The crisis of Nepal goes beyond legality

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I Introduction
Nepal is caught in what most people assume is a constitutional crisis. There are two aspects of this crisis, which need to be kept distinct. The first, and the more transient though it may turn out to be the more problematic, is the result of the dissolution of the House of Representatives and the failure to hold elections within six months of dissolution, as stipulated by the constitution. Consequently, the country is, at best, operating under half or a quarter of a constitution. Parliament does not exist and therefore the validity of government itself is questioned as ministers must be drawn from Parliament except for a short period that has already lapsed. Moreover there can be no parliamentary accountability of the cabinet. The present practice of accountability to the King has no constitutional legitimacy, nor any political legitimacy. Article 127 (which provides that the King may issue Orders necessary to remove difficulties in bringing the Constitution into force) is too fragile a reed to sustain the burden of the governance of the country and cannot act as life support for the constitution, with the collapse of the entire parliamentary system that lies at heart of the 1990 Constitution.

The second crisis is about the legitimacy of the constitution itself. The conflict of the last decade, by effectively disabling the state from discharging its fundamental constitutional obligations to individuals and communities, has rendered the constitution meaningless. The roots of Maoist rebellion lay in their dissatisfaction with the way the constitution was framed, its orientation and how it has operated. But there are other groups as well who are troubled by the lack of constitutional recognition of national diversity or social justice, and who consider that the state has been monopolised by high caste and other privileges groups. While the constitution has its supporters, there is now a general acknowledgement that it needs, at the least, to be revised, if not replaced.

It is not self-evident how the current constitution can be resurrected—and without its resurrection there seems to be no obvious way to return to constitutional rule or to find means to tackle problems of reform and national reconciliation. So paradoxically, while I consider that the constitution has some excellent provisions and with reform can serve as the vehicle of future political and social developments, I am also of the view that the procedure for its revival and reform has to come from outside its own framework. At heart, Nepal’s problem is not constitutional but socio-political—the present constitution contains the seeds of development to respond to present anxieties but they will not germinate without political nourishing. Nepal needs a process to draw up a consensus on its vision of the future and to affirm it in a national compact. Fortunately, that possibility lies within Nepal’s grasp. There seems to be very considerable consensus on what needs to be done and on the willingness to engage in a process for this purpose. What is lacking is agreement on the procedure to achieve this.
II The reforms

The debate has not surprisingly centred on the ability of the 1990 Constitution to deal with social and political problems facing Nepal. The vision of the constitution is sufficiently broad ranging to encompass the aspirations of Nepal’s different groups and communities. The difficulty lies in the technique. While a part of the political settlement that lies behind the abandonment of the panchayat system and introduction of multi-party democracy was effectuated in the constitution, some other components, like inclusiveness and social justice, were acknowledged but not incorporated in legal forms that lend themselves easily to implementation or enforcement. Constitutional reform now must ensure the complete implementation of the 1990 settlement and understandings explicit in the constitution.

The claims and passion which now animate Nepalese politics are themselves the result of the limited democratisation promoted by the 1990 Constitution. Democracy does stir things up. Those who advocate democracy must accept that its ideology and aspirations create new forms of consciousness, identity and empowerment whose inclusion is necessary to achieve fully the political and social benefits of democracy. The striking thing for an outsider is how similar is the analysis by the key protagonists of the problems facing Nepal and the necessary reforms. To take the matter forward it is necessary to assess the strengths and weaknesses of the constitution. The general assessment may well be that that while the constitution has several good points, it needs important reforms in some key respects.

First the good points. It acknowledges the supremacy of the people and proclaims the supremacy of the constitution over laws (and presumably administrative policies and acts). It recognises the ethnic and linguistic diversity of the people (but not adequately the religious diversity). It has a reasonable chapter on fundamental rights with a special concern for its enforcement. Directive Principles of State Policies establish important social and economic goals. It seeks to insulate some critical state powers and functions from political control or influence by vesting them in independent commissions, authorities and offices, such as conduct of elections, appointments to the judiciary, and appointments to and the management of the public service. An independent court system has the powers of judicial review and the authority to maintain the rule of law. A constitutional council is established to ensure independent appointments to sensitive state posts such as that of the Chief Justice and Auditor-General. It sets up an independent authority to investigate abuse of office, including corruption, with powers of prosecution. Recognising that democracy is not possible without national and democratically run political parties, it provides for the regulation of political parties.

Now to weaknesses. An overriding goal of the constitution, among the celebration of diversity, is national unity and the political integration—an objective which is to be achieved by ‘promoting healthy and cordial social relations amongst the various religious groups, castes and classes, communities and linguistic groups...’ (art. 26.2). The approach of ‘cordial social relations’, accompanied by some remedial action to alleviate discrimination against the disadvantaged, contrasts with a constitutional approach based on rights and entitlements. Some members of the Constitutional Recommendation
Commission considered that too explicit a recognition of minorities would perpetuate differences and might even lead to the break up of the country (while others were of the view that some recognition was essential to ward off criticism that the Commission had ignored minorities). Indeed here we have a major dilemma regarding the organisation of the state in multi-ethnic societies. The answer lies perhaps in a middle position, in which people’s multiple identities are recognised for some purposes, but within the overarching citizenship of the country.

Thus, while diversity and social justice are presented as key goals, they are insufficiently accommodated in the constitution. The foremost reform must aim towards inclusiveness—bringing into state and power structures communities that have hitherto been excluded or marginalized. A review of the electoral system is necessary to achieve this, although more vigorous recruitment by political parties and the promotion of candidates from the marginalized communities are also necessary. The issue of the design of the state cannot be avoided. There is need for further democratisation and participation through regional decentralisation of state power to enhance democracy, development and regional equity. Parliamentary government, on which there appears to be very wide consensus, should be strengthened through the clarification of relations between the King, the government and the legislature (and perhaps by removing immunity for acts done by the Monarch in the exercise of his public functions (arts. 32 and 56.1) and restricting some of his rule making powers (e.g., arts. 39, 40)). While these reforms may satisfy supporters of constitutional monarchy (who are numerous), they may be resisted by two groups on the opposite ends of the spectrum—the royalists who may consider that they undermine the institution of the monarchy and Maoists, who have been opposed to the very notion of monarchy and wanted a republic. The parliamentary system, on which there seems to be universal consensus, also needs ‘stabilisers’ to ensure stability and effectiveness of government (lacking in some measure so far); this might perhaps be achieved firstly by adopting the German method of the ‘constructive vote of no confidence’ - which requires the motion of no confidence to nominate the successor prime minister - and secondly by restricting, if it is possible, the fragmenting of political parties. The status and role of armed and defence forces should be defined with greater clarity, emphasising the commitment to the security of individuals and communities and the principle of civilian control. Another imperative is social justice, particularly the removal of the severe economic discrimination against dalits and indigenous communities and affirmative action for a transitional period. The greater participation and integration of women, who do not enjoy full equality with men under the constitution, in political and economic spheres brings together many of these objectives - inclusiveness, social justice and participation - and must be a priority for reform.

All this may seem to constitute a new and radical agenda. But the truth is that this agenda is drawn from the constitution itself. The constitution recognises ethnic and linguistic diversity but only partially provides for its incorporation (and in disregard of religious diversity makes the state Hindu). The constitution upholds the equality of all citizens and prohibits discrimination on the basis of the various factors that constitute the diversity of Nepal. Every community is guaranteed the right to conserve and promote its language, script, culture and religion (arts. 18 and 19). The constitution commits the state to
promote the conditions of welfare on the basis of the principles of open society by establishing a just system in all aspects of the national life, including social, economic and political, while at the same time, protecting the life, property and liberty of the general public’ (art. 25.1). The state is committed to eliminating ‘all types of economic and social inequalities which is possible through the establishment of harmony amongst the various castes, tribes, religions, languages, colour and communities’ (art. 25.3), and to pursuing affirmative action (art. 26.11). Another constitutional commitment, to promote democracy, is ‘the maximum participation of the people in the governance of the country through the medium of decentralisation of administration’ (art. 25.4). The constitution places a special emphasis on gender equity. Not only is a state policy the maximisation of opportunities for women in the ‘task of national development’ (art. 26.7) but a specific method – albeit in the event relatively ineffective - is prescribed for the political representation of women: at least 5% of the candidates of any party for elections to the House of Representatives must be women (art. 114).

The proposed provisions would make the constitution not merely a political instrument to allocate power among state institutions but also the social charter that so many people want the constitution to be, responding to their sense of identity and the quest for justice. According to the chair of the Constitution Recommendations Commission of 1990, 95% of the suggestions to the Commission related to culture, language and religion. Perhaps these were not seen as relevant to the constitution; certainly they are not proportionately reflected in it. These social dimensions provide a wonderful vision of Nepal: the richness of many traditions and cultures, the recognition of the several identities its citizens carry, yet its diverse communities united in their common allegiance and loyalty to Nepal, and all committed to establish a democratic, open and just society. It seems that there is more or less a national consensus on this vision. The challenge of reform is to turn it into reality.

III The procedure

If an outsider is struck by the broad consensus on reforms, she is equally struck (and surprised) by the lack of a consensus on the procedure for reform, including the method of return to constitutional rule. On the former, differences revolve around two principal options. The first (which has the support of the King, the present government and most political parties) is to secure reforms through amendments to the present constitution using the amendment procedure provided in art. 116. The other view (held particularly by the Maoists and minorities) is that reforms should place through a constituent assembly. The difference on procedure can become a real stumbling block to reform. So what hangs on the difference?

What hangs on the difference are the scope of change and the dynamics of the procedure. It may be possible, at a technical level, to improve the constitution sufficiently to accommodate the concerns of most groups. But the procedure has its own dynamics, and may legally or practically restrict the scope of change, privilege some groups at the expense of others, and affect people’s consciousness of the new dispensation. Let us turn first to the scope of change. The power of Parliament to amend the constitution is
restricted by article 116.1 which states that an amendment bill ‘must not be designed to frustrate the spirit of the Preamble of this Constitution’. This formulation has resonances with the judicially developed doctrine of ‘basic features’ of the constitution which the Indian Supreme Court has used to control the amendment powers of Parliament. Presumably the Nepalese courts would have the authority to examine whether an amendment violates this restriction. What may be said to constitute the ‘spirit of the Preamble’? From the phraseology of the Preamble, the following principles could be identified as the basis of the constitution: (a) people as the source of sovereignty; (b) guarantees of basic human rights to every citizen; (c) social, political and economic justice for the people; (d) adult franchise; (e) parliamentary system of government; (f) multi-party democracy; (g) constitutional monarchy; (h) an independent and competent system of justice; and (i) fraternity and the bond of unity on the basis of liberty and equality. Some of these principles are not easy to demarcate, but there was some common understanding of them in the struggle for reform in 1990. For our present purposes suffice it to say that looking at the present consensus on reform described above, the only problematic area is constitutional monarchy which precludes the republican option favoured by the Maoists. Their present position may be less rigid now and a truly constitutional monarchy in the way implied in the preceding discussion may be acceptable to them. But of course article 116.1 does preclude some kinds of change. There also remains the difficult question of what meaning might be ascribed to ‘amendment’. Indian courts (and some academic authorities) have taken the position that ‘amendment’ cannot cover wholesale changes to the constitution (although some countries, such as Guyana and Fiji, have relied on ‘amendment’ to introduce entirely new constitutions). If the narrower view of ‘amendment’ were adopted this would impose a restriction on changes (though perhaps only the principle of constitutional monarchy is potentially a sticking point).

The constituent assembly approach would not start with any restrictions of this kind. It would, moreover, start with a clean slate. This is its attraction to its supporters, and the flaw to its opponents. Those who favour the 1990 political settlement with the necessary adjustments outlined above are afraid that a constituent assembly may open a Pandora’s box and the fundamentals of that settlement may be thrown out. The constituent assembly procedure is, for them, too open ended and too prone to be hijacked, and they prefer the parliamentary process involved in amendment. There may well be anxieties about popularising politics which could result from a broad participatory process. On the other hand, those who advocate a constituent assembly fear that the elites that dominate Parliament and fashioned the 1990 settlement as reflected in the constitution may not adopt the necessary reforms. Once the framework of article 116 is accepted, there would be no way to force change on Parliament. It is therefore useful to look at the dynamics of the two approaches.

The parliamentary procedure would put a premium on a consensus among political parties (which for the most part they seem to have developed). It is probable that political issues would prevail over social and economic. There may also be a propensity to retain power at the centre. The King would have considerable leverage over the process and outcome, as he is given a (limited) veto. He can refuse to assent to the amendments and
force the two Houses of Parliament to reconsider them. Only if they could send the same or another bill to the King supported in a fresh vote again by a majority of at least two-thirds of the members, would he be compelled to assent.

The constituent assembly would give a greater direct voice to other organised groups as well. It would be clearly based on people’s sovereignty and more likely to educate the people in the niceties of constitution engineering and thus more likely to secure legitimacy. But the process could take a longer time and there is some risk that with too many claimants staking their demands, and the dominant forces somewhat marginalised in the assembly, those forces would resist a new constitution, inside or outside the assembly, perhaps successfully. On the other hand, the constituent assembly may have the greater capacity to fashion a genuinely national consensus if all key interests are represented, putting a closure on constitutional controversies.

There is of course no one method that a constituent assembly has to follow and the opportunities and threats vary with the precise method used. For example, the degree of popular participation depends on how the draft constitution is prepared; if it is prepared by a committee of the assembly (as happened in India), people’s participation may not be much greater than in a parliamentary process. It is also possible to have an independent and expert commission which the task of preparing a draft for the constituent assembly, after full consultation with the people.

The constitutional recommendation commission seems to be a well tested device in Nepal and it is likely that its use would bridge, at least to some extent, the differences between the two approaches. Such a commission, provided it was sufficiently reflective of national diversity, could provide the forum for public participation and promote a nationwide debate on the ills of and cures for the constitutional order. Its report and recommendations must reflect the recommendations of the public. In this way the demands that the review process must engage the people and provide the basis for national reconciliation can be met short of a constituent assembly.

The prospects of the process would depend on the degree of prior agreement on the objectives of review and the values and principles that must inform the new or amended constitution. Indeed a substantial degree of agreement should be the pre-condition for the start of the process. Fortunately, although there may not be total consensus, it seems that there is enough that this would not be a major problem. The differences that remain can be negotiated during the review process when an environment of understanding, good will and compromise will have developed.

If the device of prior agreement on pre-conditions and the appointment of a constitutional commission can bridge the differences between the parliamentary and constitutional assembly routes, then does it matter which approach is adopted? Perhaps it does. A constituent assembly has the great merit that it can be organised to truly reflect the full diversity of the nation. Groups which are not adequately represented in Parliament—and they include the Maoists—need to be present as participants at the moment of the birth of the new constitutional order. The 1990 constitution was principally concerned to balance
the interests of Monarchy with those of the political parties, and so the interests to balance were limited; now the larger agenda has raised a multiplicity of issues which require wider participation to balance competing interests. The character of a constitution as a compact among its people and communities is marked more appropriately through negotiations and in a constituent assembly than in the less inclusive forum of Parliament. And there is of course the additional difficulty that there is no Parliament now to which the nation can turn. This and related issues are discussed in the next section.

IV How to get there?
First all the key interests groups must come together. A pre-condition for such a meeting is the cessation of violence. An effective ceasefire will open much several options. Therefore the first priority is a truce and an undertaking by all interest groups to pursue a settlement only by peaceful, and if necessary sustained, negotiations. They must agree to negotiate in good faith and be prepared to make concessions. They groups must also undertake to respect the human rights of all individuals and communities. Negotiations cannot take place in an atmosphere of violence or the threat of violence.

Even with a truce, the way forward is contested. The lack of a Parliament with no easy way to convene another, the breakdown in the talks between the government and the Maoists, the declining legitimacy of the King, and the refusal of political parties to engage in constitutional talks without the recall of Parliament make a meeting exceedingly difficult. But not impossible. There are various options to overcome the present predicament. The King could convene a meeting of all the groups to discuss the way forward. If the invitation is sent to a sufficient wide spectrum of organisations representing social and political diversity, a recalcitrant group will find it hard to stay out. This meeting could be the first of a series of roundtables until agreement is reached on all aspects of the review process. (The roundtable could also agree on the running of the government in the interim, as South Africans did pending a final constitutional settlement). Another possibility is the restoration of the Parliament and reliance on the procedures of the constitution to ratify agreements towards reform.

Perhaps the easiest way to break the logjam may be for the King to convene a roundtable which will take the process at least to the point where a constitutional commission is set up, which means that decisions on the goals and scope of reform and subsequent procedures have been agreed on. A constituent assembly may be the best mechanism for the examination and adoption of the constitution draft—even if violence continues. The assembly could be composed of the members of the dissolved Parliament, and representatives of Maoists, women, dalits, minorities and other social and economic groups nominated or elected by their own organisations. It would be highly desirable in that case that the constitution is adopted before the next general elections, so that the next general elections can bring the constitution into effect. Otherwise the implementation of the constitution could be delayed by several years as the new parliament runs its course.

I would suggest that some way should be found to give legal effect to the agreement of the roundtable. People would need assurance not only that all parties are committed to it but also that no one would be able to disregard, violate or scuttle it. One way to do this
would be for the King to issue a legislative instrument containing the agreement. Better still, Parliament might be reconvened for the express, and sole, purpose of entrenching the agreement in the constitution (and authorising resources for its implementation) which would give a high degree of guarantee.

Is such a procedure legally possible? Yes, most probably. If the roundtable is able to agree on the procedure and if the procedure and objectives of review are close to the spirit of the present constitution, either of the above measures will carry the force of law under the doctrine of necessity which recognises deviations from the strictly legal rules and procedures if that is the only way to preserve the integrity of the state, or ensure order and stability so that the security of the people is safeguarded. It is obvious that in the present circumstances, the strict constitutional and legal procedures cannot be followed. Steps must therefore be taken to return to constitutional rule as speedily as possible. These steps must involve the Maoists and probably other non-parliamentary groups as well to ensure that the agreement is adhered to. No other steps seem as likely to facilitate the return to constitutionality. The Supreme Court in all probability would endorse the agreement under the doctrine of necessity. To strengthen the legal basis of whichever of the two procedures is followed, the Supreme Court might be requested to give an advisory opinion on this matter after the steps proposed here have been taken.

While the nation waits for talks about talks, it is unnecessary that the debate on reform be suspended. The debate should be initiated now by those interested in reform. Political parties, civil society, academics, etc. can promote the debate; prepare materials for civic education on constitutional issues, including an analysis of the present constitution; and distribute papers on options for reform. In this way when the roundtable meets, its members will be well briefed and so will the public when the constitution commission begins to collect public views. Civil society can also meanwhile, building a peace movement, continue its pressure on key interests groups to begin negotiations.

V Concluding observations

Nepal needs desperately to get out of its political immobilisation. Yet this is a good moment to seize the opportunity for a durable political settlement. People are weary of the war and hunger of peace and some normality in their lives. The major interest groups are willing to enter into negotiations. There is sufficient consensus on reforms and the need to engage people in the review process that a deal can be struck quickly. An early settlement of the political crisis will enable Nepal to resume social development and economic growth, and to ensure physical and psychological security to the people.

There are very considerable dangers in the continuance of the political and constitutional impasse. The longer the impasse and the governance of the country through arrangements incompatible with the constitution, the greater is the threat to the very notion of constitutionalism and rule of law, so hard fought for. With every day that passes, the culture of violence strikes deeper roots. Numerous lives are lost and communities destroyed needlessly as the impasse continues. The role and influence of the army will increase and its concerns and demands will constitute another set of issues that will need
to be negotiated, making a political settlement that much harder. Polarisation within society will increase. It is almost certain, given the dynamics of multi-ethnic societies, that minorities and other marginalised communities will lose patience and escalate their demands and will perhaps resort to violence of their own. Society will become more militarised. The economy will continue to decline bringing further suffering and despair to the people. The continuing impasse and the lack of energy or willingness to break out of it will diminish the ability of the King to fashion and supervise consensus building. History and the people of Nepal will then judge their leaders very harshly.