 Pakistan and Bangladesh were found to be under the military regime and Nepal was found to be under Monarch. Democratization of the legal system in these three countries started only after 1991. However, the role of the judiciary of these countries in upholding rule of law during the period of political crisis can not be denied. In several judgments the judiciaries of respective countries tried to maintain the stability of the legal system by upholding rule of law which was often vitiated by

⁶¹ Lecture on A PERSPECTIVE ON THE PHILOSOPHICAL BASIS OF THE BHUTANESE CONSTITUTION in the Royal Institute of Governance and Strategic Studies by the then Chief Justice of Bhutan on 21st March, 2014.

the interference of the executive and/ or the legislature. In these three SAARC countries change occurred as a result of violence which paved the way for transformation from analytical positive school to sociological school⁶². It is only in case of Bhutan where transformation from monarchy to democracy happened through a peaceful means, by the will of the (command of the) sovereign.

⁶² According to the Sociological school of law the main purpose of law is to resolve conflicts amongst various interests in the society.