

# A Constitutional Cliffhanger in Nepal: Big Challenges amidst Weakening Hope



by Kanak Mani Dixit

## Kanak Mani Dixit

is a prominent Nepali journalist and civil rights activist who has pioneered the arena of South Asian media. Recognised in Nepal and elsewhere as a voice for pluralism and democracy.

The challenges and hopes in ‘making democracy real’ have current relevance in Nepal because the country is engaged in the writing of a new constitution. The thrice-extended deadline of the Constituent Assembly (CA) is set to expire in end-May 2012, and critical issues are coming to a head even as we speak here in Panchgani. Additionally, Spring has historically been the ‘season of discontent’.

For seven decades, the people of Nepal have been engaged in the battle for democracy against family oligarchy, royal autocracy and periods of anarchy. By now, we should have been fine-tuning the received model of liberal parliamentary democracy, to iron out weaknesses and make it more relevant to the national societal context. However, we seem to be going back to a previous era in terms of the values to back governance, and the new constitution may just lead us towards an elected autocracy, a retreat from the open society that was the gift of the sidelined Constitution of 1990.

Radical populism rules the landscape as constitution-drafting has proceeded in fits and starts. The society is politically polarised and confronts multiple challenges – inter-community distancing, an incomplete peace process, stalled development, an economic stagnation of 15 years and counting, unaccountable government, raging impunity, weakened institutions of state disagreement over the definition of federal provinces, the destruction of local governance structures, and so on. Meanwhile, the foundational understanding of representational politics is being turned on its head, with class analysis (and warfare) sought to be replaced by identity politics. Non-democrats dominate the House, and at every step they resist the critical tenets of democratic governance.

The constitution-writing began with the election of the CA in April 2008, and the agreement was to disband the cantonments of the UCPN-Maoist by September of that year (holding more than 19,000 ex-combatants as defined by the United Nations Mission in Nepal, UNMIN). However, the Maoist party prevaricated relentlessly, and the constitution-drafting has proceeded in a situation where one political party retained its armed force, sequestered in cantonments, throughout. Thus, the constitutional drafting has been under conditions of duress.

The rise of the Madhesi forces after the Madhes Movement over the winter of 2007 gave at long-last a voice to the citizens of the flatlands, but the newborn plains political parties have been intent on building their base through competitive populist positioning rather, and they have not been ready yet for the principled give-and-take that constitution-drafting demands. The fact that the various committees in parliament are required to conclude their reports to the CA plenary through majority vote has only helped in radical posturing among all parties, who have kept their final positioning under wraps while the charade of drafting has gone on.

Meanwhile, the two large parties with democratic legacy, viz. the mainstream left CPN (UML) and the historically dominant Nepali Congress, are frayed by internal divisions and cowed by the Maoist momentum at the centre and the districts, built on a base of populism, control of state institutions, muscle power and hard cash. Rather than be the guardians of democracy in the drafting process, the NC and UML seem to be practicing 'democracy by rote', a mindset far removed from the founding fathers of Nepali democracy represented by the likes of Bishweswar Prasad ('BP') Koirala. In this hour of constitutional debates, Nepal lacks the dynamic thinkers that India had in a Bhimrao Ambedkar or a Jawaharlal Nehru. The stolid presence of Girija Prasad Koirala is sorely missed, and the constitutional 'stalwart' in Kathmandu is the Maoist chairman Pushpa Kamal Dahal (*nom de guerre*: 'Prachanda'), who presents himself sometimes as an acolyte of Siddhartha Gautam and at other times of BP Koirala.

Sadly, the civil society frontline has not been able to hold aloft the torch of liberty to illuminate the constitution-drafting, intimidated as it has been by the populist energy of the UCPN-Maoist. The significant amount of 'donor-funding' for the peace-process, transitional justice, community assertion, constitution-writing and related areas, while they have provided some benefits of exposure have served to dull the 'political instinct' of the societal gatekeepers. The intelligentsia of Kathmandu, *ab initio* with weak background in the social sciences and in the run for donor-consultancies, has been unwilling to speak truth to power, or truth to populism. The views of much ex-Nepal scholarship as well as of influential organisations such as the International Crisis Group and the now-departed UNMIN – on the whole privileging the Maoists and denigrating the parliamentary parties – has affected the constitutional discourse. Overall, this attitude is guided by the regard for the UCPN-Maoist as the political underdog even though it has been part of the state establishment since 2006.

India, as a key presence in Nepali politics whether one likes it or not, is focussed on the ending the peace process, while seemingly oblivious to the emergence of a centralised government under a direct presidency and an untenable definition of federalism, according to identity. If there is hope that an autocratic centre in Nepal, as during the three decades of the Panchayat regime till 1990, would provide a stability in a country so rich in natural resources that India needs (hydropower, irrigation water, etc), such a calculation is bound to be dashed in the days ahead by the relentless activism of an awakened populace. China, for its part, seems willing to support any evolution in Nepal that brings on a strong central government in Kathmandu, rather than a vibrant, cantankerous pluralist society.

What Nepali citizens would want in this late date in the second decade of the 21<sup>st</sup> century is a 'democratic constitution' rather than simply a 'constitution', a document that will deliver better governance and more inclusive growth than the 1990 Constitution. Something that will live up to the high values maintained by the public at large, as was evident in the great People's Movement of April 2006, which was an uprising against both royal autocracy and the politics of violence. Sadly, the political parties represented in the CA, in place through a mixed direct and proportional election system, have not been able to respond to the public's expectations. The Maoists, as the largest party in the Assembly with 38 percent voting power, has been dragging its feet when it comes to forming a democratic constitution, and every concession for democracy has had to be wrested after interminable negotiations – whether it is separation of powers, judicial supremacy, fundamental freedoms or human rights. Till today, the Maoist party has not agreed to placing the term 'pluralism' in the draft, in a country more plural than perhaps any other in the world, and for a long time the party insisted on including a laudable reference to the 'people's war' in the text.

The NC and CPN (UML) should have refused to negotiate on the new constitution as long as the UCPN-Maoists held on to its 'private army', but they did not do so. The best we can hope now is that the peace process will end more or less simultaneously with the promulgation of

the new constitution. This will mean that, in essence, Nepal will have a basic law that was drafted under the shadow of the gun. Divisions within the Maoist party of late, which has been replete with intriguing name-calling, has made the peace process even more vulnerable. On top of that, going against numerous, public agreements to complete the process over the years, in the beginning of January 2012, some Maoist leaders began to insist that they would walk away from the peace process (and already agreed provisions) if the other parties did not agree on a directly-elected presidential system.

The focus of all political parties on leading and forming governments has also distracted from the constitution-writing. Because the Constituent Assembly serves in parallel as the 'Legislature Parliament' (the awkward terminology chosen to make it more palatable to the anti-parliamentary Maoists), the constitutional work has been affected by the interminable fight to form and bring down governments. Since the middle of 2011, the Government of Nepal led by Baburam Bhattarai has been an albatross coalition of the Maoist and the Madhesi parties, and the two main democratic forces – the NC and CPN-UML – are on the outside. The need for goodwill of the large Maoist party (and its chairman) to get into government has weakened the other political parties and their individual leaders when it comes to constitution-drafting. Only this can explain, for example, why working groups including the main political parties have agreed: on a pardon/amnesty to all perpetrators (from both sides) of the 1996-2006 conflict era; on making the National Human Rights Commission weaker than it presently is; on the near-total neglect of Nepal's experience in local governance at the village and district level; and so on.

Indeed, there are many issues on which the Constituent Assembly – in whose corridors one would be hard put to find more than a couple individuals who may properly be called a 'jurists' – seems set to deliver a document that has many provisions that are impractical and, in the end analysis, un-democratic. Two of the most critical issues facing the people of Nepal on the outside as they watch the goings-on in the Constituent Assembly are the definition of federalism and the structure of governance.

- There is a strong push to establish federalism where the provinces are defined by identity (mainly ethnic and language) rather than by economic geography, and where there would be political prior rights (*agradhikar*) for the designated communities. This agenda denies the fact that Nepal is a country of mixed habitation right down to the village level nearly everywhere, and that privileging selected communities is an invitation to conflict. The country has more than a 100 communities, yet only 14 have been demarcated by the State Restructuring Committee of the CA in its bare-majority recommendation to the plenary. The theory behind 'identity federalism' is that in the case of Nepal, community status is synonymous to class-based socio-economic marginalisation. And yet, no province has been set aside for the Dalit of hill and plains, who would fit the community-equals-marginalisation more than any other group. In response to protests from Dalit activists, the proponents of ethnic federalism propose 'non-territorial federalism' for them as a non-credible sop. Likewise, as more communities and sub-communities find their voice and demand their own space, the response is to promise ever-more 'autonomous councils'. The proposal for 'ethnic federalism', as it is has come to be known, is essentially a call to create Bantustans in Nepal, an attempt to promote politics by identity rather than by class. Clearly, if this move succeed as it well could, the CA is set to make a mockery of the very idea of federalism, making it a 'ceremonial' affair in which Kathmandu will retain its centralised power.
- The push to include a directly-elected presidential system in the new constitution seems designed to fulfil the ambitions of the chairman of the UCPN-Maoist, both as a means of immediately ending the challenges to his leadership from the 'hardline' faction of Vice-Chairman Mohan Vaidya, as well as to continue as the dominant figure of national politics in the medium- to long-term. Mr. Dahal is not keen on the ups and downs of a prime minister-in-parliament system, and wants only the executive president's position, and he knows that he would be elected, by hook or by crook. Meanwhile, together with the royalists of yore, the

Maoists party has been at the forefront of labelling Nepal's cumulative six year's experience in untrammelled parliamentary democracy (1959-60, 1990-1996) as an abject failure. The very party which picked up the gun against the parliamentary system in 1996 tries to prevent its reinstatement, this is to be expected. What is unexpected is the weakness in the UML and NC parties when it comes to defending the record, particularly between 1990 and 1996. As of now, Nepal's CA seems bent on going the 'Sri Lankan' way of instituting a directly elected presidential system (or directly elected prime ministerial system, which would be no different) even as scholars in Colombo moot the idea of a return to parliamentary system. The fact that a centralised, powerful presidential system goes against the very idea of devolving power to the federal provinces does not seem to worry federalist campaigners enough for them to stand against a presidential system. Meanwhile, the two neighbours of Nepal may be thinking that a presidential system will bring stability to the Himalayan frontier – but past experience has shown that all it would do is introduce the 'peace of the cremation ground', an autocratic stability, which would keep the society on the boil for a long time to come. The directly-elected president would rapidly evolve into an autocrat, going by Nepal's specific political experience of the last seventy years: we would be inviting the return of the Panchayat autocracy in a different, non-royal guise. The CA has not been able to articulate the voice of the people adequately, and so it may well adopt a system which will allow an 'elected autocracy' to rule for a while before there is a spontaneous uprising sometime in the future – but more times would have been lost for economic consolidation and equity in a stable, peaceful democracy. The present plan of action is to ensure that only the president is directly elected, to allow the incumbent to consolidate power, while every other office and institution would be indirectly elected. This would include the entire Lower House of Parliament, in place through a mixed system of direct and proportional elections) and the prime minister (elected by a vote in the House). It needs to be kept in mind that the directly-elected president would become Supreme Commander of the Nepal Army, a position that is ceremonial in the case of the current constitutional presidency. A situation is thus being created for the election of the Maoist Chairman as an elected autocrat, given his record since entering open society in 2006, and his leadership of a party that has yet to declare its abandonment of the politics of violence.

It may indeed be that a non-democratic constitution will be promulgated in Nepal in end-May 2012. It could also be that, recognising the weakness evident in the CA, the people would find a way of sending a message for democracy and pluralism that is loud and clear. In which case, despite all the brinkmanship, a democratic constitution may emerge. Beyond that, given that the Supreme Court of Nepal has forbidden any further extension of the CA deadline beyond May 2012, in case agreement on a document proves impossible the political parties would have to fashion a future regime that would have to include an election to a legislature, which may or may not function as a CA.

The idea of writing a new constitution, at least for many, was to build on the structure of democracy and open society introduced in 1990, and through the new constitution to move towards a more transparent, efficient and inclusive governance as a 'federal', 'democratic', 'republic' of Nepal. The trail is a constitutional cliffhanger.

