



Nepal: Understanding the Travails of Constitution-Making

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ABSTRACT

Nepali people started yearning for democratic rule right from the 1940s when India's struggle for Independence was rising in tempo and strength. Influenced by political developments in India, they formed their own political organizations from the Indian soil. The Nepali Congress party, formed following the model of Indian National Congress, launched a militant struggle in 1950 against the oppressive authoritarian regime of Rana oligarchy which ruled Nepal for 104 years with absolute power. In 1951 Jawaharlal Nehru negotiated a tripartite agreement between the Ranas, the King of the Shah dynasty who had been under virtual captivity during the reign of Rana oligarchy and the leadership of the Nepali Congress party to usher in democracy in Nepal. It was thought at that time that Nepal will soon embark on democratic polity under a Constitution written by a Constituent Assembly. But this was not to be. The Shah king of Nepal who was restored to power as the titular head of a Parliamentary Constitutional Monarchy through the agreement soon asserted his sovereignty. People of Nepal ended monarchy in 2006 at the end of a decade-long conflict and civil strife caused by the armed insurgency carried out by Nepal's Maoists. A Comprehensive Peace Agreement (CPA) signed by the Maoists and the mainstream political parties envisaged a new Nepal — a secular democratic republic instead of the Hindu Kingdom headed by a monarch it used to be — under a Constitution to be written by the people through the medium of a Constituent Assembly. Nepal, however, has failed to write for itself a Constitution even though the people of Nepal elected two Constituent Assemblies for that purpose, first in 2008 and, since it could not succeed in writing the Constitution, again in 2013. It seems that the legacy of troubles for establishing democracy in the erstwhile Hindu Himalayan Kingdom is continuing. This paper tries to give a historical perspective to the current travails of Constitution-making in Nepal and highlights contentious issues which come in the way of building a consensus for writing a Constitution.

KEYWORDS

The Beginning of the quest for Democracy

Nepal's quest for democratic governance began long back in 1940s when the then newly educated Nepalis got inspired by India's struggle for independence and the anti-colonial and democratic political urges sweeping across the whole of the Indian sub-continent, and formed political organizations with the aim of overthrowing the authoritarian rule of the Rana oligarchy. Ranas ruled Nepal with absolute power and authority for 104 years from 1846 to 1951.¹ They were ousted from power in 1951 at the end of an armed struggle waged by the Nepali Congress, the main political party formed by Nepalis in exile in India. The task of this ouster was made easy by the alliance received by the Nepali Congress from King Tribhuvan Shah who at that time was a virtual prisoner of the Ranas in his own royal palace.

The Origin of Shah Dynasty and Rana Oligarchy

Modern Nepal was founded by Prithvi Narayan Shah (1772-1775 AD). Originally a Rajput chieftain of Indian extract holding sway in the Gorkha region lying west of Kathmandu in Nepal², he conquered the then Malla rulers of Kathmandu valley in 1776. By his subsequent conquest of other principalities surrounding Kathmandu valley, he for the first time unified Nepal and brought the diverse religio-ethnic groups under one national authority. His successors undertook a process of expansion of the realm of the Shah dynastic rule, leading to the creation of a Greater Nepal by the year 1786. Nepal then encompassed Tibet in the north and the areas up to the banks Sutluj river in the west, the Tista river in the east and the Terai plains in the south.³ The impulse for and success in territorial expansion continued until Nepal faced defeat at the hands of the British in the Anglo-Gurkha War of 1814-16 which decided the present boundaries of Nepal.

The Rana oligarchy came to power in Nepal in 1846 through an infamous episode called "Kot Massacre" enacted by the founder of the regime, Jung Bahadur Kunwar, who was a

Minister in the court of the then reigning Queen Rajya Lakshmi of the Shah dynasty. Jung Bahadur Kunwar was made the Prime Minister immediately after the Kot Massacre in which he had eliminated almost all his potential political rivals, bringing to a bloody end to a long period of conspiratorial and murderous power struggle among and within a set of influential non-royal noble families. After the death of Prithvi Narayan Shah's son Pratap Shah in 1777, the Shah royal family itself was divided because for most of the period thereafter a minor was on the throne and the effective control of Government was mostly in the hands of a regent or a Mukhtiyar (Minister). There were frequent contestations among different branches of the royal family to wield the royal power by becoming the regent. Different factions within the non-royal noble families, who monopolized the army and bureaucracy including the post of Mukhtiyar, took sides with one or the other of the different factions of the divided royal family. The non-royal nobles made members of the royal family pawns in their power games.⁴

After he was made the Prime Minister, Jung Bahadur Kanwar forced the Shah King Surendra to issue a royal decree recognizing the Kunwars as Rajputs making his family equal in caste status to the royal family,⁵ and he renamed himself as Jung Bahadur Rana. He then divested the royal family of all powers, kept them as virtual prisoners in their palace and inaugurated the 104 years long period of authoritarian reign of Rana oligarchy.

Lawless Rule of the Shahs and Ranas

Both the Shah kings and the Rana rulers could not integrate the whole of Nepal into a coherent political system. The rulers of the various principalities conquered by the Shah kings had not surrendered their full autonomy to the Shahs. They retained control over their own subjects on internal matters, conceding authority to Shahs only in the collection of revenues and foreign relations. This arrangement continued until

1961. The Rana administration tried only to strengthen the system of revenue collection, at first by consolidating the system of patronage of local land-holding elites initiated by the Shah rulers and by confining land-ownership mostly in the hands of the Rana families and their close allies through the Birta land grant system.⁶

Shah and Rana rulers derived social legitimacy and exercised strict control over various social groups through Brahminical Hinduism. The Muluki Ain (Chief Law) adopted in 1854 by the Rana regime legitimized the non-egalitarian Brahminical Hindu social concepts based on ascription of status which relied on the notions of purity and impurity.⁷ The Muluki-Ain in effect functioned as a form of Constitution⁸ and ensured abject subservience of the Nepali masses to the Rana autocrats, who treated Nepal like a private fiefdom. There had nothing in stake for them to attempt for any kind of socio-economic development in the country. The first effort for encouraging education in the country came only when a somewhat liberal leaning Dev Shamsher Rana came to power on 5 March 1991. He also moved to abolish slavery, but was quickly removed as other Ranas felt his moves to be dangerous to their interests^{9,10}. Chandra Shamsher who replaced Dev Shamsher established educational institutions in the country, but only to educate members of Rana families and other feudal elites closely allied to them.

Rana rulers had an agnate system of succession whereby the position of the ruler, i.e., Prime Minister, was to be passed on to brothers seniority-wise and after the turn of the youngest brother to the members of the next generation seniority-wise. Ranas also took many wives and mistresses from different castes. These factors in time created a situation of there emerging a large numbers of Ranas on the roll of succession to the Prime Ministership. This situation led to the division of Rana family member into 'A', 'B' and 'C' class categories, based on the caste status of their mothers, and to the exclusion of 'B' and 'C' class Ranas from the roll of succession.^{11,12} This in turn created severe schism among Rana families with 'B' and 'C' class Ranas resenting their exclusion from power and later working against 'A' Class Ranas, who formed the core of the Rana hierarchy.

Constitution of 1951

At the same time as the politically awakened and newly emerged educated sections of Nepalis, who significantly included the disgruntled group of 'B' and 'C' class Ranas, were mounting pressure against Rana regime, King Tribhuvan Shah hoped to regain the lost power and prestige for the royal family and managed to free himself with the entire royal family from their captivity in the palace with Indian help. The Indian leader Jawaharlal Nehru mediated a tripartite compromise agreement between the King Tribhuvan, representatives of Ranas and the Nepali Congress in 1951 for restoring King Tribhuvan as the titular head of a Parliamentary Constitutional Monarchy.¹³ As per the terms of the Delhi agreement, King Tribhuvan issued a royal proclamation affirming the people's right to be governed by a Constitution drawn up by a Constituent Assembly to be elected in due course.¹⁴ For the interim period, a coalition government was formed with representatives of Ranas and the Nepali Congress Party. An Interim Government Act 1951 was promulgated.¹⁵

The royals, however, soon managed to acquire to themselves all supreme legislative, executive and judicial powers.¹⁶ King Tribhuvan through a proclamation made on 10 January 1954 declared that he alone exercised supreme authority in the country. The Constituent Assembly envisaged in the Delhi Agreement to draw up a democratic constitution for the country was not allowed to be elected. Instead, when political parties formed an alliance and started civil disobedience movement against the autocratic ways of the monarch in December 1957, King Mahendra, who succeeded his father King Tribhuvan, agreed to hold elections to elect a Parliament under Constitution "granted" by him¹⁷. That Constitution of 1959 was nominally prepared by a Drafting Commission but

in fact drafted by the British Constitutional lawyer, Jennings. In the elections held in 1959 under this Constitution, the Nepali Congress Party won large majority and formed the first democratically elected Government in Nepal.

Constitution of 1962

King Mahendra soon dismissed this first democratically elected Government through a coup d'état in 1960. He then introduced a Party-less Panchayat system. Banned all political parties and, in 1962, promulgated a Constitution to institutionalize this system. It centralized power in the hands of the King while constituting three layers of Government consisting of (a) directly elected village and town councils, (b) District Panchayats elected by village and town councils and (c) Rashtriya Panchayat consisting of a majority elected by the district panchayats and the rest including king's nominees and representatives of "class organizations" sponsored by the king. Mahendra claimed this to be a new "Nepali" political system that conformed to the spirit of Nepal's culture and traditions.¹⁸

While the socialistic-oriented veteran leader of the Nepali Congress B. P. Koirala managed to lead the party on the path of resistance to the new system, King Mahendra succeeded in bringing to his side many of the former leaders of that party. A number of different communist groups that emerged in Nepal also decided to work within the system, which was essentially an absolute monarchy on which the institutions of panchayats of different levels were haphazardly grafted to give it a democratic façade. The new political system did not change the essential character of panchayats which have traditionally functioned in Nepal as instruments of caste administration or as judicial bodies in the implementation of Brahminical social regulations. Monarchy also appeased the power structures and vested interests that existed at the local level. The nascent middle class represented by the Nepali Congress was not strong enough to effectively challenge the monarchy. The young generation of the middle class was at first appreciative of the government under the new system for the nominal reforms introduced like the abolition of Birta and other land reforms and the limited measures undertaken for modernizing the society and developing the economy. About 50,000 to 60,000 representatives of the new Panchayat institutions who were the main beneficiaries of these reform and development programmes gave a broad support base for the monarchy.¹⁹ The monarchy also drew maximum support by arousing popular nationalist sentiments. It portrayed political parties as anti-nationals working against country with the support from outside, especially India from where Nepali Congress leaders opposed monarchy.

The limited reforms and development programmes introduced by the monarchy could not alter the power structures and resolve social and economic problems. As a result the regime faced serious political challenges in the 1970s and 1980s. The student community took to streets in 1979 which snowballed into a powerful movement for democratic reforms, prompting the monarchy to hold a referendum on the continuance of the panchayat political system with some reforms, including provisions for direct elections to the Rashtriya Panchayat. In the referendum conducted in 1980, the Panchayat side narrowly won with 54.8 per cent of the votes polled.²⁰ But this could not avert further challenges to the regime which culminated in the *Jan Andolan* (National People's Movement) against the monarchy in 1990 which was joined by all the political parties, different professional groups, human rights activists and even some sections among the panchayat establishment.²¹ Pressure from crowds on the street forced the then king Birendra to dismantle the Panchayat system and hold democratic elections.

Constitution of 1990

An interim government was formed to run the Government until the elections. A new Constitution was announced by the King on 9 November 1990. It was drafted by a Constitution Recommendation Commission (CRC), which was an advisory body. It provided for a bicameral legislature — a House of

Representatives elected directly and an Upper House elected on the basis of proportional representation of system. It formally placed sovereignty in the people, and contained many of the basic features of the liberal model of democracy such as "freedom to organize parties", "freedom to compete in elections", "freedom to organize and campaign openly", "free press" and "free and equal opportunities for all".²² It, however, left option for the King to exercise wide powers, including emergency powers (Article 115) and discretion to "remove the constraints and obstacles in enforcing the Constitution" (Article 127).²³

The radical communist group of Nepal, the Maoists, who had participated in the Jan Andolan along with democratic political parties and an alliance of seven moderate communist parties called the United Left Front (ULF), and some smaller parties and ethnic and regional organizations, who were not represented in the CRC, criticized the constitution-drafting process for its exclusivity. The Constitution of 1990 declared Nepal a "multi-ethnic, multi-linguistic kingdom" and recognized Nepali as the language of the nation. It declared "multi-party democracy" and "constitutional monarchy" as the basic features of the Constitution. During the drafting process, the moderate leftist groups, who were represented in the CRC, opposed the incorporation of these features as they wanted to leave future scope for abolition of monarchy and replacement of bourgeois democracy with people's democracy. However, the pro-Congress and pro-royal stand prevailed on this issue as well as on declaring Nepal as a Hindu state rather than a Secular one. The United Marxist-Leninist (UML), the main group of the moderate leftists in the ULF later in its Fifth Convention held in 1993 even formally replaced the doctrine of People's Democracy with Pluralist People's Democracy and accepted the need to work in the framework of competitive electoral politics.²⁴

The first elections to the House of Representatives under the new Constitution were held on May 12, 1991. The Constitution of 1990 did not help to produce political stability in Nepal. Various Governments formed after 1991 by the Nepali Congress and the moderate communists and the democratic political leadership in general failed to enjoy credibility and respect as they indulged in corruption and nepotism, and intra-party personal rivalries. Parties forged opportunistic alliances and formed governments. In the absence of serious pursuit of the important goals of welfare and development of the people, all the attempts of forming alliance and government formations appeared to have been done merely for gaining and enjoying power.

The Maoist group who had participated in the first elections held in 1991 under the new Constitution "to expose the system from within", soon denounced the Constitution and called for transforming Nepal into democratic republic with a Constitution written by a Constituent Assembly. To achieve this objective, they launched a militant "people's war" campaign which grew in strength by drawing volunteers and supporters from the poverty-ridden common masses of Nepalis, educated sections of young Nepalis who were disillusioned with the promise of parliamentary democracy and radical intellectuals.

In 1991 Nepal was the second poorest country in the world.²⁵ The free-market economic policies adopted by the new "democratic" governments benefited the emerging Nepali middle class, but failed to better the lives of masses of Nepalis who had high hopes from democracy in the cause of which they had been mobilized to oppose the monarchy. Through the decade-long "people's war", the Maoists ideologically challenged and militarily fought the entrenched socio-economic and political system of Nepal in which a small section of hill-based upper caste Hindus monopolized everything. The unjust system had systematically discriminated and excluded the majority of Nepalis on the basis caste, ethnicity, region and gender. The Maoists effectively converted the disappointments and frustrations of the victims of this systemic and systemat-

ic exclusion who were the indigenous people (*janjatis*) of the hills and plains of Nepal, Dalits who were subjected to untouchability and the people of the southern terai plains (Madhesis) who were deprived of opportunities and access to power even while their resources were being appropriated by the hill-centric upper caste Hindus.²⁶ The Maoists thus made their forceful presence in Nepal's political landscape.

The chaotic conditions created by the Maoist insurgency and the failure of the Governments to contain it gave opportunity to the King to find ways of undermining the Constitution. Though the king was only a symbolic head under the 1990 Constitution, he had the advantage of continued allegiance of the Royal Nepal Army (RNA). The elected governments at first hesitated to involve this army for containing the Maoists for the fear that it may lead to a coup by the King as happened in 1960.²⁷

As the Maoists began to inflict heavy casualties on state police security forces from 2000, the army loyal to the king chose to disobey the Government when at last the latter decided to involve the army for repelling the Maoist onslaught. Maoists' call for abolition of monarchy became louder and louder after the sensational royal massacre of 2002 in which crown prince Dipendra killed most members of the royal family including his father King Birendra, his mother, brother and sisters. Birendra's brother Gyanendra, who became King after this incident, dismissed the then Government headed by Sher Bahadur Deuba of the Nepali Congress (Democratic) and dissolved the Parliament in October 2002.²⁸ He then ruled the country indirectly through the Governments personally appointed by him. In February 2005, Gyanendra seized full powers in his hands and started ruling directly.²⁹

As the democratic political parties were co-existing with the monarchy under the scheme of the Constitution of 1990, they had trusted the king to abide by the Constitution. This co-existence had the support and approval of India and the international community. The King breached this trust by his authoritarian take-over of the full control of the Government. This breach of trust nudged the parliamentary parties to reconcile to the Maoists' position of aiming for a republic by overthrowing the monarchy.³⁰ They did overthrow the monarchy by joining forces with the Maoists during the 19 days of Jan Andolan-II in April 2006. Buckling under the pressure of the massive people's protest in the streets of Kathmandu and at the palace gate, Gyanendra announced the reinstatement of the dissolved Parliament, which then declared Nepal as secular state, renamed the Royal Government of Nepal as the "Government of Nepal" and the Royal Nepal Army as the Nepal Army, bringing it under the control of the Council of Ministers, and the king and the royal family were dispossessed of their immunities and privileges.³¹

Comprehensive Peace Agreement (CPA) and Plans for a Republican Constitution

After liquidating monarchy, Maoists and the democratic political parties signed A Comprehensive Peace Agreement (CPA) on 21 November 2006. The CPA envisaged constitutional change as a lasting solution for the persisting economic and social inequalities.³² It declared that that people of Nepal shall make their own Constitution through a Constituent Assembly. In 2008, they elected a Constituent Assembly (CA) for the first time in history. In the CA, elected through a combination of the First-Past-The-Post (FPTP) and the Proportional Representation (PR) electoral system, the Maoists emerged as the largest party winning 240 out of the total strength of 601. This surprised not only the democratic parties inside Nepal but also the world outside Nepal. The CA elected in 2008, which also doubled as a Parliament, became the most inclusive legislature in Nepal's history with a significant number of "Dalits" for the first time, and more women, more Madhesis and more members of the indigenous communities. The elected CA-cum-Parliament formally abolished monarchy and declared Nepal to be a Democratic Republic.

It seemed that by writing a Constitution, Nepal would establish itself as modern democratic country coming out of a decade-long conflict and strife. International community including India rendered help in conducting elections to the CA and educating the people and political parties about the various issues involved in Constitution-making. UNDP-Nepal identified the following issues to be addressed while writing of a Constitution for Nepal:- (a) Restructuring of the State with federalism, (b) Diversity, (c) Human Rights, (d) Social inclusion, (e) Justice system, (f) System of Government.³³

In spite of high hopes and various help and suggestions rendered by the international community, the CA elected in 2008 failed to write a Constitution, because the major political parties could not come to a consensus over crucial issues like how to restructure the country into a federal system of States and what form of government to adopt. Having failed to arrive at a consensus on these issues, the first CA was dissolved in 2012.

The reasons for the failure of the first CA are many. One reason is that the CPA and the Interim Constitution had stipulated that the elected CA should adopt the Constitution by consensus and, if the consensus failed, by clause by clause passing with a two-third majority. Adoption of Constitution through consensus was not possible because of the sharp divisions between the Maoists and the different Madhesi parties, on one side, and the Nepali Congress (NC) and the UML of the moderate left, on the other side, on the main contentious issue of how to restructure the state into a federal republic. The NC and UML are in fact not the votaries of federalism though they had accepted federalism in principle in the CPA. Now, after having agreed to federalism in principle, they wanted the new federal state of Nepal to be based on limited number of federating provinces created on the basis of economic viability which is not acceptable to the Maoists and the Madhesi parties who strongly favour federating provinces to be created on the basis of ethnic and geographical-sub-nationalist identities in order to ensure political inclusion of the ethnic and regional groups of people who have traditionally been excluded from power.

Another issue which sharply divided the two opposing sides is the form of government. The NC and the UML want a Westminster model of parliamentary democracy with a Prime Minister enjoying full executive powers, the Maoists prefer a popularly elected President to have full powers, which was tactically supported by the Madhesi parties though they knew that a parliamentary system would serve their interests better.³⁴

A third issue of sharp contestation is the electoral system to be adopted. The NC and UML want the FPTP system, while the Maoists are for PR system. There are also other issues in which the NC and UML and the Maoists hold different views. These include the question of setting up an independent constitutional court for adjudicating on constitutional disputes which the Maoists favour but which the NC and UML are opposed to, arguing that a Constitution Bench within the existing judiciary will serve the purpose.

Even if, in principle, consensus on these contentious issues could have been arrived by adopting possible middle grounds through negotiations and concessions by each side, the possibility for this was nullified because of the fear of the NC and UML about the Maoists capturing full state powers after 2008 elections. The move of the Maoist leader Prachanda who became Prime Minister after 2008 elections to dismiss the chief of Nepal Army was perceived by the NC and UML as part of the Maoist design in the direction of capturing the state. Therefore, the concern that was foremost in the minds of the leaders of the NC and UML in this period was how to weaken the position of the Maoists in power. This led to the resignation of Prachanda and thereafter formation of different governments subsequently. In the resulting political instability, political parties were not very much concerned about solving the contentious issues involved in the writing of the Constitution.

The first elected CA-cum-Parliament, however, achieved success in the negotiated settlement of the issue of integrating the Maoist fighters of the People's Liberation Army (PLA) in the Nepal Army. Turning the Maoists into a full-fledged democratic political party is also a significant achievement of the political processes of the period of the first CA (2008-2012).

The failure of the first CA to write a Constitution for Nepal forced people of Nepal to elect second CA in November 2013 in which the Maoist party (UCPN-M), which dominated the first CA was reduced to third position. The second CA has set up five Committees to speed up the process of constitution-making by resolving the contentious issues that hobbled the first CA. Though a deadline of January 2015 had been fixed to complete the Constitution drafting process, that deadline has passed without making any progress towards consensus. The Political Dialogue and Consensus Committee of the CA has been unable to arrive at a consensus on disputed issues. There are now two options open: either to complete the Constitution-making by passing by two-third majority the clauses regarding the still contentious issues which is in the realm of possibility for the parties opposed to Maoists, including the pro-monarchist parties represented in the CA, as they can muster a two-majority in the CA, or to wait for more time to evolve consensus through continued negotiations and give and take process.

Clearly, choosing of the first option by the NC and the UML, by bringing in the pro-royalist parties to their side, to avoid an inclusive federal political set up which institutionalize inclusion of Madhesis and marginalized ethnic groups will result in continued political instability in Nepal. It will be difficult for them to totally neglect the aspirations of the traditionally excluded groups like Janjatis and Madhesis who want an inclusive federal set-up for Nepal, for though they could gain some political representation in the 1990 democratic set up — for e.g., the Nepal Sadhbhavana Party representing the Madhesis was part of the different coalition Governments formed in the post-1990 period, by and large the people belonging to these groups still felt “excluded” from the political system and its benefits.³⁵

The fact that a faction of Maoists led by Mohan Vaidya Kiran has split and formed a separate Communist Party of Nepal-Maoist (CPN-M) arguing for continuation of revolutionary struggle, has weakened and demoralized the Maoists.³⁶ Maoists of the UCPN-M have toned down their radical position on federalism and inclusion, but the dissident Maoists of the CPN-M, which boycotted the 2013 CA elections, are leading a 30-party alliance seeking ethnically based provinces,^{37, 38} while the mainstream political parties are sticking to the elite stand of not letting the country to be divided on the basis of sub-national identities at any cost. The demand for federalism is too much for the entrenched hierarchies of Nepal to stomach. Elites have reportedly even openly expressed that the mainstream political parties, which protected their interests under the earlier political order, gave away too much to the Maoists in the CPA.³⁹

With political process started with the CPA of 2006 continuously failing, voices seem to be raising, predicting the restoration of monarchy in Nepal along with its status as a Hindu nation.⁴⁰ The coming to power of the BJP in India in 2014 has also raised a possibility for Indian support for this reversal of the position of Nepal as a Hindu nation. However, the pronouncements of Prime Minister Narendra Modi during his visit to Nepal and his address to the CA in August 2014 opposing the adoption of a Constitution by voting and supporting the writing of Constitution through consensus so as to give a sense of ownership to all including Maoists, Madhesis and marginalized ethnic groups indicate that Nepal's journey towards a secular and inclusive democracy is irreversible though it may take some more time to chart a middle ground on the contentious issues involved in the Constitution-making process.

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