

## The Rule of Law Under the Constitution of Nepal

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### Abstract

This article deals with the constitutional provisions of rule of law, its implementation status and challenges to implement it. Rule of law is the value of democratic institution that focuses on the legal justification of every action by the government officials and adjudication of disputes through the independent and competent court. The Constitution has guaranteed the rule of law through its preamble, fundamental rights with constitutional remedy, directive principle and state policies and various other provisions that have added hope for the people of limited government. The Constitution focuses on both horizontal and vertical separation of state power. Horizontal power is divided into three organs of government; legislative, executive and judiciary and vertical power is divided into central, provincial and local level government with the federal character of the nation. The judiciary is empowered to test the constitutionality of legislative and administrative actions which is the essence of rule of law of democratic nations. The Constitution guarantees the functional and institutional independence of judiciary. Thus, the article argues that the Constitution of Nepal, 2015 wants to establish, promote and protect the rule of law in Nepal but its implementation depends on the commitment and actions of the state authority. The finding of the study is there is the need of more laws and institutional arrangements to establish rule of law and to implement Constitution. The analysis is significant to as it helps to understand the constitutional provision of rule of law, its implementation status and challenges to implement.

*Keywords:* constitution, rule of law, human rights, judiciary, government, implementation

### Introduction

The term “Rule of Law” means to provide justice, in accordance with law. It ensures limited governmental power and protects individual rights. Universally, rule of law means law is supreme and all people should be under the law. It is main spirit of rule of law and further says that rule of law defines the law. The rule of law is a concept, which is capable of different interpretations by different people, and it is this feature, which renders an understanding of the doctrine illusive. Of all the constitutional concepts, as (Barnet, 1996) argued rule of law is the most objective and value-laden. The concept is ancient ideal, and discussed by Greek philosophers such as Plato and Aristotle around 350 BC.

(Massey, 1995) Summarized the whole concept arguing that it is the juxtaposition

of arbitrary power. Furthermore, it's all about the legal justification of all actions carried by the government officials and court adjudicating on the basis of posited laws and established principles. Everyone must obey the law and law controls everyone is the essence of this concept which is also supported by Dias (1994) and opined that we are slave of law in order that we might be free.

(Allenan, 1995) quoting the English lawyer argued that the law binds all members of the state whether rulers or subjects. The doctrine was embodied even in Magnacarta (1215) and laid down that rule of law as justice according to law and not only for subject but for rulers and if anybody breaks law he/she will be punished only on the decisions of the judges. In this regard competent court has the pivotal role to established rule of law in its respective jurisdiction. Magnacarta is the first historical document which established supremacy of parliament in Britain and later followed by the Bill of Rights (1688), The American Independent Revolution (1776), Glorious British Revolution (1688) that framed people's freedom, justice and rule of law.

The commonly accepted contents of rule of law was developed and forwarded by (Raj, 1997) that includes all law should be prospective, opened and clear, law should be relatively stable, the making of particular laws, orders should be guided by open, stable, clean and general rules, the principle of natural justice must be observed open and fair hearing and absence of bias in the judge is essential, the independence of judiciary must be observed, the courts should have review power over the implementation of the other principles and the court should be easily accessible.

Absence of arbitrary power to any officials and individuals is the essence of rule of law. Law governs every person in society, including governmental officials and law-enforcement officials. The court can apply the doctrine of ultra vires equally to every government agency and official for the acts that are beyond the authority conferred by law. In addition, a person can only be punished for a breach of an existing law, and never for breach of a law not existing at the time doing something.

Equality before law and law protects equally to all is another principle of this concept. The courts must apply laws equally to all people regardless of their race, class wealth, religion etc. Every accused person should be entitled to a fair trial, to be informed of the allegations against the person and have an opportunity to rebut the charge against him, and to have his conduct assessed by impartial judges.

Supporting to this fact (Belton, 2010) opined that rule of law is not a single and unified but is composed of five separate, socially desirable goods, or ends; a government bound by law, equality before the law, law and order, predictable and efficient rulings and guarantee of human rights. The rule of law is the principle that governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedure. The principle intended to be a safeguard against arbitrary governance.

From the above analysis, the rule of law cannot be isolated from political society.

The rule of law is related with the political aspect. It gives emphasis to individual rights, which are recognizing and protected by law. It is also emphasizing the democratic system, responsible and accountable government free, fair election etc. are related to the rule of law and it is centralized to the limitation of the government's power.

### **Statement of the Problems**

Especially on this date, rule of law is a critical and challenging issue. It is interrelated with constitutionalism. Having proclaimed the constitution in 2015 and a number of other statutes and rules, people are not satisfied with the government system and court. The human rights situation is not satisfactory and deteriorating each year in International Human Right Index. After a long wait, the periodic election has been implemented but the question has risen by people on its impartiality. The corruption situation is in an increment position. Appointment of constitutional council's member is not fair. Appointment of judges in different tiers of court is not unquestionable. Constitution is yet to be get maturity and have seen interpreted as per the convenience by the government and political parties. Every action government official must be justified legally but still actions are made on the basis of tradition beyond the constitution and laws. People's involvement in law making process is the key of rule of law but every law are still made on the basis of political consensus which is fully against the rule of law principle. In this situation the researcher has tried to address following research questions.

- Whether the concept of rule of law is properly incorporated in the Constitution of Nepal ?
- Does Constitution guarantee the independence of judiciary in order to ensure rule of law?
- Has the constitution incorporated the principle of separation of power and check and balance to guarantee rule of law?

### **Objective of the Study**

The general objective of the study is to find the provisions of rule of law enshrined in the Constitution of Nepal, 2072. Moreover, how the constitution is capable to bring rule of law concept and if the constitution is properly implemented, does it carries principle of rule of law is the overall objectives of the study. The specific objectives are as follows.

- To evaluate the constitutional provisions and practice of rule of law in Nepalese perspective, especially in the Constitution of Nepal, 2015.
- To find the incorporation of rule of law concepts in the Constitution.

### **Review of Literature**

The idea of the rule of law is a very old one—almost ancient. Rule of law was not a term that Bracton, a judge in the reign of Henry III in the 13th century, used to introduce the idea. He put it this way instead: "The king himself ought to be subject to God and the law, because law makes him king (Dicey, 1915)

Edward Coke is considered to be the originator of this concept when he said that the king must be under God and law and thus vindicated the supremacy of law over the pretensions

of the executives (Smith, 2015).

Over the years the ambit of rule of law has been widened. Now it's considered to be a part of basic structure and hence can't be abrogated even by the Parliament. Constitution is the *grund norm* and every law has to be in conformity with it. In (Keshavananda Bharti vs State of Kerala, 1973) the Indian Supreme Court enunciated the rule of law as one of the basic aspects of doctrine of basic structure. The Indian Supreme Court in the case of (Maneka Gandhi vs Union of India, 1978) has also declared that Art 14 strikes against arbitrariness and amendments such as the 39<sup>th</sup> Amendment are invalid since they go against the basic structure of the Constitution.

As rule of law is the limiting government power, limitation can be made through the separation of power and check and balance between state organs. (Mainali, Separation of Power in Constitution of Nepal, 2017) argued that separation of powers refers to the division of the government responsibilities into distinct branches to limit any one branch from exercising the core functions of another. The intent is to prevent the concentration of power and provide for checks and balances. Specially, the legislative branch is responsible for enacting the laws of the state, nominating the President, Vice-President, Prime Minister, Speaker, Deputy Speaker and appropriating the money necessary to operate the government. Similarly, (Bagehot, 1867) opined that there can be no liberty if the judicial power were not separate from the legislature. In such a situation, the life and liberty of the subject would be exposed to arbitrary control of judges, who would also be legislatures. Where the judiciary is joined to the Executive, the judges, he believed, would behave with violence oppression.

If all the government power is exercised by a single person or wing, there can be huge possibilities of being ruled by a person rather the law. As the (Rockham, 1990) referring the great philosopher Aristotle wrote that it is necessary to separate the legislative and executive power of the government. When the legislative and executive powers are designated in the same person or in the same institution, there can be no liberty because apprehensions may arise since the executive and legislative may enact tyrannical laws and execute them in a tyrannical manner.

Every democratic country adopts the spirit of constitutionalism to promote the concept of rule of law and wider participation of people as well as control of the sovereign constitution in government affairs. (Mallwain, 1947) mentioned that constitutionalism recognizes the necessity for the government but insist upon limitation on government. it is antithesis of arbitrary rule and its opposite is despotic government of will instead of government of law. Supporting to this argument (Andrews, 1963) contended the constitution does not only impose restraints on government as a function constitutionalism but also legitimizes the power of the government. Along with this, thought constitution, governmental institutions are established, and there function, powers and interrelationship are defined in these arrangements.

Judiciary has the pivotal role to establish rule of law in any democratic nations. When the government starts encroaching power of the government and tries to exceed its limitations,

judiciary reminds it and compelled to carry its functions and duties as per the established and posited laws and standards. But it is not possible if the judiciary is not independent and controlled by any other mechanisms of the state, institutions, individuals or party involved in the case.

(Shakya, 2006) opined that judicial independence is intimately linked to the accountability perfectibility, transparency and participation of the public in governance. The independent judiciary in a democratic state should be guided by some basic standards, each of which applies to individual judges and to the judiciary as whole.

### **Research Methods and Materials**

Both analytical and descriptive research approaches have been applied. The study is based on doctrinal research method. The study is conducted by using secondary information. Information is gathered from Constitutions, Acts, Rules, and Regulations, decisions of Supreme Court, precedents, and constitutions of other countries, international covenant and conventions. Other sources of information have been collected from books, journals, law reports, commentaries, newspapers etc.

### **Results and Discussion**

In Nepal, the concept can be traced back to the Government of Nepal Act, 1948 which was the first written Constitution of Nepal. As (Dhungel, 1998) argued that the Act was a compromise between the Ranas, in the face of mounting internal and external pressure for democratization, sought liberalization with a continuing regime and the demands of the opposition force. (Bashyal, 2020-2021) opined that there was no any space for the concept of separation of power on this Act. All the executive, legislative and judicial power were exercised and controlled by Rana Prime Minister. He was supreme and also controlled all powers of both legislative and judicial organs. He was the supreme commander of the armed forces of Nepal and his rule for all practical purpose resembled military dictatorship.

Interim Government of Nepal Act, 1951 was based on the principle of rule of law and separation of power. Government was responsible and accountable to the parliament. Independence of judiciary was guaranteed through the constitution which is regarded as the setback for the rule of law in Nepal. (Sharma, 1998) in his constitutional essay argued that rule of law was declared one of the basic objectives of the state. The act recognized the Pradhan Nyayalaya (Supreme Court) as an Apex Court and the Pradhan Nyayalaya Act, 1951 was also proclaimed which made several provisions regarding the supremacy of constitution, law and judiciary. Doctrine of judicial review was formally incorporated in the Act.

The first parliamentary Constitution made by the people's representative was made in 1959 with the various provisions of rule of law. It guaranteed the fundamental rights and right to remedy that enables court to issue necessary and appropriate orders and writs i.e. certiorari, prohibition, habeas corpus, mandamus, and quo-warranto. The Constitution made necessary arrangements to make government accountable so that government couldn't exceed its power and rule of law may prevail. It also guaranteed the rule of law by making the provision as if delegated legislation is made inconsistent with the constitution then Supreme Court had given authority to declare it unconstitutional. But still, independence of judiciary was not fully

guaranteed as chief justice and other judges were appointed by discretionary power of the king.

Banning political parties and ending the democratic norms, Constitution of Nepal, 1962 was promulgated by the King Mahendra that left all the hopes of people to exercise democracy in Nepal.

The constitution formally abandoned the independence of judiciary, rule of law separation of power and constitutionalism. But despite having various limitations in the constitution, Supreme Court had tried to establish and promote rule of law and constitutional supremacy by deciding some landmark decisions. Some of the notable cases i.e. (Yaggya Murti Banjade vs Bagmati Special Court, 2027), (Sarbaggya Ratna Tuladhar vs Rastriya Panchayat, 2035) are some notable cases where Supreme Court stand in favor of people and quashed the arbitrary power of government despite having risk to the judges of being sacked by the King.

After the influencing people's movement for long time to establish multi-party democracy in Nepal, Constitution of Kingdom of Nepal was promulgated in 1990 adding more hope and aspiration to the people having various principles of rule of law. It guaranteed the basic human rights of the people, competent and independent judiciary, core value of the constitution and basic structure were declared through the preamble, adult franchise and so on. Supreme Court was empowered to test the validity and constitutionality of the legislation made by parliament and of other sub-ordinate legislation. Judicial review was guaranteed and adopted constitutionally. Equal protection of law and equality before law principle was guaranteed through the fundamental rights that ultimately promote the rule of law in Nepal.

Declaring Nepal as a federal, democratic and republican state and ending 138 years long active as we constitutional monarchy, the Interim Constitution was promulgated in 2007. The constitution adopted the democratic norms, rule of law, independent and competent judiciary and core values of constitutionalism. Supreme Court was empowered to examine the constitutionality of legislative and administrative actions. Supreme Court also empowered with the power of judicial review and to issue directive orders through the public interest litigation. Whether the judiciary is competent and independent or not can be patterned through its capacity garnered through the constitution. In this regard, if it has a power of judicial review then it certainly can put government in its limit.

While the 2015 Constitution has generated a lot of hope, it will not be enough to change the country's constitutional and political culture, which has been shaped over decades of perverse governance praxis; a culture that accepts collusion and impunity, crises and destabilization, and backroom deals and horse-trading as normal (Payne, 2019). In 2015, Constitution of Nepal has a very short growing and yet to get maturity. The intentions of the legislatures in various provisions of the constitution are extracted from the interpretation of the court.

Preamble of the constitution says, it is committed to the civil liberties, fundamental rights, human rights, adult franchises, periodic elections, independent, impartial and competent judiciary and concept of the rule of law. These principles are guaranteed in order to build a prosperous nation.

The constitution has guaranteed both civil and political rights and economic, social and cultural rights under the "Fundamental Rights and Duties that contain 33 Articles. In this regard constitution protects right to life, liberties, equality rights and economic, social and cultural rights which is the setback to the rule of law. The right to equality guaranteed by the constitution comes with an affirmative action provision. Constitutional remedies are also guaranteed along with the rights when any rights under the fundamental rights and duties section are violated Supreme Court has the jurisdiction to enforce these rights. High Courts in all provinces also have the power to issue the necessary and appropriate orders for the enforcement of fundamental rights or any other legal rights for which no other remedy has been provided or, for which the remedy, although provided, appears to be inadequate or ineffective or for the settlement of any legal question involved in any dispute of public interest or concern.

The rule of law is an outstanding and fundamental constitutional concept ingrained in the constitution is explained under Directive Principles and State Policies in Article 50 (1), which states:

The political objectives of the state shall be to establish a public welfare system of governance by creating a just system in all aspects of national life through the rule of law, values and norms of fundamental and human rights, gender equality, preoperational inclusion, participation and social justice, while at the same time, protecting the life, property, equality and liberties of the people, in keeping with the vitality of freedom, sovereignty, territorial integrity and independence of Nepal, and to consolidate a federal, democratic, republican system of governance in order to ensure an atmosphere conducive to the enjoyment of the fruits of democracy, while at the same time maintaining the relations between federal units on the basis of cooperative federalism and incorporating the principle of proportional participation in the system of governance on the basis of local autonomy and decentralization.

To eliminate all forms of discrimination, exploitation and injustice based on the grounds of religion, culture, tradition and to develop the socio-cultural values and democracy is the principle of the state that guides and obliged state to make policies, programs, and laws required to achieve this is one way forward to the rule of law. Policies regarding the political and governance systems of the state include the policy 'to maintain rule of law by protecting promoting human rights' (Art 51 (b) (2)) directs the state to respect, protect and promote human rights of the people by creating environment and institutional and structural provision to ensure it. Though Nepal has already become a signatory nation of various multilateral and bilateral conventions on human rights that include child right, women right, labor right, indigenous right, LGBTIQ rights and many more, but still the execution of these rights seems lacking due to the unequal laws and institutional mechanisms.

(Adhikari, 2020) argued that as a principle, the rule of law ensures the supremacy of the constitutional values in the system of law and preserves fundamental rights, justice and security as obligations of state power for all citizens. All measures of state power (that is, laws, administrative regulations, and decisions of the judiciary) must be guided by the unwritten principle of the proportionality as the most important parts of the rule of the law and the human rights limitations on the exercise of state power.

Separation of power and check and balance is another principle that keeps government on its limitation and controls state mechanism from exceeding its authority. The Constitution of Nepal, 2015 separates the state power both horizontally and vertically. Horizontal separation is the west-ministerial model where state power is separated between legislative, executive and judiciary whose objective is to protect the liberty of the people and assurance of good governance. The constitution guaranteed that there is no concentration of power in a single branch of government and each branch are empowered to exercise its power on their legal limitations and hold the capacity to check others branches of government whether they are exceeding their limitations or not. More importantly, constitution has guaranteed the independence of judiciary, thus assures constitutional supremacy. Adhikari (2020) opined that under the Constitution, there is also a "vertical separation of powers" applicable to the federal structure, down from a very modern perspective of the Constitution the federal (national) level to the provincial and local levels. There are little differences between the federal and provincial arrangements. However, the separation of power at the local level is more prominent, because the local executive is formed independent of the legislature is not based on the parliamentary system.

The constitution focuses on improving constitutional independence of the Supreme Court providing the final authority to interpret the constitution and laws. On this regard (Zhu, G., 2020) argued that lower courts also have the authority to interpret the constitution, but the Supreme Court has the final word, and it sets legal precedent which is binding on all courts and authorities.

### **Conclusion**

The Constitution of Nepal, 2015 is the seventh written Constitution of Nepal in its seven decades history of Constitution making process. Regardless the essence of the concept, 'Rule of Law' as a phrase has been included in the Constitution of Nepal, 2062, Constitution of the Kingdom of Nepal, 1990, The Interim Constitution of Nepal, 2007 and The Constitution of Nepal, 2015. This Constitution of Nepal, 2015 came into force in September, 2015 replacing the Interim Constitution 2007.

It is regarded as one of the most inclusive, democratic, and people's centered Constitution where the basic norms and values of the constitutionalism, rule of law, human rights and justice principle. Rule of law is seen from the preamble to various other provision of the Constitution. The Constitution is committed to multi-party democratic system of governance, civil liberties, fundamental rights, human rights and rule of law.

The Constitution has added the hope and aspiration for the people by assuring that one (government, institution or individual) cannot force people to believe. A tyrannical and despotic government can force people to act, but democratic government cannot. The basic feature of the Constitution is that whether there is ample provision or not to put government in its limit. In this regard, the most important role lies in the judiciary. If the judiciary is competent and independent; both functionally and institutionally then people have faith on it and believe that unless I commit wrong I will be safe. So, the Constitution empowered



judiciary, especially the Supreme Court to test the constitutionality of legislative and administrative action. In this connection, the court exercised the power of judicial review and the essence of this is to maintain rule of law and constitutionalism.

The Constitution has guaranteed the rule of law through the provision of fundamental rights with its compulsory implementation along with the constitutional guarantee of remedy on it. Directive Principle and State Policies shows that Constitution is committed to make obliged government to formulate laws, policies and programs to assure rule of law in Nepal. This is the path shower for the state. Though, question cannot be raised in the court regarding whether these policies and principles are properly implemented or not but government cannot be escaped to implement and answer must be given to the people if raised.

Only enshrining the beautiful provision in the Constitution does not fulfill the people's hope rather it should be properly implemented as well. The purpose of the provisions is clear as the Constitution wants to establish, promote and protect the rule of law but whether these provisions are allowable by the Constitution, what shorts of laws are required to implement it, what kinds of institutional arrangement shall be made in order to proper implementation of the provision are always of serious concern. Only the words in the Constitution does not guaranteed its implementation rather depends on the commitment of the executer, parliamentarians, politicians, civil society members and all stakeholders.

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