

# The Life and Death of the Constituent Assembly of Nepal

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The working of the Sambidhan Sabha of Nepal provides a guide on how not to write a constitution. The Constituent Assembly was meant to be a place for discovery, healing and nation-building but ended up a divisive arena that neglected jurisprudence and succumbed to radical populism.

The four-time renewed term of the Constituent Assembly (CA) of Nepal was to expire on the midnight of 27 May 2012, the date confirmed as non-negotiable by the Supreme Court. On that day, as the senior-most leaders of the political parties went about the motions of seeking compromise on the definition of federalism, day turned into night and the clock moved towards, and finally past, the midnight hour. Rather than do the closing rituals and arrange for a formal transition to avoid a constitutional vacuum, Prime Minister Baburam Bhattarai decided to announce new elections – for a Constituent Assembly.

The floodlights had already been turned off at the International Convention Centre where the CA was housed, and most of the 601 members who had waited listlessly since midday had already left the darkened compound. Only the odd television journalist was present, delivering sombre requiems to an institution elected in April 2006 to restructure the state, institutionalise the republic, and reformulate state society relations in the oldest nation state of south Asia. No leader, not even the CA chair, Subhas Chandra Nembang, turned up to announce the passing of the institution. “It was a dog’s death”, said one commentator. The best one could find by way of official announcement was a line on the CA’s website, which stated, “Constituent Assembly of Nepal is dissolved after 27 May, 2012”.

The abandonment of the assembly exemplified how the house was manhandled by new political forces bent on consolidating their position rather than drafting the basic law. This ultra-utilitarian tendency was most prominent with the Unified Communist Party of Nepal (UCPN) (Maoist) Party and, towards the last year, the United Democratic Madhesi Front. The Nepali Congress and the Communist

Party of Nepal (Unified Marxist-Leninist) (CPN-UML), as the parties with a democratic legacy, were weakened by fragmented leadership and reduced to defensiveness against the Maoist momentum in the assembly.

Most of the time spent on constitution drafting was pretence, backed by little jurisprudence, poor understanding of comparative south Asian experience, and diverted by a surfeit of donor-funding for overseas tours and in-country activism. The independence of the CA was also affected in the last year by the involvement of India in the federalism debate. On federalism, there was a significant gap between what the people wanted, as indicated in public opinion polls, and what the CA members sought to promulgate. With the house and national intelligentsia in thrall of radical populism, it was unlikely that the CA would have delivered a document representative of the people of Nepal in all their diversity of identities and demands.

Four years were squandered, time that should have been spent on healing, rehabilitation and reconstruction following the decade-long insurgency. The CA emerged a divisive arena rather than a place of compromise amidst diverse demands, between the political parties, classes, linguistic groups, regions, castes and ethnicities. The constitution that emerged would have made one side or the other militantly unhappy on the matter of federalism. The public seemed to know this instinctively, which was why the morning of 28 May dawned calm, contrary to the conflagration that many political soothsayers had predicted.

The primary responsibility for the CA’s failure lay in the hands of the UCPN (Maoists), as the largest party in the house holding 38% of the votes. Actually, the party chairman Pushpa Kamal Dahal manipulated the house for his own purposes even more than his party’s, pushing the other parties towards unhealthy compromises. In the morning-after blame game, the Maoists accused the Congress and UML of having killed the CA because of their position against identity-led federalism, while the latter maintained

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that the Maoists had pulled the plug, having no more use left for an institution they had used to consolidate themselves above ground. Many internationals were mortified by the turn of events, seen as one more proof of the chicanery of Nepal's political class.

It has not been remarked enough that the entire constitution-drafting over four years was conducted under duress, amidst intimidation and threats of revolt and "state capture" by a Maoist party that was busy entrenching itself as part of the state establishment. The assembly laboured under the shadow of the gun: the cantonments with their combatants remained under Maoist chain-of-command throughout. All the agreements made on critical matters were therefore tainted by the threat of violence, including the deals on governance structuring, separation of powers, electoral system and the definition of federalism. Additionally, given that the CA also doubled as "Legislature-Parliament", with the votes he commanded in the house the Maoist chairman was able to get the UML and Congress leaders to agree on vital issues by dangling the prospect of prime ministership.

Democratic Nepal has sacrificed much time to chaos and uncertainty – 10 years of war plus six years of "political transition" – with nothing to show for it other than further impoverishment of the already-poor. The lifetime of the CA saw more than a million citizens flee as migrant labour to the Gulf, Malaysia, and the poorest to India. For all this pain, a Maoism-manipulated constitution was about to be foisted on the public, with the other parties acquiescing out of exasperation, fatigue and embarrassment. That was not the kind of constitution-writing the people deserved, and we now know how to be more rigorous the next time around. Only those who believe that Nepal deserves a new constitution regardless of universal democratic values and principles of jurisprudence would have thought that things were going well with the CA.

### **Compromised Drafting**

The rules of procedure of the CA themselves discouraged the spirit of compromise so important for constitution-writing. The 10 thematic committees

required only a 50% majority to send their recommendations to the plenary, which ensured maximalist grandstanding from the start. The fact that both the CA and Legislature-Parliament had the same members proved fatal, because government-formation always took precedence, adding both rancour and unprincipled compromise. This duality was to the advantage of the UCPN (Maoists) chief Dahal, who used the lollipop of government-formation to get Congress leaders to abandon their insistence on the parliamentary system and agree to a directly-elected presidency. The preposterous departures possible was evident in the final compromise on a mixed system, where a president directly elected by the people was expected to remain "constitutional" while a prime minister elected from a weak parliament (a mix of directly elected and proportionally appointed members) was expected to be an effective head of government.

For all practical purposes, the CA stopped being a house of 601 members at about the time that it self-extended its term at the end of the mandated two years, in May 2010. Thereafter, the negotiations entered the drawing room where a dozen leaders of the UCPN (Maoist), Congress, UML and the Madhesi Front, called the shots. The rules of procedure were mauled as the time of promulgation neared, and voting procedures truncated to near-nothingness. The original provisions for countrywide public consultations on the constitutional document were made pro forma, and then done away with altogether.

Much of the pending issues were pushed into the Constitutional Committee, then further out to the "Dispute Resolution Sub-Committee" chaired by Dahal, and from there on to the cabal of party bosses meeting in the hotels and resorts, and once even in Zurich, Switzerland. The claim after the CA's second year that "80%" of the drafting work was complete referred to mainly the word-count. The most critical issues of federalism, governance, separation of powers and electoral system remained unresolved and bunched at the very end.

Only on 15 May 2012 was a deal reached between the three main parties

and the Madhesbadi leaders, on the mixed presidential/prime ministerial model, a direct/proportional election system, a constitutional court, and 11 provinces whose names would be decided by the respective future provinces. Looking innocuous from the outside, each of these compromises would have weakened representative politics, compromised the judiciary, and created provinces that were economically unviable.

Intriguingly, on the final day of the CA, neither the members nor even the chair of the Constitutional Committee had in their hands the agreed text of what was supposedly to be promulgated later in the day or night. The drafting exercise had become a farce long before the 27 May.

### **Road to Assembly**

The first demand for a Constituent Assembly was made during the dying days of the Rana regime in the middle of the last century, but it was scuttled in an extended tussle between the Nepali Congress and the monarch Tribhuvan and later his son Mahendra. The parliamentary election of 1959 brought B P Koirala's Congress Party to power, but then a royal coup led to three decades of the Panchayat autocracy. In 1990, Mahendra's son Birendra was forced to submit to the people's will and a committee was tasked with writing the post-Panchayat constitution. It was the constitution promulgated in November 1990 that introduced the daylight of democracy to the people of Nepal.

While the bad faith and incapacities of the party bosses became evident soon enough, the parliamentary order was self-correcting and society was well on the road to social transformation, participatory development and economic growth. The promulgation of the Local Self-Governance Act in 1999 promised democracy from the villages and districts upwards. The parliamentary system would have ironed out the kinks in representational politics, including the obvious domination of the political and administrative echelons by the Bahun (hill brahmin) caste, but it was not given the time. In February 1996, a small political party unhappy with its poor showing in Parliament, decided to go underground against the parliamentary system.

The parliamentary parties were too busy bickering to respond to the gathering Maoist momentum in the hinterland, and the royalist army was kept from engaging the rebels by Birendra and, later, his brother Gyanendra. In their “people’s war”, the Maoists made use of the midhill terrain, the absence of state administration in large parts, anti-Indian ultra-nationalism, the general disgruntlement with the Kathmandu-centric state, lethal action against community leaders in the districts, and the youth’s attraction to radical leftism. State brutality added to the rebels’ ranks, as did the Maoist use of child soldiers. The disbandment of locally elected bodies (village and district) in 2002 allowed the party to move into the political vacuum that was created all over the country.

Even as the Maoists consolidated and the war became more conventional, the rebels began to lose ground to the army. Meanwhile, Gyanendra abandoned his secret negotiations with the Maoist chairman and conducted an army-backed coup to grab absolute power from the parliamentary parties in May 2005. At about this time, India became interested enough to facilitate meetings between the parliamentary parties and the Maoists, and a 12-point deal was inked between the Congress, UML and the Maoists in New Delhi. In order to save face with the cadre as they abandoned the people’s war, the rebel leaders needed agreement on a constituent assembly, which was agreed to.

The 12-Point Agreement provided a fillip to the announced movement against Gyanendra’s autocracy, and upon its success in April 2006 the disbanded Parliament was reinstated. As the Maoists came above ground, their skills at propaganda and coercive powers put the other parties on the defensive. Political decisions were taken that went beyond the People’s Movement’s two-point demand of peaceful politics and end to royal autocracy. Girija Prasad Koirala ended up providing 83 seats in the revived Parliament to the Maoists who had emerged above ground, the same number as held through elections by the UML of the mainstream left.

With the last general elections having been held in 1999, the political class and civil society were so desperate to go

back to representative governance that they failed to insist on the disbanding of the Maoist fighting force before the elections of April 2008. (Their lassitude is also explained by the fact that they had not bargained on the runaway Maoist success.) Nor was the international community, including the United Nations Mission to Nepal (UNMIN), alert to the possibility of the cantonments influencing the elections. The Maoists were therefore gifted an overwhelming psychological advantage during the polls and thereafter. The only person who could have given competition during the elections to Dahal, the dynamic demagogue, was the old warhorse Girija Prasad Koirala. But Koirala did not step out to campaign, weakened by emphysema and also possibly waylaid by Dahal’s promise of elevating him to be the first president of the republic.

While perhaps a third of the electorate would have freely opted for the Maoists as a vote for change against the known parties and faces, much of the Maoist victory was assured through intimidation. The original November 2007 date for elections was scuttled because the party was not “ready”, but it had its system of coercion in place by April 2008. The leaked “Shaktikhor video”, containing an extraordinary harangue by Dahal to a group of ex-combatants, exposed the step-by-step Maoist strategy of fear-mongering to win the CA elections. The other parties were prevented from even entering large parts of the districts for campaigning, and the election-day itself was rife with polling booth capture and coercion. When the Election Commission was approached to nullify voting in several posts, its chief refused to act, stating that the assembly elections must be seen as part of the peace process. Among the influential western donors, a false notion was created that raising the stakes would invite a Maoist walkout on the peace process.

### Drafting under Duress

The CA was called at a time when Nepal was reeling under multiple, cross-cutting challenges. These included the need for post-conflict rehabilitation, inter-community dialogue, economic revitalisation, restart of development activities, revival of local government, and redrawing the

relationship between Kathmandu Valley and the countryside. The new republic had to be consolidated and the state made capable of reasserting its presence all over and ensuring rule of law.

The CA’s work was made difficult by the lack of an intio agreement on fundamental principles to guide the constitution-writing, and the place became the ineffectual cauldron into which the multitudinous demands were poured. Agreement on a democratic constitution to be adopted by the “rainbow membership” of 601, in place through a 50-50 mixed system of direct elections and proportional representation, would have greatly enhanced the document’s acceptability. Unfortunately, differences were exacerbated and the society left more divided than ever. No one was even counting how much had been lost in terms of national momentum during the four years of the CA’s life – in development, economic growth, social cohesion and international standing of the Nepali state.

The Maoist party clearly saw the road to the CA as opportunity for state capture it could not manage via the battlefield. The assembly would be the place to try and define a one-party state through a “people’s republic constitution” (*jana-sambidhan*), with the proposed text to be found in a model constitution unveiled by party Vice Chairman Baburam Bhattarai in March 2009. The party leadership made no effort to hide its agenda for overwhelming the state, available in its pronouncements, documents and actions.

If the CA could not be used to construct a state structure that was amenable to one-party rule, the alternative for the Maoists was to break state institutions and introduce chaos to such a degree that it would prove useful for the party’s advancement. Step by step, attempts were made against the bureaucracy, police, army and the judiciary.

The one area of disagreement within the Maoist triumvirate leadership lay in the fact that while Mohan Vaidya openly advocated revolt, Dahal-Bhattarai were more circumspect, especially in front of western and Indian interlocutors. The two “pragmatic” leaders used hoary sloganeering to keep the cadre mollified, but were quite willing to go for government

capture if the takeover of state proved impossible. As far as Dahal-Bhattarai were concerned, the fait accompli of the Maoist-run state would then be placed before the international community, as the royal Panchayat regime had done five decades earlier and lasted for three.

The best the parliamentary parties could do in the constitution-drafting was to try and decelerate the Maoist juggernaut, hoping it would be forced into the democratic path in spite of itself, through the sheer passage of time and proximity to state power. While everywhere else in the world the Maoists were underdogs, in Nepal they emerged after 2008 as the most powerful force within the national establishment. However, this was not accompanied by the rapid democratic transformation demanded by the people and the CA deadline.

After the April 2008 elections, the UCPN (Maoist) promised to the other parties that the cantonments would be disbanded by September of that year. However, despite repeated declarations of handover and even a sham flag-lowering in January 2011 in front of appreciative western diplomats, the Maoists did not transfer the cantonment supervision to the army until March 2012 – that too only after a sudden danger of mutiny in the ranks by the Vaidya faction.

The overseas observers preferred to perceive the CA term as a “cooling off” period for the Maoists, which meant that the institution was seen more as a tool of the peace process than for drafting Nepal’s basic law. But, intriguingly, given their deep bias against the mainstream parties as “status quo forces”, the internationals were not proactive in demanding that the UCPN (Maoist) fulfil its part of the bargain with the people – turn democratic, give up the cantonments, and formally declare abandonment of the politics of violence. This international indulgence allowed Dahal-Bhattarai to tighten their grip on the government machinery even while they dragged their feet on constitution-writing and the peace process.

When challenged for their palpable drift, CA members of the Congress and UML parties claim that they were engaged round the clock in fending off the Maoist attempt to impose a jana-sambidhan. The

examples of nomenclature would suffice to illustrate the rearguard battle of the democratic parties, they say – the Maoists refused to allow any reference to *bahulbaad* or *sansad* (pluralism, parliament) in the document, while it was all the others could do to keep a laudatory reference to the “people’s war” from being included in the preamble. “From press freedom to the right to private property, it was holding action throughout”, said a Congress Party lawmaker.

The Congress and UML were wracked by internal divisions, weakened in the districts due to the Maoist targeting of their cadre, and unable to dynamically address the Nepali public on critical choices before the CA. While the democratic-minded assembly members toiled in the trenches, their top leaders made compromises on critical matters of governance, electoral system and the judiciary, willing to drag the country into a fault-ridden constitution, all in the hope of government positions. One would have expected some of the Madhesi leaders with democratic socialisation, and now leading new political parties, to stand up for pluralist values in the CA. However, they were compromised due to the cohabitation with the UCPN (Maoist) in government.

The western donor community, with its deficient reading of Nepali social relationships and rapidly evolving political landscape, was influential in the constitutional discourse through its funding of activist non-governmental organisations (NGOs), workshops and academics. The failure and ultimate collapse of the CA firstly requires introspection from the Nepali political class and civil society, but the donors and diplomats who were such a proactive presence during the life of the CA cannot be absolved entirely.

### The Federalist Debate

According to the 15 May agreement between the main political forces, the country was about to be handed a mixed presidential-prime ministerial system which, in the Nepali context, was ready-made for the evolution of an autocratic presidency. If the fount of all social justice, economic growth and social development is democratic practice, then the polity was about to discard it with eyes wide

open. The tenets of liberal democracy could only be applied in the diverse landscape of Nepal through parliamentary order, but it was being abandoned by its own loyalists in the Congress, UML and the Madhesi Front. Meanwhile, it was as if the Kathmandu cognoscenti and the international community, watching so intently, had no sensitivity to the fact that Nepal had suffered 30 year autocratic kingship of the Panchayat. Society was being readied for rule-by-commis-sar, even as state institutions had already been weakened

If promulgated according to the 15 May deal, the new constitution would have introduced a mixed election for the House of Representatives, with 55% of the MPs directly elected and 45% through proportional representation. This privileging of the proportional system, while promoted as a tool for inclusion and appropriate for the CA elections had it been properly applied, would have continuously weakened the representation of the people in the national legislature. With the identity movements of the hills and plains having gained such potency over the past decade, it was intriguing that the ethnic and Madhesi stalwarts did not want to fight for “proportionality” in the candidate rosters of the political parties, and were instead willing to weaken the representative power of parliament through a mixed electoral system.

In line with their repeated attempts to weaken the Supreme Court, the Maoists sought the reappointment of all judges after the promulgation of the new constitution. This they could not manage, but they did get agreement on a constitutional court. In itself, such a court was not undemocratic, but the installation of what would be seen as an alternative judicial authority at a sensitive point of political transition would have weakened the Supreme Court, which was battling all alone to stop the run of impunity promoted in large part by the state itself.

While the electoral system, judiciary and structure of governance were important matters to define Nepali society far into the future, there was surprisingly little debate on these. The compromises made by the politicians were accepted silently by civil society as a Maoist fait accompli, even

as the debate was fulsome, loud and polarising when it came to defining federalism.

As the Madhesi movement erupted in the winter of 2007, according to its demands the Interim Constitution was amended to define Nepal as a “federal” republic. The actual delineation of the provinces and definition of centre-province relations was to await the CA, where this matter ended up being the most contentious. The UCPN (Maoist) moved in to become the firebrand promoter of ethnicity-based federalism, jettisoning the plank of class struggle, in a country of mixed habitation to the village level. The right of selected communities to political prior rights (*agradhikar*) was also bandied about, adding to the consternation of many communities. The Madhesbadi force became a Maoist ally with its own demand for a single, elongated plains-specific province (*ek madhes ek pradesh*). Meanwhile, all sides preferred to forget Nepal’s recent successes in decentralisation and local governance as if it would poison federalism.

A division emerged between those who believed that provinces must be defined on the basis of economic viability (*samarthya*) and others single-minded in their demand for identity-based division of the country to counter historical marginalisation by the Kathmandu centre. While public opinion polls showed that more than 70% of the population were against identity-defined federalism, the momentum within the CA was in the opposite direction. The ethnic and Madhesbadi stalwarts who rooted for provinces by identity seemed to detect no contradiction in the Maoist chairman’s steamroller for a directly elected and centralising presidency, which flew in the face of a devolved federalism.

The CA’s State Restructuring Committee proposed, by majority vote, a 14-province federal model with eight to nine ethnicities getting their own provinces – in a country of mixed habitation with more than 100 officially recognised communities. Even though the committee had defined several sub-heads under “identity”, including language and culture, it was the criterion of ethnicity that was privileged. There were few to remonstrate when the dalits, making up the second largest population

category, were asked to accept a mercurial “non-territorial federalism”, pushed by some donor-funded activist groups. Meanwhile, the Bahun-Chhetri community, making the largest proportion in the population, smarted under the given category *anya* (other) that the Interim Constitution had relegated them to.

As the CA deadline of 27 May approached, the federal discourse trifurcated among those who argued against federalism, who stood for definition by economic geography, and who sought identity as the exclusive defining criterion. There was even a forced attempt to create a binary in which all who rejected identity-based provinces were labelled “anti-federalist”, including those who believed in provinces by economic-geography. While the ethnic stalwarts in the hills insisted on provinces named for the dominant ethnic groups (*ekal pahichan*), in the plains the focus was on the indeterminate Madhesi identity, which variously did and did not include the Muslim, Tharu and plains dalit.

From one perspective, the campaign to carve out economically unviable units in the hills seemed to be an irate reaction to control of the national polity by the “upper” castes, particularly the Bahun, during the democratic era after 1990. However, the proponents seemed not to consider that the Bantustans thus created would lead to economic decline of the very communities sought to be privileged. Nor did they study whether ethnic politics, once it was sanctioned, would end up penalising the privileged communities – nowhere more than 35% of the population in the proposed provinces – as the others “ganged up”.

As far as the Tarai plains were concerned, the Madhesbadi leadership seemed not to prefer a federal model for prosperity, where the wealth of the hills in the transforming economy would be shared by the people of the plains through “north-south” delineations. The establishment of plains-specific federal units would hold the possibility of preventing the plains population from enjoying the highland resources, including hydropower, stored reservoir water for downstream irrigation, as well as tourism, agro-forestry and service industries. A

sliver of a province running the 500-mile length of the Tarai seemed to make little sense in terms of the administrative logistics, economic resource, and linguistic and caste/ethnic diversity – and it was incongruous for the Madhesi Front itself to be lobbying for it.

### India’s Involvement

The evident involvement of the Indian state in promoting plains-specific province(s) in Nepal was more than surprising. Beyond the matter of whether it was proper to get involved in another country’s constitution-writing, one was forced to look for the logic behind New Delhi’s position. There was no telling whether it was geopolitics vis-à-vis China; the perceived security vulnerabilities linked to the open border; the exasperation with the Kathmandu-centric state requiring build-up of an “alternative” power base; or the language politics of the Ganga plains (Hindi vis-a-vis Awadhi, Bhojpuri and Maithili, all recognised as national languages in Nepal).

In the weeks before the CA’s term expired, the Madhesbadi and ethnic leadership decided that it was now-or-never time to press their demands. Pressure mounted on the Congress and UML to accept single-identity provinces in the hills and one/two provinces in the plains, but they balked, fearful of a backlash from other communities including the Bahun-Chhetri. The ethnic stalwarts closed ranks behind the Nepal Federation of Indigenous Nationalities (NEFIN). In the Tarai, there was a brewing campaign to promote separate linguistic identities (Awadhi, Bhojpuri, Maithili), but then a bomb blast in Janakpur killed five Maithili cultural activists, which immediately dampened the activism elsewhere.

In private discussions, Dahal would concede with UML and Congress leaders that, despite his public rhetoric demanding many provinces by ethnicity, six provinces would be appropriate. However, he said he did not dare go public with that. The Maoist party – the triumvirate made up of three Bahuns, incidentally – had sought to cynically use the ethnicities to build the cadre base, but the campaign was now going beyond the party’s grasp. Dahal sought to have it

both ways when, with society on edge as the assembly deadline neared, he suggested that the ethnic activists descend to street action against the “anti-federalists”. This call was contributory to the communal flare-up in the last days of the CA. Meanwhile, a Bahun-Chhetri campaign arose to demand indigenous status as given to the ethnicities, while tension erupted between the Tharu and the hill people of the far west. At the penultimate moments of the CA’s life, the silent smaller communities were beginning to spring to life; whichever way the federal debate was decided in the promulgated document, the descent was sure to be from the frying pan into the fire.

### The Day of Reckoning

The farce of the last day of the CA, 27 May 2012, only served to indicate the depths of incapacity that the House had descended to. The members of the CA remained at the International Convention Centre precincts the whole day and deep into the night without the House being called. It seems Bhattarai and Dahal had already decided to announce elections, their plan was merely to waylay the other players till midnight. Once, the two even invited the NC and UML leaders to the prime minister’s residence in Baluwatar, but then disappeared into another part of the building, making the guests believe in conspiracy.

The widespread belief is that the CA’s demise came from the deadlock on federalism. Certainly, the ethnic stalwarts were unhappy with the challenges to “single-identity provinces”, though they were said to have conceded to “multiple-identity” in the last hours of the CA’s life. The Madhesbadi leaders resisted the formation of more than two plains-based provinces. Those who believed in samarthya were unenthusiastic about the deal on 11 provinces, convinced that it would deliver a failed federalism. During the final days, word went around that the Chinese were against identity-defined federalism in Nepal.

Beyond federalism, too, none of the players were fully enthusiastic about the final possible outcome – the Maoists for their inability to force through a complete “people’s constitution”; the heavy-heart

of those who had abandoned the parliamentary model; and the royalist, Hindutva right which believed that the new constitution would further consolidate the republic and prevent a return of monarchy that they were pinning their hopes on.

While there was certainly enough polarisations and suspicions to go around, it was a more pedestrian calculation that led to the collapse of the CA – Baburam Bhattarai’s desire to continue in government. Were the constitution to be promulgated, the Interim Constitution called for the dissolution for the CA and continuation of the Legislature-Parliament till elections. It was a certainty that the disgruntled Mohan Vaidya faction within the UCPN (Maoist) – livid against the Dahal-Bhattarai duo for having given up on the “revolution”, leaning too far towards India, and having compromised on “ethnic federalism” – would have joined in a no-confidence motion. The Congress, UML and other parties would have been only too happy, and there would be a majority for the motion to pass. The ouster of Baburam Bhattarai and his cabinet from Singha Durbar was therefore guaranteed with the promulgation.

It was Bhattarai wanting to remain prime minister for some extra time, then, that took the life of the CA. For this, he had to manufacture a situation where the CA could not meet even for a ceremonial departure. This also meant that when the midnight hour arrived, the country had no constitutional road map, only the announcement of a new election to the CA made without consensus, as required by the Interim Constitution.

In the two-year extension of the Constituent Assembly beyond its original two-year mandated life, the Assembly was hijacked by the leaders of the three largest parties and the Madhesi Front. Had Prime Minister Bhattarai not moved forward with his personal agenda of dissolution, the political bosses would have agreed on the controversial issues on the last day and the country would have got a polarising document for a constitution. Because the public was denied the education that comes from open debate, suspicion mounted on all sides even as the CA’s term drew to a close. Enhanced intercommunity distrust was the CA’s final gift to the populace.

A fine constitution written with the help of social scientists and jurists and promulgated by the 601 “rainbow membership” would have ensured both rigour in the writing and ownership by the populace, but there was not the due diligence required in such a vital exercise. No more than a couple of members of the entire house could properly be described as “jurists”, and the CA was hurt by the absence of comparative jurisprudence among the scholars in society at large. The civil society stalwarts, made famous by their fight against the king just a few years earlier, preferred silence when it came to the difficult choices before the CA, whether on federalism, form of government or electoral system.

As a textbook case on how not to write a constitution, the Nepali exercise also suffered from an excess of “donor funding”, with overseas trips, overseas expertise, and the diversion of local activists and scholars into workshops and consultancies – all of which served to reinforce the monochromatic view of Nepali society harboured by so many ambassadors and programme officers. As the favoured CA members trooped to South Africa and Switzerland, the constitutional experience of the south Asian neighbourhood – India, Pakistan, Bangladesh, Sri Lanka – was scarcely considered. India’s experience of constitution drafting and its subsequent history of constitutionalism and constitutional law failed to make an impact on Nepal’s would-be framers as they collected frequent flyer miles.

### Past the Horizon

The Constituent Assembly served as a classroom for the people of Nepal, a tuition session in preparation for a later time of more rigorous constitution-writing. For the first time, amidst the churning of the identity movements, Nepali citizens got to understand the diversity of identities within the ancient nation state, the difference according to ethnicity, caste, faith, class, language-dialect, district, geographical origin and even altitude. One could perhaps take satisfaction that the non-promulgation of a likely problematic constitution prevented a further polarisation of society, even though democratically-minded citizens would have

fought to defend open society and rule of law whatever the nature of the document handed down.

With the death of the CA on 27 May, Nepal was pushed into constitutional free fall, without a legislature or a road map decided by the elected representatives. This has happened at a time of multiple dangers, from inter-ethnic tensions to economic distress and near-total loss of faith in public institutions. It is not clear that even the most dynamic political force can lead the way out of the maze. While the radical left and the Madhesbadi parties have attempted to consolidate their grip on state power, the social democratic middle of Nepali politics as represented by the Congress and the UML is severely weakened. Even as a new political party of the ethnicities is

mooted, the right wing appears to have made strong gains among the populace, with its focus on Hindutva and a revival of monarchy. Gyanendra, the former king, has been emboldened enough by the political disarray and countrywide disquiet to go public with the call for reinstatement of the institution.

Given the sine die abandonment of the CA (and the Legislature-Parliament), the credible institutions that now exist are the office of the president of Nepal and the Interim Constitution with its stricture that the political parties work by consensus. While Bhattarai has called for an election for a new constituent assembly, it would be appropriate for a national political conference to decide on the way forward with an open mind. The first task would be the formation of

a national unity government in place of Bhattarai's caretaker cabinet.

The way out of the psycho-social morass and all-pervading sense of hopelessness would be for a national political conference of the main political parties to meet and call for general elections to a five-year parliament. That legislature, voted in through free and fair elections unlike the last one, would consider a draft constitution prepared by a panel of experts. In coming up with the draft, that panel would take advantage of the constitutional debates within the departed CA as well as the broader debates in society. The new constitution would be promulgated after the peace process is finally complete, when one party's ability to dominate all others has peaked.